Bar News

The journal of the NSW Bar Association

...are lawyers (almost) always the villains and why is it always Michael Douglas?

Also inside...

Television Cameras in Court
Flaws in DNA Profiling
...ion in Queensland

Autumn 1990

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In this issue

Cover: Michael Douglas as Oliver Rose in "The War of the Roses"
Photograph Courtesy CBS Fox

Bar Notes

Justice K.R. Handley A.O.

On 30 January 1990, Handley Q.C. was sworn in as a Judge of Appeal of the Supreme Court. His imminent appointment was, as his Honour acknowledged at his swearing in ceremony, one of the worst kept secrets of 1989. During the two years prior to his appointment, his Honour worked tirelessly in the interest of the Bar in his role as President of the Bar Association. After standing down on the expiration of his term in office, his Honour chose not to take a well earned break, but instead, to keep his hand in, travelled to London where he practised for two months as a junior (having been admitted there two or three years ago) at Lincolns Inn. He did chamber work principally, but made one appearance in the High Court seeking to have an aging aristocrat declared a lunatic. He did well, and was invited to return later this year to conclude the case, but events overtook him.

He capped his career immediately prior to appointment by being appointed an Officer in the Order of Australia. ❑

Statements from the Bar table

A Professional Conduct Committee has had to consider a complaint made by one Barrister against another about conduct in the course of lengthy, tense and difficult committal proceedings.

During examination-in-chief of a child, numerous objections were made, all of which were ruled upon by the presiding Magistrate. On the following day, before continuing with examination-in-chief, the Counsel examining expressed a wish to, and did, "make a statement" from the Bar. The Barrister then proceeded to make various allegations and complaints about the objections made by the other Barrister. There was a reply made and a subsequent attempt to make a further reply.

The Council, however, considered that members should be aware that statements from the Bar table, whether about evidence or otherwise, are generally inappropriate and may, in certain circumstances, found a complaint relating to professional conduct. Matters relating to the conduct of a hearing and to evidence are matters for the presiding judicial officer. Conduct of opposing Counsel which has evidentiary or other implications for the conduct of a hearing should be the subject of an objection in the normal manner. Questions of conduct, thereafter, may be pursued by complaint to the appropriate professional body and certainly not by statements made from the Bar table. ❑

"Citation of Federal Court Reports"

As from the sittings commencing on 3 April 1990 *The Federal Court Reports*, the official reports of the Federal Court, will be required to be cited in the High Court instead of the *Australian Law Reports* for Federal Court cases.

Workers Compensation

The Bar Council has considered the question of the representation of fund managers and former licensees under the Workers Compensation Act 1987.

Where a respondent's liability may extend over a period which would involve both a former licensee and the fund manager of the same insurance group there is an obvious possibility of a conflict of interest in the conduct of the litigation.

In such circumstances, unless an agreement for division of responsibility has already been arrived at, the former licensee and the fund manager should be separately represented in the proceedings. Separate Counsel should be retained in these circumstances. ❑

Queen's Counsel for 1989

The following barristers were appointed Queen's Counsel by the Governor-in-Council, effective from 1 November, 1989.

In order of seniority:

(Vic)	1. SHAW, Brian John
(WA)	2. WILLIAMS, Daryl Robert
(QLD)	3. GALLAGHER, John Edward
(WA)	4. HEENAN, Eric Michael
(Vic)	5. HARPER, David Lindsey
(Vic)	6. FINKELSTEIN, Raymond Antony
(Vic)	7. ROSS, David John
(Vic)	8. LOVITT, Colin Leslie
	9. CRAIGIE, Rodney Graeme
	10. GLEESON, John Nicholas
	11. COWDROY, Dennis Antill
	12. GARNSEY, John Joseph
	13. COLLINS, Bruce Wilkie
	14. BEAZLEY, Margaret Joan
	15. BRANSON, Christopher Charles
	16. WEST, John Norman
	17. SIMPSON, Carolyn Chalmers
	18. CRAIG, Malcolm Graeme
(C.P.)	19. ROSSER, Paul David
(C.P.)	20. ROBINSON, Wendy Louise

The Annual Conference of the Australian Institute of Judicial Administration is to be held on Saturday and Sunday 18 and 19 August 1990. The Conference is to be held in Melbourne at The Graduate School of Management, 200 Leicester Street, Carlton South.

Details of the programme will be available shortly from the AIJA office, 103-105 Barry Street, Carlton South.

From the President

Court procedures are undergoing significant changes largely in the interests of ensuring that justice is not denied to people because of delays. Many of these changes have been administrative, but some which have occurred and some which are proposed are legislative and may be more lasting.

The response of the Bar Council to the Delay Reduction Programmes in the Courts has been entirely positive. Traditional opposition to the appointment of Acting Judges has been modified, concern about the reference of matters to Arbitrators has been reduced and there has been full co-operation in trying to ensure that Barristers are aware of the need to have cases fully prepared for preparation on the date for which a hearing has been fixed. In return there have been assurances from the Attorney-General that the appointing of Acting Judges will be only a temporary measure, which will not extend beyond the time when the present delay has been overcome - by mid 1991 at latest. The same is true in respect of Arbitrators, at least in the Supreme Court.

Another move which has been foreshadowed is the substantial elimination of juries in civil cases in the Supreme Court. Not without real apprehension the Bar Council has resolved to agree to a modification in the types of cases which will be heard by a jury. This has been done on the basis that, like the other measures which I have referred to, such a change is appropriate at a time in which there is significant delay in the hearing of Common Law actions in the Supreme Court. However, like the other measures it is to be hoped that the substantial abolition of jury trials in Common Law cases will be reviewed when the time to trial has been reduced to that which is acceptable. There are powerful arguments for retaining juries in Common Law cases. Not the least of these include the need to ensure that the administration of justice involves members of the community and not just members of the profession and because jury verdicts as to damages are a good indicator for Judges and practitioners of the community's views in relation to damages.

One other measure which has given rise to considerable concern is to change the nature of committal proceedings. This measure is not one for which delay is the rationale. The position taken by the Bar Council is that the present system, with some adjustments, is preferable to that which has been proposed and that the changes proposed are not in the best interests of justice.

In a time of pressure, in relation to both economics and time, it is essential that quality of justice, as well as speed, remain in the forefront of the thinking of those whose task it is to administer our system of justice.

Another matter which will undoubtedly occupy considerable time during the current year will be the Cost of Justice Inquiry. Recent statements by one of the members of the Senate Committee could foreshadow some stormy times and perhaps adverse headlines about what lawyers earn and about our Australian system of justice. However, the statistical data which have been gathered show that in 1985/86, the median incomes of lawyers were less than those of doctors, general managers and academics and that the average earnings of lawyers were not out-of-line with the earnings of professional groups. It is essential that facts and accurate figures be put before the Senate Committee so that its report will be properly based . Support for the Law Council of Australia's submission and for our Bar's submission in relation to a number of matters particular to the Bar is important and I hope that members, when called upon, will give this support. ❑ Barry O'Keefe

The President does his best for East-West unity at the Berlin wall over Christmas.

AUSTRALIAN BAR ASSOCIATION CONFERENCE ~ 1990 ~ DARWIN

ABA CONFERENCE
Darwin
Northern Territory

Saturday 7 July - Thursday 12 July 1990

TO ALL BARRISTERS
Greetings from the Northern Territory of Australia

Programme

The programme includes discussion of the following topics: -

1. Independance of the Judiciary
2. Preserving the Committal
3. Royal Commissions and Administrative enquiries
4. Managing the Long Criminal Trial
5. Advocacy and Negotiation
6. The Independent Commission against Corruption
7. Alternative Dispute Resolution for Barristers

together with others of direct practical interest to Barristers.

SPEAKERS

Distinguished Australian and International speakers include -

The Honourable Sir Daryl Dawson A.C. K.B.E., C.B.,
Brennan J. (H.C.), Toohey J. (H.C.), Coldrey QC,
Temby QC, Sir Lawrence Street, Beaumont J. (Federal Court),
The Honourable Wee Chong, Jim Chief Justice of Singapore,
Hunter Q.C. (UK).

DARWIN

Australia's only tropical capital city. The weather during July is simply magnificent.
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to travel to the Tiwi Islands, to stay at Seven Spirit Bay Wilderness Resort on the Coburg Peninsula
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Lights, Camera, Cross-Examination: Television Cameras in the Court

Both the Bar Association and the Law Society have opposed the televising of the proceedings of the I.C.A.C. Richard Phillips examines the arguments and comes to a different conclusion.

Barristers who have read the article in this issue by Peter Hutchings and are disconsolate at the thought that lawyers rarely wear the white hats in the movies may soon have the opportunity to appear on the silver screen themselves. In the not too distant future, it is likely that Australian Courts and Tribunals will follow the lead of the American Judiciary and the recent recommendations of the English Bar and allow television cameras to cover proceedings.

Televising ICAC: The First Step?

It is possible that the first step in the process will be the televising of the proceedings of the I.C.A.C.

The Parliamentary Committee upon the I.C.A.C. is currently reviewing the question of televising public hearings of that Commission. Public hearings were to be held on 26th March, 1990. If that Committee reports favourably upon the concept, there will no doubt be increased pressure in Australia to allow televising Court room proceedings. Ian Temby QC declined to be interviewed by *Bar News*, but did pass on, via the Commission's media officer, the following comment: "The Commission has not formed a view concerning the proposal to televise its hearings. The choice lies between not permitting (televising) or permitting it on a very restricted and carefully controlled basis. We look forward to receiving the considerations of the Parliamentary Joint Committee".

Dramatic shots taken during the trial of Joel Steinberg for murder of Lisa Steinberg, aged 6. The trial, in the New York State Supreme Court was filmed by television cameras throughout. Here, Acting Justice Rothwax looks on while Ira London, Steinberg's lawyer questioned a witness, Dr. Aglae Charlot about a photograph of the deceased child. (UPI/BETTMANN NEWSPHOTOS).

Overseas Experience

In England and Wales, since 1925 s.41 of the Criminal Justice Act has made it an offence to take a photograph in any Court. It seems that this ban extends to television and moving picture cameras as well as to still cameras: *Re: St. Andrew's (Consist. Ct.)* [1977] 3 W.L.R. 286, *Re: Barber v. Lloyds Underwriters* [1987] Q.B. 103. The ban continues, although a working party of the English Bar has recently recommended that the law be amended to permit the televising of Courts on an experimental basis: see *Counsel* May/June 1989, 5.

In the United States the ban on photography in the courts commenced in the late 1930s' see Lindsay:-"An assessment of the use of cameras in State and Federal Courts." [1984] *Georgia Law Review* Volume 18, 389.

By the mid-1970s, however, American State Courts began to relax the prohibition on cameras in Court. One important step in this process was a 12 month trial of televising courtroom proceedings in Florida in 1977. By 1985, forty-three of the American States permitted, subject to a range of restrictions, television coverage of appellate and/or trial proceedings on an experimental or permanent basis: see *Gardner*: - "Cameras in the Court room, guidelines for State Criminal Trials". [1984] *Michigan Law Review* 475.

In both the U.K. and the U.S., it seems that the impetus for the prohibition on photography of Court room proceedings was the sensationalist coverage of certain trials. In America, in 1935 the press, including one motion picture camera person, disrupted the trial of Bruno Hortman, who was being tried for the kidnapping and murder of the baby of Charles Lindbergh. As a result, the American Bar Association promulgated Canon 35 of the Canons of Judicial Ethics forbidding the use of motion or still cameras in Court, later amended to include a reference to television. This was followed by most of the American States.

In the United Kingdom and Wales, the publicity surrounding a number of sensational trials between 1904 and 1922, including one photograph in 1912 of a judge at the moment of passing a sentence of death on one Frederick Sedden for murder, seemed to have built up the necessary pressure to bring about the prohibition of the photography of Court room proceedings: see *Dockray*: "Courts on television." [1988] 51 M.L.R. 593.

The Australian Experience

For the most part, it would seem that television and camera coverage of Court room proceedings is prohibited in Australia as part of the Court's inherent power to control and regulate its own proceedings. However, in addition there are some pieces of legislation that also affect the possible televising of proceedings, such as s.68 of the Jury Act, 1977 (NSW), which prohibits the publication, printing, broadcasting or televising of material that might identify a juror.

There are some instances of television coverage of pro-

ceedings in Australia. They include the following.

In 1981, Coroner, Mr. D. Barrett S.M. allowed the televising of his findings in the first Coronial Inquiry into the death of Azaria Chamberlain. He did so, he said:

> "Because of the intense public interest that the Inquest had generated, and because of the prevalence of 'unfounded' rumours that had circulated in relation to the Inquest,: see N.S.W. Law Reform Commission Issues paper, *Proceedings of Courts and Commissions - Television Filming, Sound Recording, and Public Broadcasting, Sketches and Photographs* 1984, (hereafter "NSWLRC") 34.

In 1981, part of the proceedings of a case in the Hobart Court of Petty Sessions were televised. The case concerned Saturday afternoon trading by a major retailer, and the providing Magistrate allowed the opening of the case by the prosecution and defence to be televised over the objection of both Counsel because of the intense public interest in the matter. (ibid)

The A.B.C. programme "Four Corners" on two occasions has televised Court room proceedings. In June, 1981, a programme about the work of Magistrates Courts included footage of proceedings at Sydney Central Court of Petty Sessions, comparing the more usual work of that Court with the so called Security Security conspiracy case *(Commonwealth Police v. Anagnostopoulos)*. On another occasion, in 1981 "Four Corners" in a programme concerning burglary broadcast part of a trial in the South Australian District Court. (ibid)

In addition to the general televising of proceedings, the closed circuit televising of Court has been allowed in Australia for some time. In the trial of *R. v. Chamberlain* proceedings were transmitted via closed circuit television to a separate room where news media were present, in order to avoid the disruption of the actual proceedings of themselves by the presence of large numbers of reporters. (ibid)

The High Court of Australia also has a provision whereby proceedings are televised via closed circuit television, primarily to allow speakers to be identified for the purpose of the transcript, but also allowing proceedings to be transmitted to a nearby press room. (ibid)

Arguments in Favour of Televising Proceedings

The argument for televising or filming proceedings must be found in the principle that the courts should be open to the public. The case of *Scott v. Scott* [1913] A.C. 417 is still the classic authority of that principle. In that case, Lord Atkinson said:

> "The hearing of a case in public may be, and often is, no doubt, painful, humiliating, or deterrent both to parties and witnesses and in many cases, especially those of a criminal nature, the details may be so indecent as to tend to injure public morals, but all this is tolerated and endured, because it is felt that in public trial is to be found on the whole, the best security for the pure, impartial, and efficient administration of justice, the best means for winning for it public confidence and respect." (at 463).

Lord Shaw quoted Bentham: "Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the Judge himself while trying under trial" (at 477).

In our society, the most effective means of making sure that the Courts are open to the public and that justice is seen to be done is to ensure that the medium by which most citizens get their information about the world - the television screen - relays Court proceedings.

This appears to be the attitude of the Working Party of the Public Affairs Committee of the General Council of the (British) Bar. The Working Party recently considered the issue and concluded that the law should be amended to permit the televising of the Courts on an experimental basis. Among other things, the Working Party concluded that:

> "There is a significant advantage in televising Court proceedings, namely that it would enhance the public's understanding of, and confidence in, our legal system, judiciary and the decisions of our Courts. Television would provide greater public access to the Courts and would permit personal observation, as opposed to second hand reports in the printed media and to television reporters speaking to camera and recounting what happened that day in the Court building behind them. Televising would fulfil an educative and informative function. Objections to televising are based largely on fears which, in practice, are revealed to be unfounded, and in part upon an emotive reaction to television which does not do justice to the skill and responsible attitude of the broadcasters. There is, for example, nothing intrinsically impossible or difficult about achieving a fair and balanced televised Court report."

It will be noted that these rationales include not only the notion expressed in *Scott v. Scott* that public monitoring of hearings has an effective role in making the Courts accountable to the public, but also a broader educational rationale.

In the United States, whilst the Courts have refused to hold that there is a constitutional ban on televising Court room proceedings, it is noteworthy that neither the first amendment (free speech) nor the sixth amendment (the right to a speedy and public trial) had been held to automatically grant access to the Courts by television cameras: *Nixon v. Warner Communications Inc.* 435 U.S. 589, 610 (1978); *Gannett v. De Pasquale* 443 U.S. 368 379-81 (1979). The Courts have concentrated on the guarantees of due process in the fifth and fourteenth amendments. Decisions based on this guarantee are made on the basis of the facts in the instant cases. Thus in *Estes v. Texas* (1965) 381 U.S. 532 the Supreme Court held that the disruption to the procedure caused by the presence of twelve or more camera persons, microphones, cables, wires, etc. disrupted the proceedings and deprived the Defendant of due process. Sixteen years later, in *Chandler v. Florida* (1979) 449 U.S. 560 the Court refused to reverse a trial on the ground that televising it was unconstitutional. The *Chandler* trial was subject to the (fairly minimal) restraints imposed by the Florida guidelines on the televising of trials, and in *Chandler* the Court noted advances in technology had greatly reduced the disruptive effect

of television. Another, perhaps unspoken factor, was that the *Estes* trial was one of great notoriety; "the Defendant, Billy Estes, was a well-known Southern financier charged with swindling and false pretences." (Lindsay, 397).

Following the 12 month trial period in Florida, the Florida Supreme Court conducted a survey of attorneys, witnesses, jurors and court officers, and considered a separate survey of the Florida judiciary. The results were in favour of televising proceedings:

> "The Florida Supreme Court failed to find any of the adverse effects predicted by opponents of the admission of cameras. The evidence indicated no increase in the number of grandstanding lawyers, posturing judges, intimidated witnesses, or distracted or fearful jurors. According to the court's survey, there was no significant reduction in the desire of jurors, witnesses, court personnel and attorneys to participate in a televised trial as compared to a trial only covered by newspapers. The Court concluded that 'on balance there is more to be gained than lost by permitting electronic media coverage of judicial proceedings subject to standards for such coverage' ": Lindsay, 411.

Arguments Against the Televising of Courtroom Proceedings

A useful summary of the objections to televising of courtroom proceedings is to be found in the wording of the amended Canon 35 of the American Bar Association, here reproduced in part:-

IMPROPER PUBLICISING OF COURTROOM PROCEEDINGS. Proceedings in Court should be conducted with fitting dignity and decorum. The taking of photographs in the Courtroom, during sessions of the Court or recesses between sessions, and the broadcasting or televising of Court proceedings detract from the essential dignity of the proceedings, distract participants and witnesses in giving testimony, and create misconceptions with respect thereto in the mind of the public and should not be permitted.

This canon illustrates the three categories into which objections to televising Court room proceedings can be divided: First, that televising detracts from the dignity and decorum of Courtroom proceedings. Second, that the use of video equipment in the Courtroom will physically or psychologically disrupt proceedings to the disadvantage of justice. Third, that the alleged educational value may not be as great as is alleged by the media proponents of television in the Courtroom, and that televising may be in fact misleading.

As to the first category of objections, whether you believe that the dignity or decorum of the courtroom will be lessened more by television cameras than by, say, the tape recording devices of sound recordists recording material for the purpose of the transcript, and the interesting exhibits tendered in some proceedings, will substantially depend upon emotional factors and a subjective view of what constitutes dignity and decorum.

More important, on the basis of any rational examination of the proposal, are the latter two categories.

The second category is the disruption of proceedings by the distraction of witnesses and participants. Distraction can take a number of forms. In *Estes* the Court referred to four different types of distraction. First, pressure on, and distraction of jurors caused by the publication of their presence in Court and the presence of equipment. Second, interference with witnesses who may be embarrassed or demoralised, or alternatively may tend to "ham up" their evidence or who may even be reluctant to appear. Third, the impact on the Judge, including the necessity to supervise television crews. Fourth, the impact on the defendant, in a criminal trial, who should arguably not be distracted by public surveillance. Interestingly, that Court did not comment upon another possible problem: the increased pressure on Counsel and solicitors in Court, who may likewise suffer from "mike fright", or, perhaps, from a tendency to over-act.

Hedda Nussbaum, Steinberg's lover, testifies against Steinberg during the trial. (UPI/BETTMANN NEWSPHOTOS)

The third category of objection, that of creating misconceptions in the mind of the public, counters the alleged "educative" function of cameras in the Court room. It may well be misleading to suggest that cameras in the Court room can give an accurate portrayal of a trial, even if lawyers, witnesses, and the Judge and jury are not distracted. Television would be unlikely to portray all of a trial, or even all of the testimony of a particular witness. Television coverage does not permit "personal observation" as the British Working Party would have it; rather it force-feeds a selected and edited account which reflects the subjective opinion of the camera operator and producer on what is salient and relevant.

The television audience, as political operators are well aware, likes to receive its information in the form of very short, often thirty or sixty second "grabs" or "bites". The nature of the competition for ratings will tend to ensure that the more sensational parts of proceedings and indeed of more sensational proceedings, will be televised, perhaps at the expense of the actual substance of the trial. One remembers the media coverage of the Chamberlain trial from outside the Court room, for example, and the emphasis on the clothes worn day by day to Court by Lindy Chamberlain.

Try this test: how many recent newspaper accounts of trials gave an accurate, objective summary of the proceedings, and how many were so-called "colour" pieces concentrating on the personality, foibles, or appearance of the participants?

As Sir Laurence Street has said: "the media has both an inherent limitation in the extent of the cover that can be telecast, as well as an inherent tendency for the form and appearance to overshadow the substance. This latter prospect imports a further tendency to induce those participating in the proceeding to give undue attention to the form and appearance of their part in the litigious process. Being at the expense of substance, this could distort the process of justice itself". NSWLRC, 39.

Controls on Cameras in the Court Room

Even in the home of *LA Law* television cameras are not allowed unfettered access to the courts. All American states that permit televised proceedings do so subject to a range of restrictions: see Gardner, 495ff; Lindsay, 402ff. The following are examples of the issues seen as most needing some form of regulation:

First, should televising be subject to the consent of the parties or of witnesses? American jurisdictions differ on whether a witness can object to being televised, or whether a party (particularly a defendant in a criminal matter) can do so.

Second, whether the jury should be televised. Most American jurisdictions restrict or prohibit coverage of the jury.

Third, should certain types of proceedings be excluded? Many American jurisdictions limit coverage of juvenile matters, matters involving domestic relations, and sexual offences. [Lindsay 419-420; Gardner 500].

Fourth, should televising of courtroom proceedings be subject to a requirement of balanced reporting? Currently, Australian commercial television stations are required by Television Program Standard 15(a) to present news programmes that "present news accurately, fairly and impartially". Readers may draw their own conclusions as to whether this rule (a) has any meaning and (b) has any effect.

Fifth, what technical restrictions should there be on the equipment used in the courtroom? In order to minimise distraction by cameras, lights, personnel and microphones, American state jurisdictions have various rules restricting the equipment used. For example, Florida's Supreme Court requirements include:

* Prohibition of artificial lights;
* Allowing only one camera and one camera technician in court during proceedings (presumably the various networks have an agreement whereby the output is shared);
* Prohibiting the moving of the equipment during the pro ceedings; and
* Requiring the media to use the court's audio equipment, thus avoiding a plethora of microphones and cords.

Conclusion

Despite initial concerns about the effects of television cameras in court, those who have considered the issue overseas seem to have concluded that, on balance the idea is a good one. Although some of the arguments in favour are less than totally persuasive, on the other hand the procedure does not appear likely to destroy our legal system.

At present proceedings are frequently covered second-hand by enthusiastic but often inaccurate reporters from the media. Parties, witnesses and counsel in a newsworthy case run the gauntlet of reporters and cameras on the court steps. It is hard to see how the actual intrusion of unobtrusively operated cameras in the actual court could effect much of a change for the worse.

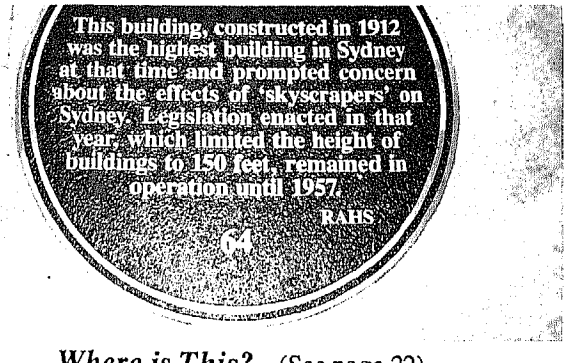
Perhaps a sympathetic view will be taken in Australia, leaving for consideration the real issue: whether it is sufficient basis for an objection to a question in cross-examination that the camera is favouring the opposing counsel's good side.

NOTE: In order to make this piece as readable as the writer's limited ability will permit, references have been kept to a minimum. Readers are referred for further detail on this topic to the sources listed. *Bar News* would like to thank Commissioner Temby and media officer Roberta Parker of the ICAC and Mr. Malcolm Kerr MP, Chairman of the joint Parliamentary Committee on the ICAC and Mr. David Blunt, Project Officer of that Committee, for their assistance. ❑

Judicial Comity?

A Californian Court had to decide whether the appellants were properly convicted of possessing obscene films with an intent to distribute them. The majority of the judges reversed the conviction of the appellants. Associate Justice Hanson dissented. In response to his dissent, Associate Justice Thompson, with whom Judge Lillie agreed, said that they felt 'compelled by the nature of the attack in the dissenting opinion to spell out a response'. They did so, in seven numbered propositions: '1. Some answer is required to the dissent's charge. 2. Certainly we do not endorse "victimless crime". 3. How that question is involved escapes us. 4. Moreover, the constitutional issue is significant. 5. Ultimately it must be addressed in light of precedent. 6. Certainly the course of precedent is clear. 7. Knowing that, our result is compelled'. The initial letters of the seven propositions spelt 'Schmuck' and left the reader of the law report in no doubt as to their view of their dissenting colleague. The judgment added a reference to a German dictionary, in case anyone had missed the point. *People v. Arno 153 Cal. Rptr. 624, 628 n.2 (1979); see Judges, David Pannick, OUP 1987.* ❑

How Well Do You Know Sydney?



Where is This? (See page 22)

Post Street and Robertson - Admission in Queensland

On 16 November 1989 the High Court held that the Rules Relating to the Admission of Barristers of the Supreme Court of Queensland were unconstitutional. Those who flocked across the dingo fence to be admitted found that admission was not unconditional. David Jackson QC explains.

I have been asked to provide this Note on the present position concerning admission of interstate barristers to practice in Queensland. In essence the position is that interstate barristers may be admitted to practice, but admission in the first instance is conditional for one year. The relevant condition is that between conditional admission and application for the order absolute, the applicant has not pursued any occupation or business other than that proper for a barrister.

The provisions for conditional admission derive from rr. 15B(1) and 15B(2) of the Rules Relating to the Admission of Barristers of the Supreme Court of Queensland. They are of recent origin and were inserted into the Rules on 2 July 1987 after the plaintiff in Street v. Bar Association of Queensland (1989) 63 A.L.J.R. 715 had applied for special leave to appeal from the decision of the Full Court of the Supreme Court refusing his application for admission.

Rule 15B(2) provides that the applicant may be granted absolute admission on satisfying the Court that between the date of conditional admission and the date of the application for the order absolute:

> "... he has practised principally in Queensland and has not pursued any occupation or business other than that proper for a barrister."

The first condition of the rule, namely that the applicant has practised principally in Queensland since conditional admission, will ordinarily be inapplicable to residents of other States because of the decisions in Street v. Bar Association of Queensland and Re Robertson (1989) 63 A.L.J.R. 769. The second - that the person admitted conditionally has not pursued any unsuitable occupation - has been applied by the Full Court of the Supreme Court with some rigour, notwithstanding that r.55 gives the Court power to dispense with the requirements of r. 15D(2), or to abridge the time fixed by it.

Thus on 14 December 1989 D.M.J. Bennett Q.C., a barrister for years and a silk in every other Australian jurisdiction, was admitted only conditionally [1]. The Full Court, per Macrossen C.J., said:

> "As to the further matter of conditional admission which is provided for under rule 15B we note that the validity of this rule has not been attacked and that the special circumstances of the applicant are what are relied upon again asking for a dispensation in that respect. The Court is not prepared to dispense with the requirement of conditional admission in the first place which is imposed....".

On the same day G.K. Downes Q.C., again a barrister for years and a silk in many jurisdictions, was refused absolute admission, the same Full Court's reasons being:

> "Once again the validity of Rule 15B is not attacked. Perhaps at some time its continued application will need to be looked at, but the Court is of the view that the application should, in the first instance, be conditional only, notwithstanding the suggestion that we should waive that requirement under rule 55."

On 12 March 1990 the Commonwealth Solicitor-General's application suffered a similar fate, with the Full Court, again per the Chief Justice, saying:

> "Submissions were made to us in December that there were other special cases and I suppose whatever we do today, we will hear similar submissions. We do not purport to look into the future when bringing any particular skill to bear but the fact, of course, that Mr. Griffith is Solicitor General now does not necessarily mean that he will be for all of the ensuing twelve months. The Court is of the view that the applicant should, of course, be admitted but that his admission should be conditional in accordance with the procedures which under the Rules currently apply to interstate admission."

The case of the Commonwealth Solicitor-General highlights the absurdity of retention of the requirement of conditional admission. The result of its operation is to pervert the probabilities, because residents of Queensland with no "track record" as barristers are admitted unconditionally, but non-residents must be admitted conditionally even if they have practised exclusively as barristers for decades, and have given no hint of straying from that path [2].

The validity of the relevant condition must be very doubtful in the light of s.117 of the Constitution and the decisions earlier referred to [3]. The rule should be altered to abolish the requirement for conditional admission, however, without the need for a case to be mounted challenging it. The concept of conditional admission was introduced for reasons which were transparent, and unattractive. They failed to achieve those aims and that fact should be recognised. ❑

[1] Bennett Q.C., it may be noted, had been the successful leader appearing for Street in Street v. Bar Association of Queensland, and both Bennett and Street were admitted in Queensland on 14 December 1989. Yet, because Street's application came under the "old" rules, Street was admitted unconditionally and Bennett conditionally.

[3] On the day when Griffith Q.C., S-G was admitted conditionally, a very new Queensland graduate was admitted unconditionally.

[3] Section 117 would not assist residents of the Territories.

What, Not Swahili Again, Your Honour!

There are many things that are taken for granted in a court of law: eccentric judges, sleepy court officers, brusque associates, long delays - the list goes on. One of the most basic, most commonsense assumptions of laymen, lawyers, and judges alike is that English is the language that must be used in a New South Wales court. Why? It just seems obvious, doesn't it?

The question of which language or languages may be used in court proceedings is not a question that can be quickly answered. Reference to the Supreme Court Practice will yield, at 38/1/9, the categorical statement that "The proceedings of the Court must be in English". The authorities supporting this brazen assertion are two English cases: the first is Re Trepca Mines [1960] 1 WLR 24, and the second, In the Estate of Fuld, Deceased [1965] 1 WLR 1336, which decision is an application of the first case. In Re Trepca Mines Roxburgh, J. states "There is, of course, no question but that the proceedings before me must be conducted in English and in no other language" (p. 27). The learned judge supports this contention by reference to the Pleadings in English Act, 1362 (36 Ed. 3, c. 15), despite the fact, which he concedes, that it was repealed in England in 1863. He also cites the Welsh Courts Act, 1942, but as this Act only applies to Wales, it is hard to see how it is relevant. No other support is offered, so the judge's ruling becomes nothing more than an assertion. As a result, the Supreme Court Practice can make no useful contribution.

There do not appear to be any New South Wales or Commonwealth statutes that relate directly to the question. Australian case law does not go much further. The only cases even slightly related concern the rights of parties with regard to court interpreters (Dairy Farmers Co-operative Milk Co. Ltd. v. Acquilina (1963) 80 WN (NSW) 501). Both take the proposition that English must be used for court proceedings as a given. Both were correct, but that was before the Imperial Acts Application Act, 1969 (NSW)....

36 Ed. 3, c. 15 was the first Imperial enactment to attack the by then well-established practice of using French in courts of law. Despite this statute, and a valiant, but ultimately thwarted, attempt by Oliver Cromwell to force all court proceedings to be in English, this did not occur until 1731, when 4 Geo. 2, c.26 finally abolished the highly corrupted Law-French, and enshrined the English language as the language of all English courts (apart from the Court of Admiralty, which was allowed to proceed in Latin). Or so Parliament must have thought.....

4 Geo. 2, c.26 was repealed in New South Wales by the Imperial Acts Application Act, 1969 (NSW), ninety years after its repeal in England in 1979. Upon its repeal, all statutory basis for the proposition that English is the prescribed court language in New South Wales vanished.

What, then, is the law as it now stands? Do we, perhaps, revert to Law-French, the common law reviving upon the repeal of a statute? Although s. 9 (1)(a) of the Imperial Acts Application Act purports to prevent a revival of old law upon the repeal of Imperial Acts, in the case of the repeal of an Act without its replacement by a new one, there would have to be a common law revival in order that there be any law at all on the topic. The alternative is that a no-law area springs into being. If this were the case, then any language would have equal legal status in court, the language or languages to be used in any particular hearing to be agreed upon, presumably, between judge and counsel.

So if during your next court appearance the judge asks you whether you consent to the case being tried in English, do not be thrown, but, rather, consent magnanimously. Or perhaps you might prefer Latin, Greek, Slovenian, or Sanskrit. Remember, however, that cases tried in Ancient Sumerian may require court reporters to brush up on their cuneiform. And always, yes always, carry your Law-French phrasebook. ❑ Marcus Young, Tipstaff of the Supreme Court.

The Cruellest Cut

Wheelahan DCJ (as he then was)
"X" v. "Y" District Hospital

R.E. Quickenden for Plaintiff
A. Renshaw for Defendant

R.E. Quickenden: "In this case, Your Honour, the Plaintiff alleges he lost a testicle due to the negligence of the "Y" District Hospital.

His Honour: ....(flicking through court papers) "Has a Memorandum of Consent been filed?"

A. Renshaw: "Your Honour, the Plaintiff is not a thoroughbred racehorse." ❑

Why are Lawyers (almost) Always the Rats and why is it always Michael Douglas?

Peter Hutchings, a freelance film critic, turns the spotlight on the entertainment industry's portrayal of lawyers.

Q. Why are lawyers such rats?
A. Because the cheese is so good.

It can't be too long before there is a move to disbar Michael Douglas.

In his two recent screen appearances as a lawyer - *Fatal Attraction* and *The War of the Roses* - he has been guilty of breaking and entering, destruction of property, and assault and battery. Not to mention adultery. Indeed, it would appear that, in films, the second-oldest profession has replaced the common law offence of housebreaking with home- wrecking.

Douglas may well have done for the legal profession what Paul Hogan has done for Australian tourism. Do you want a life of financial ease and sexual opportunity? Become a lawyer. Do you wish to violate most of the civil code with impunity? Become a lawyer. Do you wish to have a stable, satisfying married life? Don't marry a lawyer.

" Lawyers seem to be a convenient device for highlighting the moral murkiness of life after the 'sexual revolution' "

Somewhere in Hollywood, I suspect that there is a group of vengeful ex-wives of lawyers, who have underwritten these films with the proceeds of their marriage settlements.

Would it be too fanciful to view *Fatal Attraction, Sex, Lies and Videotape*, and *The War of the Roses* as alternate scenarios concerning the dangers of living with lawyers? Are the law and family life too difficult a combination?

Even in Woody Allen's fanciful treatment of a lawyer's private life (gone very public) in the "Oedipus Wrecks" episode of *New York Stories*, the law is portrayed as incompatible with happily married life, albeit that Sheldon Mills is a lawyer embarrassed by his mother rather than his suicidal/ homicidal lover.

John Millaney - "Sex, Lies and Videotape"

Lawyers may be the lowest form of life after liars, but they evince an awe-inspiring aptitude for activities designed to propagate the species. In the opening of *Sex, Lies and Videotape*, the lawyer John Millaney (played by Peter Gallagher) comments upon the sexual attractiveness of married men, but those comments may need to be considered in the context of the priapic proclivities of married male lawyers.

What is it that is, at once, so unsatisfying about their home life - when they can get home after working long hours at the office - and so erotic about their life away from home? Here, we might distinguish between John Bishop's shortcomings in the marital - as opposed to the extra-marital - orgasmic stakes, and the capacity of Oliver Rose (played by Michael Douglas) for eliciting a multi-orgasmic response from his wife Barbara (played by Kathleen Turner). While the lawyer is being a rat, the "little woman" is busy making a home for him, even if it eventually bores her to distraction and desertion.

While this scenario may be a familiar one in marriages containing one career professional and one career domestic, these films suggest that this is especially the case for the legal profession.

However, a more crucial question is why film lawyers are rats and why television lawyers are sensitive, caring individuals. Why doesn't Corbin Bernsen date psychotic editors? Or, have a wife to screw around on? Perhaps this can be explained by the difference in the demands of the two media. Television, in the form of the series, relies on a staple of sympathetic characters in a way that film doesn't need to.

Also, since television is something that happens in your home, a TV series needs to present identifiable characters, whose predicaments are much the same as those of its viewers. In *LA Law* the lawyers are often portrayed as being at the mercy of the legal system, particularly of judges and juries, in a manner familiar from John Mortimer's *Rumpole of the Bailey*. This very neatly places a group of prosperous, glossy people right where we all live, especially if we might happen to also be lawyers. If you want viewers to keep coming back - and *LA Law* is reputed to be mandatory viewing for many young lawyers - you need to make your character sympathetic to professional and non-professional viewers alike. Steven Bocho, the creator of *Hill Street Blues* as well as of *LA Law*, is very good at doing this.

By contrast, the scenarios of *Fatal Attraction, Sex, Lies and Videotape* and *The War of the Roses* allow very little room for a sympathetic presentation of lawyers. None of these lawyers is ever presented in a situation, for instance in court, where someone else might be a rat, and they might be a hero. The domestic perspective of each of these films places these lawyers beyond our sympathy, except where we can identify with their fears for their family.

It is worth remarking that, at first, not too many filmgoers picked Michael Douglas for the rat that he was in *Fatal Attraction*. In amidst the howls of protest against this film's

Questioning DNA Evidence

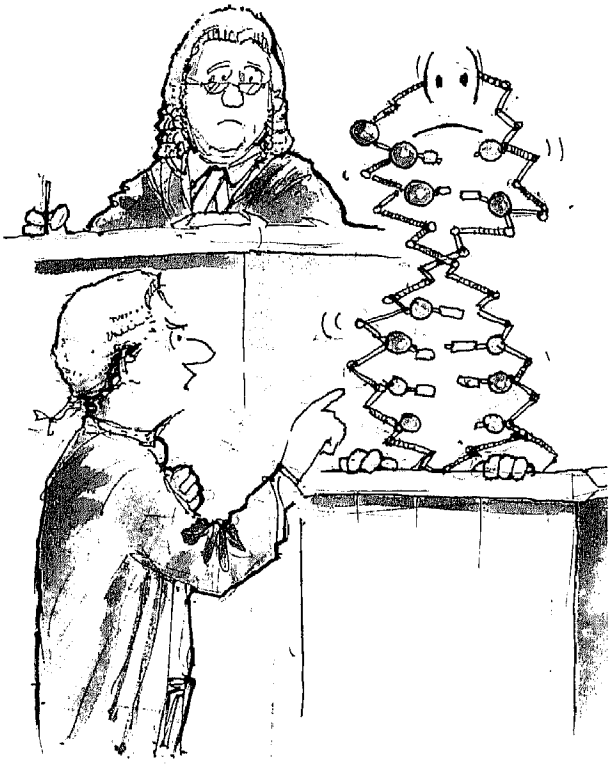
J.T. Kearney points out some flaws in the emerging criminal investigation technique of DNA profiling.

DNA Profiling has been hailed as the most important new criminal investigation technique of this century. It may prove to be so, but recent experience in America indicates that despite the praise, the technique is far from infallible and is still in its infancy in terms of standardisation. DNA evidence, whether produced by the prosecution or defence can be open to challenge and readers might appreciate some ideas as to how to go about doing this.

Background

The technique essentially focuses upon the human cell and the genetic information contained in the DNA molecule. Certain parts of that molecule are unique to the individual, or at least to a very small proportion of the population, and by comparing biological samples from different places and times the testing laboratory is able to "match" the samples as being from the same human being. For example, the semen from a rape victim can be compared to the blood of a suspect.

The advantage of this technique over traditional blood typing is that the result can be declared with near certainty. This involves some complex experiments and afterwards statistical analysis based upon data banks of information.



Limitations

The technique has its limitations. It finds its main application in paternity matters. Otherwise in criminal matters, such evidence will usually only arise where identification is in issue. Investigating authorities need to have a certain quantity of biological material left behind at the scene of the crime. A single drop of blood is sufficient. Alternately semen, hair roots or skin can also be employed. Problems can arise when the sample is contaminated and in this regard it should be noted that air or sunlight are potential contaminants. Further, the technique is expensive and time consuming. Although the test itself involves well accepted technology, it requires rigorous management and the employment of a variety of cross experimentation to ensure accuracy, particularly where the sample is small in quantity, old or degraded.

Another primary problem is that some aspects of the test are not yet in the public domain. That is, some of the steps involved have been patented by various companies, who in reliance on the same theory, employ differing techniques to achieve the same end. Being left to private enterprise has naturally led to some vigorous promotion with possibly inflated claims as to accuracy. For the same reason, standardisation has not been achieved and some aspects are subject to differing opinions in the scientific community. A seminar was held by the Australian Institute of Criminology last year (DNA and Criminal Justice, 30-31 October 1989, Canberra) and the papers are available from the Institute for those wishing to obtain reading lists or further information.

Castro's Case

The People of the State of New York v. Castro (unreported) Supreme Court of State of New York, Sheindlin JSC, 14 August 1989 (a copy is available in the Bar Library), was the first serious challenge to the reliability of DNA profiling evidence. Castro had been accused of a double murder. His wristwatch was found to have drops of blood on it. Castro claimed that it was his own blood. DNA profiling evidence indicated it was blood from one of the victims. What came to light in the course of the 12 week pre-trial hearing relating to the expert evidence, was that the theory and techniques of DNA profiling are capable of producing reliable results. However, the actual testing of the samples in this case failed to use the generally accepted scientific techniques for obtaining reliable results and the evidence was ruled to be not sufficiently reliable to go before the jury. In other words the tests are potentially reliable but were sloppily done in this instance. To reach that conclusion Sheindlin JSC employed the American doctrine known as the Frye test to determine the admissibility of the expert evidence. That test arises from Frye v. United States 293 F1013 (1923D.C.Cir) where the Court laid down a test, applied generally in America since, that expert scientific evidence will be admissible only if the new theory and technique have gained general acceptance in the relevant scientific community. Although such an approach is known in Australia see R. v. Carroll (1985) 19 A Crim R; R. v. Lewis (1987) 29 A Crim R 267) at this stage it could not be said to be the law in Australia. If such an issue arose it would probably be decided by the discretion to exclude otherwise admissible evidence if it would operate unfairly against the accused, see Ireland v. The Queen (1970) ALR 727; Bunning v. Cross (1977) 141 CLR 54, and Cleland v. The Queen (1983) 57 ALJR 15. A tactical decision would have to be made as to whether to employ the pre-trial applications

portrayal of a woman, there weren't too many voices heard to observe that Douglas was the real villain of the piece. The popular reception of films has more to do with prejudices that feel they have been catered for than with any attention to detail. As noted in a number of interviews, no-one in the cast was under any illusion that Douglas was the rat of the piece. It is his character's response to Alex Forrest (played by Glenn Close), escalating into a murderous rage when she threatens to tell his wife about her pregnancy, that provokes her violence. His is a rage given a quite loose justification in terms of some idea of "the rules" of adulterous liaisons.

Indeed, both *Fatal Attraction* and *The War of the Roses* feature a scene in a law library in which Douglas seeks advice about family law: respectively, the rights of paternity, and his right of access to a contested property during divorce proceedings. And, similar to *Fatal Attraction*'s discussion of the unspoken rules of adult adultery, John (the lawyer-adulterer of *Sex, Lies and Videotape*) invokes the rules of evidence in defending himself against an accusation of infidelity.

Lawyers seem to be a convenient device for highlighting the moral murkiness of life after the 'sexual revolution.' And there is a tradition, in America, of seeing the lawyer as a representative of the best that society has to offer: the rule of law (a.k.a. The Constitution), and upward mobility through education and effort.

In this context, as well as in our local context, lawyers bear the brunt of society's anxieties about itself.

Oliver Rose - The War of the Roses

Australians have traditionally had an enormous, quite exaggerated, respect for the medical profession. At its most basic level, that profession is generally in the position of being able to make people feel better, even if it is at a considerable cost. Lawyers are not often in the same position: they are the people who aid and abet real estate agents in adding to the cost of home buying, they are the people who deal with divorce, etc.

Furthermore, Australian attitudes towards the law can be characterised by mistrust. The law has, until recently, been written in the archaic language of a foreign ruling class: it has never been seen as a common instrument of the people in the way that Americans view their legal code.

What Australians and Americans may have in common, at this point in time, is a dislike of lawyers based upon the fact that lawyers are a class of people who are paid well - when those bills are finally honoured - to organise other people's lives and business.

In societies governed by secular individualism, lawyers represent the last force capable of telling you how to behave towards your husband or wife, or how to make a buck. They are paid to be knowledgeable about things that we probably all think we know enough about already, and they can probably outsmart most of us at what they do.

This brings us to the second part of our question: "Why Is It Always Michael Douglas?"

There is nothing coincidental about Michael Douglas' choice of roles: because he is primarily a successful producer, he can afford to be very careful in what he acts in. Without wanting to stretch this point, I think that there is a certain identification between Douglas - as an example of upward mobility - and the figure of the successful lawyer.

Further, to speak in the language of another Douglas alter-ego, he has lots of street smarts when it comes to judging the mood and concerns of the public. Back in the seventies when vigilantes were being presented as the answer to the ills of the legal system, Douglas played the role of a murderous judge in *The Star Chamber*. The characters of his last four screen roles have all been - lawyers or not - men tainted with a corruption which is presented as generally endemic to American society, and the filmgoing public have put their money where their interests are.

Fatal Attraction, Sex, Lies and Videotape and *The War of the Roses* show the American family under threat from one of the pillars of society, and all three films articulate a different morality in dealing with this problem. Through its connection of private dishonesty with professional negligence *Sex, Lies and Videotape* is a much more moral film than *Fatal Attraction*, as the "Kirkland matter" becomes the name for both John's marital infidelity and his professional arrogance. Finally, marriage collapse coincides with career collapse.

The War of the Roses presents itself through the narration of Gavin D'Amato (Danny DeVito) as a tale without a moral, yet it contains a narrative concerning the morality of legal practice.

The dirtiest legal rat of this film is - not surprisingly - the "wife's lawyer" Harry Thurmont (played by G.D. Spradlin) who threatens to use Oliver's note to Barbara (written when he thinks he is dying of a heart attack) as a lever in the property settlement.

Gavin is an accessory to this kind of legal machination, but an increasingly unwilling accessory, to the point of being fired as Oliver Rose's legal adviser. At the conclusion of this expensively complimentary tale of the warring Roses (told in his $450.00 an hour time), Gavin claims to have learnt to advise male clients to be generous about property, so that they can get out of their marriages in one piece and recommence their lives.

For the newly-married Gavin the moral, then, is that lawyers shouldn't interfere with the family. And this is a perspective encapsulated in a joke Gavin tells during his narration of "The War of the Roses" which may serve as a postscript to this article:

Q. What do you call 500 lawyers at the bottom of the ocean?
A. A good start. ❑

procedure in Part 53 of the District Court Rules, to challenge such evidence or on a voir dire in the course of the trial or failing those avenues to challenge the evidence before the jury as was done in Chamberlain v. The Queen (1984) 153 CLR 521. The controversy surrounding the latter case and a quick read of Castro's case might suggest that it would take careful thought and preparation before trying to challenge such complex evidence before a jury.

For the same reason, lawyers have virtually no hope of mastering this specialised field and will require the services of one or more consulting experts to examine the DNA profiling evidence and results to make a decision as to whether a challenge is warranted. Certainly, suspicion should be aroused when the original sample was small in quantity, was not fresh or has been exposed to sunlight, water or other contaminants. Further, in each test there are subjective elements, particularly where the scientist visually "matches" bands produced on an autoradiograph (similar to an x-ray). This is a critical step and Castro's case shows how the testing laboratory can be overzealous in looking for similarities between the bands rather than the opposite. Sheindlin JSC suggested that the party proposing to use DNA evidence should give discovery of the following to the opposing party, and it is suggested that the following list should be obtained from the opposing party, hopefully by consent, or by employing one or more of the procedures under Part 53 of the District Court Rules. The relevant information is:

1. Copies of the autoradiographs, with the opportunity to examine the originals;
2. copies of laboratory books;
3. copies of reports by the testing laboratory;
4. a written report by the testing laboratory setting forth the method used to declare a match or non-match, with all relevant criteria;
5. a statement by the laboratory setting out the method used to calculate the allele frequency in the relevant population;
6. a copy of the data pool for each locus examined;
7. a certification by the testing laboratory that the same rule used to declare a match was used to determine the allele frequency in the population;
8. a statement setting forth observed contaminants, the reasons for them, and tests performed to determine their origin and the result of the tests;
9. if the sample is degraded, a statement of tests performed and the reasons for them;
10. a statement setting forth any other observed defects or laboratory errors, the reasons for them and their results;
11. a chain of custody of the document.

It is to be hoped that prosecution authorities will co-operate in providing such material upon request.

Conclusion

DNA profiling has the potential to become a standard technique in criminal investigation. At the moment it suffers from lack of standardisation and the Castro case has called into question the professionalism of some of the laboratories employing DNA technology, in the same way that the Chamberlain case and its aftermath have brought expert evidence into question. For DNA profiling, it is early days and it is suggested that by obtaining the above information and one or more consulting experts opinions, the client can be advised accordingly and in some cases a challenge to the reliability of the testing laboratory may be warranted.

Further Reading

A. Coelli " One Chance in 165 Million"
Australian Law News September 1989 p.22

P. Macalister "From Fingerprints to Genetic Codes" NSW Law Society Journal April 1989 p.43

W.C. Thompson and S. Ford "DNA Typing" Trial September 1988 p.56

C. Freckleton "DNA Profiling, Optimism and Realism" Law Institute Journal May 1989 p.360

B.S. Lander "DNA Fingerprinting on Trial" Nature 15.6.89 Vol.339 p.501. ❑

Many more references are to be found in the conference papers from The Australian Institute of Criminology.

Order Out of Chaos

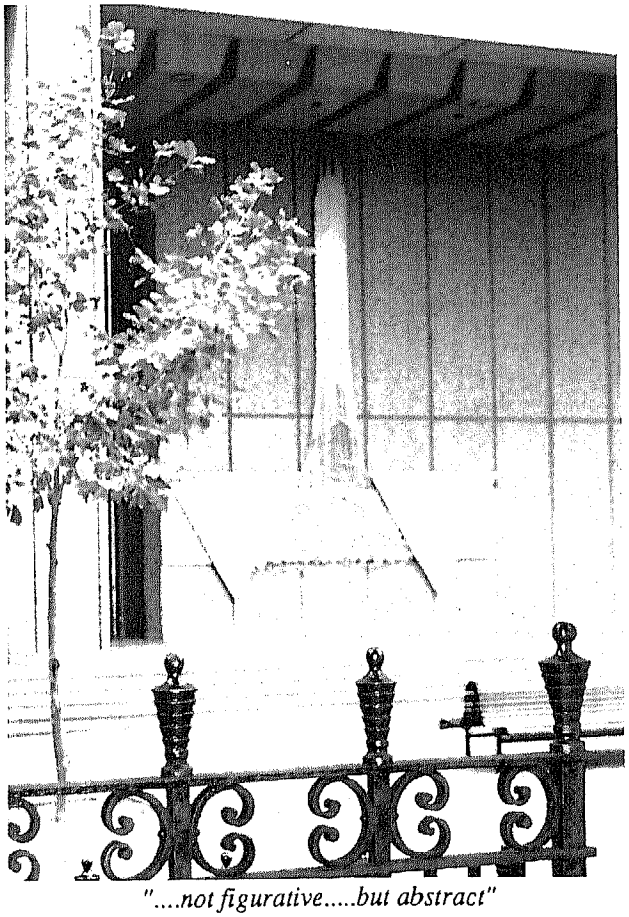
Clive Evatt explains the mysterious appearance of the wall sculpture on the Supreme Court building.

He who pays the piper may call the tune. Most art is influenced by patrons whether they be the Barbarinis or in this case a select committee of the Law Courts Building.

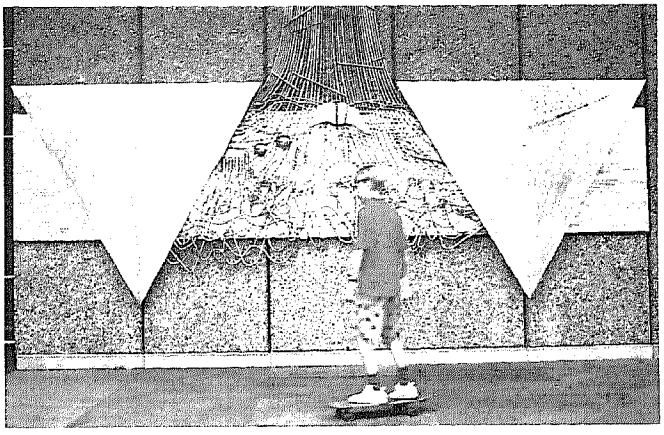
When the Courts were finished in 1977 it was intended to place a 3' by 4' bronze plaque on the southern facade to commemorate this historic event. A suitable 5" deep hole in the wall of these dimensions was left by the builders. Unfortunately no one could agree on the inscription of the plaque - which names were to be included and which left out.

The hole remained gathering dust over the years when it was decided a decent wall sculpture would look good and at least hide the hole. A competition confined to four of our leading sculptors was conducted. Each submitted a marquette and Robin Blau was declared the winner. His instructions were complicated. The sculpture had to be made of a graffiti proof material and should not protrude out onto the pedestrian corridor because the skate boarders who whiz up and down in weekends might be injured. It had to cover the hole. It was not to be figurative (i.e. blindfold lady) but abstract to give it a modern flavour. Finally, although abstract, it was to symbolise the relationship (if any) of law to the community.

Even Picasso would have despaired at such a brief. But Blau has triumphed with a unanimous verdict. His stainless steel sculpture is beautifully made with a finish most Australian artists will not or cannot achieve. The test of a sculpture is it must look good close up as well as from a distance. Blau scores in both departments. The best view is from the steps of St. James Church but it can be seen to advantage as far away as Hyde Park.



"....not figurative.....but abstract"



Safe for skateboarders....

Unfortunately, facing south it cannot reflect rays from the sun but there are plans to illuminate the sculpture at night. I predict that even artificial light will give the work another vibrant dimension. Close up the figures and symbols are exquisite in their perfection. Blau was a jeweller before turning to sculpture and this shows in the intricacy of detail.

The work was unveiled on 1 February 1990 and Blau has called it "Order out of Chaos". He says "Historically the law has been expressed by the symbol of the balance" and that the community is portrayed in the foreground struggling "to develop into the symbol of order and form".

Blau is the creator of Australia's most publicised sculpture - the coat of arms on the Federal Parliament House. Most of us do not think of coats of arms as sculptures but they provide ample opportunity for creativity. Mike Kitching's coat of arms in the vestibule of the Supreme Court has as much movement and expression as a Bernini.

I cannot agree that Blau's work is abstract. It may be impossible for any sculpture to be so classified. The triangles at the base represent the scales and what is supposed to be chaos below changes to order at the summit, no doubt due to the application of the law represented by an open book. The problem is that Blau is too skilled a craftsman to do anything chaotic. Everything is so perfect it might have been better titled Order out of Order.

Like some briefs, this one ended up a financial disaster. Blau spent more making the piece than his modest commission. However he deserves full credit for a job well done and perhaps a small plaque somewhere with his name would be appropriate. As they also played a vital role in the design, the names of the members of the select committee could be added. ❑

Clive A. Evatt

Cross-Examination as to Credit

The Bar Council recently had to deal with one of its members against whom a complaint was made in relation to a breach of Rule 52 concerning cross-examination as to credit.

That rule provides:

1. A barrister shall not ask questions in cross-examination which go only to credit and which attack the character of the witness unless he has reasonable grounds for believing that the imputation conveyed by the questions is well-founded or true and where the answers to such questions might materially affect the credibility of the witness.

2. For the purposes of this rule a barrister prima facie has reasonable grounds for believing that an imputation is well-founded or true if a solicitor instructs him that in the solicitor's opinion the imputation is well-founded or true but in all other cases where a person informs a barrister that the imputation is well-founded or true, the barrister shall make such enquiries as are practicable in the circumstances to satisfy himself that there are in fact reasonable grounds for believing that the imputation is well-founded or true.

In the case in question a witness had previously been charged with false swearing. The charges had been dropped and had never come to trial. The barrister asked the witness whether charges had been laid against him and the witness replied advising that the charges had been withdrawn. The barrister then asked him whether the subject matter of the charges was false swearing.

The Council took the view that the barrister was in breach of the rule. His instructions extended merely to the fact that the charges had been laid, not as to the truth of the underlying allegation. The fact that charges have been laid is not a matter which, in the opinion of the Council, is capable in any circumstances of going to a witness' credit within the meaning of rule 52. If a person has been convicted, of course, that matter goes to his credit and similarly, if there are instructions as to the truth of the underlying allegation, those facts may go to his credit. The mere fact that a person has been charged, however, is not in the same category, a fortiori where the charges have been withdrawn.

On this occasion the Council took a lenient view and decided that a reprimand was the appropriate sanction. In future cases, however, now that this ruling has been published, a stricter view is likely to be taken of similar breaches of the rule. ❑

Communication Breakdown

The Importance of Cultural and Language Awareness in Court

Perth barrister Len Roberts-Smith explores the problems of multi-cultural communication in Court.

In any Court proceeding it is the sworn duty of the tribunal to do justice to the parties, according to the merits of the case and the evidence adduced before it. The extent to which the tribunal can fulfil that duty will often depend on the quality of the communication between the court, witnesses, the parties and their representatives.

That is often difficult enough with English-speaking Australians: it becomes dramatically more difficult - and dangerous - when dealing with litigants, defendants or witnesses whose first language is not English.

The problem is by no means confined to the law. In his article *Informed Consent: A Linguistic Perspective* [1] Robert Eagleson refers to the following interview between doctor and patient:

"Doctor: Have you had a history of cardiac arrest in your family?

Patient: We never had no trouble with the police."

The purpose of this paper is to examine the process of interpretation and to draw attention to some problems of communication which, if not appreciated, may lead a tribunal to act on a wrong understanding of the facts and so be unwittingly diverted from its primary duty to do justice.

First, consider the process of interpreting and the law relating to the use of interpreters. Different languages are not simply different sets of labels for the same things. Likewise, grammatical construction varies from one language to another. The very concepts behind the words may be dramatically different. The way in which words are used often varies widely from one culture to another. An appreciation of all of these considerations is of vital importance to any tribunal called on to assess the credibility of witnesses whose first language is not English and make findings based on the testimony of such witnesses.

The most obvious difficulty is lack of semantic equivalence, i.e. where there is no equivalent word or expression in one language for a word or expression in another. Some excellent examples are given in a seminal article on this topic by Dixon, Hogan and Wiezbicka. [2] They include the following:

"The simple Russian sentence 'Ivan udaril Petra nozom v ruky' (John hit Peter on the arm/hand with a knife) cannot be interpreted into English without additional information because the Russian word 'ruka' corresponds to the English word for both 'hand' and 'arm'."

"In Czech, Bulgarian, Croatian, Macedonian, Polish, Serbian, Slovak and Slovenian, the word for the hand is the same as for the arm and the word for the leg is the same as for the foot."

The legal significance of an evidentiary misunderstanding based on this purely-language difficulty, to a workers compensation claim, a personal injuries case or a criminal trial, is obvious.

Even words that are semantically close, but which have different emotional connotations may present major difficulties. Dixon *et al.* give the example of the simple geographical or political term "'Soviet", which has no equivalent in Polish. [3] Instead, there are two possible Polish words: the first "radzieki", is a word introduced and fostered by the post-Second World War Polish Government and implies love and respect for the Soviet Union; the second word, "sowiecki", implies the exact opposite. Use of the inappropriate word could provoke an unfortunate outburst or similar reaction; with the danger that a judge or magistrate, who did not realise what had in fact prompted it, might construe that outburst as in some way reflecting adversely on the credibility of the witness.

In Italian the sentence, "Lui e venuto dopo di me", literally and correctly interpreted is, in English 'He came after me'. But while the Italian version can mean only after in terms of later in time, the English version is ambiguous: it may mean either later in time or "He chased me". Again, the unrecognised incorrect use in evidence, for example, could be crucial to the outcome of a case.

The simple English sentence "I went to see a friend" cannot be interpreted into some languages without additional information. An interpreter from English to Serbian, Russian or Italian would have to know whether the friend was male or female to interpret it at all; but an interpreter who seeks that information is likely to be told not to engage in a conversation with the witness!

In England and Australia the morning finishes and the afternoon starts at 12 o'clock. But in Polish the morning "rans", finishes around 11 o'clock and the afternoon, "popoudaie" starts later at approximately 3.30 p.m. It takes little imagination to see the potential for a miscarriage of justice when the essential witness to an accused's alibi defence in a serious criminal case is asked whether she or he saw the accused in the morning on the day of the offence, the critical time in fact being, say, 11.30 a.m.; and the problem is, the English speakers in court will never realise what has happened in the interpretation.

The last illustration was given by E.G. Cunliffe, Secretary and Director of Research of the Australian Law Reform Commission, in a most useful paper presented during Law Week in New South Wales in 1984. [4] He also pointed out colloquialisms, whether in English or of some other language, cause their own problems and noted a case in which a defendant was involuntarily committed to a psychiatric institution for observation because, when asked by a magistrate how he felt, he used an expression that literally interpreted meant, "I am God of Gods". In fact (unknown to the magistrate) this was a colloquialism in his language with a meaning in English similar to "I feel on top of the world". [5]

The basic point is, it is not simply words or grammatical constructions that have to be interpreted, but the concepts and ideas, the meaning, behind them. A sentence is, after all, no more than an expression of a single thought. Interpreters often have to seek further information before a reasonable interpretation is even possible. That is when we see lawyers, magistrates and judges who do not understand the process, insisting (usually with exasperation) that the interpreter "just interpret

exactly what the witness has said: don't have a conversation with him".

Interpretation is not a simple technical exercise; it is a difficult and sophisticated art. It requires (on the part of the interpreter) an awareness and understanding not only of the respective languages, but of the social, legal and cultural differences of the two communities. To the extent that interpreters do not have this awareness and understanding, their ability to properly interpret will be impaired.

I turn to the law: Article 14(3)(F) of the 1966 *International Covenant on Civil and Political Rights*, to which Australia is a signatory, stipulates that in criminal cases every one should "have the free assistance of an interpreter if he cannot understand or speak the language used in Court." This, however, applies only to criminal cases. Even then, it is a matter for the judge or magistrate to decide in his or her discretion whether or not the accused can "understand or speak" the English language. That is usually done by a series of questions along the lines of "where do you live?", "how old are you?"?, "how long have you been in Australia?", and so on, which can generally be answered reasonably well. It is quite a different thing altogether for the accused then to be able to understand the whole course of the evidence and addresses; and to do so sufficiently well to defend him or herself or give proper instructions to counsel. [5]

The decision whether or not a witness should have an interpreter must be made in the light of the fundamental proposition that the accused must have a fair trial [6] to which I suggest should be added "and be seen to have had a fair trial". The position is even worse in civil cases. There is clearly no right to the use of an interpreter and courts have generally displayed a marked reluctance to allow them where it appears that the party or witness have some understanding of English. [7]

It is often suggested that the interests of justice are better served by having a partially-fluent accused or witness cross-examined in English than by allowing him or her an opportunity to think about the answer before the question has been interpreted. It is beyond the scope of this paper to deal with that argument, and it has been well answered elsewhere. [8]

It has been asserted, however, that "there must be a stronger probability of injustice occurring when interpreters are not used than when they are used unnecessarily" and that is a view with which I respectfully agree. [9]

Interpreters are often used by the police when interviewing suspects. It is sometimes not appreciated by the interpreter that if the case is defended, he or she will have to be called as a witness for the prosecution. That is because what the interpreter has said to the interviewing officer in English would otherwise be hearsay. It becomes admissible only if the interpreter testifies that he or she understood both languages, interpreted properly both ways, added nothing and left out nothing. The High Court has held in *Gaio v. R* (1960) 104 CLR 419 that once these conditions are satisfied the interviewing officer can give evidence of the accused's answers as interpreted into English because the interpreter has acted merely as a conduit or interpreting device.

The judgments in *Gaio* have often been criticised as demonstrating the classic misunderstanding of the process of interpretation. To my mind such criticism is ill-founded. The High Court was not attempting to analyse the process from a language point of view at all; the Court was concerned simply to explain in terms of legal principle why such testimony did not offend the evidentiary rule against hearsay, as a matter of law.

The fact that a statement or record of interview is typed in English (which the accused does not understand) but is nonetheless signed or otherwise adopted by him/her, will not render it inadmissible. Indeed (subject to any other exclusionary rules), it will be admissible as a document if read over to the accused and adopted by him/her, through an interpreter. [10] This, of course, is only the principle of law as an admissibility, it does not go to the weight or reliability of such a document, which may well turn on the words actually used by the accused in his/her own language. Whatever the legal principle therefore, it is always best, where possible, to have the interview recorded in the accused's language, whether or not an English translation is provided.

Judges and magistrates presiding over criminal cases in which interpreters have been used by police should be aware of the possibility of incorrect interpretation having occurred during the interviews. It will no doubt be said that this is the duty of counsel for the accused, and so it is. But it is unfortunately too often true that neither the accused nor the court is well served by counsel in this regard. Many have no doubt also experienced cases in which a cross-examination on a supposedly inconsistent prior statement or record of interview is in fact based on nothing more than misinterpretation or lack of communication rather than anything sinister.

It may often happen that the word used in an accused's own language has more than one possible meaning in English. This can be a very real danger where an interpreter in a police interview, for example, has used an English word that reflects badly on the accused, whereas another English word (also appropriate semantically) may perhaps have quite a different meaning, which, indeed, may be the meaning intended by the accused.

Once again, where the court interpreter interprets the accused's meaning properly, the court is then likely to be confronted with a cross-examination directed to persuading it that the accused had changed his/her story between the police interview and giving evidence. This difficulty can generally be overcome only if the first interpreter has made a record of what was said *in the suspect's own language*, as well as the English language version.

Other Aspects of Communication

Against this background, lightly sketched as it is, I turn now to other aspects of communication that may have an effect on a court's ultimate disposition of a case.

A judicial officer with a proper understanding of the importance of language and cultural differences will be able to evaluate the extent to which a witness's demeanour, language and behaviour are attributable to general characteristics of that person's ethnic group rather than to his or her individual

personality.

Such factors can range from apparently coarse language (when the English-swearing version reflects no more than verbal emphasis common to the client's culture) to an impression of deceit or deviousness (when, for example, the Vietnamese client persistently avoids looking the lawyer in the eye, that being a sign of respect in his own culture and so demonstrating no more than good manners), to complete misunderstanding when the same Vietnamese client answers "Yes" (that being, again, a mark of politeness, usually meaning "'Yes, I am listening to..." or "have heard your question").

Reaction and attitudes to police and the courts can be markedly different. Reactions are often perceived by monolingual and monocultural Australians as characteristics of an individual, that is, in the person being difficult, unreasonable, aggressive and so on, when in reality they are no more than cultural characteristics common to the particular ethnic group and conditioned by different concepts and understanding. For example, in many European countries the police have an overtly political role and are given to arbitrary and brutal behaviour against which there is no legal safeguard. The courts in some countries are merely organs of political control and repression. People who have lived their lives under such systems will have quite different reactions to police and the courts than will Australians from other cultural backgrounds. It is necessary for lawyers and judicial officers to understand these influences.

Non-Verbal Communication

Body-language is a term that is currently very much in vogue. Those who think they have just discovered body language would no doubt be surprised to learn that lawyers have been aware of its importance for centuries. Lawyers' talk of the importance of a judge or tribunal being able to observe the demeanour of witnesses, is of course, simply another way of talking about body-language.

Like verbal communication, body language (non-verbal communication) also differs from culture to culture.

With Arabs emotions are controlled publicly by presenting a smiling face and using stereotyped utterances, but violent expression of emotion, i.e. screaming, is a sign of sincerity. Appearance is important to Arabs: they are sensitive to criticism.

Danes have a very small personal zone; Greeks feel ignored if they are not stared at in public; Italian youths and many Asian males hold hands; middle-Eastern voices are very loud but, to them, this means they are sincere.

For Vietnamese, in social, as in family life, the suppression of hostility, aggression and other negative feelings is encouraged, and flexibility, harmony and readiness to compromise are highly valued. In the wish to please another person a Vietnamese may say, "yes" without meaning it. The key to understanding lies in how committed or reluctant the person seems when the answer is given.

Smiling is a common social response, though sometimes hard to interpret since Vietnamese may smile with joy but also to hide confusion, ignorance, fear, anger, shyness, contrition, bitterness or disappointment.

Direct eye contact with "superiors" may sometimes be avoided as this could be considered challenging. A child who keeps his/her gaze fixed on the ground may be trying to show respect, not disrespect.

A lack of understanding of these factors is likely to cause a judge, jury or magistrate to draw incorrect conclusions about the veracity and credibility of a witness from his or her observed demeanour in court of the witness-box. Of course, injustice can occur both ways. These problems of interpretation or communication will not always work against an accused; they may work just as much against the prosecution. A wrong acquittal in this sense is as much unjust as a wrong conviction.

In criminal cases, cultural considerations (even apart from the problem of interpretation) can be vital. For example, what could not possibly amount to provocation of the reasonable white Anglo-Saxon Australian may well do so for someone from a European or other background. [12]

The Interpreters

Interpreters are a resource available to courts and tribunals to enable the latter to properly perform their judicial duty. As with any other resource, the court must have the ability to perceive when the need to use an interpreter arises. That will surely be when there is any real risk of a lack of full understanding by either the court or the witness. This risk is often greatest when the witness can speak some English. The tendency, inevitably, is to assume a greater degree of understanding than actually exists. Much will also depend on the circumstances, the nature of the occasion and the significance of the particular matter. In cases of doubt it is always wise to use a competent and accredited interpreter.

The use of family members or people not trained as interpreters should be avoided. The use of a family member can significantly inhibit a witness from disclosing to the court information that the witness may not want the family member to know.

Untrained interpreters, far from facilitating communication, can cause even greater problems. Their language skills may be deficient, they will often not have the necessary appreciation of relevant cross-cultural differences, they do not have interpreting skills (as opposed to merely a language ability), their choice of words is imprecise and can be misleading and they generally have a tendency to flavour the interpretation with their own views or perceptions of the facts.

The major hazard from the court's point of view, is that where one or more of these factors is present an dthe interpretation is inadequate or simply wrong, the court will not be aware of that.

There are other, less subtle, problems with using unqualified interpreters.

The proper use of interpreters requires specific skills and expertise. There is a list of excellent suggestions for users of interpreters appended to a most useful article by Crouch [13] and I would strongly recommend anyone frequently working with non-English-speaking people to obtain a copy.

When speaking, the first person must always be used, this

is particularly important in court. Thus questions must be addressed directly to the witness, not to the interpreter. The proper form is "What did you do next?" and Never (to the interpreter): "Ask him what he did next". The latter is a short road to confusion. The court must be receptive to comment from the interpreters on any difficulties being experienced. It is necessary to use short sentences so the interpreter is able to interpret them in a sensible way. Difficult terms, or legal jargon, may have to be explained either to the interpreter or the witness, or both. The interpreter should never be asked to comment on a witness's veracity or to express any personal opinion on the merits of the matter (which, of course, is not something likely to occur in court anyway); although he or she should be asked to indicate and explain any relevant language or cultural aspects that arise.

Conclusion

I hope this necessarily brief examination of the process of interpretation has been helpful in drawing attention to the importance of cultural and language awareness when dealing in a forensic context with people whose first language is not English.

We know that interpretation is not a simple robotic exercise, but a complex and demanding task requiring far more than just a language ability. In addition, it requires skill, a knowledge and understanding of both cultures and an ability to deal effectively with all manner of people.

Whether or not a judge or magistrate is able to properly fulfil his or her judicial duty will often depend, in no small measure, on the extent to which witnesses are able to communicate properly to the court. A judicial officer who has a genuine appreciation of the language and cultural considerations that arise in a particular case, will be at pains to ensure that anything that will improve that communication and so provide the court with a proper basis for fact-finding and assessing credibility and the value of the evidence generally, is encouraged, and that anything tending to impair or stand in the way of effective communication is avoided. ❑ Len Roberts Smith

END NOTES

1. Eagleson R. *Informed Consent: A Linguistic Perspective.* Medicine, Science and the Law Symposia, 1986, Law Reform Commission of Victoria.
2. *Interpreters: Some Basic Problems*, Dixon, Hogan and Wierzbicka, (1980) *Legal Service Bulletin*, p.162.
3. ibid., at p.163.
4. Paper *Interpreter Useage in the Legal System* delivered to a NSW 'Law Week' Seminar on 3 May 1984.
5. See also *R. v. Lee Kun* (1916) 1 KB 337, where an appeal by a non-English speaking Chinese against conviction for murder was dismissed on the ground there was no substantial miscarriage of justice when the evidence given on his trial was not interpreted to him, because that had been the same as the evidence given on the committal - which had been interpreted.
6. *Johnson* (1986) 25 A. Crim. R. 433 (CCA, Qld).
7. See *Harvey v. Fuld* (1986) 2 All 55; *Filios v. Moreland* (1963) SR (NSW) 331 and *Dairy Farmers Co-op v. Aquilina* (1963) 109 CLR 458.
8. *Australian Government Commission of Enquiry into Poverty, Migrants and the Legal System*, Ch.5, Courts esp, at p.36; and *Interpreters in the Legal System* by E.G. Cunliffe, supra.
9. *Migrants and the Legal System*, supra, at p.36.
10. *R. v. Lambe* (1791) 2 Leach 552; 168 ER 379; *Curtis v. The Queen* (Unreported) Tas. CCA, S.No. 12/1972 List 'A', *R. v. Zema & Jeanes* (1970) VR 566; *Fande Balo v. The Queen* (1975) PNGLR 378.
11. The use (or non-use) of interpreters in police interviews with non-English-speaking suspects may be a ground for subsequent judicial exclusion of any confessional material so obtained. See e.g. *R. v. Anunga* (1976) 11 ALR 412; *Gudabai v. R* 52 ALR 133 and *Interrogation of Australian Aborigines* by Frank Bates, 8 *Crim. L.J. 373.*
12. *R. v. Dincer* (1983) VR 460. The striking difference in possible outcomes under a criminal code similar to those in Queensland and Western Australia but applying a different cultural yardstick can be observed in Papua New Guinea. In *Regina v. Yanda-Piaua & Ors.* (1967-68) PNGLR 482, having held that in determining whether provocation exists so as to reduce wilful murder to manslaughter. Mann CJ concluded that a blow in the face with a fist was sufficient to constitute provocation reducing murder to manslaughter even where the retaliation consisted of an attack with an axe committed with such violence as to evidence a plain intention to kill. His Honour based this conclusion on a finding that the ordinary peaceful citizen living in the cultural environment of the accused could be expected, almost to the point of certainty, to react in such a manner. In *Regina v. Noboi-Bosai & Ors.* (1971-72) PNGLR 271 Prentice J held that the seven accused who had eaten the body of a recently-killed native from another village were not guilty of improperly or indecently interfering with a dead body because cannibalism was an accepted practice in the area and that "in assessing propriety and decency of behaviour in relation to corpses in the Gabusi area, (the court) should endeavour to apply the standards.....of the reasonably primitive Gabusi villager of Dadalibi and Yulabi in early 1971' (p.284).
13. Crouch, A., *Interpreters, Translators and Services: Towards a Better Understanding* CHOMI Reprints No. 398, Clearing House on Migration Issues, 133 Church St., Richmond, Vic., 3121, and see generally, *The Current Situation in Legal Interpreting in Australia*, a paper for the Interpreting and the Law Conference, Sydney, July 1988, presented by the Victorian Ethnic Affairs Commission; and *Migrants and the Australian Legal System* by J.A. Kiosoglous, SM, a paper prepared by the Australian Institute of Multicultural Affairs.

Not to the Point

Starke J. "This is an appeal from the Chief Justice, which was argued by this Court over nine days, with some occasional assistance from the learned and experienced counsel who appeared for the parties. The evidence was taken and the matter argued before the Chief Justice in two days. This case involves two questions, of no transcendent importance, which are capable of brief statement, and could have been exhaustively argued by the learned counsel in a few hours." *(Federal Commissioner of Taxation v. Hoffnung & Co. Ltd. (1928) 42 C.L.R. @ 62).*

OBITUARY

The Hon. Antony Larkins Q.C.

Antony Larkins was born on 20 October 1913 and died on 27 November 1989. His last illness was of sudden onset and short duration. But he had been in poor health for several years.

His ancestors implanted in him a noticeable aversion to authority. He was a rebel at school; also at the University, which he had to leave because of a disagreement with the then Dean of the Faculty of Law. This check to his career was only temporary; he completed the Barristers' Admission Board course and was admitted to the Bar in May 1938.

As an NCO in the Sydney University Regiment he incurred the frustrated disapprobation of his commanding officer (who could do nothing about it) by marching into Holsworthy for an annual camp with an empty kitbag on his back, shaped however to look as if it were full because he ingeniously stuffed it with an inner wall in the form of the shaped outline of a laden bag, made of Arnotts biscuit tinplate kindly supplied by one of his friends in that family. His gear was delivered, painlessly for him, by Anthony Horderns, which in those days carried such small consignments anywhere in the metropolitan area for one shilling and sixpence.

He rendered war service in the Australian Army Legal Corps: his medical condition (he had suffered the removal of his gall bladder) rendered him unfit for a more active role. Not that his martial career was inactive: he served in New Guinea and stamped through jungle areas teeming with the enemy, armed with nothing more lethal than a monocle, a fearsome ginger moustache and a conspicuously large walking stick. His use of such a stick incurred the unavailing disapproval of his GOC, for Tony had consulted the regulations relating to the carrying of canes by officers before cocking that particular snook at authority. Neither the enemy nor his GOC frightened him. He probably frightened them; for he had a capacity for inspiring awe in those of whom he disapproved.

He resumed practice after the war, establishing a reputation for sound law, good advocacy and prodigiously hard work, all garnished with his own very individual style. The Bar was very different in those days: there was not available in Phillip Street, except in the most senior reaches of the profession, the profusion of remunerative commercial work that keeps people of ability busy today. He took a well deserved silk gown in 1955, after doing a case - the Mace adoption case - which propelled him into a limelight from which he had never been far distant. That brief marked the commencement of a long-standing professional connection with the late Frank Packer, who and whose family became his firm friends. He gave them much wise counsel. In his later years at the Bar he acquired the cachet of being a leading counsel who appeared for the rich and powerful. Much of his forensic career, however, consisted in appearing at moderate fees, for people in very different circumstances - mainly workers injured in their employment. For all his clients, whatever their station in life, he was utterly unsparing in his attention to the case in hand.

Tony became a judge of the Supreme Court in 1971, at the age of 57. Whereas in his private life he was altogether disinclined to adopt a judgmental attitude when dealing with the faults and foibles of his friends and acquaintances, he demonstrated under the call of duty that he could go against the grain of his nature by being severely judgmental, particularly about sloppy advocacy.

He was a competent, painstaking (and because of the latter quality) somewhat slow judge. He had come to the bench at what today is regarded as a late age, by which time many years of intensive effort at the Bar had left him without any burning ardour for giving judgments designed to make the law reports. Any lack of such enthusiasm on the part of a primary judge is not to be regarded as a fault.

Now something must be said about the private Tony Larkins, the wholly civilised and well-read man whose company so many enjoyed and whose wit and joie de vivre enriched those who were exposed to him in social discourse or, if they were fortunate enough, in the ties of friendship.

He fell in love only once. It was a very long time ago - before the second war. The girl was the sister of his best friend. She did not reciprocate his affections. He never tried again to find a wife; largely, one suspects, because of the depth of his emotions and his ingrained habit of arriving at irrevocable decisions which, unlike those of many other people, remained so.

Tony Larkins was the best friend anyone could ever have. He was sparing in his selection; but once he had unlocked the gate and admitted someone to the garden of his friendship and confidence, his solicitude, and his selfless generosity were of legendary proportions. In his eyes, his friends could do no wrong (quite often contrary to the fact). He would defend them to the utmost with an obstinacy of undoubtedly Irish origin. One of his many notable qualities was his capacity for inspiring the admiration and loyalty of young people. Those who visited his home in his last days saw clear evidence of this. He inspired the young because he treated them as equals. Herein lies a lesson for all older people.

Tony Larkins lived to the full the life that he and fate marked out as his lot. In doing so he imparted some of his zest for life and its pleasures to those who were close to him. It is a pity that he was never blessed with children of his own, because he possessed qualities which would have made him a just, wise, affectionate and understanding parent.

He was to the very end uncompromising about the truth as he saw it. He met death without flinching. Just as he had been a stranger to fear during his life, he had no fear at the end. By his passing our world has lost some of its colour. But he will remain in our memory. The light he shed on people and events was so strong that his mere physical absence from us will not extinguish it. ❑ T.E.F. Hughes Q.C.

Legal Research 2000 AD....Bad News for Book Worms

John Hutley, Lynn Pollack and Josie Taylor from the Supreme Court Library offer visions of the research tools to come...

With the Year 2000 only ten years away, here are just a few predictions form a slightly scratched crystal ball.

Those practitioners who hope that computers in chambers are only a fad, and everybody will return to paper-based sanity, had better think again. On the other hand, those who believe in the totally "paperless office" are also suffering from a delusion. Society places too much emphasis on such documents as deeds and sealed contracts to abolish them in the foreseeable future.

What is more likely is that, even with massive paper recycling in the next ten years, today's paper extravagance will be economically and socially unacceptable. Unbound law reports, reprinted acts, loose leaf updates et al., all in the name of remaining current with legal developments, will soon be a thing of the past. Paper is already and must continue to give way to optically and electronically based storage media. This media is typified by the laptop computer and CD-ROM disks. These disks, which are the size of musical compact disks, can store whole series of law reports (e.g. years) with the capacity of near instantaneous retrieval of relevant passages.

Armed with a briefcase sized machine and a handful of optical disks, the barristers of the year 2000 A.D. will draw from a vast array of primary sources, both public and proprietary, anywhere and at any time to prepare their arguments. To achieve its purpose of a mobile chambers this machine, (red or blue models optional!) will combine the present technologies of the fax, the mobile phone, the modem, the hard disk and the photocopier.

This combination of technologies should allow the bar to access their own electronic libraries, the electronic transcript of the day's proceedings and their pleadings wherever they are i.e. in court or on their yachts. They will be able to dial into databanks all over the world at any hour of the day or night and libraries, such as the Law Courts Library, may provide 24 hour access to their catalogues and indexes and their electronic collections of rarer material. Researchers will be able to access the data they want, copy it electronically either onto their own machines or to the library workstations, add their comments, convert it into a word processing document and then dispatch it by electronic mail to the court or to their colleagues interstate or overseas. (What challenges for the intellectual property bar!)

Established publishers overseas are already transforming their paper-based services to these alternative storage media and building from there to enrich this primary data with commentaries and relevant related publications. A typical example is West's Federal Civil Practice Library which provides on 2 x 5" disks all the information the American lawyer needs to research federal practice on disks which fit in the palm of your hand. Using these 2 tiny disks and without leaving their desks, American lawyers can now page through Wright & Miller's 20 volume work, Federal Practice & Procedure, or find a topic in the table of contents or index and jump directly to the relevant section; they can check the procedure against a range of manuals and textbook commentaries; they can search for jury instructions or just select a case citation in the text and go directly to the opinion in the Federal Rules Decisions. In hard copy the sources contained on these 2 disks take up several bays of shelving in major law libraries.

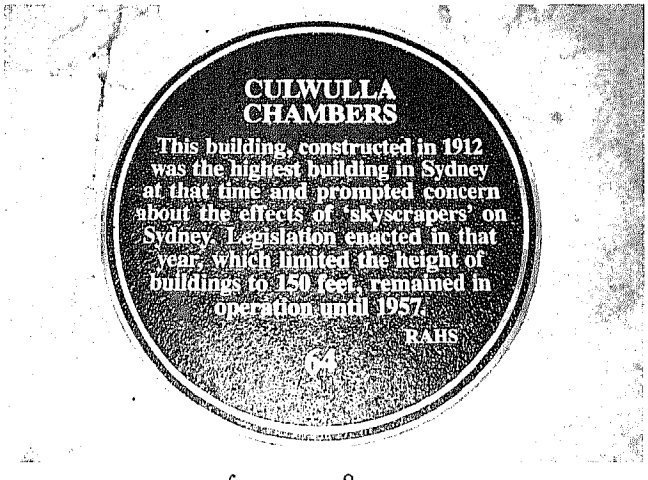
It is only a matter of time before our local publishers produce similar libraries of local law, which will be sold to practitioners, who specialise in that area, on a subscription basis much in the way they subscribe to loose-leaf services now. Already Diskrom Australia is marketing a Commonwealth Corporations Disc and a Commonwealth Statutes and Statutory Instruments Disc and INFO-ONE is marketing NSW, Victorian, South Australian and Tasmanian case law on CD-ROM. These developments have the potential to overcome the problem of out of date editions of major works with new disks being issued as changes in the law occur. Current delays in obtaining unreported judgments and new legislation will be overcome as the courts and the legislature use technology for the electronic transmission of new judgements and legislation. The drudgery of photocopying will be just a memory.

In the future, libraries will have jukeboxes of such data, which will either be available on a dial-up basis or even possibly for loan. A range of expert systems will be available in libraries to enable counsel to test a known set of facts against inbuilt formulae based on current legal principles and current legislation and these will be updated on a subscription basis to ensure they are always up to date. Electronic floor libraries will be linked by a local area network (LAN) and gone will be the day of running from room to room hunting for misplaced volumes.

These brief views of the future offer the prospect of blessed release from overloaded bags of books and to some degree from the need to purchase expensive chambers to house the remains of long dead trees. Counsel will be able to operate equally effectively in remote parts of the country, interstate, overseas or even perhaps from some far flung planet.

Yes, it will cost - but so do filing services, space and your time!

Most of these predictions are the logical extensions of already existing technology. Barristers who ignore these developments will one day face opposing counsel with outdated, cumbersome and unacceptably expensive information at their peril. ❑



.....from page 8

Restaurant Reviews

Around Town.....

"Real Ale? Only Two & Eighty Lines..."

Now in its second year of trading, the Real Ale Cafe is a welcome addition to the CBD. Situated only a short distance from the Parks & Gardens Court in King Street, it is a convenient place to take lunch although the diversions available (see below) may make it a dangerous place for busy counsel with a 2pm resumption.

The cuisine is reminiscent of the New York delis which are popular with the beautiful people of the upper East Side. The à la carte selection has hearty meals and includes steak and Guiness pie or steaks served with your choice of sauce (both $14.50).

If you feel like having a snack, try one of the beer bagels on offer - like bagel burgers, ploughman's bagel or smoked salmon bagels ($5.50 to $8.50). There's a daily specials board and the restaurant is large enough to ensure that you can enjoy your meal without being elbowed by fellow diners. Bookings are strongly recommended, particularly at lunch hour when seats are at a premium.

A major trading point here is that the good food may be washed down with any one of the two hundred and eighty odd beers available at the bar. At the Real Ale Cafe you will find bock, doppelbock, Kreik, Kwak, strawberry brews, blackberry brews and a multitude of ales, bitters and lagers.

If beer is not to your liking then there is a more than adequate wine list.

As if that's not enough, the enterprising folk at the Real Ale Cafe have introduced a group aimed at assisting beerophiles to increase their appreciation of the amber nectar. Called simply "The Beertesters" this group of discriminating beer drinkers enjoy the product of the brewer's art to the fullest.

To facilitate this the Real Ale Cafe offers Beertester members benefits including special function rates, participation in special offers on imported beers, exclusive beer tastings and much, much more. To join all one has to do is speak with mine host and leave a forwarding address.

An added attraction (as if one was needed) is the jazz. Recent artists at the Real Ale Cafe have included Tuck & Pattie, James Morrison, Tommy Emannuel and Monica & The Moochers.

Places like the Real Ale Cafe really do make boozing a refined pastime.

Real Ale Cafe
66 King Street, Sydney
Phone: 262 3277
Cards: AX BC DC MC V
12pm-midnight Mon-Wed
12pm-1am Thurs-Fri
6pm-12pm Sat (kitchen closes 10.30 pm)

"Ship Ahoy!"

Until recently one would avoid recommending that friends from interstate visit a pub in Woolloomooloo. In short the 'Loo was a tad seedy with few redeeming features. Enter the renovators to raise the consciousness a bit and "presto!" - we have a few beaut pubs where waterfront tilers previously stood.

Situated on Cowper Wharf Road the Woolloomooloo Bay Hotel has cafe-style seating out front for diners and drinkers alike and a beer garden-cum-bistro in back. Just a few minutes' walk from the madness of Macquarie Street the 'Bay is convenient to lunchers from the legal fraternity. A seat outside on a sunny day and you're set.

The menu will appeal to seafood lovers - oysters, calamari, coconut crab, scallops, prawns and fish appear together with market specials. Oysters mornay or Kilpatrick, Balmain Bugs, chilli crabs, seafood basket with chips and the mixed platter for two are all worth sampling and reasonably priced. Fettuccine marinara is a specialty, and those with a hankering for land mammals can obtain steaks, or for $5 a "Special" hamburger served with salad and chips.

The 'Bay is also a popular venue on weekends when the public bar is converted into a rock retreat. Usually the music tends to be heavy rock (and covers of Springsteen) but the volume is well controlled and it doesn't seem to scare the locals.

Woolloomooloo Bay Hotel
2 Bourke Street, Woolloomooloo
Phone: 357 1376 357 1928
Cards: AX BC DC MC V (bottle shop)
Lunch: 12pm-3pm Mon-Fri
Dinner: 5.30pm-9pm Mon-Sun

❑ Stuart Diamond

And Abroad.....

A Far Flung Circuit Town

When evidence on commission or a product liability conference (May 24-26 1990!) force you to spend time earning assessable income (or improving your capacity to earn assessable income) in Paris (France), a meal in Alain Dutournier's Carre des Feuillants restaurant is a must.

It is situated in an arcade at 14 de la rue Castiglione, about 100 metres from the Intercontinental. The food is based on the recipes of the South East of France but lightened to reflect cuisine minceur notions and to meet modern low fat requirements. Superb but unobtrusive and friendly service is an outstanding feature.

The party of the fourth part speaks fluent French so a discussion in advance was possible. Desserts had to be ordered before anything else - house specialties take time - "commander en début du repas".

Our advice was to share two main courses, to have no entrée, to have a strawberry cognac soufflé between us and then to sample the mountain cheeses of the Pyrénées.

We chose firstly a "Noix de St. Jacques en fine croûte persillée". Wonderfully fresh large scallops in tissue paper thin pastry with fresh parsley in alternate layers of the pastry were served with finely sliced endive, tomato and fresh basil and were light and superb. The house white was a Chassagne Montrachet!

Next a Grabure Bernaise "d'après la recette du Bicentenaire". This was a peasant style white bean stew of the l'Adour region with preserved goose, ham, saucisse de maison, tomato, onion and garlic cooked long and with fresh spinach and green peas added later so as to be just cooked. The fat had been skimmed or sieved off in the process before the addition of the greens and the greasiness often associated with such peasant style food was completely absent.

Wonderful crunchy fresh bread was enhanced by the juices of the Grabure.

The soufflé was just perfect.

After a dignified pause, slivers of six regional cheeses and fresh bread were served, including a mountain goat's and a sheep's cheese, a wonderful blue and a Munster cheddar.

Too much; unreal; or whatever the right superlative is: "magnifique" perhaps.

❑ John Coombs

Immoral Advices

One issue on which professional conduct committees are frequently asked to give rulings is whether it is permissible to advise a client who wishes to know how he can lawfully dispose of his assets in the face of impending bankruptcy. Often the advice is sought in circumstances where the client believes that a person may have a claim against him and is concerned to organise his affairs so that there are no assets available for the putative creditor.

The correct position in relation to such advices is that the ethical rule is co-extensive with the legal rule. Counsel may not advise a person as to the manner in which he may successfully break the law without being found out. Similarly, counsel may not advise a person to do anything which is illegal. On the other hand, there is nothing wrong with counsel giving correct advice in relation to the law even if that advice facilitates an immoral purpose.

The main difficulty in this area has been a degree of ignorance by members of the Bar as to the true legal position of a person disposing of assets. The first matter of which members should be aware is that a conveyance of assets may be a fraudulent conveyance (ie. a conveyance with intention to defraud creditors) even though at the time one has no creditors in existence. It has been held, for example, that a person embarking upon speculative futures trading who deliberately divests himself of assets so that he will be unable to meet his liabilities if his trading fails has made such a disposition. See Ex parte Russell; re Butterworth (1882) 19 Ch. D. 588. Cf. Perpetual Executors Limited v. Wright (1917) 23 CLR 185 at 193, 198 where it was held that the transaction was not void if it ultimately turned out that no creditors came into existence.

The second matter of which members advising in this area should be aware is that Section 266 of the Bankruptcy Act provides a criminal sanction for a fraudulent conveyance in certain circumstances. The invalidating provision (which has no time limit) is Section 121 of the Bankruptcy Act.

Thirdly, there are new provisions in Division 4A of Part IV of the Bankruptcy Act which deal with the situation where a debtor works for a family company or family trust so that the whole of his income goes into that company or trust rather than to him.

So long as the member correctly advises his or her client as to the law, there is no ethical problem in advising a client what he or she can and cannot do in the face of impending bankruptcy. It must be remembered, of course, that the "cab rank" rule does not apply to legal advice so that a member is not bound to advise on this area if he or she does not feel comfortable doing so. ❑

Book Reviews

Australasian Computerised Legal Information Handbook

by G.W. Greenleaf, A.S. Mowbray, D.P. Lewis (Butterworths, 1988, $39.00)

Quick easy access to the vast volume of reference and legal material is now becoming readily available with the increasing number of computerised legal information services. Material that was previously locked away on the shelves of dusty law books is now at the fingertips of anyone with a computer keyboard and access to the vast electronic data retrieval systems.

The challenge is for lawyers to learn how to use these new services most effectively.

The Handbook is designed to aid the transition of lawyers from fountain pens to computer display screens. It begins with an introduction to the principles of legal information retrieval. This is designed to serve as a starting point to understanding what they are and how they work. These questions are answered through tutorial demonstrations of the systems in action, with reference to the parameters of each individual system. The bulk of the Handbook is devoted to outlining the different databases pertinent to Australian and New Zealand lawyers.

Part A covers the introduction of the user to the world of information retrieval, giving a brief overview of what the systems are, what is involved in getting connected, and how to go about searching effectively.

Part B of the Handbook is an exhaustive guide through the overall perspective of full text retrieval. The section comments on everything from logging on to complex searching of specific databases within specific systems. The most common and basic databases are introduced along with some simple search strategies.

In Part C, the reader is taken on a comparative study of many of the databases available in Australasia, using a compare and contrast approach. This is particularly valuable as the process of how to learn about a new database is revealed, rather than just the idiosyncrasies of the introduced systems.

A complete list and explanation of all Australasian databases is provided in a reference format in Part D. This is the most definitive and exhaustive list of its kind and serves as an invaluable guide to the services available to any lawyer wishing to expand his proficiency.

The Handbook's main advantages stem from the duality of its presentation: both as a quick access reference for the experienced user wishing to avail himself of an alternative database, and the easy to follow "how to" tutorial for the novice attempting to master the power of a full text retrieval system.

Additionally, each section is followed by a self test, to check the reader's understanding of the material. These exercises provide a quick, concise means of reflecting one's comprehension of the information.

The benefits to the lay person of learning about full text retrieval systems from authors who are professional educators, rather than technical writers, cannot be over-emphasised.

The Handbook is easy to read, easy to follow, logical and easily understood. As a starting point for the novice or a reference platform for the expert, it serves as a quick readily available storehouse of essential information. Its main drawback is one it shares with all technical reference books in that the speed of changes and developments in the field covered make it impossible for the Handbook to be completely current. An update is eagerly awaited when and if it becomes available.

❑ Andrew Macintosh

The New Company Law

Peter Gillies (The Federation Press $39.95)

The Commonwealth's introduction of the Corporations Act, 1989 (expected to come into effect on 1 July, 1990) provides an appropriate occasion for the publication of Dr. Gillies' new work on company law. The legislation constitutes the culmination of a trend to uniformity and centralisation in the administration and control of companies, which was commenced by the uniform Companies Act, 1961 and continued with the Interstate Corporate Affairs Commission agreement of 1974 and the co-operative companies and securities industry legislation of 1981.

With the increasing sophistication of commercial activity in recent years, the pace of change in company legislation has quickened correspondingly. The uniform Companies Act consisted of 399 sections; the Corporations Act has 1,350. Apart from its sheer volume, the current legislation is undoubtedly more complex and intricate than in the halcyon days of 1961. The drafting of the Act is further complicated in an effort to circumvent the limitations of the Commonwealth's constitutional power.

One significant development in the new legislation is the concept of the "close corporation", introduced by the Close Corporations Act, 1989. This is a new form of body corporate, designed for the perceived needs of small business enterprises, under which financial and reporting requirements are less extensive than otherwise but the liability of members and officers to third parties is increased.

8 February, 1990 the High Court held to be unconstitutional those sections of the Corporations Act under which the Commonwealth purported to regulate the incorporation of companies. Apart from the particular sections which were directly considered by the Court, the validity of other provisions (including those in the Close Corporations Act) are now in doubt. It would seem that the Commonwealth was not constitutionally entitled to introduce the "close corporation" concept in the manner in which it has done since, presumably, the Commonwealth can only legislate for the conversion of an existing company into a "close corporation" but is incapable of regulating the incorporation of such a company.

A degree of uncertainty thus surrounds the future of the "new company law" which is not likely to be resolved in the short term. In the meantime, practitioners will be called upon to advise as best they can concerning this uncertain future state of affairs.

The Corporations Act remains for present purposes in the penumbra of the existing co-operative scheme legislation. Dr. Gillies' book provides an expeditious means of entry into the labyrinth of the new legislation. It will be found that for most practical purposes the substantive law does not differ under the future regime although the structure and terminology of the new legislation is occasionally at variance.

Notwithstanding the considerable bulk of the legislation, to a great extent the day-to-day problems encountered in company law require consideration of common law principles. As in other works in the field, the greater part of Dr. Gillies' book consists of a consideration and explanation of the application of the legislation in the decided cases.

Whatever the future holds for the general applicability of the Corporations Act, an understanding of the established judge-made law of companies remains essential for the majority of questions arising in the area. Dr. Gillies has set out in straightforward and lucid terms the standard authorities on the subject. He has also provided a very complete coverage of the recent Australian cases by way of cross-reference where detailed explanation is unnecessary (footnotes are not employed, so that all references are incorporated into the text.)

The New Company Law does not seek to explore problem areas of uncertainties in the law, nor to theorise concerning its underlying philosophical basis or desirable future course. Rather, this book provides a simple and direct statement of the state of company law at the present time and upon the coming into effect of the Corporations Act, 1989.

❑ S.P. Epstein.

Obituary - Judge A.F. Tolhurst Q.C.

Judge Tolhurst Q.C., a recent appointee to the District Court Bench, died suddenly on 19th March, 1990.

His Honour was born on 28th March, 1938. He was educated at De la Salle College, Marrickville where he was dux in 1955 and obtained a maximum pass in the Leaving Certificate in that year.

He graduated as a Bachelor of Law, Sydney University in 1960 and later was awarded a Masters degree. His Honour worked for a time in the Public Trustees Office and served articles with Messrs. Rishworth, Dodd & Co., before commencing practice at the Bar in 1961. Initially he practised generally but later specialised in Equity and Revenue Law. He was the author of Stamp and Estate Duties New South Wales, published in 1971. This work became one of the standard texts on the subjects and he a recognised authority in revenue law. He was appointed Queen's Counsel in 1985 and his ability as Counsel was highly regarded.

He was a popular and respected member of Chalfont Chambers, whose door was always open to other members of his floor when assistance with perplexing legal problems was required. In addition to his legal knowledge, His Honour read widely over the whole of his life and gained knowledge in wide areas of learning, apart from the law.

His appointment to the District Court Bench on 15th November, 1989 was received with universal acclaim by the legal profession and it is a matter of great regret to those that have known him that he had but little time to use his considerable talents in service to the community as a Judge of the District Court. ❑ A. McInnes Q.C.

The Out-of-Court Rule

Barristers' Immunity in the Court of Appeal

Paul Donohoe reviews the latest case on liability of barristers.

How far from the courtroom door will the line be drawn?

In the Gianarelli Case 165 CLR 543 the High Court held that barristers were immune from suit for in-court work: Bar News Autumn 1989. The New South Wales Court of Appeal has held that a barrister who failed to do anything about claiming interest upon any damages before judgment was immune from suit: Keefe v. Marks (1989) 16 NSWLR 713. The case is interesting for several reasons.

Are Judges simply looking after their own?

No. Gleeson CJ at 717 D to E identified the underlying policy as extending to persons involved in court proceedings: not only barristers but also judges, jurors and witnesses.

Where does the immunity begin?

On this issue the Court was not unanimous. Gleeson CJ at 718 E to 719 E held that the immunity covered all work involved in what is commonly called a brief to appear, such as:

1. interviewing the plaintiff;
2. interviewing other witnesses;
3. giving advice and making decisions about what witnesses to call and not to call;
4. working up any necessary legal arguments;
5. giving consideration to the adequacy of the pleadings; and if appropriate
6. causing any steps to be undertaken to have the pleadings amended.

He concluded at 719E that all of this was "intimately connected with the work ultimately done in Court" and Meagher JA apparently agreed; 729 A & C.

Priestley JA dissented, and it should be remembered that an application for special leave has been filed. He made these points:

(1) some pleadings may not be so intimately connected with the work in court that they can fairly be said to be a preliminary decision affecting the in-court conduct of the case;
(2) the degree of connection must be assessed; and
(3) there may be a difference between making a decision and an omission.

His Honour did not consider whether the arguments would succeed; only whether they were arguable because the issues arose on a strike-out application a procedure for which he confessed "no particular fondness".

In the present case he thought it arguable that immunity did not extend to "a simple out-of-court omission to consider whether a claim for interest was available." at 725 C to D. ❑

Motions and Mentions

Counsel Liability for Costs!

The Chief Justice has issued the following Practice Note:

"PRACTICE NOTE NO. 61
NOTIFYING COURT OF COMPROMISE, ETC.

The Supreme Court Rules 1970 have been amended by adding Part 33 rule 88 as follows -

8B The parties to proceedings commenced in the Court shall, where it is a fact that -
(a) there is an agreement for compromise or settlement of the proceedings;
(b) the proceedings are discontinued; or
(c) an appearance or defence is withdrawn, forthwith notify the Registrar of the fact.

The observance of the rule is required so that only "live" cases are listed for call-overs, conferences and hearings.

It is the duty of counsel and solicitors to observe the requirements of the rule. They will usually be ordered to pay personally any costs thrown away by default in observance of the rule." ❑

Law Council of Australia Federal Litigation Section

Membership of one or other of the various Sections of the Law Council of Australia provides a unique opportunity to practitioners through pro bono work to assist in the development of the Australian legal system and to promote the profession which serves it. The Federal Litigation Section is of particular interest to members of the profession who are involved in practice and litigation in federal jurisdictions (other than the criminal law and family law jurisdictions).

The Section was launched at the 1987 Perth Legal Convention by the Chief Justice of Australia, Sir Anthony Mason. The Federal Litigation Section represents the interests of lawyers practising in the federal jurisdictions (except family and criminal law). It provides a forum in which all members of the legal profession can make their views known.

Section members biennially elect an Executive to head the Section. The current Executive comprises Pat Dalton QC - Melbourne (Chairman), Justice Malcolm Lee - Perth, Tony Templeman QC - Perth, Chris Pullin QC - Perth, Alex Chernov QC - Melbourne, Garry Downes QC - Sydney, John Richards - Melbourne and Ron Ashton - Brisbane.

The Executive considers a wide range of issues including questions relating to rules of practice of the High Court and Federal Court; constitutional matters; tenure of appointments; industrial and administrative law legislation; costs; defamation and contempt laws. In addition, the Chairman participates in meetings of the liaison committees established as links between the Law Council and the High and Federal Courts.

Five important specialist committees assist the Executive. These are Administrative Law, Costs (Scales Review), Courts (Federal), Defamation Law and Industrial Law. They are constituted from members of the Section. The Committees have drafted numerous submissions which have been adopted by the Law Council and lodged with Government, the Administrative Review Council and other bodies as appropriate.

Members of the Section are kept informed of the activities of the Executive and Committees through the Section newsletter which is distributed to members quarterly.

The Section Executive invites members of the profession involved in federal practice and litigation to become members of the Section and to lend it their support and expertise.

For further information regarding the Section please contact Mrs. Val Basham-Mercer, Section Administrator, Law Council of Australia, GPO Box 1989 Canberra, or by phone on (062) 47.3788.

Fourth National Family Law Conference

The Fourth National Family Law Conference is to be held at the Gold Coast 18-21 July 1990. This will be followed by a Satellite Conference at Hamilton Island 23-24 July 1990.

The Conference has included for the first time the finals of the student moot competition which has been arranged in Australia and New Zealand and which is supported by the Law Council. A full court comprising the Hon. Justice Alistair Nicholson, Chief Justice of the Family Court, Australia; His Honour Judge Patrick Mahoney, Principal Family Court Judge, New Zealand; and His Honour Judge Michael Chrism, the Family Court, Hong Kong, will judge the Australasian final.

The Conference programme is specifically designed to deal with practical problems confronting Family Lawyers in all aspects of their practices. These issues shall be dealt with in a full programme blending plenary sessions with panel and practical application sessions. Key speakers have been invited from the U.S., New Zealand and Australia. Most speakers are new to the Australian scene and will provide exciting and stimulating sessions. An excellent social and accompanying persons' programme has also been arranged.

The Conference at Hamilton Island will include sessions on the role and objectives of the Family Law and Family Rights Section of Lawasia; the UN Charter on the Rights of the Child - its adoption, implementation and significance; and the role of Islamic Law in the Asian/Pacific region. Speakers for these sessions will include Profession Miran Siraj of the University of Malaysia and Mr. Brian Burdekin, the Australian Human Rights Commissioner. Other topics to be presented by overseas speakers will be on Adducing Fresh Evidence on Appeals; Enforcement of Custody Orders; The Hague Convention; and Appellate Advocacy.

To obtain a registration brochure or for further information contact: Ms. Gail Hawke, Capital Conferences, P.O. Box E345, Queen Victoria Terrace, Canberra A.C.T. 2600. Telephone (062) 85 2048 Facsimile (062) 85.2334. ❑

Law Foundation Travelling Fellowships

The Law Foundation of New South Wales is offering up to five travelling fellowships to people involved with the legal and justice systems, interested and capable of investigating and analysing developments or practices which could be helpful in N.S.W.

The Fellowships are awarded annually. Successful applicants will receive sufficient funds to meet the cost of air travel, ground transport, accommodation and meals.

Applications close on 31 July 1990. For further information, contact Terence Purcell, Director of the Foundation on 29.5621. ❑

Charitable Objects

Members of Ground Floor Windeyer Chambers raised over $6,000.00 and purchased a Pulse Oximeter for The Childrens Hospital, Camperdown.

The Pulse Oximeter is a moniter which measures arterial haemoglobin oxygen saturation. It is completely non-invasive and reduces trauma to children undergoing surgery or in intensive care.

The project was co-ordinated by Dino Bertini in liaison with Mary Clarke of the Childrens Hospital Fund. The Floor members responded quickly and generously to the project, reaching their target in a few weeks. ❑

Law Conference: Sport and the Law

An International Law Conference to examine the powers and functions of the International Court of Arbitration for Sport. This is the Court in which the Australian pentathlete, Alex Watson, was reported last year as bringing appeal proceedings against his suspension arising out of the 1988 Seoul Olympics.

An International Law Conference which will be addressed by a member of the Court and which will bring together outstanding Australian and English speakers to examine and compare the importance and effect of law on the activities of sportsmen and women in Australia and England.

Scheduled for 20-25 January 1991, the venue is the Le Bristol Hotel, Villars, Switzerland, a four-star hotel with state of the art conference facilities and indoor swimming pool, squash court and gym and the conference will include a visit to the Court at Lausanne.

Attendance at these programmes will qualify N.S.W. legal practitioners for 10 MCLE UNITS respectively under the N.S.W. Law Society Mandatory Continuing Legal Education Scheme.

Because of the location, the necessity to finalise arrangements and the limited facilities, registration and accommodation bookings must be made by 31st July 1990. If space permits, subsequent registration will be subject to a late fee.

For further details including conference programme, list of speakers, registration form and information on accommodation available contact:

Ms. Anne Deighton
AZPH Pty. Limited
11/174 Phillip Street
SYDNEY NSW 2000

DX 377 SYDNEY
Telephone: (02) 232 8409
Fax: (02) 232 7626

Loose Parts

It has been suggested to the Bar Council that loose parts of reports should be made available by senior practitioners to junior practitioners when the seniors have received their bound volumes, the idea being to make available to juniors reports which they might not be able to afford at an early stage of practice. It was suggested that the scheme be administered by the Bar Association, those senior members participating providing the loose parts for distribution by the Association staff. It was proposed that the juniors entitled to benefit from the scheme would be those up to 5 years' standing.

The Bar Council approves the scheme in principle, but has decided that the Association has neither the staff nor the facilities to administer the scheme. However, the Council commends to the individual floors - or perhaps groups of floors - the initiation of such a scheme for the benefit of their junior members. ❑

ILA Conference 1990

The 64th ILA Conference will be held at the Gold Coast during 19-25 August 1990. It will be preceded by a 2 day seminar in Cairns on 17-18 August dealing with environmental considerations. Topics at the Gold Coast Conference include Dispute Resolution in International Commercial matters, Regulation of International Capital Markets. To register, contact: The ILA 1990 Conference Secretariat, PO Box 226, Aspley, Queensland 4034. ❑

Win! Win! Win!

What is the moral of this story? Your editors are as fond of competitions as anyone else. We are offering a prize of one bottle of champagne for the discerning reader who provides us with the moral of this tale.

A solicitor whose accounts had been kept in a confused way, acting upon the advice of his counsel, refrained from giving evidence before the Solicitors Statutory Committee. He admitted the breaches and his counsel argued that the facts did not disclose professional misconduct. The argument failed and he was suspended from practice for a time.

He appealed. The Court of Appeal heard that the solicitor was anxious to enter the box and make a clean breast of things, and his only reason for not doing so had been counsel's advice.

Moffit P. led a unanimous Court in a scathing criticism of counsel, who was named, and whose advice he described as "incredible" and "unbelievably bad" and part of "an unfortunate course of events" making the case wholly exceptional and justifying orders upholding the appeal (with the appellant to pay the costs of the appeal), and for a new trial upon the same questions with or without amendment; K.....v. Law Society of New South Wales N.S.W.C.A. U/R 11 December 1978.

In April 1978 the solicitor had his wish. He entered the box, was cross-examined by M.J.R. Clarke Q.C. as he then was, and, on 1 November 1979 he was struck off: Law Society Journal February 1980 p.7 at p.15. ❑

This Sporting Life

Historic Win in 6th Great Bar Race

The 6th Great Bar Race was sailed in perfect conditions on Sydney Harbour on Monday 18th December, 1989. There was a good weight of breeze at 15 knots from the NE and the harbour turned on yet another glorious day.

It made for an exciting and fast race but there was little to indicate that the event would provide an historic result that would capture the imagination of the 43 skippers and the hundreds of crew and spectators.

The winner of the "Law Book Company Sailing Trophy" was Curtis in "Xanadu", a long time campaigner in the race, who had commissioned a brand new Adams 10 for the event. It was said, in his entry, that the boat had not performed well in its shake down races as the result of the inexperience of crew and skipper. There was little evidence of any lack of expertise in either crew or skipper as Curtis went to the line a convincing winner. There is no doubt that he will be heavily handicapped in future years. Mr. Brian Crane, the National Sales Manager of the Law Book Company was kindly on hand to present the trophy.

Second place went to Gruzman in "Anthanta VI" and third to Wheelhouse in "Wunderbar".

"El Presidento" O'Keefe Q.C. made a grand entry to Store Beach via water taxi in good time to present the Bar Association pewters to the place getters. He has promised that for this year's race he will hopefully be able to arrive as the skipper of his small steamboat which he is presently in the process of refitting. We will look forward to a majestic arrival!

There was an air of expectation as to the winner of the "Chalfont Cup" for Judges and Silks. It was ultimately determined that the winner was Davidson J. of the Compensation Court of NSW Bench in "Golden Era" and that this was the first occasion, in the history of the race, that this cup or any other trophy had been won by an all judicial crew.

Post race reports indicated that the crew of O'Meally J. and Moroney J. of the Compensation Court Bench and Freeman DCJ, formerly of that Bench, put on a fine display of precision crew work that would have gladdened the hearts of America's Cup Veterans. There was a reliable report that Davidson J. as he surged for the line, was able to squeeze additional knots out of the boat as his crew engaged in a hearty and robust rendition of "Hail Glorious St. Patrick", which had the effect of literally lifting the boat out of the water as it flew for the line. It was thought by many that this superb effort had made them a hot favourite for the "Gruff Crawford Memorial Panache Trophy" but, alas, Wheelahan Q.C. and his committee of O'Connor and Al Willis of the Royal Sydney Yacht Squadron, in accordance with the Deed of Gift, which confines competition for this trophy to the Junior Bar, felt that Petrie in "Following Sea", who had circled all of the course buoys on several occasions, should receive this cherished trophy.

The all judicial crew

"El Presidento" and Des Kennedy celebrating....

Those on board "Freight Train", the largest boat in the race, a Freya 63 skippered by Mooney were fortunate to experience the exhilaration of a sail along the NSW coastline after the race in the excellent sailing conditions. The boat again performed exceedingly well in the race. Morris Q.C. put in a fine performance in his gaff rigged sloop "Careel".

The race, yet again, provided a wonderful day for all skippers, crew and spectators. The traditional post race celebrations on Store Beach provided a perfect finishing touch to a great day's sailing.

Thanks to O'Keefe Q.C., for being on hand to present trophies, to Wheelahan Q.C. the Officer of the Day, O'Connor for the Start Boat, Emeritis Professor Al Willis, the Official Starter and the Royal Sydney Yacht Squadron for their assistance in handicapping.

Thanks also to Walsh for his brilliant design of the Official Race Pennant consisting of a white wig on a turquoise background and to my secretary, Maggie Jennings, for her dedicated assistance in the organisation of the race. ❑

Des Kennedy

Cricket: Bar Routs Solicitors (Just)

On Sunday the 11th March, 1990 the Bar played a NSW Law Society XI at the magnificent North Sydney Oval. This game had been a regular fixture in the Bar cricket calendar; however, it lapsed approximately 5 years ago at a time when the cricketing force of the solicitors' team was overwhelming.

With the assistance of some "new talent", namely, Rod Foord, John Harris, Robert Weber, Greg Levick, Simon Burchett and Robert Dubler, the Bar took up the challenge.

The solicitors were restricted to 165 runs for 9 wickets off their allotted 40 overs due to tight bowling by King (2/22), Webb (1/26 off 6), Sandrasegra (1/30 off 8), Foord (0/23 off 7) and Peter Naughtin (1/88 off 6) and Levick (3/11 off 3).

The Bar batted and found itself slightly behind the target set after 3 early run outs. John Harris meanwhile made 60 runs. He was joined at the wicket by Rod Foord. Unfortunately Harris was bowled and Foord was joined by Greg Laughton. In the last over 7 runs were required and when Foord was also run out for 52 on the 3rd last ball, 3 runs were required for a win and 2 for a draw. Laughton was facing and completely missed the next ball. On the last ball of good length, pitched outside off stump, Laughton played a shot which he had saved for the occasion - some British commentators would describe it as 'a swat to couch shot corner'* and with only one bounce reached the boundary and thus won the game thereby returning prestige to the Bar who had not beaten the solicitors since 1983. ❑ Peter Maiden

* ***This is not a typesetting error. The first reader who identifies any reputable British cricket commentator who has so described a shot (supported by proper evidence) gets a free ticket to the next Bar-Solicitors Cricket Match.***

Council of Professions Golf Day 8 November 1989

The Bar was represented by Peter Gray and Dennis Flaherty, who found themselves somewhat out-numbered as the competition is one for teams of eight. However, the solicitors were similarly placed, and so Roger Williams and Dennis Hill made up an agreeable legal foursome.

The Killara course was in benign mood, earthworks reducing the length of several holes dramatically. As a result, scores were flattering and the Bar duo came within a whisker of carrying off the best 4-ball, their 48 points succumbing only a countback.

The overall honours went to the dentists, from the vets and the surveyors. A most enjoyable dinner at the clubhouse concluded the day. It is to be hoped that 1990 sees a larger turnout from the Bar. ❑ Peter Gray

The Great Bar Squash Competition

The inaugural Great Bar Squash Competition was played at the University and Schools Club during the winter and spring of 1989.

The competition was an inter-floor competition, open to all floors who could entice at least three members to play.

The following floors were represented - 8 Wentworth (P. Taylor, P. Blacket, P. Greenwood and J. Gleeson), 8 Windeyer (C. Loveday, J. Bryson, G. Newport, M. Evans), 13 Selborne (J. Thomson, T. Barrett, J. Marshall, D. Casperson), 4 Selborne (N. Cowdrey QC, G. Mackey, K. Morrissey, R. Montgomery) and 16 Wardell (D. Wilkins, M. De Lizio, B. Donnelly).

A Round Robin competition was played, with each team playing each other team on two occasions. Regrettably, the Wardell team had to drop out of the competition due to the members' other commitments.

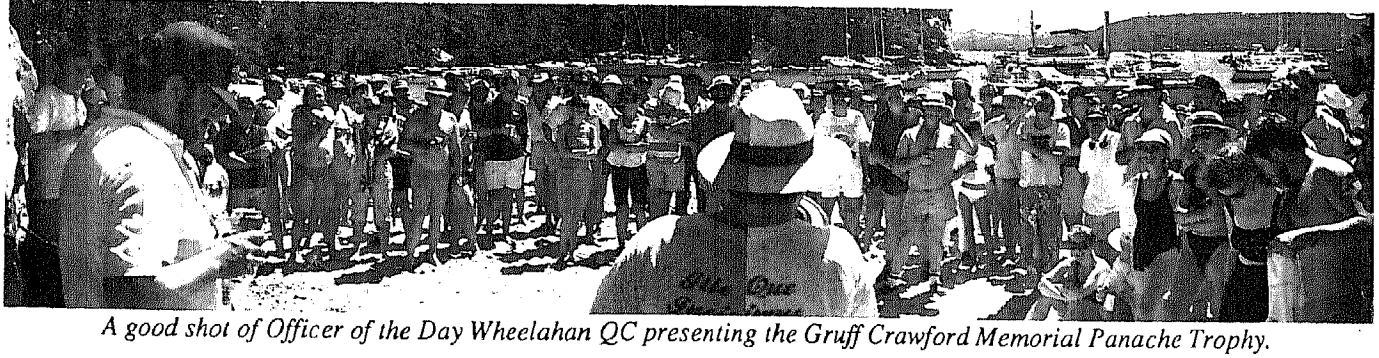
The Grand Final, between 8 Wentworth and 8 Windeyer, produced one of the most exciting matches ever seen at the University and Schools Club. Loveday (8 Windeyer) and Gleeson (8 Wentworth) toiled for what seemed like hours before Loveday finally had his way. But it was all to no avail and 8 Wentworth clinched the series with a victory by Taylor over Newport and a victory by Greenwood over the absent Bryson.

The series was, at all times, played with excellent spirit. Players who struck other players always apologised and the players who were struck always got even.

A perpetual trophy was donated and presented by His Honour Judge McCredie, himself no slouch on the squash court (or the tennis court, or the District Court).

The President, O'Keefe QC, reminded us of the value of such social activities in facilitating our professional dealings with one another and enhancing the community at the Bar. Coombs QC threatened to participate in the competition once his knee is in proper condition. Such a threat is not to be taken lightly and the existing competitors wish John a long recovery.

Tony Reynolds attended to the running of the competition and kindly donated a Best and Fairest trophy which was carried away by Jim Thomson (13 Wentworth). ❑ P.H. Greenwood



A good shot of Officer of the Day Wheelahan QC presenting the Gruff Crawford Memorial Panache Trophy.