# Bar News

*The journal of the NSW Bar Association*

*The Hutton Picture Company*

# THE ART OF ADVOCACY

*Summer 1991*

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**Editor:** R.S. McColl

**Assistant Editor:** P.M. Donohoe QC

**Editorial Committee:** R.S. Angyal, A.H. Bowne, G.D. McIlwaine, R.B. Phillips

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Cover: F E Smith arriving at the Law Courts in July 1913 for a £50,000 breach of promise case; beyond him is his clerk J E Peteil, who served him throughout his career.
Picture from "The Hulton Picture Company."

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B J S O'Keefe QC - himself
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F E Smith as a young barrister - Eyre & Spottiswoode
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page 28: Mark David
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**Contributions are welcome, and should be addressed to the Editor, R.S. McColl, 7th floor, Wentworth Chambers, 180 Phillip Street, Sydney NSW 2000**

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# *in this issue ....*

# Bar Notes

## Queen's Counsel for 1991

The Governor-in-Council has approved the appointment of the following people as Queen's Counsel.

1. The Honourable Peter Edward James Collins
2. BILL, Eliot Michael
3. COOKE, John Donal
4. BUENO, Antonio De Padua Jose Maria
5. KARKAR, John Hanna
6. LASRY, Lex
7. DORNEY, Kiernan Damian
8. COLEMAN, Peter Evan
9. LLOYD, David Henry
10. STRATHDEE, Ian Douglas
11. HISLOP, John David
12. SACKVILLE, Professor Ronald
13. CHRISTIE, Terence Joseph
14. HALL, Peter Michael
15. STEVENS, Clarence James
16. O'CONNOR, Colin Emmett
17. LINDGREN, Kevin Edmund
18. AUSTIN, Stephen Berry
19. COLES, Bernard Anthony John
20. DEAKIN, Peter John
21. BISCOE, Peter Meldrum
22. HOLMES, Malcolm Fraser
23. WRIGHT, Frederick Lance

## Supreme Court 1990

The 1990 Annual Review of the Supreme Court which was published during 1991 makes interesting reading. In the introduction, the Chief Justice highlighted the challenge to the Court in the problem of applying limited resources, human and material, in the manner best suited to handling a large and constantly increasing caseload. He pointed out that the appellate jurisdictions of the Court, in particular, were confronting the problems and caseload of the nineties with judicial resources prescribed in the sixties. Thus while the Court of Appeal retained its 1966 format of the Chief Justice, the President and six Judges of Appeal, the number of first instance judges from whose judgments appeals lay to the Court of Appeal had doubled. The effect on the Court of Appeal's work was graphically illustrated by statistics showing that the number of appeals instituted in 1966 was 334, whereas the number instituted in 1990 was 861, most of which are disposed of by judicial decision rather than settlement. As the Chief Justice pointed out pungently, "The logistics of appellate work are often completely overlooked by administrators who assert that an increase in the number of judges is not the way to solve the problem of court delays."

The reports dealing with the individual Divisions of the Court bore testimony to the troubled economic times. Of the 5,519 cases commenced in the Equity Division during 1990, approximately 45% were applications for winding up of a company, nearly all of which were undefended.

Filings increased in the Commercial Division despite the filing fee being increased from $800 to $1,200. (It was increased again in 1991 to $1,400.) The growing caseload made allocation of judicial resources difficult with the time from call-over to hearing increasing, in direct conflict with the philosophy of the Division.

The Review noted that the Chief Justice's Policy and Planning Committee was examining the possibility of court-annexed forms of alternative dispute resolution with a preference for mediation and conciliation over arbitration. This has now borne fruit as reported on page 46 of this issue. ❑

## Professional Indemnity Insurance

Following the introduction of the Legal Profession Act the Bar Council became concerned that the cover provided by the Minet and Steeves Lumley Professional Indemnity Schemes failed to provide cover in respect of awards of compensation (up to $2,000) and other orders which might be made against a barrister by the Disciplinary Tribunal or the Professional Standards Board: see ss149(3), (4) and (5); ss163(3), (4) and (5). Awards greater than $2,000 may be made with the consent of the barrister.

Accordingly negotiations were undertaken through the kind offices of Frank Hoffmann of Hoffmann Consulting Pty Limited, insurance consultants, in the first instance with Minet (whose policy runs from October to October) to have the standard policy amended to cover this kind of liability. These negotiations were successful and those who insure with Minet will have noticed a reference to a new broader wording with additional extensions in the outline of the scheme which accompanied their last renewal notice.

The effect of the amended wording, in brief, is that the barrister is covered in respect of any award for compensation made under the two sections referred to above and, in certain circumstances, in respect of orders for waiver or repayment of fees or orders for performance of work made under the Act. No cover is provided if the award is made by consent without the barrister first obtaining the underwriter's consent. The policy will also now provide cover in respect of costs and expenses incurred with the underwriter's prior consent in the course of the investigation and defence of a complaint against a barrister. Members who insure with Minet should obtain a copy of the policy to understand the precise nature of the extended cover offered.

The Association has asked Mr Hoffmann to continue negotiations with Minet to seek to remove certain restrictions perceived in the cover for orders in respect of fees and the performance of work and also to negotiate with Steeves Lumley (whose policy runs from March to March) to seek to have the cover provided under that policy similarly extended. ❑

## Human Rights Award

The President of the Court of Appeal, Justice Michael Kirby CMG, has been awarded the Australian Human Rights Medal by the Human Rights and Equal Opportunity Commission. The medal recognises Justice Kirby's consistent and outstanding contribution over many years to the promotion, observance and understanding of human rights. The President of the Human Rights and Equal Opportunity Commission, Sir Ronald Wilson, presented the medal to Justice Kirby on 24 November. ❑

## Honour Board

An Honour Board recording the names of the various Presidents of the Bar Association and the dates during which they held office was unveiled in the Bar Association Common Room on 29 November 1991 by the Right Honourable Sir Garfield Barwick, AK, GCMG. ❑

# *From the President*

This, my last editorial as President, is concerned with light and hope for the future at a time when darkness and lack of confidence abound.

The harsh economic climate which has prevailed in Australia in recent times has not left the Bar unscathed. In common with many in other professions and in the managerial sector of our community, the Bar has suffered the effects of shrinking private and public funds. In the competition for public funds political reality dictates that health, welfare and education will be afforded higher priorities than legal services, even though the legal services with which the Bar is constantly dealing, are concerned with individual rights, both as against the State and as between individual citizens. The recent significant cut in the legal aid budget is but one manifestation of this political reality.

In such hard times the Bar will survive if, and only if, it is able to demonstrate its worth to the community. This will best be done by an adherence to a standard of excellence which will ensure that we are more effective and efficient, in both the quality of the services delivered and their cost, than the alternatives which are bandied about by some politicians and some sections of the media.

Putting to one side the battles between the titans in which the cost of even a long case is small when compared with the amount or matter in issue, the present times dictate that only the real issue or issues in cases be fought, but fought with an economy of time which does not sacrifice excellence in quality. This will require a mastery of the case, both facts and law, and a careful thinking through of the essentials. It means we all need to work even harder on our cases, to analyse, to exercise judgment more than ever. It also means we must all sharpen our skills as advocates. If excellence is the strength of the Bar then to the extent that hard times mean fewer cases, they also mean a better-than-ever opportunity to develop and demonstrate our excellence.

After almost 35 years in practice I believe more than ever in the value to the community of a strong, independent, separate Bar and am confident that the hard times through which Australia is passing and which are affecting the Bar can and will strengthen the Bar, in the same way as steel is strengthened in the tempering furnace.

Just as the Bar needs to demonstrate its excellence, so too does it need to demonstrate its cohesion. Some years ago the much loved Mr Justice Glass wrote a book entitled "Discord Within the Bar". It was a work of fiction. However it highlighted the adverse effects on the Bar of division and of internal dissention. Over recent months the hard economic times have tended to exacerbate latent divisions within the Bar. These have been a source of headlines for the media.

Though eye catching, these have tended to be accompanied by or to give rise to articles which have been either lacking in substance or in some instances have been just plain wrong. A house divided within itself is more likely to fall than one which is united. I hope that the most recent Extraordinary General Meeting will have cleared the air and paved the way for the restoration of a sense of unity within the Bar.

There are many outside the Bar who will continue to attack it. Some of these may well be frustrated lawyers, others may have an agenda which is not overt, but which involves a reduction in the strength and the lessening of independence of our legal system. Let us not do the work of such people. If we believe in the value of the Bar to the community we should surely be able to co-operate to ensure that the institution of the Bar as we know it will continue to grow in strength, thereby providing a firm foundation for the protection of individual rights.

Let us make the worst times the best times. ❑

B S J O'Keefe AM QC

## Dingo Fence Crushed in the Rush

"I understand you are about to set something of a record."

With those introductory words, the Honourable Mr Justice Thomas of the Supreme Court of Queensland commenced the Group ("Conditional") Admission of 85 New South Wales Barristers and 45 Victorian Barristers on 7 October 1991.

Mr Justice Thomas commented that the group admission "was a natural and welcome consequence of the *Street* decision".

His Honour further said that he saw the admission as telling evidence of a broadening of our national identity and legal mobility and strongly suggested "all States adopt rules to facilitate paper Admissions".

His Honour's comments for reform were most timely.

At the National Press Club in July 1990 the Prime Minister warned that by 1992, Australia faces the prospect of having more barriers controlling goods and services between its States and Territories than will exist between the twelve sovereign states of the European Community.

More specifically, Sir Laurence Street has recently commented in the September 1991 issue of the *Australian Law News* that

> "[t]he time has arrived when the Australian Legal Profession should see itself as precisely that - an Australian profession. We have a system of National Courts in the form of the High Court, the Federal Court and the Family Court; we have cross-vesting legislation that brings the Supreme Court into that overall fabric. ... I am convinced that we need to recognise that our individual lawyers are first and foremost Australian lawyers."

The Law Council of Australia and the various Bars and Law Societies have all agreed in principle to implement reciprocal admissions which do not require the practitioner to personally attend Court.

Such proposals however, simply remove some of the impediments to reciprocity and fail to address the more fundamental question of facilitating the establishment of a national legal practice.

Half measures such as "paper admissions" will not fully promote a truly national legal system. Either professional and administrative differences between the States and Territories justify distinct admission rules or they do not. The proposal to make admissions rules and professional standards uniform to enable paper admissions has merit. However, they do not completely address the ultimate objective, namely the establishment of a nationally structured legal system. Paper admissions will only serve to perpetuate the State boundaries of our profession. Surely the time has arrived for the implementation of a Federal Admission which is accorded and given recognition in each State or Territory.

If paper admissions were in place with Queensland in the case of the recent Group Admission, the personal attendance of 145 Interstate practitioners at the admission ceremony would have been substituted with the filing of 145 affidavits. Those affidavits would still have to annex various "certificates of fitness" obtained from jurisdictions throughout Australia and overseas (if appropriate) and depose to the practitioners' "good fame and character".

Moreover, Queensland admission rules are unique in that they only admit an interstate practitioner "conditionally". That is, on condition of proper professional and personal conduct for a twelve month period. At the end of the probationary twelve month period, a further affidavit must then be filed with the Court so that one's "absolute" admission can then be moved. Although the practitioner's personal attendance at the Court is not required for the absolute admission, one must surely question the contribution such rules make to our national legal practice.

If Australian lawyers aspire to the creation of a national profession, then any practitioner admitted to practise by the Superior Court of any one State or Territory should be required to register his or her name on the Roll of the High Court of Australia. As a consequence of such registration on the Roll of the High Court, that practitioner would then be entitled to practise as a legal practitioner before the Supreme Court of any State or Territory throughout Australia. ❑

Malcolm R Gracie
New Barristers Committee

# A letter from the Managing Editor of CCH Australia Limited

There's a Vietnamese proverb that goes: "Force binds for a time; education binds forever", which is an appropriately oblique opening for a par about our ***Guide to Doing Business in Vietnam.***

It was written by Chu Van Hop, who begins his foreword with the statement "This is a future tiger" which, he says, has been adopted by a number of international commentators when discussing Vietnam because it reflects the general respect and hope for that country now that it has been opened to international economic co-operation and now that private initiatives are recognised and encouraged.

His book, says Chu, is an attempt to provide practical information to those who are interested in taking part in the expected improvement of business opportunities in Vietnam. It has been compiled, he writes, to partially fill a vacuum in which relevant information on Vietnam is not as readily available as it is on most other countries.

Who's Chu? It might well be asked, and why is he able to write such a book?

The answer is that he's peculiarly well qualified. He is American trained, Australian based, a Vietnamese national, with a background in engineering, business administration and journalism, and a former director of community affairs (with our Department of Immigration and Ethnic Affairs); he was an adviser to the New South Wales Premier before becoming the head of an international business consultancy practice ... which, not unexpectedly, has its emphasis on advising on investment in Vietnam!

A Hong Kong based US lawyer said recently that once the US prohibition on trading with the enemy is lifted by Congress, US businesses will swarm into Vietnam in large numbers. (Actually, the words he used were "they'll blitz the place".)

As some far-sighted Australians are right now pointing out, at the present time Australians have this rare opportunity of being in the vanguard.

It used to be said that the bulk of the authorities on bankruptcy and winding up were decided in the 1890s, early 1930s, and mid-1960s, following of course the major depressions or recessions; or, put another way, it is possible to track the country's bad economic times through the law reports.

It's therefore no surprise that the first four cases reported in a recent report to our ***Australian Company Law Cases*** concerned statutory notices of demand. In the first and most important of these,[1] the Federal Court confirmed that a statutory notice which overstated the amount was invalid ... but, as if to have a bit each way, the court went on to hold that non-compliance with such a notice can still be evidence of actual insolvency. In other words the court ruled that, though the notice by overstating the amount due was invalid, failure by the company to respond to the demand (albeit for an overstated amount) could give rise to the inference that the company was unable to pay the lower amount admittedly due. One was, therefore, led to the conclusion that the company was unable to pay its debts.

Of course, the court's task in coming to this conclusion in this particular case was made somewhat easier by the actual figures involved. The overstatement was in the order of $4.53 ... the actual amount of the demand was $552,484.22.

As the court said, faced with a demand for half a million you don't neglect to pay because it's five dollars too much!

Speaking in the House of Lords in 1985, Lord *Meston*:

> "A cynic has observed that if you go 'bust' for £700 you are probably a fool, if you go 'bust' for £7,000 you are probably in the dock, and if you go 'bust' for £7 million you are probably rescued by the Bank of England."

Some of the quirks and problems associated with the reporting of cases are touched upon by Megarry in his *Miscellany-at-Law*; he notes that law reporters have long had their problems, citing as an example the reporter who in 1610 recorded that "at another day the case was rehearsed again, and argued by Yelverton and Fenner Justices, but I did not hear their arguments, insomuch as they spake so low".

He also gives as an example of brevity a 1788 report[2] where the entire report consisted of the one sentence "Reprizal was said by Lord Thurton C to be a common drawback".

And brevity (but not so brief as that) is what CCH has aimed for in the new book ***Topical Tax Cases for Australians.*** The other aspect of this book that is important is its comprehensive coverage ... over 1,600 cases are included.

So here, in one 571-page volume, arranged by topics in alphabetical order, are digests of all those significant tax cases you've ever needed to refer to.

Talking about brevity brings to mind what is claimed to be the entire closing argument by a district attorney in the US in a drink driving case. It went:

> Roses are red
> Violets are blue
> Point one five
> Means drunk to you.

The report says that the verdict was guilty.

In the July/August issue of ***The CCH Journal of Asian Pacific Taxation*** we began a series called "Tax Conference — In Print".

Now, it has been said that "writing is but a different name for conversation" and our tax conference concept was but an extension of that thought. As presented, it was like a discussion between a number of tax practitioners from various countries within the Asian Pacific region. The topic having been raised by one speaker was then commented upon by the others.

The tax topic picked to launch this feature concerned the international sale of computer software. This was seen as an appropriate topic because it transcends national boundaries: it is a problem of the kind that vexes practitioners within many jurisdictions. Our conference began by presenting the Australian view, and is followed by contributions from practitioners from other Asian Pacific countries who express their opinions as to how that question might be answered in their jurisdiction.

*One of the conditions for reading what is good is that we must not read what is bad; for life is short and time and energy are limited.*

Shopenhauer

1. *Ataxtin Pty Ltd v Gordon Pacific Developments Pty Ltd* (1991) 9 ACLC 865.
2. *Hall v Hall* 1788 Dickens' Reports, Chancery 710.

# *Letters to the Editor*

Dear Editor

You're never going to believe this, but my practice (such as it is) depends on my having an infallible filing system: I can usually lay my hand on correspondence years old in an instant, but in this case, I put aside the Autumn Edition of your estimable publication, intending to reply to the letter concerning the waiving of hearsay, and now having worked out my answer, I can't find it!

So, I'll have to do my best from memory. While I am a somewhat recent addition to the NSW Bar (though one of which I am extremely proud), I have had some considerable experience in other parts of the world.

The one redeeming feature of the common law, the one saving grace it has above all other systems of law, above the presumption of innocence and the requirement of the prosecution to prove its case to the degree of sureness (if these are indeed not two ways of looking at the same thing), is the Rule against Hearsay. In particular, that a defendant shall not be convicted of a crime by hearsay.

This is very much a double edged sword, because it appears to be taken as axiomatic that neither shall a defendant have the *benefit* of hearsay, though it is possible to argue that this could be deemed to be contrary to the above maxims. Cases known to every student are those where the statement of a since deceased woman that she had been given an illegal abortion by a person other than the defendant was not allowed to be admitted in his favour; and the case of the young child who stated that his attacker was black, when the defendant was white (*Sparks v R* [1964] A.C. 964]).

This latter case gives rise to the problem also of whether a statement which would be inadmissible because the witness was too young to give (or otherwise incapable of giving) testimony (sworn or otherwise), should be allowed in by the back door. This however is a separate problem.

While it is not for me to seek to defend the English legal system after the recent scandals of which you are no doubt fully aware, and indeed the Peter Wright litigation also, the Rule has however reached its apotheosis in England, where it is regarded as a rule of law. The significance of this is that it cannot be waived, either by the agreement (implied or otherwise) of the parties, nor is it a matter for the discretion of the judge. Thus if it is discovered at any stage throughout the trial that testimony was in fact hearsay, then the judge should direct the jury to ignore it (for all the good it will do, please see below!)

It also follows that Counsel should not knowingly or carelessly allow testimony of his witnesses which he knows or should know are hearsay. This has never been the case in the USA, where it is common for Counsel to ask his witnesses matters of hearsay, subject only to objection by the opponent, and not even so much as a rebuke from the judge. This is done both in the hope of catching the opponent out, and of prejudicing the jury if the inadmissible testimony is in fact put before them, for however short a time.

As pointed out by Lempert & Saltzburg, judges are always willing to find exceptions to the rule against hearsay where they convict defendants, but not where they acquit them (*A Modern Approach to Evidence* 2nd ed [1982] p527). The rule against hearsay is constantly under attack in England, but because it is there regarded as a rule of law, the attacks have to be directed against the substance of the rule. For examples of this I humbly refer the reader to my book *The Law of Fact*, which is shortly to be published in Australia by the World Law Centre. Mention may be made of the arrant casuistry of the Court of Appeal in holding that hearsay assertions of a negative (such that the absence of any entries in a written record of sales of goods means that the goods must still be the property of the alleged owner) are negative assertions, thus are not assertions at all, and thus not hearsay in the first place (*R v Shone* [1983] 76 Cr. App. Rep. 72)!

The difference is not merely semantic, because it may not be immediately apparent that what the 'witness' is testifying to is in fact hearsay at all. In a case in which I appeared the defendant was accused of using a railway ticket which had been materially altered. In the circumstances of the particular case it was necessary (but I should add by no means sufficient) for the prosecution to prove that the defendant had used the ticket on a particular *outward* journey (the alleged offence relating to the return). A ticket inspector was produced who testified that he had been on that outward journey, and had not noticed any alteration to any tickets he had checked.

Bearing in mind that not noticing an alleged alteration in a ticket could hardly be the most memorable incident in a long career as a ticket inspector, and also that the alleged events had taken place some months previously, and that the ticket inspector had been interviewed only shortly before the trial (the prosecution having only then realised the necessity of calling him), the first question I asked in cross-examination was how did the ticket inspector know he'd been on that particular train in any event. The immediate reply was "From the duty roster"!

No such roster was produced to the court, and in any event would be admissible only as a statutory exception to the rule against hearsay. In any event again, since the duty roster related only to events which were at the time in the future, it does not prove that the ticket inspector actually did travel on that train: the difference is identical to that between an appointments' diary, and a diary compiled after the events related in it.

If the rule against hearsay were only one of procedure and not of substance, would I have been taken to have waived my objection to the hearsay by not having objected to the question the moment it was asked? How or why should I have had any grounds for doubting the authenticity of the statement before it was made? Why should the defendant have been prejudiced by the fact that the prosecuting counsel had overlooked the fact that his witness's testimony was hearsay? What would have happened if the hearsay had come to light only after the close of the prosecution's case, or indeed after the end of the trial? Would this removal of evidence be the much vaunted 'new evidence' that could be introduced on appeal, or indeed after any appeal had failed?

In the event the judge directed (or at least should have!) the jury to ignore the testimony. He should indeed have directed the jury that there was no case to answer, but that's another story! I note from your article that the US idea, that the rule against hearsay is one merely of procedure, and can thus be waived, is getting a foothold in NSW. I urge all those reading this article to try by all means to stop this, for the above reasons.

R.G. Prince
56 Centre Point
London SF1 5NX
England

## Postscript

I recently sent you an article for your consideration on the matter of the present correspondence relating to the waiving of hearsay. Having done so, I have now come across the original item which started it, so I wonder if I might be allowed to submit the following by way of addendum? To remind the reader, this was an item in the Summer 1990 edition of this estimable publication under the title "One Question Too Many?", where views were invited on whether Counsel cross-examining to establish that testimony was hearsay, had inadvertently waived the hearsay (which the testimony unarguably was), by asking in effect "Was that just what someone had told you?"

I remember when as a schoolboy I first realised that there was a difference between 'hearsay' and 'heresy'! If the pun may be excused, I wonder if there may have arisen a heresy in the Rule against Hearsay, which I shall endeavour to elucidate as below:

A photograph may or may not be hearsay. I go to some lengths in my previously mentioned book to show that it is, at least generally, not hearsay (and thus indeed even that photo-copying does not generally import an element of hearsay!), but that point does not concern us here. I go on to conclude that a photograph may even be testimony: if the testifier (i.e. the person testifying whom, for the reason that I state in my book, I am forced by logic to call a 'testifier'; he may or may not be a witness: that is for the jury to decide) is asked, not "Is this a photograph of the shop on the occasion in question?", but "Did the shop look like that then?", then the origin of the photograph is totally irrelevant: the photograph is merely one way that the testifier can deliver his testimony.

This does not beg the question of whether the testimony is in fact based on what the testifier has been told (or otherwise communicated to) by somebody else, and thus is hearsay because the testimony is in either event really that of some third person, merely being related to the jury (or other tribunal of fact). This is a completely separate matter.

It is for the party who needs to prove a point to call testimony (or other means of proof) for the purpose, not for the other side to disprove it. That is what is meant by saying that it is up to a party to prove its case. It may transpire by skilful cross-examination that the testimony which has been adduced is in fact untrue, or hearsay. In the latter case it is then open to counsel in chief to establish that it comes under one of the statutory or common law exceptions to the rule against hearsay.

Suppose that counsel in chief says "Look at this photo-graph; did someone tell you that this is a photograph of the shop then?" or equally "Did someone tell you that the shop looked like that then?", opposing Counsel should immediately object to the question, not on the ground that the question itself is hearsay, which is impossible, since questions can hardly be hearsay, but on the ground that the answer sough (in this case 'yes') would be hearsay. This is a wholly different situation from that where, counsel in chief having elicited from the testifier that the photograph was one of the shop then, or that the shop looked like that, he then asks "Is that just what someone told you?"

This does not seek to introduce hearsay, but seeks to discover (what counsel in chief should already have known) whether the testimony already given is hearsay or not. This applies whether the hearsay is admissible or not, because the jury is entitled to take into consideration that the testimony is only hearsay even if it is admissible. Even if opposing counsel were so misguided as to want to object to the question, he could not do so because the answer sought is not hearsay. Nor is it objectionable even as a leading question, because it seeks to lead the testifier away from the point that counsel calling him seeks to provie, i.e. that the testimony is that of the testifier's own unaided senses.

Exactly the same situation arises if the question is put in cross-examination: the question does not seek to introduce hearsay, but to discredit hearsay which has already been given. This is surely the fallacy in the argument of those who assert that the 'hearsay has been waived': since the question is not even objectionable, the objection can hardly have been waived by non-use, can it?

Cross-examination may elicit that testimony is untrue, e.g. that the testifier was mistaken, perhaps he got the date wrong, or the wrong location, or indeed that he is deliberately lying, though this does not absolve counsel calling a person to testify from satisfying himself beforehand that that person is both honest and reliable: this will be personally in the case of his client or an expert witness, or through his instructing solicitor otherwise. This also includes satisfying himself that the testimony is admissible.

While there is no reason to think that this was the situation in the instant case, what then of the counsel who deliberately produces a testifier before the court knowing that he has only dishonest testimony to offer, but hoping that the other party will not discover the fact? Is he a really clever lawyer, or is not such counsel guilty of deceiving the court?

What then of the counsel who produces to the court a testifier who has only hearsay to offer: is the situation any different? Likewise, on the basis that ignorentia legis haud excusat, the testifier as presumably a layman is deemed to know the law, if he keeps quiet even to the counsel calling him about the fact that all he has to offer is hearsay (since he is deemed to know the law, he is deemed to know what hearsay is, while we lawyers are entitled to claim ignorance of it!) is he not guilty likewise of deception?

Is this not then the reductio ad absurdum of the argument that hearsay is merely a procedural rule, i.e. one that can be waived? Does it not otherwise put counsel in an impossible position, faced with a choice on the one hand of being in breach of his professional duty by hoping to deceive the court by adducing testimony which he knows is hearsay in the hope that that fact will not be discovered, and on the other hand to be in breach of his duty to his client by not adducing the testimony at all?

Is the only escape for counsel to plead ignorance, i.e. to claim that he was so inept that he did not realise that the testimony was hearsay, and is he not then in breach of his duty of competence?

Does this not prove that hearsay must be a substantive rule, which I repeat is one that cannot be waived, and must indeed be taken by the judge if opposing counsel does not spot it? Could it possibly be that regarding hearsay as a mere procedural rule is a device developed by appellate courts as a way of avoiding being forced to allow appeals, on the basis that the admission of the hearsay was the appellant's own fault, by his counsel's failing to spot the hearsay?

If an understanding of hearsay is a requirement of professional competence in a barrister (or indeed even a judge!), there would soon be very few judges or barristers left in practice (at least in England!). The same result is achieved in England by the general rule that points of law (which a substantive rule against hearsay is) cannot usually be taken on appeal if they have not been taken below, but this does at least leave open the possibility that the damage that is caused by putting inadmissible hearsay before the jury even if only for a short time, can be reduced by a direction to them to ignore the hearsay, and indeed by his not being able to rely on it in his summing up.

Since as asserted above, hearsay is almost always used against defendants rather than in their favour, is not the regarding of hearsay as a mere procedural rule thus just another example of the penchant for judges to allow hearsay against defendants rather than in their favour?

Is thus the competent counsel who elicits that what has been put before the court, by the more or less culpable fault of the other counsel, as testimony is really untrue, to be told in the very next breath that, even though he has done so, by the very fact of doing so he is deemed to have consented to the waiving of the untruth and has thus allowed in the very untruth to which he wishes to object? Is this not in the first place contrary to the very notion of waiver, which is that it is informed consent, even if only by implication? Could anything be more ridiculous, to put this again in the terms of the formal logic (to which we lawyers can surely all aspire if none of us can emulate) another example of reductio ad absurdum?

Why then as in the instant case should the situation be any different in hearsay? If the counsel who by his lack of ability fails to discover that his testifier's testimony is in fact inadmissible, and thus calls him, to be in a better position than one who does, and thus does not call him? What then of the position of the counsel who knowingly calls a testifier whose testimony is hearsay, in the hope that the other side will not discover the fact: is he to be in a better position than the other, who honestly does not call him?

The questions asked by the counsel in cross examination in the instant case are exactly those which should have been asked in chief, on pain that if they weren't, that party would be found not to have proved the fact that he wished to establish, i.e. what the premises looked like on the occasion in question. This should have been introduced by such preliminary questions as "How well (if at all) do you know the premises?"

Or is what is being asserted merely a semantic argument: is it accepted that it would be perfectly permissible for the counsel in cross-examination, instead of "That was just what someone had told you?" to have asked, "You hadn't discovered that by your own unaided senses, had you?", then I challenge it on that basis: it is a purely semantic argument. An example of a semantic argument is asking someone to define a vacuum: it is just the absence of everything else.

While I am unaware of the situation in NSW, in England at least hearsay is perfectly permissible in any event in an affidavit, so long as the source is stated, and the deponent states the fact that he believes the hearsay. If the situation is indeed the same in NSW, since the testifier states that indeed the fact asserted had been told him by another person, it seems quite likely that he knew who that person was. It was thus just a matter of the failure of the counsel in chief to have drafted his affidavit properly which would have been the reason why the hearsay should not have been admitted, rather than the brilliance of the counsel in cross-examination in asking (as it is alleged) one question too many.

I am delighted to have been able to be of service to my colleagues at the NSW Bar by what I trust is the putting-down of a heresy, just as the famous case of *Subramaniam v R* ([1956] 1 W L R 965) laid another heresy. I hope shortly to be able to commence practice in NSW, and should be delighted to receive any further correspondence on this or indeed any other points arising from The Law of Fact.

R.G. Prince
56 Centre Point
London SF1 5NX
England

Dear Editor

Lawyers, like most Australians, have ambivalent attitudes to American influences, as your note on the Stars and Stripes Invasion attests.

But why does a witness have to take an oath with the Bible in the right hand? Here in the ACT, a witness who takes an oath is told, "Take the Bible in your hand". Which hand the witness chooses is of no consequence.

What is wrong with the witness holding up the unoccupied hand? The practice is not peculiarly American. It is what they do in Scotland. Even the English courts allow Scottish oaths - and without the witness having to prove that she is a Scot (Archbold, 43rd ed, 403).

And if you are worried about people "taking the stand" instead of "entering the witness box", forget it. That dreary battle was lost long ago.

I do agree though that showing judges using gavels is a bit much. In Canberra we do not even have staves to be tipped.

The Honourable Mr Justice Jeffrey Miles
Chief Justice of the Australian Capital Territory

Dear Editor,

Recently I was passed a brief to appear for the plaintiff in an industrial accident case. I was amused by the judicious placement of the comma in the following reply to the defendant's request for further and better particulars:

> "Selected light duties not involving heavy lifting, repeated bending, climbing or strenuous work. Without in any way limiting his case in an effort to assist the Defendant, the Plaintiff instructs us that a non working supervisor's leading hands position may be appropriate."

I thought other members might find the passage entertaining if not educational.

Jay Anderson
11th floor Garfield Barwick Chambers
53 Martin Place
Sydney

# *The Art of Advocacy*

*On 17 October 1991 Lord Alexander of Weedon QC addressed the New South Wales Bar Association on the art of advocacy. Lord Alexander was educated at King's College, Cambridge. He was admitted to the Inner Temple in 1961 and took silk in 1973. He became a bencher in the late seventies and took silk in New South Wales in 1983. He was Chairman of the English Bar between 1985 and 1986. In 1989 he became Chairman of the National Westminster Bank Plc. His speech is reproduced by* Bar News *not only for the benefit of those who were unable to attend, but also for the benefit of those who, having attended, would undoubtedly wish to remind themselves of his pertinent advice.*

I was early on taught a golden rule of advocacy. Not the golden rule of rugby football which is always get your retaliation in first, but rather the golden rule of advocacy that you always make your best point whilst the Court is fresh and hopes that you may be going to talk sense. So may I immediately say what a delight it is to be back amongst colleagues of the New South Wales Bar. I have the happiest memory of working closely with them from time to time over some 15 years.

Perhaps it is because of my affection for your Bar that I rashly assented to the title of this talk. All my life I have fought shy of attempting to speak about the art of advocacy. Last year, for the first time, I was lured to do so far from the metropolis in Sheffield in Yorkshire, and before an audience of academics and students. Tonight, before skilled barristers, is much more daunting. For advocacy is more of an art than a science, and we each have our own style. I have always suspected that once we attempted to analyse our own approach it would, like the proverbial piece of china, fall to pieces in our hands. But, for all these doubts, I am very glad to be here, and here goes.

*Lord Alexander of Weedon QC*

For all of us, advocacy is, in its classic definition, the task of pleading a cause before a Court of Justice. But advocacy in Court is but one species of the art of persuasion, and it depends on the same fundamental principles as when it is used in other areas of life. This means that it calls for an infinite variety of styles to match the occasion. In the home, in the pub or wine bar, or at debate, we are all seeking esentially the best way of putting across a particular point of view. A solicitor negotiating a settlement needs to be an expert advocate. So, as I am learning, does a company chairman. We will seek, depending on the occasion, sometimes to be gently persuasive or quietly provocative, or coldly lucid or forceful, or perhaps more rarely, but sometimes necessarily, obstinate or dogmatic. To be able to be master of all these styles, yet to have the touch to decide which is the one to use at any moment, would make us truly master of the great art of advocacy. Winston Churchill, writing of his great friend the barrister and later Lord Chancellor, F E Smith, said:

> "For all the purposes of discussion, argument, exposition, appeal or altercation, F E had a complete armoury. The bludgeon for the platform; the rapier for the personal disputes; the entangling net and unexpected trident for the Courts of Law; and a jug of clear spring water for an anxious and perplexed conclave."

And yet, as we all know, F E Smith's style had a certain abrasiveness. The jokes are legendary and they essentially consisted of one inherent characteristic, rudeness to the Tribunal. All very impressive but Lord Hailsham once told me that there was many a young barrister in the '20s and the '30s who ruined what might otherwise have been quite a reasonable career by attempting to emulate F E Smith. Smith himself described the excitement of fine argument in these words:

> "Eloquence is like the flame. It requires fuel to feed it, motion to excite it, and it brightens as it burns."

This matchless description emphasises the flow of vital forces which is inherent in the art of persuasion. Words are harnessed to capture the imagination, and to carry along the hearer. Some advocacy may be quite deliberately unemotional, not least in situations where naked appeal to emotions rather than logic would be suspect. But lurking below the surface is almost invariably an attempt to persuade people not just in their heads but in their hearts. Indeed, sometimes the attempt is to persuade them in their hearts when they are wholly unpersuaded in the head. This is not only true of jury advocacy. Judges are sensibly human in their reactions, as we are reminded by the old aphorism that beneath the ermine robes of the judge beats the heart of a common jury man. And the canvas is wide, thrillingly wide, for the variety and the evolution of the problems of the law creates genuine and legitimate choice for the Court between rival contentions. There is often no absolutely right, or totally logical, answer. Here it is that advocacy shapes the vitality of the law, and moulds the argument, blending precedent and principle, and ever reaching out to adapt to the new challenges which society throws down. Lord Wilberforce once put it with his usual acumen when he said that in all fine arguments, and in all great judgments, there will be a leap which logic has to make to adapt to a novel or a subtly altered problem. For judgments, as well as arguments, are essentially essays in advocacy.

So the canvas for us as advocates is large. What characteristics should he or she, should the advocate possess? There is a temptation in any profession, and the law is no exception, to confine its practitioners too narrowly. This can constrict the personality, as Disraeli recognised, when contemplating a choice of possible professions for one of his fictional characters. He spoke thus of the bar:

"The Bar. Pooh! Law and bad jokes until we are forty;

and then with the most brilliant success the prospect of gout and a coronet. Besides, to succeed as an advocate, I must be a great lawyer and to be a great lawyer I must give up my chance of being a great man."

So, too, if we confine ourselves only to the erudite or the scholarly argument, as a Mr Pepler wrote in a short poem:-

"The law the lawyers know about
Is property and land;
But why the leaves are on the trees,
And why the winds disturb the seas, ...
And Hope survives the worst disease,
And Charity is more than these
They do not understand."

The more rounded the advocate, the more likely he or she is to reach the heart of the case. For it is an indefinable flair, coupled with strength of character and articulacy, which made Marshall Hall and Carson, Birkett and Hastings stand out amongst their peers. There is, in the end, a magic about the great performances in Court which reminds us again and again that advocacy is an art not a science. The single hour's advocacy which I would most have liked to hear since the Second World War was the start of Garfield Barwick's speech for the Respondents in the Commonwealth Banking case. Both Kenneth Diplock, then one of the Counsel and subsequently a senior Law Lord, and Cyril Green, one of the most experienced of wily Privy Counsel managing clerks, separately, and from very different perspectives, described it to me as the best advocacy they ever heard. Evatt had addressed the Court with many erudite arguments. Perhaps he had been slightly too lengthy. Barwick rose half an hour before lunch and, from force of personality and, more importantly, by grasping immediately the central issues in the case, he stamped his argument indelibly upon the pages of the judgment. No one who heard him ever forgot the occasion. And that is an illustration of instinctive magic, power and force of personality.

*"... unpredictability is ... the essence of litigation ..."*

But, with flair as the ultimate gift, what are the techniques with which you can supplement it? There have been books written to help the aspiring advocate. When I was young I avidly read Harris's *Hints on Advocacy*. It was very helpful in telling me how to cross-examine someone who had been injured in a collision between a horse and carriage. Of more recent time there are *The Art of the Advocate* by Richard du Cann QC and *The Technique of Persuasion* by Sir David Napley. One other book, from which I gained much help, is *The Examination of Witnesses* by Sir Frederick Wrottesley. He had seen advocacy from two perspectives, both as barrister and judge. This, of itself, was a very great help. In England we still encourage young barristers to go out as marshalls with judges and to watch arguments sitting on the bench and sharpening the judge's pencils.

But there is an even more fundamental basic quality. Our work is founded upon the use of language. Words and their nuances and subtleties, and their shades of composition, are all important. To speak the language of the law, search out, if you can find it, an admirable but now sadly out of print anthology, *The Law as Literature* gathered together and edited by Louis Blom-Cooper QC. Read the cross-examination of Pigott before the Parnell Commission, and also Sir Richard Muir's notes for the cross-examination of Crippen. Read also the thoughts of the late Sir Harold Laski, as he travelled home after defeat in a libel action. If you do so you will know the sensitivity and agony of the losing litigant who will inevitably make up a proportion of the clients of, dare I say it, even the best of you. Remember too the words of Lord Denning:

> "No matter how sound your reasoning, if it is presented in a dull and turgid setting, your hearers - or your readers - will turn aside. They will not stop to listen. They will flick over the pages. But if it is presented in a lively and attractive setting, they will sit up and take notice."

Lord Denning has also emphasised the words of Sir Walter Scott in Guy Mannering. The hero visits a Scottish advocate, Counsellor Pleydell, who points out the books of history and literature on his walls saying this:

> "These are my tools of trade. A lawyer without history or literature is a mechanic, a mere working mason; if he possesses some knowledge of these, he may venture to call himself an architect."

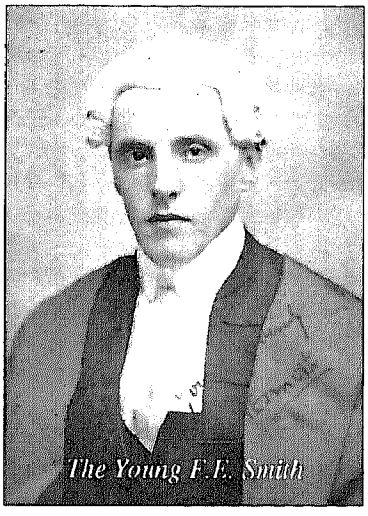
So it is a priceless advantage for advocates to be widely read and literate as they set out on a career in which the use of language is central.

What comes after education? Preparation, advice and management are not glamorous, but are essential parts of the art of advocacy. One of the great talents of us as barristers and often unrecognised outside is discouraging a client from suing. This involves evaluating the case, recognising its strengths and weaknesses and either discouraging clients wholly from suing or at least encouraging them to settle. Take libel actions. Since we are all sensitive to our reputation, people very quickly reach for their libel lawyer. They tend to forget that other people may instantly half-forget what is written about them, and that an action in Court may simply resurrect and remind people of the libel two years later. The client may need education in the uncertainty that attends any jury trial. My personal approach was to encourage them to sue only in the plainest cases, or where the libel so struck at the heart of their reputation as to leave them effectively no alternative. The techniques of advocacy are inevitably employed at this stage of the case - in approaching, rather like a game of chess, how you seek to think through the various issues and permutations to give the right advice. In the same way the thoroughness of preparation of evidence, whether factual or expert, is key. Such advice and case management are fundamental to our success and engage all the skills and instincts of the advocate. For, whilst unpredictability is at the essence of litigation, we can always seek to lessen its incidence.

This means, does it not, that there is no substitute in fact for the most intense and careful preparation and planning of the case. We should know what arguments we are to adopt, and in

what order we should present them. We should take, insofar as we can, firm decisions in advance as to which witnesses should be called, and in what order, because for an advocate to carry conviction in court, it is necessary to be master both of the facts and legal arguments. We should also have advised our clients carefully which points should be taken, and which by contrast would sacrifice credibility, and we must have taken trouble to persuade our client to agree with us as to the sensible mode of presentation. There was nothing worse than sometimes the tedious American client who, having been told which points were good and which were bad, would ask of the bad points "Yes, but can we not take the position on those points". Well, I believe that taking the position on bad points destroys the case of credibility.

But, I hear you say, however conscientious we may be, we can never wholly exclude surprise. I agree. May I take the true story of the shipping case in which the issue was whether the vessel was scuttled. Such cases can have their murky side. The expert witness for the plaintiff seemed to have an impeccable pedigree - not least a long and distinguished period in a colonial police force. His evidence-in-chief finished about ten minutes before the mid-day adjournment. Cross-examining counsel, taken by surprise, played for time. He began desultorily:


The Young F.E. Smith

"May I ask you some questions about your very impressive curriculum vitae?"
"Yes certainly."
"There appears to be a gap between your time in the Hong Kong police, and your becoming a private investigator?"
"Yes."
"Perhaps you would tell me what you were doing then?"
"I was temporarily unavailable for work."
"Oh, I'm sorry, were you ill?"
"No."
"What were you doing then?"
"I was in prison."
"Oh," said quick-witted Counsel, realising that he might inadvertently have struck lucky, "how long were you in prison?"
"For five years."
"Five years, that's a long time. What was the offence?"
"Perjury," came the answer.

At that moment lunch mercifully intervened, but the claim - like the vessel - sank without trace. So much for the essential preliminaries. I hope they are enough to indicate that the skill of an advocate in my view begins long before a case comes to Court, and that a principal skill is good judgment. The strongly-developed perception of reality, as well as knowledge of precedent, are vital. May I say a word about the interaction of precedent and principle. They must be tested together. One way, which was I think my own, and probably the lazy way was to look for what appeared to be the purposive, and the sensible result of the case, and then test it against the authorities. If the authorities were against the approach, then how strong were they? If there was an odd case standing out like a jagged rock at first instance, then the answer was to go and have a word with Lord Denning. Indeed, perhaps the greatest quality of Lord Denning, who, along with Lord Reid, did most to keep English law in touch with society in a speedily changing world, was his unremitting search for principle. And principle is not abstract: it evolves, and it inevitably reflects a view of sensible morality. Well, that's one approach, but another approach, often equally valid, is to see where the authorities lead, and then to stand back and see whether they are consonant with principle. In some ways this may be a sounder way, since it means that the historical strengths of the law are weighed before the practitioner applies what may well be is or her own idiosyncratic approach to principle. But the one approach which, in my view, is fatal is to go to the authorities, establish the precedents, and then asume unthinkingly and without more ado that they supply the answer. Because at some point they must be tested against the purpose of the law, which is ultimately the unremitting lode star for the Courts. Areas of education, general knowledge, sensitivity and analysis of argument come together in the choice of arguments to be advanced, and mould that indefinable, sometimes elusive, quality of judgment.

One of the essential qualities of good judgment is selection of the points to be argued. Clearly we must argue the points we are instructed but we have a large say in persuading the client which are the good ones to be put forward. It has recently been a criticism of some within the English profession that they are prepared to put all points before the Court without too much discrimination, in the hope that one or other of the arguments may appeal to the Court. This cannot be good advocacy. It is all very well to think that this approach may lead to a case succeeding on a point which could only appeal to a bad judge on an off day. But it is our job to weed out those points, both to give credibility to the sound argument and to keep it within sensible bounds. We risk an adverse judicial reaction which has sometimes recently been voiced at home if we argue points by which we ourselves are wholly and completely unconvinced. As I say, we may sometimes be instructed to do so, but we should exercise our own power of persuasion with the client to seek to limit the case to those points which are sensibly arguable.

How then, perfectly armed in a sense with all these qualities, and I only make no apology for devoting quite a bit of what I am going to say to advocacy before we get to the Court room because I believe that without it we are nowhere. But perfectly armed with these qualities how should the advocate approach the task in Court? I would not attempt to talk about individual tricks of advocacy. You will all know them, you will have evaluated them, you will know which work for you, and they are ultimately less important than fundamental principles. What should our attitudes and approach be? Perhaps the most important key, which should never be forgotten, is that we as

the advocates are not the audience. We have throughout to be asking ourselves the difficult question: "What is my hearer thinking? What is he or she concerned or worried about? What points are impressing them? What points are troubling them?" This sensitivity to the tribunal requires flexibility, and is probably easier when the trial is by judge alone, since the intervention of the Court tends to make known the way the tribunal is thinking. In my experience, the most important aspect of a case tried by judge alone is what is called the Socratic dialogue - or, more prosaically, the questions from the tribunal and the answers of Counsel. These are central to the case. However much we may have thought about them in advance, the answers always have to some extent to be shaped to meet concerns which are explicit or implicit in the way the question is put. In appellate advocacy, where the arguments for each side often have considerable merits, the way in which the judge's doubts are satisfied is the critical and vital difference between success and failure. And that does not mean of course that when a question is put we simply reassert our proposition with confidence. We have to see , if we can, into the mind of the judge, examining what lies behind the question and seeing where if the question tends to be against our argument we should probably start in order to establish logically and sequentially why the approach adopted by the judge should not be preferred to our own case, in the same way in which any doubts he has about the case for the other side are subtly enhanced, preferably under the guise of apparent objectivity. Sensitivity to the tribunal is a quality which is difficult to learn, but it is the most priceless gift which an advocate can be granted. One of the best advocates who ever led me in practice, James Comyn QC, was not so much of a wordsmith as some of his contemporaries, nor as stylish. But he had the priceless gift of antennae which appeared to reach right out to read the minds of the judges whom he was addressing. I remember once, we were having a difficult argument before a court of 3, one judge was being very favourable to our case. He was really our strong man and at lunch time I said to James "Well, it's marvellous that we've everything to fight for because we have Cyril Salmon on our side". James nodded his head and said "He's not on our side, he's simply being kind to our argument because he doesn't like the way the other two are reacting". But I had been wholly fooled. My leader was closer to it. He was feeling into the minds of the judges all the time and that was the priceless gift.

If, in addition to sensitivity, I had to select two qualities which, taking integrity for granted, are the most valuable to an advocate, they would, I think, be these.

First, in presentation it is critical to be adaptable. Advocacy is after all about influencing people to our views, and people do not exist in the abstract, and they are not computers. They have human emotions. These are very different, and it is our job as advocates to seek to respond to their sensitivities.

Secondly, it is highly desirable I personally think, that our basic style of advocacy should be courteous, quiet, and thoughtful as well as lucid. There are always moments when it is necessary to be more forceful, for example when a witness is holding material back or when a judge is not doing justice to your point. But the forcefulness gains more weight if it emerges in contrast to what is in general almost a conversational style. In short, we should never declaim or speak to our tribunal in a manner by which we ourselves would be antagonised. In the same way controlled passion can be very effective, but not if the currency is debased by too frequent use.

All this differs from advocacy as some practised it in Victorian times. Then, it seems, the role of the advocate was often to create fear in opposing witnesses and to declaim to the jury. Listen to the way that Anthony Trollope, in *Cousin Henry*, describes the skills of the barrister called Mr Cheekey:

> "He could pause in his cross-examination, look at a man, projecting his face forward by degrees as he did so, in a manner which would crush any false witness who was not armed with triple courage at his breast, - and, alas! not infrequently a witness who was not false."

This reflected a generally gladiatorial style of advocate, locked in combat with the witness and his opponent, generally seeking to impress the jury more than the judge. In those days of course the public, which still treated public hangings as a carnival, expected Court proceedings to be dramatic theatre. Society ladies sat on the bench with the judge watching the spectacle. The doorkeepers recognised they were in the entertainment business and sometimes charged for entry. But even at this time the mainspring of the art of some advocates was the same as it is today: to seek to know what the tribunal is, or may be, thinking and to present a more quietly reasoned argument. Of James Scarlett, later Lord Abinger, it was said by the Duke of Wellingon, "When Scarlett is addressing the jury, there are thirteen jurymen".

So advocacy even in Victorian times was not just declamatory. Wrottesley, whose book I have mentioned, drawing on an earlier work by Edward W Cox, Sergeant-at-Law, suggests a delicacy of style when touching on the art of cross-questioning or cross-examination:

> "There are two styles of cross-examination, which we may call the savage style and the smiling style. The aim of the savage style is to terrify the witness into telling the truth; the aim of the smiling style is to win him to a confession. The former is by far the most frequently in use, especially by young advocates, who probably imagine that a frown and a fierce voice are proofs of power. Great is their mistake. The passions rouse the passions. Anger, real or assumed, kindles anger. An attack stimulates to defiance. By showing suspicion of a witness, you insult his self-love - you make him your enemy at once - you arm his resolution to resist you - to defy - to tell you no more than he is obliged to tell - to defeat you if he can."

As one senior advocate put it to me when I was young, the best cross-examination results are achieved by kindness. When preparing cross-examination, wherever possible it is a salutory discipline to frame the questions in such a way as can only permit of the answer "yes".

There is a neat story still from the 19th century which illustrates how this gentler quality of advocacy has often triumphed over the talent of a more ostentatiously dramatic contemporary. Lord Brougham, another Scot to practise at the English Bar, was against Scarlett in a succession of cases on

Assize. At the end of the series of cases, of which Scarlett had won twelve and Brougham had won one, a juror met a barrister in the street and said to him:

"Well that lawyer Brougham be a wonderful man: he can talk he can: but I don't think nowt of lawyer Scarlett."

"Indeed," was the barrister's response: "You surprise me. Why have you been giving Mr Scarlett all the verdicts?"

"Oh, there's nothing in that," said the juror, "He be so lucky, you see, he be always on the right side."

Moral: we should always make our case seem simple, obvious and common sense, and we are then, hey presto, always on the right side.

The way in which we lay out the argument may depend on the stage of the case. In opening, we may to some extent be setting out the arguments in an exploratory way, so as to test the way in which they appeal to the Court. Whilst we will have selected the issues we wish to advance, we may sometimes put them forward tentatively. We wish to encourage the judge to believe that the point is one which he, or she, has thought of for themselves.

***" We wish to encourage the judge to believe the point is one ... he, or she, has thought of for themselves."***

This way of gaining the sympathy of the Court is illustrated in the story told - perhaps apocryphally - of a comment of Lord Halsbury to his colleagues when discussing the qualities of certain advocates. He said: "X is the best advocate I have ever heard." Since X was commonly regarded as somewhat lacking in the highest skills, his colleagues queried Lord Halsbury's judgment. Lord Halsbury explained: "X always argues in such a way as to give the impression he has got a wonderful case being spoiled by a third class advocate." There again I think there is a moral. One of the undoubted skills of an advocate is to put a point, if he can, in such a way that the judge feels sorry for us, takes it up, expresses it better, and then makes it his own, because then it's home for sure.

This technique of laying the arguments out, without being too precise until the Court indicates which are of interest, may work in opening. But it has no place in reply. The importance of a reply is sometimes understated. For, by this time, the rival arguments are set out with clarity. Here is an opportunity, to which your opponent has no response, to summarise his or her arguments, and to refute them one by one. By this stage of the case the arguments are finely-honed, precise, and any weaknesses in the opponent's case can be nailed by precise surgery. We can also put our own gloss on those arguments, and illustrate by example where they might lead, and we can occasionally slip in that slight forensic extravagance which can be safely used if we have the last word.

But what of the part that judges play in our advocacy? For much of what we do must inevitably depend on the quality of the tribunal. The most difficult task for an advocate is when he is unsure whether a court is grasping the argument. This tends to promote a despairing repetition, or even a declamatory haranguing, from even the most lucid of advocates. But, in addition to quality, which is so important, judges have their idiosyncrasies and it is worth studying them. I once heard an advocate asked for an example of a "good win". He responded "Success before Lord Denning, when you have all the law but none of the merits on your side."

Often the judge's interests, and idiosyncrasies, are revealed in the course of argument during the case. This means that no preparation can be too inflexible. Once, as a young advocate, I was set the task of representing a rather amiable businessman of what I would call the old school, under the old drink/driving law. The businessman had imbibed generously, to the extent of about 300mg/100ml. He adamantly pleaded not guilty, impressing on me that whatever other people were like he was perfectly able to drink that amount and drive properly. He was, however, wholly unable to remember why his car had collided with a bollard in the middle of the road, where the Police had found him slumped over the wheel. Prospects were not bright. The Stipendiary Magistrate was, however, much decorated in the war, in advanced middle age, of a comfortable, mildly self-indulgent personality, dining at his club, courteous to his wife, and kind to children and dogs. In short he was virtually the mirror image of my client. When my client took what I thought would be the final damaging step of insisting on giving evidence, the Magistrate saw a kindred soul and tried to help him and as we called it tried to run him out.

"Well you have to explain why you had the accident. Is it possible that there was a car on the wrong side of the road which caused you to swerve?"

"I wish I could say so, Sir, but I cannot remember one."

"I wonder then was visibility impeded by the rain, and bad street lighting?"

"It was, Sir, alas a moonlit night for driving with only a slight drizzle and and quite good street lighting."

"Is it possible that the vehicle had a steering failure?"

"I had the system checked the next morning, and it was all right."

My client steadfastly resisted all the opportunities offered to him. Come the time for me to make my hopeless and dramatic final speech. I had prepared a note well before the case began. In despair I threw the notes away, and said that I would make just three points. First, my client was a decent, upright Englishman who during a long career had served his country well. The magistrate nodded. Secondly, my client was clearly honestly adamant that he was capable of driving on the evening in question. The magistrate again nodded. Thirdly, my client had been too upright to resist the Magistrate's very honourable attempts to bring objectivity into the case by attempting to find out why the accident had happened. He had in short declined any attempts to help him contrary to his own

version of the truth and was he not therefore an honest man who should be believed when he said that he could hold his drink. The Magistrate nodded, instantly acquitted him, and the two old soldiers bowed to each other in mutual admiration and the Court closed for the day. The point of this story is not my own eloquence, nor the quality of English businessmen, but simply to indicate that the only arguments which matter in the end are those which appeal to the tribunal. And it is those that we have therefore to be searching for in our adaptability.

May I turn from that somewhat trivial story to consider a little the advocate of the future. Some years ago I found myself in Las Vegas for an ABA Conference. Some people who regard litigation as a lottery would no doubt regard this as a highly appropriate venue. Perhaps this is why Chief Justice Warren Burger chose the occasion to lay out his view of what would be required of the lawyer of the twenty-first century. In a memorable phrase, he said that the public would increasingly expect lawyers to be "reconcilers not warriors, healers not hired guns". Will this be a general impetus? For, if it is, it obviously will have to apply equally to the advocate as to other lawyers. In one sense the advocate, as part of the system of the administration of justice, has always been part of a process which is intended, we may often forget, as a healing element in society. A fair trial is, after all, an alternative to lynch law, to trial by battle or to trial by ordeal, and in that sense is a civilised way of resolving disputes. But, under our adversarial system, it is still often seen, certainly at home, as very gladiatorial. It is also inaccessible to most people in civil proceedings without great cost and without substantial delay. In my own country, I increasingly doubt whether people generally want their disputes resolved under a formalistic process, which takes a long time for actions to come to Court, and where they have to harness so many financial and emotional resources to go through what for them is a personal ordeal.

This attitude will, if it continues, inevitably point more and more to alternative dispute resolution. Industries may develop their own complaints resolution procedure: some have them already - complaints procedures against solicitors, ombudsmen to hear complaints against banks and building societies, arbitration within the travel industry, as well as our Press Complaints Commission. The creation of all these alternative dispute agencies reflects a realisation that a highly-developed adversarial system of law may in certain cases operate to frustrate rather than to facilitate justice. Matrimonial disputes, where the custody of children is involved, call as we all know, for extremely sensitive handling, and there is growing recognition that conciliation is much to be preferred to an adversarial contest. I do not know whether any of this strikes a chord in New South Wales but, if we move at all in this direction, then what is to be the modified role of the advocate?

The advocate will clearly have to develop techniques appropriate to alternative dispute resolution. Whether the process is done in writing or orally, the essential task of persuasion lies at the heart of mediation, and of alternative dispute resolution, just as much as it does in the more orthodox form of adversarial conflict. Those skills will need to be available in all areas where legal disputes have to be resolved. They are also needed in the mundane, workaday areas of the law which are often so vital to the client. In his Hamlyn Lectures as long ago as 1973, Lord Scarman commented on the amount of law affecting the individual - such as social security law - which was then largely ignored by the practising profession. Much has changed in this direction in the intervening years. At once this makes the task of the lawyer more humdrum, more prosaic and more day-to-day, but also more uniformly relevant.

But I think that whatever the merits of informal dispute resolution, there will always be some civil cases in which there are crunch issues which need to be resolved in Court. Traditionally all these issues have been decided by full oral procedures. More and more, in our own Appellate Courts in England as well as in the Commercial Court, a written element has been introduced, and the tribunal is asked to read key documents in advance. I do not personally believe that we should curtail oral advocacy as drastically as it has been foreshortened in some Appellate Courts in the United States. But I do equally believe that in England certainly the balance has further to tilt in favour of the written argument. The time saved can be great, and it enables the parties to get to what is the heart of the case. In my experience, the central and most challenging aspect of appellate advocacy, and, indeed, of much advocacy in civil cases in the trial Courts, comes when the advocate is asked to respond to questions from the judges. These are the areas of doubt which, when we're dealing with intelligent judges, have to be resolved, and we as advocates have to seek to ensure that the framework is provided in an uncluttered, efficient way so that we can speedily reach the heart of the case.

There will still, however, be some situations where the full adversarial procedure will be necessary. Many criminal cases, where there is a straight contest of fact, need to be rigorously explored through examination and through cross-examination. And so this will be in civil cases where there is a dispute between witnesses. Written statements can be exchanged, but there is still scope for the traditional art of cross-examination. We will never be able to assume that all witnesses will be truthful, or that none will be mistaken, and there will be no substitute in these cases for perspicacious cross-examination. But in the vast majority of cases without significant factual dispute, there seems no reason why much of the advocacy should not be written, and sensible limits placed on oral argument. Such limitations on the scope of a trial would not be a denial of justice. On the contrary, they would facilitate a more effective and economical resolution of the dispute. They would help to ensure that the costs of a trial are kept within some sort of bounds, or so, at any rate, it strikes me on the basis of English experience. But I would make on this the final point that it will make more rather than less demands on the advocate and we must never forget that the written arguments we put forward are as much exercises in advocacy as the oral argument.

What, if I may draw to an end, of the framework within which we as advocates must practise? I deliberately use the word advocate, as I have done throughout, because this, rather than the term barrister or the term solicitor, to me emphasises the true nature of the role. But it is a distinct role, the role of the advocate, different from other aspects of practice of the law. I happen to believe that advocacy is a speciality. It is a full-

time, not a part-time occupation. It is not a business. It is a calling. As everyone in this room knows, it is damnably nerve-wracking, often exciting, highly time-consuming, and all-absorbing. It demands the most total dedication, striving and commitment throughout the duration of a case. And our work is visible, it calls for instant and intuitive judgments, and the advocate carries an immense burden of accountability to the client. For standards to be maintained, it is important that those societies which value advocacy should continue to recognise it as a separate professional activity.

But it is not a narrow activity. The work of the profession of advocate does not end with the individual case. We are all as a profession involved in the development of our system of law, and its procedures, and in the need to keep them in tune with the requirements of society. This has not always been sufficiently appreciated in England. It was not until six years ago that the Bar Council had a Public Affairs Committee. It was previously thought that anyone who happened to be interested in wider aspects of the law could take part in the work of the great law reform agencies such as JUSTICE. This is all very well, but the profession itself has an important and cohesive role to play in promoting sensible developments in the law. We have our part to play in the reform of law and procedures. We have to be vigilant to assist and uphold human rights, especially those of minorities. This is of the essence of our profesison. One of these rights is the right of individuals to representation in Court. This obviously includes wherever possible an effective and properly funded legal aid system. But it also includes the principle that all litigants are entitled to a lawyer of their choice. It is easy for us, practising in England and Australia, to forget the immensity of our privilege to practise before independent judges of integrity, and to advance our client's case without fear of any personal impact upon ourselves. This, on one level, is a tribute to the effectiveness of the cab-rank principle which, since the days of Erskine, lies at the heart of our profession. We have seen attempts to whittle away at the cab-rank principle in the United Kingdom, and a few advocates who say that they will not, for example, act for the Police or act against Trade Unions. I believe it remains of immense importance that our services should be available to all comers. This principle not only serves the public but enables the profession freely to carry out its work. We have known this freedom so long that we tend to take it for granted. But experience elsewhere in the world suggests that we have to be on guard to maintain it. Here our professional body, and a united professional body and the work we do for it, has a key role.

May I conclude. I have not attempted to talk of detailed techniques or tricks of advocacy. They exist, but some of them are not always very worthy and those that are are of less importance than the general principles which each of us can seek to apply according to our own instincts, personalities and the needs of the case. I have spoken perhaps for too long and I'm sorry for that. If you had asked me to describe good advocacy in but a single sentence, instead of the time you generously allowed, I would simply have reminded you of Sir Owen Dixon's words which for me summarised it: Advocacy is "tact in action". ❑

## Readers Re-unite

On 6 August 1990, a group of eager young (ish) persons assembled in the Bar Common Room to embark upon a thankless round of papers, lectures, videos, talks by important people, ethics enigmas and yet more lectures and papers. On 27 August, 1990 an appreciative Bar Association, in recognition of the Readers' hard work and David's increased revenue, donated practising certificates to these pioneers of the reading programme.

In August 1991 they reunited... The first Annual Reunion of the August 1990 Readers took place on 23 August 1991 at the Forbes Hotel Grill Room. In answer to a Summons from Messrs Needham and Colyer, thirty-four of the sixty readers came to swap stories of what they said to the Judge, what the Judge said to them, how they foiled the Prosecution, their masterful ways with consent adjournments, and the like. Food and drink were had by all, some more than others. Perhaps the night was best summed up by the following letter, from Peter McGrath (who would probably prefer to remain nameless):

*26th August 1991*

*Messrs. Need'em and Collar ya,*
*Solicitors,*

*Dear Sirs,*

*GOODWIN AND GREENWOOD v. AUGUST 1990 BAR READERS*

*I appeared for the respondents at the Forbes Grill Room on 23 August 1990 before a rather full bench. So did a lot of other people. The hearing did not run smoothly. The arguments of the various parties appeared to lack direction and coherence as the hearing wore on. Judgment was delivered early on Saturday morning.*

*Although the costs awarded were high, given the joint and several (and continuing) liability of the respondents, I feel they escaped lightly. I would not consider you appealing in any circumstances. Please return my briefs.*

*Yours faithfully, (sgd) Peter McGrath*

The Goodwin and Greenwood contribution to the success of the Readers' programme was acknowledged - we invited them. The success of the Readers' programme itself is apparent through the numbers who replied (responses were received from all but two of the readers) and those who eventually came (45 said they would come, but 9 were unable to do so for various reasons). The camaraderie engendered by three weeks of enforced proximity had not disappeared over the passing of a year, and the consensus was that the reunion should be an annual event. If the spirit of the Bar tended towards effervescence nearing the end of the evening (that Opal Nera Sambucca is a killer) the friendships and support forged during August 1990 should indicate to those in charge of it that the full-time Readers' Programme is, on balance, a Good Thing.

PS: To those who haven't yet paid: We know where you live.

❑ Jane Needham

# *Conduct of Complaints Against Barristers*

*Most barristers, through fortunate want of experience, know little about the professional conduct procedures of the Bar Association or how to respond to a complaint. Jeremy Gormly seeks to give some guidance to those matters.*

The changes brought about by the *Legal Profession Act* 1987 have led to a much greater likelihood that any barrister can be the subject of a professional conduct complaint. Furthermore, the procedures under the Act have meant that barristers are far more likely to find themselves facing full, formal hearings to defend complaints than occurred prior to the Act.

The dictates of the Act are such that all complaints must be investigated and dealt with. This article concerns:-

(a) the procedure used to deal with complaints;
(b) the best methods for responding to a complaint if one is received.

PROCEDURE

Under the *Legal Profession Act,* the Bar Council is the body to whom any person may direct a complaint about a barrister. The Act requires the Council to assist complainants to formulate their complaints and then to investigate them. The Council can and does act of its own accord if some possible breach comes to its attention other than as a complaint.

In practice, complaints are usually received by letter directed to the President, the Registrar, the Professional Affairs Director of the Association (Miss Helen Barrett) or some member of the Council known to the complainant. When persons make oral complaints - usually by phone - they are asked to reduce the complaint to writing. Complaints are made in rough order of frequency by clients, solicitors (from either side), opposing clients, Judges, other barristers and others.

Complaints received from any source by the Council are distributed by the Professional Affairs Director to one of the four Professional Conduct Committees of the Bar Council. Those Committees consist of one Queen's Counsel who is a member of the Council and one other Queen's Counsel who may or may not be a member. In addition, there are four or five other barristers, some of whom may not be members of the Council. There is also one lay member who ranks equally in the decision making process with other members of the Committee.

The Committees usually meet fortnightly. They investigate complaints, generally by obtaining written versions from the complainant, the barrister and any possible witnesses, being usually instructing or opposing solicitors or other Counsel.

When all of the material constituting the investigation has been gathered, gaps in the material may be dealt with by way of requests for further particulars from the barrister or any other person.

After the investigation process, one member of the Committee will prepare a report and, after discussion and alteration to the report reflecting the view of the Committee, the report is referred to the Bar Council. The report, almost invariably, includes a recommendation to the Bar Council as to what should be done with the matter. Conduct matters are treated with priority by the Council and, if reports arrive from Committees after the distribution of the Council's agenda papers, they will be distributed as urgent additional items so that they are dealt with at the next meeting of the Bar Council.

Conduct complaints are usually the subject of considerable analysis by the Council and if there is not a clear view, then there is extensive debate. Periodically, where a Committee is divided in its view, a minority report will be presented by a dissentient member or members of a Committee which usually has the effect of provoking further debate. Most matters, however, involve a reasonably clear course of action.

Having considered the matter, the Council has, under the Act, a number of options:

(a) To dismiss the complaint.
(b) To find that it is satisfied that there is a valid com plaint but that a reprimand is the only penalty re quired.
(c) To find that there is a valid complaint and refer the matter for a hearing to one of two bodies, described below, which are set up by the Act.

If the Council decides that a reprimand only is appropriate, then the Act requires that the person to be reprimanded give consent to the reprimand. Curious as the provision seems, it is present in the Act to provide to a barrister the opportunity to contest the finding of a breach. Consent to a reprimand is, in effect, an acceptance of the Council's finding of a breach of conduct. The practice has been for the reprimand to occur orally in chambers delivered personally by the President.

Where a matter is too serious to be dealt with by way of reprimand, then the matter must be referred to a Board or a Tribunal. The definitions of "unsatisfactory professional conduct" (a lesser breach) and "professional misconduct" (a serious breach) are set out in s.123 of the Act. The definitions, which are not particularly satisfactory, are as follows:

> "Unsatisfactory professional conduct" includes:
> Conduct (whether consisting of an act or omission) occurring in connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent legal practitioner.
>
> "Professional misconduct" includes:
> (a) unsatisfactory professional conduct, where the con duct is such that it involves a substantial or consistent failure to reach reasonable standards of competence and diligence;
> (b) conduct (whether consisting of an act or omission) occurring otherwise than in connection with the practice of law which, if established, would justify a finding that a legal practitioner is not of good fame and character or is not a fit and proper person to remain on the roll of barristers or the roll of solicitors; or
> (c) conduct that is declared to be professional misconduct by any provision of this Act.

In practical terms, the decision of the Council in determining into which category a particular breach might fall,

determines the future path of the matter. If the Council is satisfied that a breach involves the lesser, "unsatisfactory professional conduct", then the matter proceeds to a hearing, *in camera*, before a Legal Profession Standards Board ("the Board") on which sit two barristers and one lay member.

If the Council is satisfied that the particular breach involves a question of "professional misconduct", then the matter proceeds to a public hearing before a Legal Profession Disciplinary Tribunal ("the Tribunal"). The Tribunal is constituted in the same way as the Board but its powers of penalty are far greater.

Due to a defect in the Act, where there are a number of points of complaints against one barrister (as is frequently the case), then, where complaints fall into one category and some into the other, there must be hearings in both bodies. It is not possible to refer both types of conduct to the one body. The Council is currently attempting to secure an amendment to the Act to resolve that defect because of the substantial costs burden to the barrister involved.

If the Board, when hearing an allegation of unsatisfactory professional conduct, decides during the course of the matter that the breach is one which, in fact, involves professional misconduct, then it is obliged to terminate its hearing and refer the matter to the Tribunal.

At present, there are few matters before the Tribunal and a transfer from the Board to the Tribunal, at least so far as barristers are concerned, has not yet occurred.

APPEALS

A decision of the Board (which hears the less serious breaches) may be reviewed by the Tribunal. A decision of the Tribunal may be the subject of an appeal to the Supreme Court. A separate body called the Legal Profession Conduct Review Panel ("the Panel") hears applications by complainants for review of a decision by the Bar Council to dismiss a complaint. The Panel consists of only one barrister member and two lay persons.

PENALTIES

The Board has the power to reprimand the barrister, order that he undertake further legal education or impose a fine not exceeding $2,000.00 or a combination of any of the three options.

The Tribunal may, by way of penalty:

(a) cancel the barrister's practising certificate;
(b) order that a practising certificate not be re-issued after expiration;
(c) order that the barrister's name be removed from the roll;
(d) fine the practitioner $25,000.000; or
(e) any combination of the options.

RESPONDING TO A CONDUCT COMPLAINT

The real purpose of this article arises from the experience of many persons sitting on Professional Conduct Committees and reading numerous first responses by barristers to a complaint.

It has been observed by one senior member of the Council that responses to complaints fall into two general categories. The first is to write a short, uninformative, dismissive letter of denial as though the matter ought not to be taken seriously. The second is completely different. It involves responses of 10 or 15 or more pages detailing a blow by blow history of the whole case (often unwittingly failing to deal with the complaint) and reflecting the distress of the barrister at being the subject of any complaint, whether justified or not.

Because of the nature of the Act and the duties cast on the Council to investigate complaints, neither form of response is appropriate. The dismissive response usually results in protracted investigation as a Committee struggles to obtain a full factual picture and a full response from the barrister that deals with the precise complaint. Flippant or ill-considered comments in a first response become part of the investigation file which may ultimately become evidence before a Board or a Tribunal.

The long and detailed, distressed response also prolongs investigation, but in a different way. All responses to complaints by the barrister are sent to the complainant as a version on which they may then comment. Private or confidential correspondence cannot, therefore, be received in the course of the investigation, or treated as confidential unless a real issue of legal professional privilege arises or there is some other good reason of law. Long and unduly detailed responses from the barrister often provoke even longer comment from the complainant. Everything slows down as the issues are unravelled.

Responses to complaints often have to be written when the brief has long since been sent back. Recollections of precisely what occurred will fade, particularly if the case was small or insignificant. At present, the Act sets no time limit for a complaint (although the Council is pressing the Attorney-General for a 6 month time limit) and complaints have been received sometimes years after the alleged breach of conduct.

An initial reply written without reference to the brief will frequently contain unwitting inaccuracies which may emerge in any hearing before a Board or a Tribunal. A time limit for a reply is usually fixed but, if additional time is needed to get hold of the brief, it will generally be granted.

Some sensible guides for responding to a complaint are as follows:

1. Isolate and address the complaints rather than give a full history of the whole case.
2. Responses are best if they are succinct, but must deal with the factual circumstances of the complaint and provide a full answer.
3. Few persons, including barristers, are capable of being fully objective about a personal or professional complaint. It is best to approach another barrister, preferably someone senior, or your solicitor, with the complaint and your draft reply. Most people resist doing this, but no matter how embarrassing, it invariably produces a better response.
4. Although the process required by the Act is prosecutorial in nature, conduct proceedings are not criminal proceedings. Failure to provide a prompt, full and frank response is itself a breach of standards of professional conduct.

BELATED LITIGATION

Quite frequently, something that becomes the subject of a professional conduct complaint is also the subject of either civil or criminal proceedings. When that occurs, the investigation process by the Council will cease until completion of the related litigation unless both parties otherwise agree. The Council has adopted that policy to ensure that the investigations and results of conduct proceedings are not misused by other litigants as a method of obtaining evidence in unfair circumstances. A barrister, for example, has a professional obligation to make admissions and provide a full and frank response to any complaint. The barrister in a criminal matter has a right to silence, and in a civil matter has no obligation to make admissions.

CONCLUSION

Since the new Act commenced in 1987, barristers are much more likely to be the subject of complaints. The broadening of the scope for breaches of professional conduct by reason of the two levels of definition make barristers much more likely to be involved in full hearings defending allegations of breaches of professional conduct.

If you are the subject of a complaint, draft a full but succinct reply and discuss the complaint and your response with a senior colleague or your solicitor before replying to the complaint. ❑

## For Whom the Bell Tolls

"And therefore never send to know for whom the bell tolls; it tolls for thee". (John Donne, "Devotions. XVII")

Not having a naval heritage, I have never been sure of the reason for the bell hanging alongside the bar in the Common Room of the Bar Association.

I have never been tempted to ring that bell because my Grandmother had in her backyard a bell used to summon the Local Volunteer Fire Brigade and painful are the memories of the resounding toll which I once achieved from ringing this.

Recently "Jim", a young nineteen-year-old, had a more financially painful explanation of the power of the bell in the learned magistrate's court at Bankstown.

Young "Jim" had given the bell at the bar of the Deepwater Motor Boat Club at Milperra a good belt. When told he had to shout for the bar he refused. An altercation occurred and he was unceremoniously removed from the Club by the police.

Despite his removal, "Jim" returned and punched the provocateur who had demanded that he uphold the best of naval tradition and the heritage of the club by shouting for all present.

Mr Max Coon LCM did his best to redress this effrontery to the finest of naval tradition and fined poor young "Jim" $750.00 plus $45.00 court costs. With this precedent in mind it will probably be cheaper in future to shout in the Common Room. ❑

# *Plead Guilty and Get it Over With?*

*What to do when your client assures you s/he is innocent, but nevertheless wants to plead guilty. Peter Hidden QC, Senior Public Defender explains.*

It is not uncommon for a client in a criminal case to tell counsel that he or she is innocent of the crime charged but, nevertheless, wishes to plead guilty. Some clients who are, in fact, guilty cannot bring themselves to confess to their legal representatives (particularly if the decision to plead guilty follows earlier protestations of innocence). Other clients, who may well be innocent, elect to plead guilty because their defence to the charge necessarily involves revealing other criminal conduct more serious than that charged or other behaviour, not itself criminal, of which they are deeply ashamed.

Barristers who have been instructed by the Aboriginal Legal Service will be particularly familiar with the situation. Many older Aborigines, especially from rural areas, have a long history of appearing without representation in magistrates' courts, and their experience of the criminal justice system taught them that conviction follows arrest as the night follows the day. Even with legal representation, they cannot break the pattern of pleading guilty "and getting it over with", regardless of the merits of their case; and it is understandable that they have no stomach for a fight which they are convinced they cannot win.

***"... conviction follows arrest as night follows day ..."***

In view of the familiarity of the problem, it is surprising that there is such a divergence of opinion among members of the Bar as to how it should be resolved. While the situation may present real difficulties in individual cases and must always be handled sensitively, the ethical position of counsel is not in doubt. It is succinctly expressed in one of the draft rules of the Australian Bar Association:

"8.5 PLEAS

(a) It is the duty of the barrister representing a person charged with a criminal offence to advise that person generally about any plea to the charge. It should be made clear that whether the client pleads "not guilty" or "guilty", the client has the responsibility for and complete freedom of choice in any plea entered. For the purposes of giving proper advice, a barrister is entitled to refer to all aspects of the case and where appropriate may advise a client in strong terms that the client is unlikely to escape conviction, and that a plea of guilty is generally regarded by the court as a mitigating factor, at least to the extent that the client is thereby viewed by the court as co-operating in the criminal justice process.

(b) Where a client denies committing the offence charged, but nonetheless insists on pleading guilty to it for other reasons, the barrister may continue to represent that client, but only after advising what the consequences will be, and that what can be submitted in mitigation will have to be on the basis that the client is guilty. Wherever possible, in such a case, a barrister should receive written instructions.

Provided that, a barrister acting as a Duty Lawyer in a Magistrate's Court shall not under any circumstances represent a client on a plea of guilty if the client insists on pleading guilty, but denies having committed the offence charged."

One can see the sense of the proviso but, as barristers in this state do not act as duty lawyers in magistrates' courts, it need not concern us.

It is not necessary that a client should confess to the crime charged to his or her legal representatives before counsel can appear on a plea of guilty. All that is necessary is that it be explained to the client that by a plea of guilty he or she necessarily admits the elements of the offence, and those elements should be related to the facts of the case at hand. It should also be explained that no evidence can be tendered and no submissions can be made inconsistent with an admission of those elements. If the client accepts that course, written instructions to that effect should be obtained and counsel is then free to appear on that basis.

Of course, counsel should try to ascertain in conference why the client is adopting that stance, to ensure that it is not based upon some wholly irrational reason or some misconception as to the possible outcome of the proceedings. In particular, counsel should advise the client as to the strength of the prosecution case and the prospects of acquittal. That said, however, it is the client's right, and his or hers alone, to determine how to plead.

If the client persists with the plea of guilty but insists that evidence be called or submissions made which call into question the elements of the offence, counsel should withdraw. If, however, counsel is able to appear on the basis suggested above, he or she is free to make submissions to the court not only as to the background, antecedents and rehabilitative prospects of the client, but also on any matter in mitigation of the seriousness of the offence which appears from the evidence in the prosecution case.

The situation also arises where a client claims to have no memory of the offence as a result of a prodigious ingestion of alcohol or drugs but, in the light of the evidence in the prosecution case, accepts that he or she must have committed the offence. That client can be represented on a plea of guilty on the same basis and, indeed, the intoxication may be relied upon (for what it is worth) in mitigation.

These have long been my own views on the matter and, at a recent meeting where this issue was discussed, they were affirmed by the Bar Council. ❑

# *Masters and Readers Dinner 1991*

*By popular request Bar News reproduces the speech given to the Masters and Readers dinner on 1 November 1991 by the NSW Solicitor-General, Keith Mason QC.*

Some of you may be a little surprised why someone who is addressed in court as "Mr Solicitor", or simply as "Solicitor" by Mr Justice Kirby, should be invited to speak at this exclusively barristers dinner. Let me assure you of my credentials as a member of the Bar of New South Wales.

I am fortunate to occupy an ancient and honourable office of profit under the Crown. I am doubly fortunate that it is an office of profit which, since 1884, precludes the holder from membership of the Legislative Assembly.

My earliest predecessors in New South Wales were men whose qualities reflect the high constitutional importance of the office.

The first incumbent, John Stephen, who held office for one year between 1824 and 1825 went on to become a Supreme Court judge. In 1831 Governor Darling in a despatch prepared by Stephen's own nephew, James, informed the home authorities that "if I have anything to reproach myself with, it is the forbearance I have shown in not reporting his unfitness for his office".

The second appointee, James Holland, who was a former Attorney-General of Bermuda, never took up his position because the Chief Justice refused to swear him in. Apparently Holland accidentally left behind in England the despatch from the Colonial Secretary appointing him to the office. In a letter from the Colonial Secretary's Undersecretary to Holland what was described as the "inconvenience" was regretted, but it was pointed out that Holland had brought himself into the "unpleasant predicament" in which he was placed.

*Keith Mason QC*

Later incumbents in the nineteenth century included a man who was promoted to Attorney-General when the then Attorney Dr Kinchela was discharged from office because his deafness rendered him incapable of properly performing his functions in the Legislative Council. Governor Bourke had obvious cause for concern but it did not impede him from immediately appointing Kinchela a judge of the Supreme Court where deafness was obviously not such a problem.

A man who held office in the 1850s (Darvall) had during his time at the private bar been committed to gaol for contempt for punching his opponent in court. Alfred Lutwyche held the office for a very short time in 1856. Lutwyche initially declined an offer to serve as Solicitor-General and government leader in the Legislative Council until the Attorney-General (James Martin, later Chief Justice) was admitted to the Bar. This principled stance was costly because the government fell only 21 days after Lutwyche's delayed appointment. Lutwyche served another short term in the office the following year before being appointed Attorney-General. On his rumoured accession to that office the editor of The *Sydney Morning Herald* remarked that "no doubt Mr Lutwyche is a very learned lawyer, although circumstances have not afforded him an opportunity to display that learning" (SMH 13.11.1858 p6). He was later appointed to the Supreme Court of Moreton Bay. When the separation of Queensland was imminent he claimed a seat on the Sydney bench, to be told by the government that he could either become judge of the Supreme Court of Queensland or resign.

Yet another (Hargrave) who held office during the 1860s went on to become the first judge in divorce of the Supreme Court of New South Wales. His swearing in was boycotted by the Bar and his behaviour on the Full Court so aggravated the Chief Justice as to provoke the latter's early resignation. It was also said that Hargrave's judgeship was disastrous for women suitors because he habitually decided against them. I am sure that this slight problem in judicial balance had nothing to do with the fact that his wife had previously had him committed to a lunatic asylum for a period of time in the mid-1950s.

In 1922 the Government wanted to appoint T J Ley Solicitor-General. It was blocked in this desire when the Crown Solicitor advised that Ley would thereby vacate his office in the Legislative Assembly. This was perhaps as well for the office because Ley went on to distinguish himself as a murderer.

I trust therefore that you can see that the Solicitor-General is a card-carrying member of the Bar to which some of you have recently been admitted and at which others have toiled for upwards of seven years.

All aspiring barristers seek to emulate the greats who have gone before or who are the current leaders of the Bar. We may covet their seniority, status or disposable income but I suppose that most of all we covet the attention they get from other members of the Bar. Oscar Wilde once wrote that:

> "There is only one thing in the world worse than being talked about, and that is not being talked about."

Most of all I guess that we would like to be spoken about in the Common Room for some withering riposte, destructive cross-examination, or Houdini-like escape from an impossible corner.

Wouldn't it be wonderful to be remembered like Coombes (Janet, not John) for having had the wit to answer a judge demanding to know why she had sought "the usual order" by telling him that it was "for the usual reasons".

Or consider Palmer QC, now a temporary occupant of the Supreme Court Bench, who drove the opposite party to the wall by the following devastating piece of cross-examination. A man had died intestate, leaving an ancient widow and a very run down cottage. By dint of the law of intestacy a share went to a

distant relative in Yugoslavia who had never even met the couple. The widow brought proceedings under the *Testator's Family Maintenance Act* seeking the whole estate in order to stop her eviction from the matrimonial home of over 30 years. You may be excused for thinking that her prospects were good.

Palmer had the unenviable task of acting on the instructions of the Yugoslav government to oppose the widow's claim. He must have thought that Christmas had come early when he got the old lady to repudiate the whole of the plaintiff's evidence in chief when she asserted that the signature on her affidavit was a forgery.

But Palmer feared that Master Cohen, as he then was, might disbelieve this denial. So he pressed on. The cross-examiner had one item of disentitling conduct whose detail I cannot now recollect but which he was instructed to put to this dear old lady. Again and again she misunderstood or misheard the question, or gave an entirely non-responsive answer. Finally Palmer was left with nothing but taking care that his evidence on this point was not met by *Brown v Dunn*. "Look Madam", he said with mounting exasperation "just listen to this question carefully and answer 'Yes or No'". He put the question. She nodded with apparent understanding, smiled at him, and answered "Yes or No".

She got the entire estate.

On the subject of a deft escape from a difficult question, what about Wheelahan QC who appeared for the respondent plaintiff in the High Court in April this year in *R W Miller & Co (South Australia) Pty Ltd v McKain*. A plaintiff injured in an accident in South Australia sued his employer in New South Wales in an endeavour to get around a short South Australian limitation period. The case involves the characterisation of limitation statutes in private international law. But principally it concerns the vexed meaning of the full faith and credit clause in the Constitution (s118). Judgment stands reserved in this re-run of *Breavington v Godleman*. Every Attorney-General intervened, each taking a different approach to full faith and credit, some opposed to the interests of Wheelahan's client, some entirely supportive of it, some ambiguously in the middle of the spectrum.

With his customary graciousness and self-deprecation Wheelahan QC stood back to allow all other counsel to speak before him.

In his fairly short submissions towards the end of the hearing Wheelahan addressed the conflict of laws point. But he remained strangely mute on the critical constitutional issue. As he was about to sit down McHugh J reminded him that his submissions did not deal with s118 at all. This drew the following riposte:

> "Your Honours, my submissions do not deal with 118 at all. Your Honour is your usual astute self in not finding a reference to 118 in my three pages, but may I take this cowardly approach with regard to 118, Your Honour, and say that there are those who have come to this Court to give it the benefit of their submissions far better able than we are, and in this regard, of course, we adopt those submissions which aid us."

Judicial rudeness is a major cross to be borne by the young and aspiring barrister. Some judges take far too seriously Lord Chancellor Lyndhurst's aphorism that "it is the duty of a judge to make it disagreeable to counsel to talk nonsense". Not all judges aim the bulk of their barbs at their brethren in the manner of a certain former President of this Association who is now a judge of Appeal. Usually it is counsel who cop the public rebukes. What could be more devastating than the fate of the counsel for the unsuccessful appellant in *Clement v Jones* (1909) 8 CLR 133 whose opponent was not called upon to reply. The opening words of Chief Justice Griffith's *extempore* judgment were:

> "The more the appellants' case has been argued the more hopeless has it become."

Henchman J of the Supreme Court of Queensland once recounted counsel's argument and concluded:

> "I feel myself quite unable to appreciate anything more than the subtlety of that argument." (see [1933] 48 CLR at 643).

This echoes Viscount Dunedin's comment in *Nixon v Attorney-General* [1931] AC at 190:

> "I confess that I have listened for some hours without discovering that even the ingenuity of counsel could bring forward any argument that was much worth consideration, and I think they were driven as they were in duty-bound driven, to the ultimate virtue of persistency."

But if you think this is rude, what of the American judge before whom a lawyer of Japanese extraction requested additional time to prepare a trial in the 1970s? The judge's response was:

> "How much time did you give us at Pearl Harbour?" (recounted in Pannick *Judges* p18.)

Fortunately for counsel many judges reserve their strongest emotions for their colleagues. Often of course this is confined, at least on the surface, to light bantering about such matters as the right to smoke and the right not to be subjected to smoking; or the appropriate time at which to take lunch. Here in Australia it is very rare for judicial dissent about the disposition of a case to descend to personal recriminations. One might occasionally find a paragraph at the end of a judgment, obviously written after perusal of a draft judgment prepared by a judge with the opposite view. Usually there will be a mild judicial snort as the errors of the opposing view are highlighted.

David Pannick in his recent book on *Judges* suggests that the dignity and majesty of the Bench "is not necessarily incompatible with the baser preoccupations of the human mind ... illustrated by the expressions of petty irritation and anger, vanity and jealousy which have afflicted judges in their mutual relations" (pp18-19). He reminds us that American judges regularly attack the sensitivities of their colleagues, although rarely with the force or the style adopted in a 1979 judgment of the California Court of Appeal in *People v Arno* (153 Cal RPTR 624, 628 note 2 [1979]). The 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. Associate Justice Hanson dissented. In response to his dissent the majority judges said that they felt "compelled by the nature of the attack in the dissenting opinion to spell out a response" and spell it out they did, 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.

Appellate judges have shown in the past that they can be great haters although the depths of their mutual disrepect may not always be patent. Sir Edmond Barton displayed petty envy, if not anti-semitism, when he wrote to Griffith CJ in England in 1913 saying the following about his brother justice Isaacs:

> "Isaacs used his opinion which ostensibly agrees with mine to put his own interpretations on questions so as to give some answer, and just the answer Higgins wants ... The whole affair is just a piece of manipulation however - I don't think there is the least bit of sincerity in the jewling's attitude ... It is plain to me, and I think to others, that Isaacs is building his hopes on your remaining in England and is trying to make such a big splash that he will make himself manifest as the right CJ ... His judgments are swelling to bigger proportions than ever - in fact they are very weighty - in respect of paper; and he has assumed an oracular air in Court that is quite laughable ... Isaacs of course has his jaws slavering for the devouring of some decision of yours" (quoted in Souter, *Lion and Kangaroo* pp 102-3).

Sir John Latham had a very difficult time presiding over a court in which one justice wrote letters to him referring to one colleague as a "dog" and another as a "parrot". Mr Justice Starke refused to have any consultation with his colleague Mr Justice Evatt, to exchange draft judgments with him, or even to supply him with final judgments (see Lloyd *Not Peace but a Sword - A High Court under G J Latham* [1987] 112 Adel L Rev 175).

If you turn to 42 CLR at 62 you will see Starke J commencing his judgment in *Federal Commissioner of Taxation v Hoffnung & Co Ltd* with these words:

> "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."

Sir Maurice Byers, surely one of the two or three greatest appellate advocates ever to practise in this Bar, was very adept at making the most of judicial disagreement and getting the judges to work for him in refining a difficult legal proposition that did not command universal respect. It is said that his constitutional advocacy in the High Court when Solicitor-General for the Commonwealth reminded one of a half-back rolling a ball into a scrum - usually behind second row. The simile was an apt description of Sir Maurice's forensic skills. However I must say that for as long as I have known Sir Maurice he has never struck me as looking like a scrum half.

In 1961 the Bar Association decreed that new members had to read with an established practitioner unless exempted by the Council. This revived and made mandatory a custom that had fallen into desuetude for nearly forty years. The system is designed to turn theoretic learning into practical application, to provide a sound experience in preparation, evidence, pleading and the conduct of cases, and to assist the observance of Bar standards and traditions. In recent years the system has been supplemented by more formal training with lectures, seminars and course work in the readers' programme. But this is no substitute for the ongoing relationship whereby the master makes and hopefully honours a commitment to assist, without fee, in the vital early training of his or her reader. In doing this the master is indirectly repaying a debt of gratitude to whomever he or she read with seven or more years earlier. Of course it is not a one way street because the pupil that is worth his or her salt will be available to assist, again without hope of reward, in mentions, devilling and the like.

The symbiotic relationship of master and reader reflects much of what is good about life at the Bar.

Although the relationship between master and reader is both unique and personal it must be acknowledged that each may have a different perspective of the same events.

It was said (I think) of Johnson's biographer Boswell that his father was a very close and bookish man. The father was a busy barrister who was appointed a Lord of Session in Scotland in 1754 when Boswell was 14. Throughout his life, Boswell had a particularly fond memory of a day spent fishing with his father when he was a small boy. We would now term this "quality time" in a parent-child relationship. For Boswell it must have been a rare event but the happy memory remained with him into adulthood. After the father's death Boswell came upon his diary and was able to turn up the entry for the day spent fishing. Sadly the father's note read something like: "Unable to do any reading. Day wholly wasted fishing with son."

This sad little episode, which may be a little close to the bone for those of us who are parents, reflects the differing perspectives of master and reader. The reader craves that which the master lacks: time. Unfortunately the reader often needs it most when the master has it least. If a friend in need is a pest, there is little that will try a master's patience more than the reader who wants 10 minutes' time, preferably at 9.45 am as the master is making that last phone call, signing the last letter, and thinking of the first question in cross-examination. Yet in the overall scheme of things who is to say which is the greater need: the one who needs to know the answer to unwritten questions such as whether to robe in the District Court motion list; or the one who finds it difficult to honour the commitment to the reader because of later over-commitments to his or her own practice.

Sometimes the pupil's persistence at 9.45 is of mutual benefit. My secretary today reminded me of an occasion when I was pushing my pupil Annabelle Bennett into the lift to go off and do a 9.30 mention that I had overlooked until 9.44. I had spat out my instructions and turned back to a last-minute conference. As the lift door closed, Annabelle's voice called out: "But do you act for the plaintiff or the defendant?"

When Sandy Street and Tim Robertson sought admission to the Bar of Queensland one of the constitutional battering rams levelled at the dingo fence was s92 and this raised the question whether the Bar was "trade" or "commerce". Bennett QC who represented Street was at first reluctant to invoke s92, preferring to rest his case on the ultimately successful s117.

Qualms about s92 were based, in part, upon quite realistic concerns that success on this ground could expose the Bar's flanks to the tender mercies of the Trade Practices Commission. Perhaps someone out there had read Professor Michael Zander's work called *Legal Ethics: A Study in Restrictive Trade Practices*. Or perhaps the concern lay (with less justification) in exposure to remedies under Part V of the Trade Practices Act. After all, not everyone in Australia likes barristers. Our spouses get angry at our absences; our children at our neglect; our solicitors at our delays; our clients at our fees; our judges at our obtuse tediousness. Come to think about it, there's probably only our mothers left who continue to give unconditional love and who listen with appropriate admiration about our latest exploits.

Certainly in Australia it is open season on lawyers generally. In the Australian classic *Such is Life* Collins described one of his characters thus:

> "Educated for the law, his innate honesty shrank from the practice of his profession."

Regrettably there are many who continue to hold such unworthy views of lawyers as a group.

The sad fact is that we will each be judged by the public by reference to its perception of the Bar as a whole. But if the public think that all barristers charge at the rate of those who get written up in feature articles in the *Good Weekend* that is not a reason why all barristers should act as if they were the Greg Norman of the Bar. The modern practice of some barristers who charge what the market will bear or at a fixed hourly rate regardless of the client or the type of work involved is, in my view, a regrettable departure from the proper standards of the Bar. A member of the Bar (of whatever seniority) that takes the opportunity of stinging a client that has the capacity to pay, regardless of the barrister's seniority or the complexity of the case at hand is really sending out the message that the notion of service is confined to the legally aided client. If you think that I am alone in concern about daily or hourly rates read the judgment of the Chief Justice in *New South Wales Crime Commission v Fleming* when it comes out shortly in the New South Wales Law Reports.

Overcharging, with or without the concurrence of the solicitor involved, can amount to professional misconduct. It certainly has the tendency to lower the Bar as a whole in the esteem of an increasingly critical public. And the limitations on the legal aid purse will mean that if the cost of services continues to rise fewer litigants will share in those services.

On this more sombre note I will draw my remarks to a close. Sir Keith Aickin once told me that the difference between a Melbourne client and a Sydney client was that the former took counsel's advice and then sued whereas the latter sued first and then took counsel's advice. This may perhaps explain why Sydney barristers tend to charge higher fees for court work than for advice work. It certainly means that the stream of clients, big and small, is not likely to dry up so long as barristers remember that, in the last resort, they need the stream as much as the stream needs them. ❑

## Unappealing

The price paid for appealing once too often was graphically illustrated in *In re Chunbidya & Ors* (1934) 62 L.R. Ind App 36. The appellants and others had been convicted by the Additional Sessions Judge of Cawnpore at Banda under s.148 and s.302 of the Penal Code of rioting armed with deadly weapons and with murder and had been sentenced to transportation for life. They appealed to the High Court of Allahabad when, after hearing the arguments, the judges dismissed the appeals and enhanced their sentences to death! ❑

# Restaurant Review

## Chinese Chic

In Help Street in Central Chatswood is a restaurant called the "Fook Yuen". It has relatives in Hong Kong, San Francisco and Singapore. Its clientele is very predominantly Asian. Recently, my family were literally the only occidentals present, and one of us is an Aborigine!

The place is eclectic and classy, with attractive decor, nicely turned out waiting staff and courteous, efficient service.

The food is the most authentic in Sydney and of the highest quality. Steamed dim sum, vegetarian spring rolls, and the usuals, are there, but the delicious pork shank, cold and thinly sliced in its own jelly and served with a thin tangy sauce, was true to its name; the stewed tripe with blackbean, chilli and ginger equally delicious, and both took me back to Beijing. A mudcrab with chilli, blackbean, shallots and ginger was delicately spiced and very traditional.

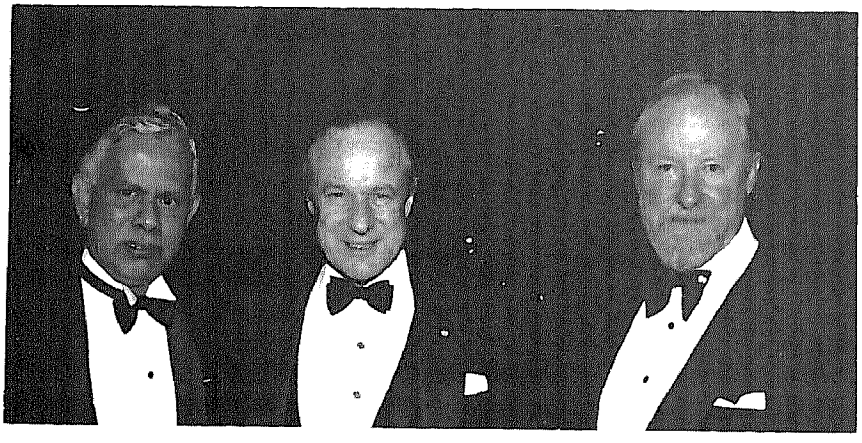
The vegetarian dish chosen was stewed vegetables with bamboo fungus, which, again, is authentic and rare in Australia. The dish was superb, the fungus setting off crisp hot broccoli, Chinese broccoli, shallots and asparagus, stewed in chicken stock and vegetable juices.

Washed down with beer and Beaujolais, this meal was superb.

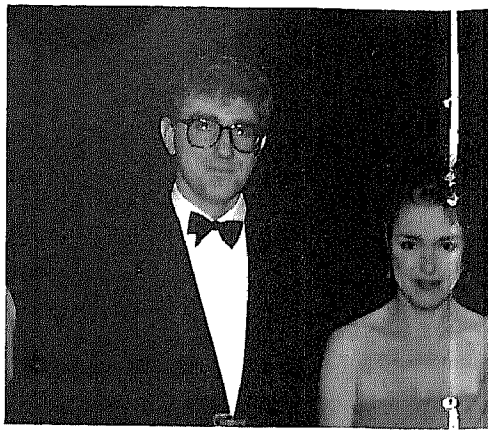
Book early for Friday and Saturday nights, but GO!

❑ John Coombs

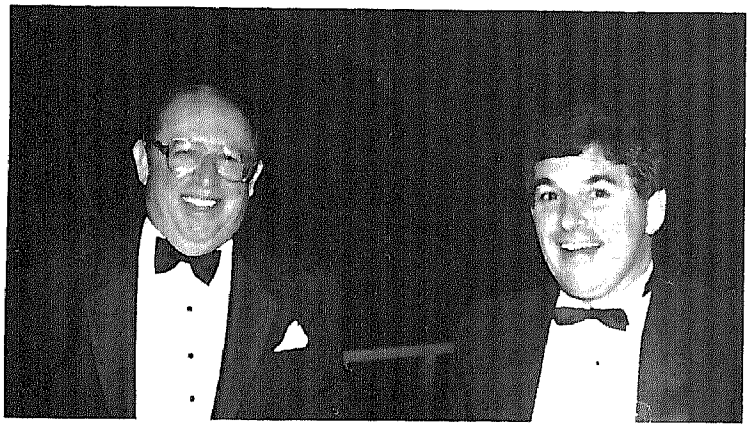
# Bench and Bar Dinner 1991



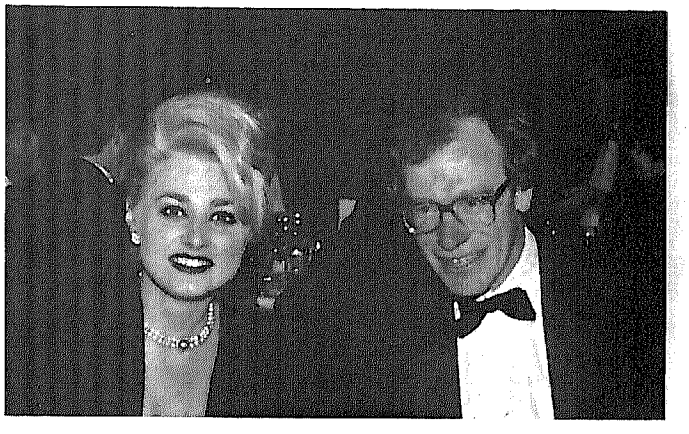
*Chandra Sandrasegara, Sir Laurence Street KCMG, K St J, Justice Purvis*



*John Marshall, Louise De[illegible] and Paul L[illegible]*

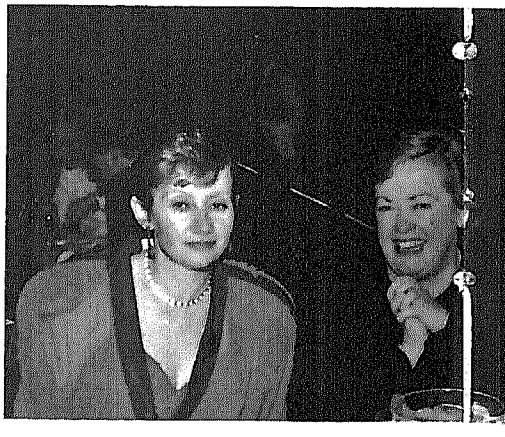


*Brian Murray QC and Clive Steirn*

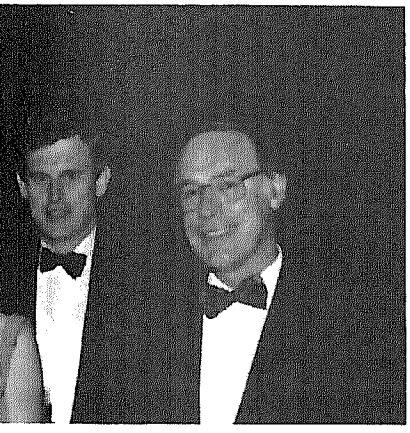


*Chrissa Loukas and Bernie Coles*

*Chief Justice Gleeson AO, Sir Nigel Bowen KBE (Guest of Honour) and Barry O'Keefe AM QC*



*Judith Gibson, Chris Cunningha[illegible]*



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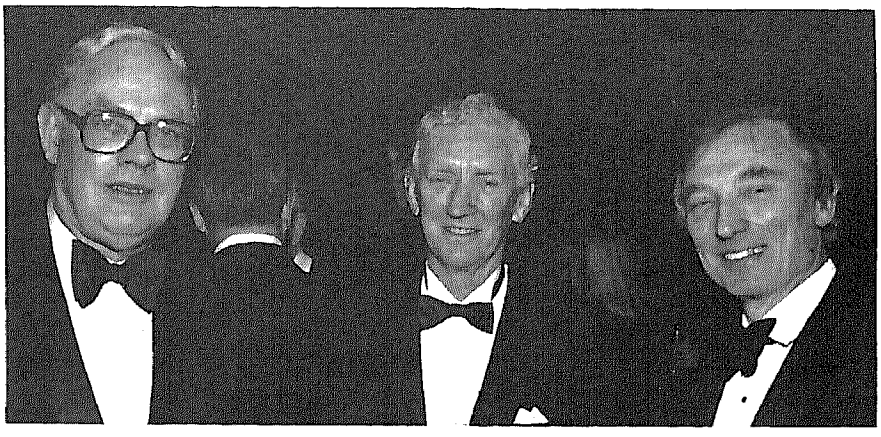
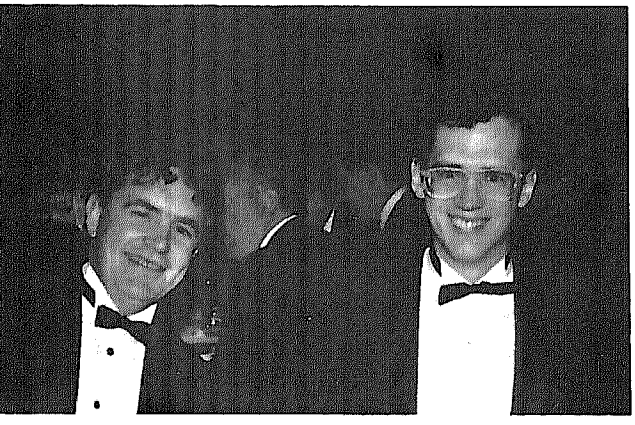


*Justice Lockhart, Justice Kearney and Justice Wilcox*



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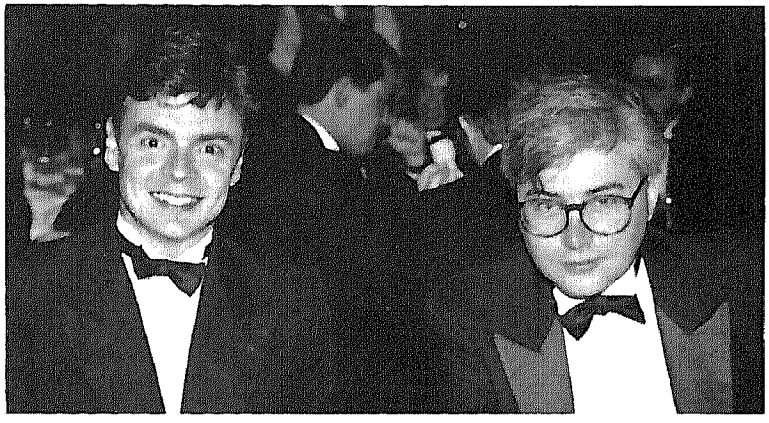
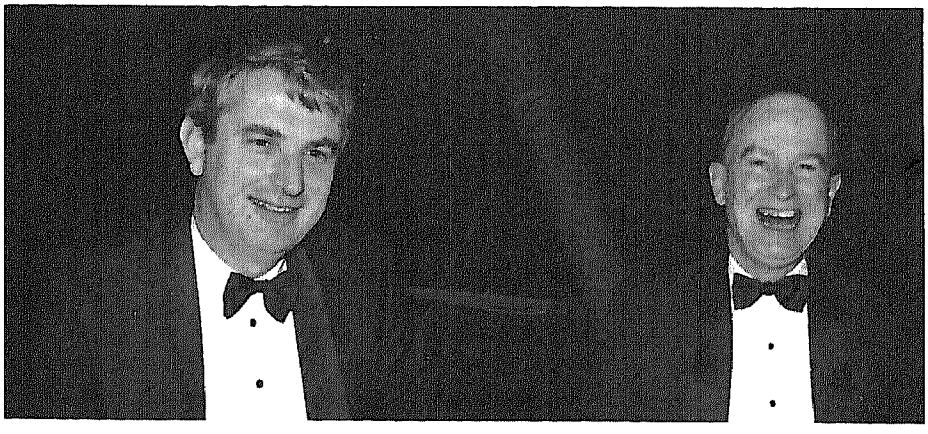


*Tom Blackburn and Bruce Connell*

*n and Elizabeth Cohen*



*Geoff Lindsay, Judge Flannery QC*

# *The Biter Bit -*
# *Literary Criticism & the Law of Defamation*

*In this article, being a paper recently delivered at a conference of the Law and Literature Society, his Honour Mr Justice Peter Heerey of the Federal Court of Australia surveys the chances a literary critic faces in the libel lottery. It should be noted that, being a Victorian, his Honour's remarks about the law of comment deal with the common law defence, rather than that provided by the Defamation Act 1974 (N.S.W.).*

One of Australia's very greatest jurists was Sir Frederick Jordan who was Chief Justice of New South Wales from 1934 to 1949.

His judgments were not only celebrated for their scholarship and lucid expression but were usually presented in striking and memorable language which argued the underlying common sense and logic of the law and its relevance to the needs of society.

His judgment in *Gardiner v John Fairfax & Sons Pty Ltd* (1942) 42 NSWSR 171 is a classic statement of the law of the defence of fair comment in the context of literary or artistic criticism.

The following passage (at p.174-175) is a little lengthy but illustrates better than anything I can why Sir Frederick held the pre-eminence that he did:

> It is essential that the defamatory matter sought to be defended as comment should be statements of opinion only. Where, however, the matter complained of is, on the face of it, a criticism of a published work or public performance, the statements are *prima facie* comments unless they are seen to be statements of fact or are proved to be such.
>
> The test whether comment is capable of being regarded as unfair is not whether reasonable men might disagree with it, but whether they might reasonably regard the opinion as one that no fair-minded man could have formed or expressed. The opinion must, of course, be germane to the subject matter criticised. Thus, if a critic denounced a book for its indecency it would not be beyond the bounds of fair comment if he also denounced the author for publishing such a book. But dislike of an artist's style would not justify an attack upon his morals or his manners. Whistler obtained his verdict, not because Ruskin had accused him of "flinging a pot of paint in the public's face," but because he was injudicious enough to call him a coxcomb into the bargain, and to suggest that he was guilty of wilful imposture.
>
> To establish malice, it is necessary to adduce evidence that the comment was designed to serve some other purpose than that of expressing the commentator's real opinion, for example, that of satisfying a private grudge against the person attacked. But this evidence is not supplied by the mere fact that the defendant has expressed himself in ironical, bitter or even extravagant language. A critic is entitled to dip his pen in gall for the purpose of legitimate criticism; and no one need be mealy-mouthed in denouncing what he regards as twaddle, daub or discord. English literature would be the poorer if Macaulay had not been stirred to wrath by the verses of Mr Robert Montgomery.
>
> In a particular case, however, the language used may itself disclose an ulterior purpose in the criticism, or may serve to support independent evidence of malice or unfairness. But ridicule alone is not sufficient. A striking example of this is supplied by the recent case of *Bergman v Macadam* (1941) 191 LT Jo 131 in which a sporting critic, in order to express the opinion that a professional boxer was past his work, said, in a broadcast, "Speaking of old men, why, just as soon as he has drawn his old age pension next Thursday, Kid Berg will totter along to Earls Court and fight Eric Boon ... After that fight Berg is almost certain to start thinking of a better way of earning his living". In an action by Bergman for slander, malice having been negatived, the judge awarded the plaintiff £500 damages on the footing that the comment was unfair. The Court of Appeal set the verdict aside and entered judgment for the defendant, holding that the comment was not only not malicious but not unfair, notwithstanding that it was "couched in language of exaggerated jocosity which seemed to characterise criticism of boxing contests".

Thomas Babington Macaulay, politician and civil servant, poet, essayist and historian, was one of the great masters of English prose. He has a double relevance to today's topic. As well as providing the paradigm of libel-proof critical demolition, he played a major part in the drafting of the Indian Penal Code, which included provisions on defamation that found their way into the Criminal Code of Queensland and from there to statutory provisions in Western Australia and Tasmania.

Robert Montgomery was a popular poet in the heroic mould who wrote two epics, *"The Omnipresence of the Deity"*, which ran to eleven editions, and *Satan: A Poem"*. Macaulay reviewed those works in the April 1830 issue of the Edinburgh Review. The criticism has survived long after the works which provoked it, and their author, have sunk into merciful obscurity.

Macaulay opened by attacking the then fashionable means by which publishers promoted worthless authors:

> Devices which in the lowest trades are considered as disreputable are adopted without scruple, and improved upon with a despicable ingenuity, by people engaged in a pursuit which never was and never will be considered as a mere trade by any man of honour and virtue ... We expect some reserve, some decent pride, in our hatter and our bootmaker. But no artifice by which notoriety can be obtained is thought too abject for a man of letters.

After commenting that "... the praise is laid on thick for simple minded people" Macaulay observed that:

> ... we too often see a writer attempting to obtain literary fame as Shakespeare's usurper obtains sovereignty. The publisher plays Buckingham to the author's Richard.

> Some few creatures of the conspiracy are dexterously disposed here and there in the crowd. It is the business of these hirelings to throw up their caps, and clap their hands, and utter their *vivas*. The rabble at first stare and wonder, and at last join in shouting for shouting's sake; and thus a crown is placed on a head which has no right to it, by the huzzas of a few servile dependants.
>
> The opinion of the great body of the reading public is very materially influenced even by the unsupported assertions of those who assume a right to criticise.

Zeroing in on his target, Macaulay says:

> We have no enmity to Mr Robert Montgomery. We know nothing whatever about him except what we have learnt from his books, and from the portrait prefixed to one of them, in which he appears to be doing his very best to look like a man of genius and sensibility, though with less success than his strenuous exertions deserve. We select him, because his works have received more enthusiastic praise, and deserve more unmixed contempt, than any which, as far as our knowledge extends, have appeared within the last three or four years. His writing bears the same relation to poetry which a Turkey carpet bears to a picture. There are colours in the Turkey carpet out of which a picture might be made. There are words in Mr Montgomery's writing which, when disposed in certain orders and combinations, have made, and will again make, good poetry. But, as they now stand, they seem to be put together on principle in such a manner as to give no image of anything "in the heavens above, or in the earth beneath, or in the waters under the earth".

The work which gave rise to *Gardiner v John Fairfax & Son Pty Ltd* was, to put it mildly, undistinguished. It was a detective story called *"The Scarlet Swirl"* written under the nom de plume "Mythrilla" and privately published by the author. Less than half a dozen copies were sold, but it attracted the idle talents of the *Sydney Morning Herald* reviewer. One of the passages complained of was:

> And when Braithwaite is not being impressive as leading detective ("he drew himself up, walked across the room to the victim, stooped down, examined him "He's dead", he said, significantly and solemnly") the lovely Jean is making good resolutions that they could not meet again.

It had been earnestly argued on behalf of the plaintiff that this was a statement of fact and not comment and was inaccurate because it meant, literally, that the book was entirely or mainly taken up with descriptions of the matters referred to. Sir Frederick remarked (at p.176):

> He is evidently using clumsily a form of expression which was used effectively by the person who said, slanderously, of Jebb that he devoted such time as he could spare from the neglect of his duties to the adornment of his person. The way of a critic would be thorny indeed if clumsiness of expression were treated as evidence of unfairness...

The only Jebbs listed in the Dictionary of National Biography are Irish clerics, judges, prison reformers and physicians all of whose extensive good works suggest they could not have provoked the attack recorded by Sir Frederick Jordan. Our research continues.

Time for a little black letter law. We have been looking at the defence of fair comment, but of course no question of defence arises unless a plaintiff can show that what was published of him or her was defamatory, that is to say it imputes some condition or conduct which would damage the standing and reputation of the plaintiff in the eyes of members of the community generally. This need not be the assertion of a moral failing. It is defamatory to say of somebody that he or she is incompetent. However, as we shall see, sometimes what provokes a plaintiff's claim for defamation in a critical setting is an assertion that there has been not just incompetence but a form of literary dishonesty.

In *Porter v Mercury Newspapers* (1964) Tas SR 279 the famous Australian writer Hal Porter complained of a review which he said imputed that he inserted "Anglo-Saxon" words in his autobiography *"The Watcher on the Cast Iron Balcony"* not with any concept of literary necessity in mind but in order to promote publicity by attracting the attention of the censor. In *O'Shaughnessy v Mirror Newspapers* (1970) 125 CLR 166 the actor and director Peter O'Shaughnessy complained that a review in *The Australian* of his production of Othello meant that the plaintiff, having at his disposal as good a group of players as Australia could produce, wasted their talents in a dishonest production devoted to enhancing his own role at the expense of the rest of the cast.

It can also be the critic who complains, as in *Turner v Metro Goldwyn Mayer* (1950) 1 ALL ER 449 where a prominent film critic complained of a letter from MGM to her employer, the BBC, complaining that she was "completely out of touch with the tastes and entertainment requirements of the picture going millions".

Such a mild reproach can be contrasted with what was said of the plaintiff in *Cornwell v Myskow* (1987) 1 WLR 630. In a column in the *Sunday People* headed *"Wally of the Week"* the following blast was delivered:

> Actress Charlott Cornwell made a proper prat of herself in Central's crude new catastrophe, *No Excuses*. And then she foolishly prattled about it pompously in public.
>
> This repellant rubbish about a clapped-out rock singer is without doubt the worst I have ever clapped eyes on. It bears no relation to rock and roll today - all concerned must have been living down a sewer for the last decade - or indeed to human beings.
>
> As a middle-aged star, all Miss Cornwell has going for her is her age. She can't sing, her bum is too big and she has the sort of stage presence that jams lavatories.
>
> Worst, she belongs to that arrogant and self-deluded school of acting which believes that if you leave off your make-up (how brave, how real) and SHOUT A LOT it's great acting. It's ART. For a start, dear, you look just as ugly *with* make-up, so forget that. And as for ART? In the short sharp words of the series, there is just one reply. It rhymes.

The imputations, that is to say what are said to be the defamatory meanings arising from the publication, were drafted by the plaintiff's Counsel in the following elegant terms:

(i) that the plaintiff had taken part in a production so repellently filthy that she and the others taking part in it might have been living down a sewer,

(ii) that the plaintiff was a middle-aged failure as an actress and singer, with a stage presence that drove the audience to the lavatories,

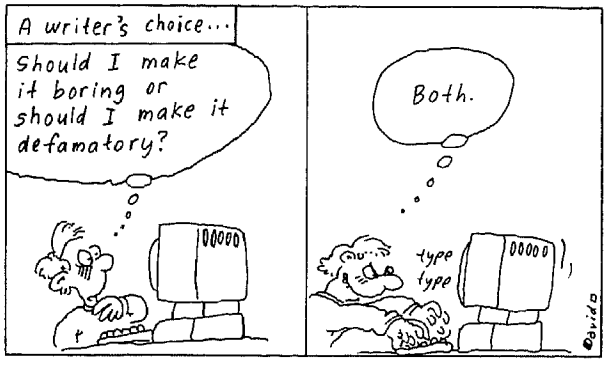
(iii) that the plaintiff was a foolish, ugly woman whose pretensions at acting in an artistic manner were utterly bogus and unjustified,

(iv) that the plaintiff lacked any ability whatsoever as an actress and was guilty of arrogant self-delusion in presenting herself as an actress to the public.

The plaintiff was awarded £10,000 damages by the jury but the defendant's appeal succeeded on the ground of wrongful admission of evidence. It is worth noting that according to the law report, counsel for the defendant on the appeal, Mr Michael Beloff QC,

> ...suggested that the courts were not the place to deal with someone's sense of grievance that another person had been rude in print about their bottom.

Our defamation law imposes what a very experienced judge in the field has called a "low threshold" of defamation. Thus it has been held defamatory to say of the leader of a political party that he has lost the confidence of his party: *John Fairfax & Sons Ltd v Punch* (1980) 31 ALR 624. Therefore if the case is sufficiently serious to warrant getting to court at all, the chances are that attention will be mainly concerned with whether the defendant has made out a defence, and particularly the defence of fair comment.




The defence of fair comment is important in this context because of the limitations which the common law places on the other two main defences of general application, justification and qualified privilege. To make out a defence of justification the defendant has to prove by properly admissible evidence the substantial truth of every defamatory meaning arising from the publication complained of. The defence of qualified privilege does not require the defendant to establish the truth of what was said, but it is only available if the publication was made on what the law considers a privileged occasion. It is now well established, at least since *Blackshaw v Lord* (1984) QB 1 and *Morosi v Mirror Newspapers* (1977) 2 NSWLR 749, that the mere fact of publication in the general media of matters of public interest is not in itself sufficient to constitute a privileged occasion.

A leading English text (Duncan & Neill on Defamation, 2nd edition, p.57) summarises the elements of the defence of fair comment as follows:

(a) The comment must be on a matter of public interest.

(b) The comment must be based on fact.

(c) The comment, though it can consist of or include inference of fact, must be recognisable as comment.

(d) The comment must satisfy the following objective test: Could any fair minded man honestly express that opinion on the proved facts;

(e) Even though the comments satisfies the objective test the defence can be defeated if the plaintiff proves the defendant was actuated by malice.

The first requirement will usually not present any difficulty since the courts have held clearly that there is a public interest involved in the criticism of literary and artistic works presented to the public.

The second requirement, that the comment must be based on fact, is the legal equivalent of the old journalistic aphorism that "Comment is free but facts are sacred". The rationale is that if a defendant sets out true facts and then his comment on those facts, then as long as the facts are truly stated, the reader is equally able to make up his own mind as to whether he agrees or not with the defendant's comment. However, it has been recognised that it is unrealistic to expect commentators on matters of public interest to express themselves strictly in a fact plus comment formula. Therefore it is sufficient if the facts, although not stated in the article, are sufficiently indicated to the reader or if they are matters of public notoriety. In the case of literary or artistic criticism of course there is the twist that the more damaging the criticism, the less likely it is that the reader will buy the book or see the play or film, with the consequence that the reader will never be in possession of the facts and able to form his own opinion. However that theoretical difficulty has not troubled the courts much.

The importance of factual accuracy was demonstrated recently by the celebrated *Blue Angel* case in Sydney where a restaurant recovered $100,000 damages. A vital issue was the question of the lobster. The defendant argued that the review did not say that the lobster was broiled for 45 minutes, only that the reviewer had waited for 45 minutes to be served. It seems the jury disagreed.

The third requirement is often of critical importance because if a statement is held to be a fact, as distinct from comment, then it has to be proved to be true, and so proved by means of admissible evidence. A comment is something "which is or can reasonably be inferred to be a deduction, inference, conclusion, criticism, judgment, remark or observation": *Clarke v Norton* (1910) VLR 494 at p.499 per Cussen J. But the law is not so ritualistic as to require a defendant to preface every comment by some formula such as "in my opinion" or "it seems to me that". A comment can take the form of fact provided it is recognisable in the context as an inference from the facts on which the comment is based: *Kingsley v Foot* (1952) AC 345 at p.356-57. It was on this ground that the appeal succeeded in *O'Shaugnessy v Mirror Newspapers*. The High Court held that what at first blush might have seemed like an assertion of fact (that the play was a dishonest production) was capable of being regarded by the jury as comment, and that the trial judge was wrong in

withdrawing that issue from the jury.

The fourth requirement has recently become a controversial issue in the law of defamation. The defence we are considering is called fair comment, but that is a somewhat misleading label. The defendant may make out the defence even though the comment is by ordinary standards unfair, in the sense that it might be prejudiced, bigoted or unreasonable. The test usually referred to was formulated by Lord Esher MR in *Merivale v Carson* (1887) 20 QBD 275 at p.281 and is in these terms:

> ... would any fair man, however prejudiced he may be, however exaggerated or obstinate his views, have said that which this criticism has said.

But does the emphasis on honesty, as distinct from reasonableness, mean that a defendant can only succeed if he establishes that he in fact held the opinion expressed in the comment? This question becomes important when the defendant is publishing a comment of somebody else, for example a letter to the editor or a review contributed by someone not employed by the publisher of a newspaper. In *Cherneskey v Armadale Publishers Ltd* (1978) 90 DLR (3d) 321 a majority of the Supreme Court of Canada held that the defendant has to satisfy two tests: the statement must be objectively a fair comment which would be made on the facts in the sense abovementioned *and* it must in fact have been the real opinion of the defendant. The question arose in this way. A newspaper published a letter which accused the plaintiff of holding racist views. The writers of the letter were not called as witnesses and there was no evidence as to whether or not the views expressed in the letter were the honest views of the writers. The defendants, the publisher of the newspaper, did give evidence that the letter did not represent the editor's view or the views of the newspaper. The majority of the Supreme Court held that the defence of fair comment failed because there was no proof of the honest belief of the writers and honest belief by the defendants themselves had been denied.

This decision caused a major controversy and provoked some legislative changes in parts of Canada. The reason is not hard to see. If a newspaper were to publish conflicting views by writers of letters to the editor or other commentators, the publisher could not possibly hold an honest belief in all the views expressed. Therefore the defence of fair comment would not be available and one of the vital functions of a free press, that of providing a forum for public debate, would be gravely impaired.

The decision in *Cherneskey's* case was criticised in the 2nd Edition of Duncan & Neill (1983) and in *Hawke v Tamworth Newspaper* (1983) 1 NSWLR 699. See also (1985) 59 ALJ 371.

Recently the English Court of Appeal in *Telnikoff v Matusevitch* (1991) 1 QB 102 has in my respectful opinion comprehensively demolished the *Cherneskey* heresy. The court (at p. 119) expressly adopted as correct the statement of the law from Duncan & Neill to which I have already referred.

The fifth requirement also bears on the question of the state of mind of the defendant, but with this important difference. If the defence of fair comment is made out it will only be defeated if the plaintiff shows that the defendant was actuated by malice. Thus it is not up to the defendant to establish the honesty of his state of mind. Malice in this context is a technical concept which includes what would ordinarily be considered as malice, that is to say spite or vindictiveness, but also it extends to what might be called wrongful or improper motives or a lack of honest belief in the view expressed or, to use the example given by Sir Frederick Jordan, the gratification of a private grudge.

Finally, I need to mention a continuing controversy affecting the law of fair comment where the comment imputes dishonourable conduct to the plaintiff. There are, on the analysis of the cases by Duncan & Neill (p.67) three possible views:

(a) the defence of fair comment does not apply at all. Suggestions of dishonourable conduct have to be justified by showing they are correct inferences from primary fact, that is by a defence of justification;

(b) the defendant has to show that the comment was a reasonable inference from the facts;

(c) the ordinary test of fair comment applies, viz. could any fair minded person express that opinion on the proved facts.

There are authorities which support each view, but I think the third is to be preferred. This conclusion is supported by a remark of the High Court in *O'Shaugnessy* where their Honours said (at p.174):

> To safeguard ourselves from too broad a generalisation we would add that it is not our view that an imputation of dishonesty is always an assertion of fact. It is part of the freedom allowed by the common law to those who comment upon matters of public interest that facts truly stated can be used as the basis for an imputation of corruption or dishonesty on the part of the person involved.

It is difficult to see the logic behind the contrary views. Dishonesty is to be deplored and an imputation of it is plainly defamatory, but there are other human failings just as bad or even worse.

In conclusion, I think that the literary or artistic critic is not too badly restricted by the law of defamation. As Duncan & Neill say (at p.69), almost any comment is defendable as fair comment provided the contents of the work criticised are not misrepresented and no personal attack is made on the plaintiff.

It remains to be seen however whether the review of a recent work in England will provoke a libel action. The book in question was *Memoirs of a Libel Lawyer* by solicitor Peter Carter-Ruck and it was reviewed in *The Spectator* by Ian Hislop, who commented:

> When journalists read a particularly dull piece about a potentially interesting subject they tend to conclude that it has been "lawyered", i.e. that everything of interest has been removed for legal reasons. This is a whole book that has been "lawyered" by its author and the result is that all Carter-Ruck's clients are praised extravagantly and so are all the solicitors, barristers and judges he has ever come across.

Is it defamatory to say of a libel lawyer that he has written a book which is dull because it is not defamatory? ❑

## Why Let Windbags Waffle on So Long? *

*David Pannick, an English practising barrister, suggests the practice of oral advocacy may need re-examination.*

The art of advocacy has received little attention from legal theorists. No doubt they are reluctant to witness pain, and to subject themselves to agony, in the interests of their science. Robert J. Martineau, the distinguished research professor of law at Cincinnati university, is a notable exception. For three months at the end of 1987, he forced himself to study the performance of our advocates in the Court of Appeal at the Royal Courts of Justice.

The result was not, as might be expected, the removal of the professor by men in white coats to a quiet place in which he could make a steady recovery. He survived the ordeal and has now published the fruits of his research, *Appellate Justice in England and the United States: A Comparative Analysis* (William S. Hein & Co, New York, $60).

Professor Martineau is not aiming to win friends in the Temple. He says that few of the barristers he observed understood basic principles of public speaking. Their arguments were unstructured and their preparation inadequate. "Some barristers appeared to think that it was essential to say, 'My Lord' at least once in every sentence", he says. The basic approach of the barrister "was to raise as many issues as possible ... in the hope that some point would find favour with the court". In "most of the appeals" that Professor Martineau heard argued by Queen's Counsel, "the QC was unable to answer even the simplest question about the appeal and had to turn to his junior counsel for advice on how to respond". In the United States, in contrast with England, oral advocacy in appellate courts is confined to less than an hour for each party. Yet Professor Martineau found that the English advocate, who tended to address the court for a day or more, spent no more time than his or her American counterpart in arguing the central point in a case. The remaining court hours occupied by the English barrister were devoted to finding and reading documents and authorities, or by preliminary submissions that could more efficiently be made in writing. Professor Martineau concluded that lengthy oral advocacy in appellate proceedings is ineffective and inefficient.

Even if all English barristers had the skills of Cicero, it is difficult to justify the willingness of the English judge to spend his professional life listening (or at least appearing to listen) to the counsel's long submissions. Legal authorities and documents are slowly recited to judges, whose own ability to read is not in doubt, and who could therefore more efficiently acquaint themselves with the material in private in a fraction of the time, leaving the advocate to draw attention to particular passages on which special reliance is placed.

English barristers have no difficulty in accommodating themselves to the practice in the European Court of Justice in Luxembourg and the European Court of Human Rights in Strasbourg of supplementing written submissions with oral argument of about 30 minutes.

Barristers have not always been prepared voluntarily to obey the essential principle of effective advocacy - keep it short and to the point - so changes are being made in the regulation of advocacy, which will have the welcome effect of cutting the amount of court time occupied by oral argument.

The Court of Appeal applies a Practice Direction, making compulsory the provision of written skeleton arguments. The success of this in limiting unnecessary oral advocacy should encourage other courts to move in the same direction. Lord Templeman has suggested that "the length of oral argument permitted in future appeals [to the House of Lords] should be subject to prior limitation". Professor Martineau's observations about the quality of English advocacy are controversial. He does not record whether the appeal court judges shared his opinions. Any critic must recognise the unusual demands of the advocate's job. Fellow lawyers can only empathise with a United States defence counsel who told the jury in his closing speech that he was doing his job "to the best of my ability with what I have had to work with". However hard the advocate tries, the judge may not appreciate his efforts. In 1982, the Supreme Court of Michigan censured a judge for responding to counsel's submissions by declaring "whether your client is guilty or innocent, you're a despicable son of a bitch".

Professor Martineau's conclusions about the need to confine the amount of advocacy are, however, compelling. As the legal system strains under the pressure of too many cases to be decided by too few judges, serious consideration should be given to whether unlimited quantities of court time should continue to be made available to long-winded lawyers. If advocates are not able to make short submissions, they may find the hitherto tolerant English judiciary imitating the Canadian judge who is said to have dismissed a lengthy legal argument with the short judgment: "Bullshit, costs to the respondent".

❑ David Pannick is a practising barrister and a Fellow of All Souls College, Oxford

* First published in *The Times*, 20 August 1991

## Getting It Off Your Chest!

A compensation claim was being heard before Justice D F O'Connor, President of the Administrative Appeals Tribunal. The worker was recalled after the employer showed some film putting in conflict her earlier evidence as to what she could and could not do. When she was called in reply she decided to make a clean breast of it by saying to the Tribunal:

"Your Honour, when I got out of the box yesterday I looked at my barrister and I thought to myself Oh shit I've just committed perjury".

Who said proceedings before the Administrative Appeals Tribunal are not "informal". The case was settled. ❑

# *Bar Association Plans to Acquire First Floor Selborne Chambers* *

*Jane Needham (St James Hall) and Justin Gleeson (Wentworth Chambers) outline the background and the issues which have arisen in the recent debate concerning the housing of the Bar Association.*

On 24 June, 1991 the President of the New South Wales Bar Association, Mr B S J O'Keefe AM QC announced that, subject to Bar Council approval, the Bar Association had agreed to purchase from Counsel's Chambers Limited the first floor of Selborne Chambers for $2.4 million. The reason given for the purchase was that the Bar Association was bursting at the seams. Its functions have increased dramatically, in particular in the areas of the reading course, legal education, regulation and monitoring of professional conduct and membership. Because of these activities, and the increase of numbers at the bar, the Bar Association's staff has increased to eleven. The acquisition of the first floor of Selborne Chambers would allow accommodation for the association staff in one area and provide much needed space for use in connection with the reader's programme and CLE. Advice had been obtained from a valuer on the appropriate price to be paid.

Subsequently, a number of dissentient barristers led by D E Grieve QC, requisitioned an extraordinary general meeting of members of the Bar Association for 6 August, 1991 to consider a motion:

> "That the company disapproves of the action or proposed action of its directors in purporting to have it acquire rights of occupancy in respect of the first floor of the building known as Selborne Chambers at 174 Phillip Street, Sydney and declares all contracts, agreements, arrangements and understandings made or purportedly made in connection therewith to be void and of no effect."

The extraordinary general meeting of members of the Bar Association was held on 6 August, 1991. After considerable debate that meeting was adjourned to a date later fixed as 24 September, 1991.

On 1 August, 1991 D E Grieve QC suggested that a possible resolution of the matter was for an agreement to be reached between the Bar Association and Counsel's Chambers Limited to the effect that the Bar Association would cede its equity shares in consideration for the right in perpetuity to occupy its existing space in the basement and sub-basement and the first floor for no rent.

The provisions of the Memorandum and Articles of Counsel's Chambers Limited relevant to this proposal are as follows:

(a) One of the objects for which Counsel's Chambers Limited is established is to permit such part of the building as the directors of Counsel's Chambers may approve to be used by the Bar Association upon terms and conditions as the directors may decide (Memorandum, Clause 2(b)(i)).

(b) The Bar Association holds seven deferred ordinary shares in Counsel's Chambers Limited which entitle it upon a winding-up of the company to all assets of the company remaining after payment to the holders of all shares of the capital paid up on the shares (Article 6A(a)(iii)). The Bar Association shares also entitle it to have the sole right to vote upon a resolution for the winding-up of the company, unless the Bar Association decides that it consents to the resolution (Article 76A).

Thus although the Bar Association is entitled to the surplus available on a winding-up of Counsel's Chambers Limited, it does not have any right to occupy any space in the Wentworth/Selborne buildings save as permitted by the directors of Counsel's Chambers Limited.

On 12 September, 1991 the Bar Council put to Counsel's Chambers Limited for its consideration a revised proposal under which the Bar Association would still obtain the right to occupy first floor Selborne Chambers without making a capital payment; however it would relinquish its right to participate in the surplus available upon a winding-up and would agree to meet maintenance charges proportionate with other shareholders. Also, the Bar Association would still maintain a right to prevent disruption of its occupancy or a winding-up. This revised proposal was put in the context of further valuations of first floor Selborne being obtained which were between $1.7 and $1.8 million as opposed to earlier higher valuations.

The adjourned extraordinary general meeting of members of the Bar Association was held on 24 September, 1991. There were two motions formally before the meeting. The first was the original motion put before the meeting of 2 August, 1991. The second was an amendment to that motion (foreshadowed in a letter of Grieve QC of 10 September, 1991 and amended again at the meeting itself) whereby the motion disapproving the action of the directors of the Bar Association in acquiring the first floor of Selborne was limited to an acquisition "for $2.4 million or any other capital sum".

O'Keefe QC, as Chairman, reviewed the work that had been done since the previous meeting to determine the best course for the Bar Association to meet its accommodation problem. He indicated that the revised proposal which had been put to the Bar Association for occupancy of first floor Selborne Chambers without capital cost but in exchange for relinquishment of certain rights on a winding-up would not be put to this meeting. It would be the subject of a separate extraordinary general meeting of the Bar Association and full information would be provided to members in relation to the proposal. Similarly, it was indicated that Counsel's Chambers would call an extraordinary general meeting of its shareholders to consider the proposal.

Various speakers, including Grieve QC, spoke for and against the motion. After some time a procedural motion was raised, namely that the motion and amended motion not be put. After a lengthy attempt to count the votes, initially on a show of hands, then on a division and then in parliamentary manner the procedural motion was passed 250 to 200 with one abstention. The meeting then closed.

* This article was prepared before the meeting of the Bar Association on November 13. At that meeting (which was attended by approximately 500 barristers) a motion was passed to the effect that the meeting was of the opinion that the Bar Council should proceed to negotiate with Counsels Chambers a lease subject to ratification by a General Meeting of the Association.

Thus the current position is that extraordinary general meetings of each of Counsel's Chambers Limited and the Bar Association will be called in the next month or so to consider the revised proposal being worked out between the company and the Bar Association. Some of the issues which emerge from the debate are as follows:

**(a)** ***Does the Bar Association need further space?***

The decision to move is based upon the needs of the Association, both in relation to its administrative functions and duties laid upon it by the *Legal Profession Act*, for more space. The proposal to occupy the first floor of Selborne includes rooms to be used for conferences, references and arbitrations, which obviously will generate some income. It would also enable the lectures in the Reader's programme to be held there, rather than, as is presently the case, holding lectures in spare Court rooms and in the Bar Association dining room. The question is really, does the Bar Association need further space in the Phillip Street/Martin Place area of the CBD?

**(b)** ***Should the Bar Association acquire further space within Wentworth/Selborne?***

On the one hand, the following matters are put. First, Wentworth/Selborne is located most conveniently to the Supreme and Federal Courts. Second, if the Bar Association were to relocate its other facilities such as the kitchen and dining room to other premises, there would be substantial wasted costs involved. Third, consultants engaged by the Bar Counsel examined a series of other options in nearby city buildings, each of which emerged as more expensive than the option to take up further space in Selborne.

On the other hand, some question whether the first floor Selborne in fact represents the best option financially for the Bar Association. Further, Grieve QC has suggested that it is contemplated that Wentworth/Selborne will be demolished within the next ten years. He says this is apparent from the 1989 purchase by Counsel's Chambers Limited of Frederick Jordan Chambers for approximately $15 million; this suggests, so he says, a plan to acquire all adjourning properties and redevelop the area between the Supreme Court, Phillip and Macquarie Streets and Martin Place. In addition, Grieve QC suggests that the Supreme Court/Federal Court complex is likely to prove inadequate to house those Courts within the comparatively near future which indicates a likely wholesale move to the Liverpool/Goulburn Street precinct. If that occurred, the Bar, as a whole, would move in that direction. For these reasons Grieve QC casts doubt on whether Selborne is the appropriate place for the Bar Association to continue its headquarters.

As a further matter, the Bar Association's occupation of Selborne Chambers has led to a view amongst some barristers outside the Selborne/Wentworth complex, and particularly amongst those not located in Phillip Street and its immediate environs, that the Bar Association and its facilities are primarily for the use of barristers within that complex. The point was made by some that it may be desirable, although expensive, for the Bar to move to another location completely so that any harmony remaining within the Bar may be preserved and relations between members of the Bar and the Association enhanced. In view of current trends towards decentralisation, and in particular the movement of Courts to the Liverpool Street area, the location of the Bar Association next to the Supreme and Federal Courts to some merely underlines the perceived isolation of District and Local Court practitioners and, in particular, the criminal Bar.

**(c)** ***If Selborne, at what price?***

Presumably the notices of general meeting for the Bar Association and Counsel's Chambers will include material supporting the valuation of the proposal from each side's point of view. The latest proposal involves a fundamental trade off. From the Bar Association's point of view, what is the value in obtaining largely rent free accommodation for the foreseeable future as against the loss of the right to receive the surplus on a winding-up at some unknown future date? The question from the point of view of members of Counsel's Chambers Limited is the reverse. One might think that the further away the likelihood of a winding-up, the greater is the value to the Bar Association in acquiring a largely rent free occupancy.

A further issue which arises is that under the latest proposal the Bar Association will have to pay "ordinary maintenance charges" associated with the first floor Selborne. Grieve QC says that this ought not include that part of the maintenance fees currently levied on Counsel's Chambers shareholders which funds the payment of interest on the 1989 purchase Frederick Jordan Chambers. The acquisition of Frederick Jordan Chambers is an issue which is the basis for a substantial level of discontent amongst some barristers outside (as well as inside) Selborne and Wentworth and in particular has made the issue presently under consideration more volatile.

**(d)** ***Is a fundamental change in the relation between Counsel's Chambers and the Bar Association appropriate?***

It was an important part of the establishment of Counsel's Chambers Limited that it would provide accommodation for the NSW Bar. The holding by the Bar Association of the "equity" shares reflected this. That situation has changed over time since now only 40% of barristers are located in Wentworth/Selborne. The problem of finding suitable accommodation for barristers, whether new barristers or established ones, is increasingly devolving upon small groups of barristers. The Bar Association's ability to look after the interests of barristers with their accommodation has declined. This proposal may mark a further divergence from the original nature of the relationship between Counsel's Chambers and the Bar Association, as it serves to confirm that the relationship between the two bodies is essentially a commercial one.

**Conclusion**

A disturbing factor arising from both meetings is the level of dissatisfaction apparent from the views of barristers "outside". The desire of the Bar Association to stay within the confines of its current home, in Selborne and Wentworth Chambers, is seen by some, rightly or wrongly, as an alliance with the practitioners in that building. It is to be hoped that further meetings of the Association can be conducted without the previous high levels of personal acrimony and with the understanding that a view taken on the issue of the Association's accommodation is not a view taken either pro-or anti-Grieve QC or the members of the Bar Council themselves. ❑

# Obituary

*Eulogy at the Memorial Service for Norman John Travers (7 August 1924-19 May 1991) at Naval Dockyard Chapel Garden Island on Monday 27 May 1991. Delivered by Judge J.L. O'Meally*

The life of Norman Travers touched each one of us here and to some degree, large or small, influenced the lives of all of us. While we gather this afternoon to lament his passing, and to offer our sympathy to Joy and Greg and others of his family, let us also give thanks to God for the joy and happiness his life brought to our lives and acknowledge the benefits we received by knowing him and the influence he had upon us.

After 26 years in the Navy Norman came in 1966 to work as a Steward for the NSW Bar Association. He had been recruited by Captain Bill Cook, then Assistant Registrar of the Association, who himself had recently retired from the Navy. Bill accurately surmised Norman's presence would serve the Bar Association well.

Norman soon settled into the life of the Bar. He learned its traditions and accepted them. Before long he knew the names of all the members of the Association and knew their likes and dislikes, particularly concerning brewed, fermented and spirituous liquors. As a person walked through the door of the Common Room, Norman would identify him, or her, and by the time he, or she, had arrived at the bar, Norman would have the usual prepared, poured and waiting.

He developed favourites among the members of the Bar and to these he gave special attention at Bench and Bar Dinners and at other functions.

Norman also became deeply involved in the sporting activities of the Bar. Each time the Queensland or Victorian Bars played cricket against the NSW Bar, Norman would be present to assist in the serving of potations and he was frequently a member of the NSW team. The defeat of the visitors, when it occurred, was usually the result of Norman's contribution in one or the other capacity.

Norman was then, as always, a man of cheerfulness. Without ever prying, he took an intense and personal interest in the careers of young members of the Bar, especially those who, like myself, started at the Bar around the time he came to work for the Association. He was interested also in their extra-curial activities, in their romances, courtships and in their families. He was interested in their forensic successes and failures. Norman knew it was brilliant advocacy alone which secured a good result from a Jury or Judge and the blind perversity or crass stupidity of the forum which caused a bad one.

He knew how to encourage and how to praise. If a young barrister, or one not so young, was down, Norman would stand him up, dust him off, and prepare him for the next affray.

Without extra pay Norman worked long hours as the Steward in the Common Room. Sometimes he would bring Joy, "The Managing Director", he would call her, to the premises to secure his departure before 10 o'clock. The ruse was not always successful. Under his patronage and with his encouragement the Bar Choir was established and, though now defunct, its members then included some who now are Her Majesty's Counsel and Judges. Attendance at "Choir Practice" was not always an acceptable excuse for the late arrival home of some of its members, but Norman was quite willing to certify, in writing if requested, the cause of a delayed departure from Chambers.

It was Norman's work at the Association and in the Navy which qualified him to be called as an expert witness in an action for damages before Mr Justice Mears and a Jury. A plaintiff was suing a brewing company for damages for injury he received when tapping a keg which exploded. Evidence of safe practice and proper instruction was needed, but lacking, and so Greg Sullivan QC, of course not then yet Solicitor General, who was appearing for the plaintiff, approached Norman in the Common Room and asked if he would give evidence on the plaintiff's behalf. Norman agreed and when called proceeded to support the plaintiff's case by giving the most outrageously inadmissible evidence. Unsuccessful objection after unsuccessful objection was taken by the defendant's counsel until, ultimately, it became too much for Mears J, who was moved to say: "Mr MacGregor, please be quiet and let Norman tell his story." The jury returned with a handsome verdict for the plaintiff. Norman remained working for the Bar Association for eight years until the combined effects of the injury to his head, suffered while playing cricket against a team from the Royal Navy, and an increasing workload at the Association made it too much. His doctors advised a change of occupation and the late Mr Justice Riley invited him to join his staff. Norman remained on his staff until the Judge died, but continued to attend functions at the Bar Association until this year, giving special attention to those he knew and of whom he approved.

He joined my staff in 1980 and we worked happily together for ten years.

Friendship pure and unalloyed was Norman's special gift. In his friendship he gave of himself and freely. He came into the lives of many as a warm wind of Spring. Each of us needs friends with whom we can share a problem and in Norman's friendship there was a sense of understanding and the power of perception, kindness and affection.

Norman had a great interest in people of all kinds. He enjoyed meeting people as he enjoyed being in the company of friends. He could mix easily with the mighty and the lowly, with the Prince and the Pauper, and he had the same set of manners for all. Vice-Regents, a Cardinal, Chief Justices and Ministers of the Crown knew Norman and addressed him by his Christian name.

Some years ago Norman and I were in Melbourne, and during the lunch hour we were walking along Collins Street.

Our progress was interrupted by one of two policemen outside an hotel and, at the same time as a red carpet was rolled to the pavement's edge, the Vice-Regal Rolls Royce pulled up. As the Governor of Victoria alighted, the waiting crowd applauded politely and His Excellency's eyes fell upon a familiar face: "Hello Norm," he said, "What are you doing here? I thought you were in Sydney."

Norman was thoroughly and loyally Australian. He enjoyed and was proud of his service in the Navy and to the Law. He liked to recognise by rank those members of the profession who served as Reserve Legal Officers in each of the Services and, while he gave preference to Naval officers, those in the Army and Air Force were given tolerable acceptance. Those who having retired from the Navy came to the Bar were given special attention.

Norman enjoyed travelling on circuit and took an interest in the work of people who inhabited rural Australia. He respected the toil of working men and women and no doubt this respect had its genesis in his own early life on his family's farm not far from Lithgow, where he worked long and hard. He retained the capacity to marvel and wonder at new experiences.

Norman had no love of scandal or gossip and he respected the right to privacy. His dislike of others related directly to pretensions. He did not often praise or blame. His strongest criticism was to say a particular task could have been performed differently.

Norman had a respect for tradition; it was a guide to him for what was proper and a guide to methods that had proved to be workable. This, I think, explains Norman's aversion to change. He had difficuilty in accepting that smoking was no longer permitted on the Court's premises and frequently disappeared to the Bar Room where obedience to such injunctions is not observed.

Like Churchill's father-in-law, he did exactly what he liked and liked what he did. Throughout the time I knew him the only person who could get Norman to do something he did not wish to do was Joy, and I suspect it may have been the same when he was in the Navy.

To those Norman knew, each meeting was accompanied by cheerfulness and a joke, frequently at the other's expense. This was because he had a capacity to see the true person free of all defensive layers and it confirmed his warmth and good humour.

In his work with me Norman was a man of loyalty, integrity and discretion. We enjoyed one another's company and took an interest in each other's family. On Friday last a greeting from Norm arrived at my home which he posted in Fiji shortly before he died. With typical concern and good humour he sent his wishes to my wife and children, to my staff and to the Judges and staff of the court. He thought he could remain solvent for another week.

Norman's death was sudden and without pain. And now that he is gone from us we extend our sympathy to Joy and to his family of whom he was the loving and much loved head.

The capacity of the human heart to love means it must also mourn a loss; but we can remember Norman's deeds and thank God for the benefits and joys we received from his friendship. ❑

# *Settlement Week 1991*

*The writer is a member of the committee which organised and implemented Settlement Week 1991. The views expressed here are not necessarily those of that committee. The writer acknowledges with gratitude his reliance in part on a draft evaluation of Settlement Week 1991 by Dr C Chinkin and Mrs M Dewdney.*

**What was Settlement Week 1991?**

Settlement Week 1991 took place in the week of 14-18 October 1991.

In and around that week, the parties in 180 cases awaiting trial in the Supreme Court voluntarily took part in mediations of the disputes that gave rise to those court proceedings. About 66 mediators, all legally qualified and counting 4 practising barristers amongst them, helped the parties attempt to negotiate settlements to their disputes.

The results were striking: more than 70% of the matters mediated settled. At 30 October 1991, the results were as follows (statistics courtesy of the Law Society of New South Wales):

**Statistics**

| | |
|---|---|
| Total number of matters listed and proceeding to mediation - | 237 |
| Number of matters dealt with during Settlement Week (14-18 October 1991) - | 164 |
| Number of matters dealt with as at 30 October 1991 - | 180 |
| Matters settled - 128 (71.1%); matters not settled - | 52 |

**What was the rationale for Settlement Week?**

Most civil cases settle before hearing. The objective of Settlement Week was to give parties and their legal representatives an opportunity to negotiate settlement, in the structured setting of mediation and under the aegis of the Law Society, well before the hearing. Settlement Weeks are widely used for this purpose in the United States.

**What is mediation?**

Mediation is not arbitration. It is a structured negotiation assisted by a trained neutral third party called a mediator. It is voluntary in two senses. First, entering into mediation is voluntary. Second, the mediator has no power to bind the parties to any particular result. If they reach a settlement, it is because they agree to it. The parties are required to attend in person with their legal representatives and, if a party is other than a natural person, someone with authority to settle the proceedings is required to attend.

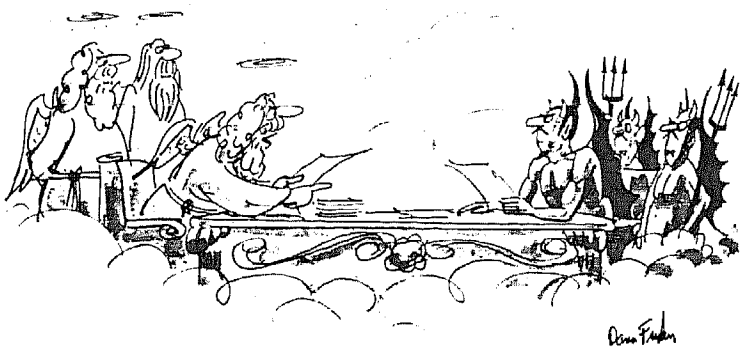
Mediators use several proven techniques:

They help the parties isolate the issues in dispute and assess the strength of their positions with respect to the issues.

They develop options for resolving the dispute.

They try to frame agreements which accommodate the interests and needs of the parties.

Mediations are confidential and are conducted on a "without prejudice" basis.



*"Then it's agreed. Watson, Smith, Teller, and Wilson go to Heaven; Jones, Paducci, and Horner go to Hell; and Fenton and Miller go to arbitration."*

Drawing by Dana Fradon; © 1987 The New Yorker Magazine, Inc.

**Who were the mediators?**

The Law Society assembled a panel of about 65 mediators, all legally qualified and with training in mediation from bodies such as LEADR (Lawyers Engaged in Alternative Dispute Resolution), the Australian Commercial Disputes Centre, the Community Justice Centre and the Family Mediation Service. Five of the mediators were practising barristers, including one Senior Counsel (though only four were able eventually to participate in Settlement Week). All mediators were required to attend a full day's additional training, and optional training on mediating personal injury disputes was also organised.

**Who organised Settlement Week?**

Settlement Week was an initiative of the Law Society's Dispute Resolution Committee. It began work on Settlement Week 1991 in August 1989. That Committee received co-operation from the Supreme Court, the Bar Association of New South Wales, the GIO, the Legal Aid Commission, the Attorney-General's Department and plaintiffs' solicitors, all of which provided representatives who served on a hardworking planning and implementation committee. The Law Foundation provided a grant towards administrative costs of nearly $50,000.

**How were cases selected for Settlement Week?**

This was a two-step process. First, with great assistance from the Supreme Court's staff (particularly its Chief Executive Officer and Principal Registrar, Warwick Soden), about 3,000 cases awaiting trial were selected from the Court's lists. On 8 March 1991, 6,500 letters, printed by the Supreme Court, were sent out over the signature of the President of the Law Society to the solicitors for the parties in those cases.

The letters invited and encouraged the solicitors to seek instructions to submit these cases to mediation in Settlement Week. Only if all parties to a proceeding agreed would the matter proceed to mediation. This - the agreement of the parties to mediation - was the second step in selection of cases for Settlement Week.

Eventually, about 1,450 positive responses to the letters

were received; this produced about 240 matters where all parties agreed and all parties paid the fee. These cases proceeded to mediation in Settlement Week.

Many of the negative responses to the letters revealed that the proceedings concerned had already settled, had been set down for trial, or had been discontinued.

**What was the financial structure of Settlement Week?**

The parties were charged $800 for each mediation, divided among the parties as they agreed. For this, they received a preliminary conference with a mediator of about an hour, and a three-hour mediation. The mediator was paid $800 for this by the Law Society. If the parties wished to continue the mediation beyond these hours, they had to agree to pay their mediator for the additional time at a rate to be agreed, but not to exceed $200 per hour.

The parties also agreed, by executing a detailed mediation agreement, that if their mediation was not successful, its costs would be costs in the cause.

**What was the role of the Bar?**

As mentioned already, four barristers were mediators. Counsel appeared at a significant number of mediations (the detailed statistical evaluation of Settlement Week was not complete when this article was written). Anecdotal accounts by mediators at two evaluation meetings (given in such a way as to preserve confidences and to not disclose the identities of participants) indicated that many counsel were very helpful in the negotiating process. Some, however, betrayed their lack of understanding of the nature of mediation by attempting to elicit evidence from their clients, as if in chief, and to cross-examine opposing parties.

As far as the future is concerned, one hopes that more barristers will consider undertaking training as mediators. Those who took part in Settlement Week seem to agree that the process of mediating was intellectually stimulating and challenging, often exhausting, but eminently satisfying when, as often happened, the parties settled their disputes.

**BREAKDOWN ACCORDING TO NATURE OF CLAIM**

| | Settled | Not Settled | Still to Be Mediated |
|---|---|---|---|
| Personal Injuries - Motor Vehicle | 73 | 14 | 18 |
| Personal Injuries - Industrial | 15 | 8 | 2 |
| Probate (including Family Provision Act) | 9 | 6 | 5 |
| Real Property & Intellectual Prop. | 8 | 5 | 7 |
| Commercial | 4 | 3 | 3 |
| Contract | 11 | 6 | 6 |
| Partnership | 1 | 1 | 1 |
| Defacto Relationships Act | 3 | 0 | 4 |
| Tort (including medical negligence) | 3 | 9 | 10 |
| Costs Dispute | 1 | 0 | 1 |
| TOTALS | 128 | 52 | 57 |

Barristers should also be aware that recently promulgated Bar Rule 79C permits them to put résumés that comply with that rule on file with organisations offering mediation services, such as LEADR and ACDC. Those bodies are often consulted by parties needing the services of mediators.

It is also worth noting that under s.53A of the Federal Court Act 1976 (added recently by the Courts [Mediation and Arbitration] Act 1991), the Federal Court will be able to refer matters to a mediator with the consent of the parties. That section is yet to be proclaimed (as is a similar new s.19B in the Family Law Act 1975); it is understood that proclamation will not occur until rules of court implementing those sections are promulgated.

**What Next?**

The Law Society's Dispute Resolution Committee is preparing a detailed evaluation of Settlement Week 1991, heavily based on detailed questionnaires that the mediators, the parties, solicitors and counsel were asked to complete. If it is seen as a success, and if a way can be found to make future settlement weeks possible without the enormous contribution of voluntary labour that this first one required, Settlement Week may be made a regular event and extended to jurisdictions other than the Supreme Court.

The ultimate aim, however, is to make settlement weeks unnecessary, by making mediation such an accepted part of the normal processes of dispute resolution that parties will engage in it without the impetus of specially organised occasions such as Settlement Week 1991. ❑ Robert Angyal

# *1991 Professional Conduct Decisions*

## NSW Bar Association v Smith

On 9 May 1991 the Court of Appeal handed down its decision in *NSW Bar Association v Smith*. The Court comprised Samuels, Mahoney and Meagher, JJA. Samuels JA wrote the leading judgment finding the barrister guilty of professional misconduct but determining that in the circumstances a censure was an appropriate penalty. Meagher JA agreed with Samuels JA's judgment except on the question of penalty upon which he agreed with Mahoney JA who proposed that the barrister's name be removed from the Roll. Accordingly that became the order of the Court together with an order that he pay the Association's costs.

The findings were that the barrister appeared for a client without any belief on reasonable grounds that he was instructed so to appear by any solicitor. In addition, when his retainer was challenged, the barrister made statements to the Bench (in the Local Court) asserting that he was retained but holding no brief in the truth of the statements. He was found to have deliberately misled the Court. In addition, the barrister was found to have lied in his evidence before the Court of Appeal.

Samuels JA discussed some aspects of professional misconduct. First, in considering whether appearing without instructions from a solicitor constituted professional misconduct, his Honour pointed out that Rule 26 of the *Bar Rules* (which deals with acting without instructions) was essential to the maintenance of a divided legal profession in this state. His Honour indicated that while the present system remains it would be contrary to the public interest to permit barristers to ignore so basic a feature of that system. Taking instructions directly from a member of the public is (with very limited exceptions) incompatible with practice at the Bar. His Honour did, however, state his opinion that acting contrary to Rule 26 cannot, without more, be reasonably regarded as disgraceful or dishonourable conduct (in the sense of the classic definition of professional misconduct formulated in *Allinson v General Medical Council* [1894] 1 QB 750). His Honour regarded the rule requiring a barrister to appear on instructions from a solicitor as being of a fundamental type "because the obligation to observe the restriction and to decline instructions from the public represents the kernel of a barrister's mode of practice. To ignore these restraints is ... to act in a manner incompatible with practice at the Bar". His Honour therefore appears to have formulated another criterion for professional misconduct, namely, acting in a manner incompatible with practice at the Bar.

Next, in dealing with the misleading behaviour, his Honour had no difficulty in finding that deliberately misleading the Court was disgraceful and dishonourable in the conventional sense and therefore also professional misconduct.

In reminding himself on the question of penalty that the disciplinary jurisdiction of the Court was wholly protective, designed to protect the public interest and the due administration of justice, his Honour was not prepared to say that the barrister was unfit to be a member of the Bar or that the protection of the public required his disbarment. Accordingly, his Honour recommended the censure.

Meagher JA concluded that it must be in the public interest that "the profession be purged of those of its members who succumb to the temptations of mendacity. The legal system can only operate effectively if magistrates and judges can accept the word of legal practitioners, and it must be in the public interest that the legal system operate effectively". Mahoney JA said that one of the things, "if not the thing, at the heart of the role of a barrister is that he is to be both frank and honest with the court before whom he appears". His Honour did not regard a suspension as appropriate in this case because the barrister had persisted in his claims right through to the end of the Court of Appeal proceedings.

The barrister sought a stay of the Order and a review of the Court's decision based upon an error contained in the judgment of Samuels JA. In a judgment delivered on 4 July 1991 on the barrister's application for a review, the Court, once again by a majority of Mahoney and Meagher JJA, dismissed with costs the application for a review. The Court accepted that there had been an error in the judgment of Samuels JA. The error concerned whether the barrister had mentioned in his evidence before the Disciplinary Tribunal a particular issue. Samuels JA had concluded that he had not but an examination of the transcript of the disciplinary proceedings clearly proved that view wrong. Because of that error, the Court undertook a review of its earlier determination but, by majority, was not of the opinion that any of its previous orders should be changed.

On 8 July 1991 the Court agreed, on the barrister's application, to a stay in the execution of its Orders until 29 July 1991 in order to enable the barrister to complete part heard engagements and to order his affairs. It required an undertaking that the barrister would not accept any fresh briefs or other professional engagements and indicated that any stay beyond that date ought to be made to the High Court to which the barrister indicated he proposed to make an application for special leave to appeal.

On 15 November 1991 the High Court granted special leave.

## In the matter of J.L. Glissan

On 25 June 1991 the Legal Professional Disciplinary Tribunal appointed to hear a complaint in relation to J L Glissan QC handed down its decision. The Tribunal comprised Byers QC, Staff QC and lay-member Mr E Barnum. The proceedings were brought under the *Legal Profession Act* 1987.

The question for the Tribunal was whether the barrister brought improper pressure to bear on his client thereby inducing the client to settle the litigation in which the barrister was briefed. The Tribunal made it clear that "it has not been suggested, nor do we believe, that Mr Glissan acted otherwise than honestly and in good faith". It was a case where the prospects of the barrister's client succeeding were very poor but the client desired to proceed. After reviewing the evidence given by the various witnesses called before the Tribunal, it found that the client indicated to the barrister that the client wished to proceed and that the barrister told the client that the barrister could not let the client go into the witness box. It found that the barrister indicated to the client that he had only the choice to settle. The Tribunal found that the barrister regarded

the case as completely unwinnable and was determined that it should be settled and that the client's determination to proceed was unwise.

The Tribunal concluded that the pressure exerted upon the client was such as to convey to him the impression that if he wished the case to proceed he would have to conduct it himself. The Tribunal went on to consider whether that conclusion entailed either professional misconduct or unsatisfactory professional conduct in accordance with the Act. It had no hesitation in determining that the barrister's conduct was outside the definition of professional misconduct nor did it think that the conduct fell in the definition of "unsatisfactory professional conduct" as contained in the Act but noted that that definition was inclusive and not exhaustive. The Tribunal said:

> "The barrister's instructings were to fight the case. His persistence overbore the instructions in the sense that they were changed to the barrister's continued pressure upon his client in conditions of extreme stress for the client. We do not doubt that Mr Glissan was completely honest in the view he took of the prospects of success and that he conceived himself to be acting in his client's interests. But honest conviction of the rightness of a lawyer's advice does not entitle him to deprive his client of a free choice. The barrister may always, should his advice not be accepted, return his brief."

Although agreeing with the proposition that counsel, when he regards a case as unwinnable, long and expensive, has a duty to put as strongly as he can to his client that he should settle, the Tribunal did not believe it to be consistent with counsel's duty to his client that his determination to settle should, directly or indirectly, overbear his client's will. The Tribunal was satisfied that that had in fact happened.

The Tribunal concluded that the barrister was guilty of unsatisfactory professional conduct and reprimanded him. The Chairman of the Tribunal was of the view that each party should pay their own costs but the other two members, whilst agreeing in the findings and the reprimand, were of the view that the ordinary rule that costs follow the event should apply.

## Finch v Grieve and Ors

On 3 July 1991 James J, sitting in the Administrative Law Division, handed down his judgment in this matter. They were proceedings brought by a barrister seeking a declaration that a resolution of the Bar Council referring him to the Legal Profession Disciplinary Tribunal was void and an injunction restraining members of the Bar Council from referring the matter to the Tribunal.

In the course of his judgment, his Honour made some observations about the concept of professional misconduct. He made it clear that it was not his task to determine whether the Plaintiff in the case before him was guilty of professional misconduct. His Honour observed that the definition of "professional misconduct" within the *Legal Profession Act* 1987 "is expressed to be only an inclusive definition and it appears to me that the purpose of the definition is to indicate that professional misconduct can extend to incompetence and lack of diligence and to conduct unconnected with the practice of law". His Honour reviewed the various cases touching upon the question of professional misconduct including *NSW Bar Association v Smith* and observed that Samuels JA "noted, but did not expressly rule on, a submission made on behalf of the Association that rule 26 of the Bar Rules ... stated a principle which all barristers, whether or not members of the Association, were obliged to adopt and that a knowing breach of r26 amounted to professional misconduct". James J concluded that the concept of professional misconduct "is much wider than the inclusive statutory definition in s123 of the Act, that there has been no authoritative pronouncement on whether non-compliance with one of the Bar rules by a non-member of the Association might amount to professional misconduct, and that the answer to that question might well depend on the nature of the rule, the nature of the non-compliance (for example, the degree of the departure of the barrister's conduct from the standard prescribed by the rule and whether the non-compliance is repeated or persistent) and whether non-compliance with the rule is connected with any other grounds of complaint against the barrister".

James J concluded that the plaintiff had not established any ground for administrative review of the Bar Council's decision (assuming that such a decision was open to administrative review) and dismissed the proceedings with costs.

It should be noted in passing that Wood J delivered an interlocutory judgment in *Finch v Grieve & Ors* on 26 April 1991. It concerned a subpoena and notice to produce directed by the Plaintiff to the President and the Registrar of the Association and was an application to set them aside on the grounds of public interest immunity and absence of legitimate forensic purpose. His Honour discusses the statutory scheme for disciplining barristers under the Legal Profession Act and the role of Bar Council in dealing with complaints. ❑

Richard Cogswell

## Robust Rejoinder

**(Extracts from affidavits used in a de facto spouse case before the Equity Division)**

Plaintiff:

"43. Since November 1987 I have not undertaken any employment and have been in receipt of a Widow's Pension. I do not consider that I am presently well enough to undertake any form of gainful employment. Annexed hereto and marked respectively "D1" and "D2" are copies of reports of Dr ..... my treating psychiatrist, both dated 14 March 1988."

Defendant:

"44. As to paragrah 43 I do not know and cannot admit the facts in the first sentence thereof and as to the second sentence thereof believe that the Plaintiff is strong enough to hold a bull out to piss. As to the third sentence I object to the admissibility of annexures "D1" and "D2"." ❑

# *Barbytes*

## A New Barrister's Computerised Billing System

The number of barristers using computers in their practices appears to be increasing. Particularly amongst younger members of the Bar, there is a realisation and recognition that it is inevitable that increasingly a capacity to organise your practice effectively will require some facility at the keyboard. The article by J S Douglas QC in the Winter edition of *Bar News* illustrates the significant impact a computer can have in a barrister's practice.

There has been a traditional reluctance on the part of the Bar to want to understand how to operate computers. Indeed, it is fashionable to disclaim any necessity for knowledge of a computer to successfully practise as an advocate. However, many barristers at the Sydney Bar, including me, have commenced to use Macintosh computers in preference to IBM computers because of their apparent ease of use.

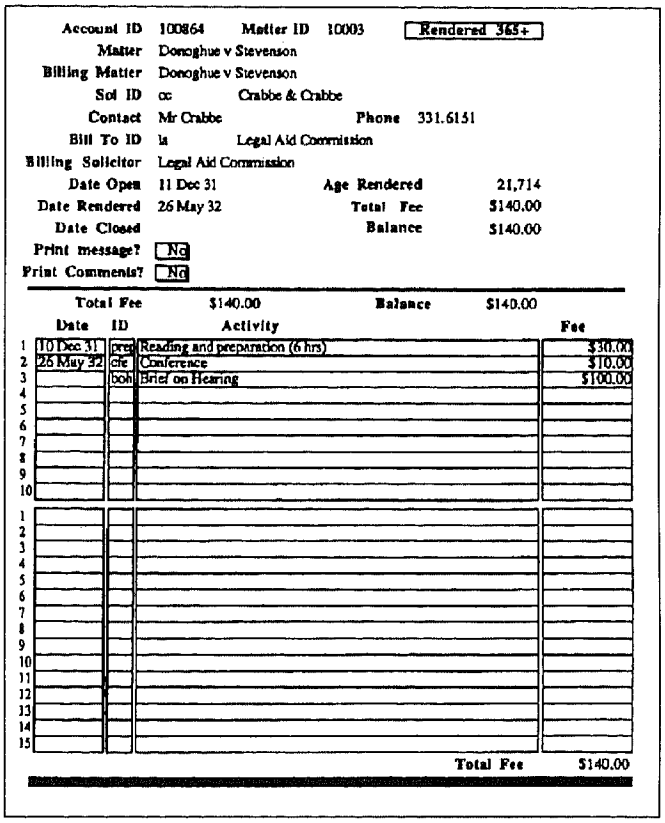
From my experience of thirteen years as a barrister, the maintenance, supervision and collection of fees is one of the most neglected areas of a barrister's practice. Many barristers operate manual cash books or card index filing systems in an effort to keep track of fees. I did this myself for over ten years. The system was imperfect, clumsy and the amount of fees outstanding at any given time was impossible to determine quickly. The sending out of account rendereds became a chore which took my secretary literally hours to perform. Further, the demands of practice are such that the chasing up of fees became one of the last tasks to which time was devoted.

When I purchased my first Macintosh in late 1989 there were a number of standard accounting software packages available but none of them was specifically tailored to the needs of a barrister and most of them were far more complex than that required by a barrister for accounting which is fundamentally simple.

I then approached Andrew Macintosh, a well known Apple computer consultant who has had considerable experience in computers, law and litigation support, to see if a simple program that would be user-friendly to barristers could be devised for the recording and monitoring of barristers' fees. Originally a database program using the Claris program Filemaker II was used to devise a system for recording fees. With the advent in 1991 of an improved software program known as Filemaker Pro, a much more intuitive billing program has now been created. We call it BAR FEES (Barristers' Fees Program). The program has now been used by myself and five other colleagues for several months. It has all the advantages of the Apple easy-to-use interface with a series of buttons that can be clicked to perform the following tasks:

1. create new accounts;
2. record the payment of accounts;
3. prepare memoranda of fees;
4. generate statements as to fees owing; and finally,
5. to report.

An example of the entry layout is shown here.



Account ID 100864 Matter ID 10003 Rendered 365+
Matter Donoghue v Stevenson
Billing Matter Donoghue v Stevenson
Sol ID cc Crabbe & Crabbe
Contact Mr Crabbe Phone 331.6151
Bill To ID la Legal Aid Commission
Billing Solicitor Legal Aid Commission
Date Open 11 Dec 31 Age Rendered 21,714
Date Rendered 26 May 32 Total Fee $140.00
Date Closed Balance $140.00
Print message? No
Print Comments? No

Total Fee $140.00 Balance $140.00

| | Date | ID | Activity | Fee |
|---|---|---|---|---|
| 1 | 10 Dec 31 | prep | Reading and preparation (6 hrs) | $30.00 |
| 2 | 26 May 32 | cfe | Conference | $10.00 |
| 3 | | boh | Brief on Hearing | $100.00 |

Total Fee $140.00

The reporting function is particularly useful as it allows you, for example, to find out on a solicitor-by-solicitor basis moneys that have been owing for 30, 90, 180 days or as desired; it will keep records of your fees earned in any particular month and will allow you to find out for any period what moneys are outstanding. I am able to find out in approximately thirty seconds the amount I have rendered in any month; how much money I have received; and this procedure can be undertaken for any periods I desire. By 30 June each year, I know precisely what fees have been rendered and received. I am in a position to indicate to my bank what moneys are owed to me for work in progress, what accounts have been rendered and which accounts are unpaid.

The billing system will automatically generate account rendereds for any period I desire. This exercise takes no longer than the time required to print the various invoices generated by the process.

A memorandum of fees, to be customised to each individual's needs, is built into the package.

Naturally, such a system inevitably involves the creation of a solicitor database with telephone and fax numbers which may be used for those attorneys with whom one is in almost continuous contact. The program requires each brief to be assigned a number when it first comes in and this then allows one to keep track of the position of the brief. This is particularly useful for those barristers who have high volume practices. I find additionally it is a check against briefs lying dormant in

chambers or filing cabinet, unacted upon because of inactivity on the part of the solicitor.

It is anticipated that the feedback from the present members of the Bar who are using the program (apparently successfully) is such that the program will be continuously reviewed and it is anticipated that there will be regular upgrades to reflect suggestions from users. The program is currently being marketed at $250. It will be necessary for users to have a copy of Filemaker Pro in their Macintosh. If you are already using Filemaker II, the cost of an upgrade is approximately $129. Filemaker Pro is a much more intuitive database program because of the button layout and colour feature of the program.

As far as the author is concerned, this is the only software program in either the IBM or Apple environment that has been tailored specifically for the needs of barristers. The price of $250 includes installation, one hour's tuition and sixty days' telephone backup.

It has been my personal experience that the system has the effect of immediately highlighting delinquent accounts and recalcitrant payers.

For further information regarding BAR FEES contact Caroline Smith on telephone 232 5714 or fax 233 7416. ❑

Paul Blacket

## Memories, memories

Coram: Gleeson CJ, Priestley JA, Handley JA
Mr McAlary QC for the respondent and cross-appellant.

Gleeson CJ: The submission you have made is the exact opposite of that made by the GIO and accepted by this Court in *Radnedge*.

McAlary: ... Can I read a few notes that I wrote down and I wrote them down last night in bed so I apologise for the state ...

Priestley JA: There is no need to go into the intimate details, Mr McAlary.

McAlary: Your Honours, John Paul II could sit at the end of my bed these days.

Priestley JA: His Honour Mr Justice Murphy has found that there is no tax deduction for such activities.

Handley JA: I remember it well.

*(Saroukas v Sutherland Shire Council*
Banco Court: Thursday 28 November 1991) ❑

# Book Reviews

## Liability of the Crown

2nd edition 1989
P Hogg
The Law Book Company Limited. RRP $89.50

"Uneasy lies the head that wears a Crown." Nowadays the Government often finds itself in the worst of both worlds as it is exposed to public law and private law remedies in relation to an ever widening area of governmental activity and an ever diminishing area of governmental immunity. The two fields of exposure are not always congruent. For example, a private contracting party is usually allowed to act in a way favouring his or her own self-interest and without first consulting the other party. Yet if the Crown is involved, the other party can choose between contractual and administrative law remedies, and it will be no defence to the Crown accused of acting unreasonably or denying natural justice that a private contracting party had no similar obligation. This is perhaps as it should be, in a legal system where the private litigant continues to have a legal right to do "shoddy things" or "dirty tricks" but the Crown has not (*R v Tower Hamlets LBC; Ex parte Chetnik Ltd* [1988] AC 858 at 877). But it can lead to difficulties if the Crown seeks to defend a contractual claim on public law grounds or vice versa.

Professor Hogg's excellent book is a reminder that effective equality before the law is a recent phenomenon, and that other countries still lag far behind Australia in this area. His broad sweep of the law of *Liability of the Crown* shows that much of what we take for granted here is still in the category of advocated reforms elsewhere. For example, injunctive relief is not available against the Crown in Canada, New Zealand or the United Kingdom. Discovery is not generally available against the Crown in Canada. The United Kingdom, most Canadian provinces and New Zealand still maintain pockets of residual Crown immunity in tort: the "model" of the Crown Proceedings Act 1947 (UK) fell short of the position achieved in the Australian colonies in 1887 through the Privy Council's bold and biased interpretation of the Australian predecessors of s64 of the Judiciary Act in *Farnell v Bowman* (1887) 12 App Cas 643.

The history of Crown liability in tort is a curious one, as Professor Hogg demonstrates. The maxim that "the King can do no wrong" meant in the middle ages that the King was not privileged to commit illegal acts. If he did, he could not be sued (because of the feudal prohibition of being impleaded in one's own court) but he was under a duty (albeit unenforceable) to give the same redress to a subject whom he had wronged as his subjects were bound to give to each other. In the nineteenth century the petition of right, which had become the principal means of suing the Crown, was held not to be a remedy in tort. The old maxim was turned on its head and pressed into Crown service. English and Canadian courts held that the nineteenth century reforms relating to the petition of right were procedural only and should not be interpreted as imposing liability in tort by implication. This effectively conferred Crown immunity in tort - usually at the expense of exposing the Crown servant to personal liability.

But not so for the Australian colonials. In *Farnell v Bowman* the Privy Council decided that the identical statute in New South Wales had the opposite effect. Liability in tort was imposed on the Crown. As Hogg points out (pp80-81) :

> "Their Lordships said frankly that in their view the English law was not apt to cope with the conditions in the Australian colonies, where governments 'as pioneers of improvements' had to embark on many undertakings that in England were left to private enterprise; it followed that if the maxim that 'The King can do no wrong' were applied to the colonial governments, 'it would work much greater hardship than it does in England'."

So the burden of errors was shouldered by government and the loss distributed. Crown servants could rest easier in bed and continue to exercise powers boldly.

In the past, the common law was the solicitous protector of the Crown. For example, the Crown neither paid nor received costs. "As it is his [the King's] prerogative not to pay [costs] to a subject, so it is beneath his dignity to receive them" (*Blackstone's Commentaries on the Laws of England* vol 3 p400). The Crown also had a prerogative immunity from garnishment orders. This really operated in favour of Crown servants who failed to pay judgment debts. Instead of deploring the inequality between Crown servants and other wage-earners, the courts supported this result on the ground that Crown servants ought not to be denied their wages in case "the temptation of poverty" affected the performance of their duties (cases cited by Hogg at p53). These and other quaint prerogatives had to be removed by statute.

Yet nowadays, at least in Australia, it is the courts who are at the forefront of removing all but essential pockets of Crown immunity. "Prerogative" is now a dirty word that a law officer daren't utter in the hearing of a judge, although he or she will occasionally get away with "non-justiciable".

Again and again, as Hogg points out, Australian courts have been in the vanguard of this levelling process, encouraged no doubt by Parliament's unwillingness to shore up diminishing areas of Crown immunity. Cases like *Sankey v Whitlam* (1978), *Groves v The Commonwealth* (1982) and *Bropho v Western Australia* (1990) illustrate this development. Limits upon the once-sacred notion that the Executive cannot be estopped from changing its mind were signalled in *Attorney General v Quin* (1990). Time will tell whether the pendulum has swung a little too far. A very recent Court of Appeal decision involving logging activities applied the offence of killing protected fauna to the Crown even though there was no express declaration to that effect: *Corkill v Forestry Commission*. This was understandable since *Bropho*, although one wonders whether a judgment convicting a private litigant might at least have offered some reasons for rejecting a serious submission that *mens rea* had to be proved.

There have, of course, been areas where new doctrines have been fashioned by the judges to recognise the peculiar role of government. One is the policy planning/operational distinction in the area of negligence which is discussed at some length in this book.

It must be a peculiar pleasure for the author of a textbook to be able to note, in a second edition, the way in which suggestions for reform made in the first edition, have been

"taken on board" by courts, whether or not they have acknowledged the source. This second edition is able to trace many such developments, especially in Australia. Yet it is as full as the first of critical comment about the existing law, so is as likely as its predecessor to serve as a weathervane for future developments.

The work covers the whole field of civil liability affecting the Crown or its servants and agents. It deals with remedies, procedural and evidentiary rules as well as substantive rights. Crown rights and duties in tort, contract and other civil obligations are discussed in detail, with full access to relevant overseas authorities. There is a timely collection of the cases involving the limits of immunity of judges and prosecutors. There is even a chapter about federal questions, which deals with issues such as jurisdiction and choice of law in a federal context.

This book is a must for those involved in suing the Crown - and isn't that practically everybody these days.❑

Keith Mason QC,
Solicitor General for the State of New South Wales

## Misleading or Deceptive Conduct

Deborah Healey and Andrew Terry
CCH Australia Limited, 1991, RRP $64.00)

"A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive." (s.52(1), *Trade Practices Act* 1974 [Cth]).

The authors of this important, substantial and useful work, respectively a Sydney solicitor and a Sydney legal academic, point out in its preface that there are now over five hundred reported or digested cases in the *Australian Trade Practices Reports* on s.52 of the *Trade Practices Act* 1974 (Cth). In relation to this "myriad" of authorities generated by those 23 words, they quote the comment of McGechan J of the New Zealand High Court: "To dip is rewarding; to swim is to drown." The importance of this work is that it will help readers keep their heads above water when grappling with s.52 and with the almost identical words of s.42 of the States' Fair Trading Acts.

And grapple they surely will, and increasingly frequently. For as the authors say:

> "Section 52(1) is a 'comprehensive provision of wide impact' which is expressed in 'very general language' and 'cast in the widest terms' to ensure its effectiveness as a 'catch-all' provision for conduct falling outside the specific prohibitions of Div. 1. Its metamorphosis from its intended role as a residual consumer protection provision to a versatile and significant action for purely *inter partes* and essentially commercial litigation is of a magnitude without parallel in Australian jurisprudence. Section 52 in conjunction with the flexible remedies of Part VI provides a broad-spectrum antidote to a wide range of conduct falling short of the norm that it establishes. It does not simply add to the general law, but in some circumstances totally embraces common law actions." (pages 2-3)

Because of this, practitioners are now used - indeed, resigned - to the presence of s.52 claims in many commercial proceedings which previously would have been cast in contract or in tort, or not brought at all. They may soon see even more claims under s.52 given the recent decision of the Supreme Court of New South Wales in *AMP Society v Specialist Funding Consultants Pty Limited* [1991] ATPR 41-137 (Rogers CJ in Comm Div). There it was held that a claim for damages under s.52 could be brought outside the three-year period for bringing actions established by s.82 of the Act, if the claim amounted to an equitable defence (at 52,988). Alternatively, it could be brought beyond the three years because "[u]sing s.52 as a defence to a claim is not an 'action' [under s.82]" (id).

The ability to use s.52 in this way may solve the common problem that arises where action is brought for breach of contract and the party sued attempts to allege that entry into the contract was induced by the plaintiff's misleading or deceptive conduct. Before the *Specialist Funding* decision, such attempts could often be defeated by the fact that more than three years had passed since entry into the contract - the time at which the three-year period normally begins to run. Previously, if the victim of misleading and deceptive conduct remained misled or deceived for the whole three years, he or she was thought to be without a remedy under s.52 - an injustice lamented by the Full Federal Court in *Jobbins v Capel Court Corporation Ltd* (1989) 91 ALR 314 at 318.

Readers should note that in *Spedley Securities Limited (in liq) v Bank of New Zealand* (Supreme Court of NSW, 19 September 1991, unrep.), Cole J declined to follow *Specialist Funding*, relying instead on the decision of the Full Federal Court in *State of Western Australia v Wardley Australia Ltd* [1991] ATPR 41-131.

*Wardley's* primary significance lies in its holding that the three-year period does not begin to run when mere "potential" or "likely" damage has been suffered; there must be "actual" damage before time runs. This decision will make application of the three-year rule more difficult, and practitioners can look forward to many hours of pondering the distinction drawn by the Full Court (which declined to follow the reasoning of a differently-constituted Full Court in *Jobbins*). Special leave to appeal from the decision of the Full Court in *Wardley* was granted by the High Court on 5 September 1991. Until the High Court rules, trial judges are in the "very unusual situation" of being confronted with two conflicting decisions of the Full Federal Court: *Thannhauser v Westpac Banking Corporation* [1991] ATTR 41-136 at 52,983 (Pincus J restoring on the basis of *Wardley* paragraph to a Statement of Claim that he had earlier struck out on the basis of *Jobbins*).

*Misleading or Deceptive Conduct*, after several introductory chapters, deals with the law that has developed around s.52 under four categories where an action for misleading or deceptive conduct can lie:

- as a general advertising remedy;
- as an "unfair competition" remedy;
- as a remedy for misrepresentation in pre-contractual negotiations;
- as a remedy for "advice" or "information" in other areas.

The authors point out that the third category represents the majority of s.52 cases and comment:

> "The most controversial use of sec.52 is characterised by one party to a private commercial contract seeking a remedy under sec.52 in respect of pre-contractual representations which, prior to the Act, would have been sought to be redressed, with little hope of success, in an action for breach of contract, deceit, or negligent misstatement. ... The application of sec.52 to such contracts is of fundamental significance to the conduct of business in Australia. The ramifications of subordinating the convenience and certainty of a negotiated written contract to the vagaries of the 'misleading or deceptive' test are immense." (page 33)

Indeed, the reality is that s.52 now "lurks in the background of all negotiations" (at page 32). Nor can one contract out of s.52. And because s.52 operates on pre-contractual conduct, whether a disclaimer or an exclusion clause in the resulting contract is effective or not becomes a question of evidence and not a question of law. The authors discuss in detail whether disclaimers can be effective, either by preventing liability or (more likely) by negating reliance on pre-contractual representations (see pages 316-22).

This book is particularly welcome because it satisfies the need for a comprehensive treatment of the law generated by s.52. The practitioner's standard reference, R V Miller's *Annotated Trade Practices Act* (12th ed 1991), had been overwhelmed by s.52 decisions. It offers the reader 25 pages of annotations to the section without any table of contents to them, followed by synopses (apparently only in chronological order) of about 120 cases. And Heydon QC's *Trade Practices Law*, for all its many merits, cannot in its one chapter on s. 52 provide the same depth of coverage as *Misleading or Deceptive Conduct*.

There is a minor criticism to be made: although the work is a CCH publication, readers are entitled to expect citations to the authorised reports. But the *only* citations given are to CCH's *Australian Trade Practices Reports*.

Finally it should be said, given the abundance of cases that has led to the need for this book, that one hopes the authors have frequent editions in mind! ❑ Robert S. Angyal

## Environmental Litigation

Brian J Preston
The Law Book Company Limited. Hard Cover RRP $87.50

The review of this book was made much easier by my having attended a lecture in the Bar Common Room late last year. The author was giving a lecture to barristers interested in entering the parks and gardens field and was introduced by Murray Tobias QC. In Tobias' words "This book is a must in the library of any barrister who wants to practise in the field. It is a very excellent work". He also took the opportunity to extol the virtues of the environmental and planning field as an area of practice for barristers.

With 18 chapters, a comprehensive table of cases and statutes and a detailed index, the book is indeed a valuable guide to practitioners wishing to practise in this field.

There is a very helpful first chapter which outlines the course of environmental litigation, discusses new legislation and defines specialist courts.

This chapter also outlines the scope of the work and contains an outline of litigation procedures taking the reader through the steps necessary to start one wandering in the field of Parks and Gardens. The second chapter is a worthwhile addition to any book covering the steps preparatory to commencement of litigation and providing a more than adequate description of limitation periods, particularly statutory limitation periods.

Chapter 5, headed "Relator Actions, Representative Actions, Class Actions and Reform", focuses on today's emphasis on environmental causes and conservation issues in the community, providing an introduction to some of those areas which have been explored in other countries. It is disappointing that the movement in the American States towards the right to sue on behalf of the fish and fauna of the country is not given more discussion. Nevertheless a helpful footnote does indicate the way to go in terms of additional reading.

Chapter 6 deals with Legal Aid, again what might be described as a policy issue. Chapters 7 to 12 deal in some detail with numerous matters which might be described as the commencement of civil proceedings, attending callovers and discovery and inspection of documents, interrogatories, subpoenas and some very practical suggestions, including those under the Freedom of Information Act.

The final chapter deals with Alternative Dispute Resolution and sets out guidelines as to the use of this mechanism, including its problems and how to mediate.

In the light of the recent controversy surrounding resource security legislation, there is no doubt that this book is, in the words of the Vice President, "a valuable guide". It can be recommended as a must for any person who wishes to appear in the Parks and Gardens area.

Although the book answers many questions in relation to policy, it still remains a mystery to me as to why the legislation is entitled "Environment and Planning Act" rather than, as common in other countries, "Planning and Environment". The mystery remains and is not answered in the book. However when in doubt at the Bar rely on good rumour! Which leads me to the suggestion about our late colleague, the then Minister for Environment and Planning and his fellow architect of the scheme (now a senior consultant with a major firm of solicitors in Sydney, practising in this area). These gentlemen, it is rumoured, did not wish to be known respectively as either the MOPE or the person in charge of DOPE.

Preston's book is a worthwhile addition to any practitioner's library, incorporating as it does very practical chapters which help to unfold the mysteries of discovery and interrogatories. ❑ Gary McIlwaine

# *Motions and Mentions*

## Equity Division - Short Notice List

"The short notice list has been established by the court with a view to affording to parties the opportunity of having their matters heard on short notice in circumstances where, by virtue of a settlement or a necessary adjournment, a Judge of the Division has become available. As I understand it from my discussions with the Registrar, matters are not put into this list without the consent of the parties and without an assurance from the parties that the matters are ready to proceed. I am also informed by the Registrar that it is his usual practice to enquire of those who seek to have their matters heard in this list as to whether there is any likelihood that the parties or their witnesses will not be available within some three or four months of the matter being placed in the list.

The purpose of this list is, so far as possible, to allow judicial time which becomes available to be utilised for the benefit of litigants. On several occasions when matters have been referred to me from this list, there have been applications for adjournments based on the unavailability of the parties, the unavailability of counsel or a lack of preparedness of the case. Each and every one of these matters flies in the face of the requirements of the practice direction to which I have already referred and to the practice, as I understand it, which obtains before the Registrar prior to his listing a matter in this list. As I have had occasion to say on several occasions recently, probably the most precious commodity which the court has to offer is the availability of judicial time. If matters are placed in the short matters list and are then sought to be adjourned for the reasons to which I have referred, the consequence is that the opportunity to obtain another matter in the list for that day, consistently with giving the three days' notice is lost, and thus other litigants are deprived of the opportunity of having their cases heard.

The comments I have just made are intended to be of general application, and I believe that they reflect the attitude of the court and that, to some extent, they may be useful to parties in plotting their courses when seeking to have a matter placed in the short notice list." ❑

(Rolfe J, *Burke v Cameron* 25 July 1991)

## Advocacy Institute

The new Australian Advocacy Institute will begin its work in November when two advocacy workshops are held in Brisbane under the auspices of the Institute.

The Institute has been established by the Law Council of Australia in response to growing demands by the legal profession for advocacy training.

The Brisbane workshops - one for the Queensland Bar and the other for the Australian Securities Commission - will be conducted by the Chairman of the Institute's Board, Mr Justice George Hampel, and Mrs Felicity Hampel. Mrs Hampel is a member of the Institute's Teaching Committee.

Workshops will also be held in November in Melbourne in conjunction with the Leo Cussen Institute.

The announcement at the 27th Australian Legal Convention in Adelaide in September of the Law Council's decision to establish the Institute has attracted wide interest, and inquiries about the Institute's programmes have been received from government and academic organisations as well as from the legal profession.

The Board at its first meeting asked the Teaching Committee to draw up a programme of workshops and other activities for 1992. In the meantime, action has been taken to incorporate the Institute and to set up administrative arrangements within the Law Council Secretariat.

The Institute is planning a training workshop for teachers of advocacy to be held at the Leo Cussen Institute in Melbourne in February. Experienced advocates from all parts of Australia who wish to develop advocacy teaching skills and become involved in the Institute's programmes will be welcome.

The Board of the Institute, appointed by the Law Council Executive, is Mr Justice Hampel (Chairman), and Messrs Alex Chernov QC, Geoffrey Davies QC, Barry O'Keefe QC, John Chaney and Chris Crowley.

The Teaching Committee appointed by the Board is Mrs Felicity Hampel (Vic), Mr Sydney Tilmouth QC (SA), Mr Philip Greenwood (NSW), Mr Hugh Selby (ACT) and Mr Laurie Robson (Vic). All are experienced in advocacy training.

The aims of the Australian Advocacy Institute are to improve the standards of advocacy throughout Australia, to provide an Australia-wide forum in which ideas and experience in advocacy can be shared, and to develop Australian materials and methods for teaching and appraising advocacy skills.

The Institute will not take over work already being done by others, but will work with them and complement and assist their programmes. It will also conduct teacher-training workshops and provide other workshops at all levels as the need arises.

Information about the Institute can be obtained from the Secretary-General of the Law Council of Australia, Peter Levy, on (06) 247 3788. Details of the Institute's programmes for 1992 will be announced shortly. ❑

## Practitioners Warned

In a series of directions hearings in July the Chief Justice of the High Court said the Court would not tolerate blatant non-compliance with the Court's rules.

In two of the cases, Mason CJ said he had contemplated sending the relevant Court papers to the Law Society.

The hearings were held, Mason CJ said, "to demonstrate that the Court is not prepared to tolerate non-compliance with its rules".

In each of the cases, an application for special leave had not been accompanied by an affidavit, and in at least one case the application had not been served on the appropriate Director of Public Prosecutions.

Mason CJ said there was "absolutely no justification for not filing the affidavit along with the application for special leave except, perhaps, if the party has been unable to obtain a copy of the judgments of the Court of Criminal Appeal".

He required an undertaking from counsel on behalf of his solicitor that the application for special leave would now be prosecuted with all due diligence. (1991) 11 Leg. Rep.Page 1

## Child Support Liaison Groups

The Family Law Section of the Law Council of Australia has established a network of National and State Child Support Liaison Groups. This article sets out some information concerning this important project.

Following the implementation of Stage II of the Child Support Scheme, it became readily apparent that there were a number of teething problems, not only in relation to the implementation of the Child Support (Assessment) Act but also the way in which the profession and the agency interacted. Although the Family Law Section initially opposed the introduction of the administrative formula, it recognised that once the legislation had been passed, it was necessary for the profession to throw its support behind the scheme, ensuring that difficulties were identified and solved as quickly as possible.

Recognising that this might best be done on a co-operative basis, it was suggested to the Child Support Agency that a network of liaison groups might be established.

The proposal was warmly endorsed by the Child Support Agency and the first meeting of the National Child Support Liaison Group was held in October 1990.

The National Group has met on four occasions since and it proposes to continue meeting every 2 or 3 months. The objects of the National Liaison Group are:

- To formulate and publish rulings and guidelines which apply nationally;
- To formulate national policies;
- To discuss amendments to the Act;
- To organise seminars on a national basis;
- To supervise State Liaison Group meetings; and
- To determine issues of principle which apply nationally.

State Liaison Groups have now also been established. These groups comprise representatives from both the Agency and the profession in each State. Most State Liaison Groups have now met at least once and the feedback so far suggests that a good working relationship has been established. The co-operative approach augurs well for the future.

The objectives of State Liaison Groups are to:

- Facilitate communication on a state basis;
- Organise seminars on a state basis;
- Organise the publication of Notices issued by the state branches of the agency; and
- Deal with specific cases on a state by state basis which raise issues of principle.

The range and complexity of topics discussed at both national and state meetings underlines the need for such a network.

Even though the project has only been operating for a short time, a number of significant developments have already occurred, including:

- A national round of seminars conducted jointly with the Agency and with the full co-operation of the Court;
- Improvements to the letters which the Agency sends to payers and payees;
- An opportunity for the profession to comment on the Child Support Amendment Bill;
- The development of a Child Support Agreement which is "user friendly" and which facilitates the use of such agreements;
- The development of a computer software package containing the formula;
- A significant improvement in communication between the agencies and the profession.

It is important that cases which identify problems in the system should be brought to the attention of State representatives so that such cases may be discussed at State Liaison Group meetings. A number of cases have already been resolved after being raised at Liaison Group meetings. Thus, members are encouraged to ring State representatives if you believe that you have a case which identifies an issue of principle which if discussed might lead to an improvement in the operation of the scheme.

A better understanding by the profession of the Agency and its problems (for example the sheer logistics of the operation) will almost certainly lead to better relations between the profession and the Agency. It is an important part of the network's role to ensure that members of the profession are educated about the difficulties which the Agency faces. The "them and us" mentality should be abandoned in favour of a more co-operative approach.

Mr Mark Le Poer Trench is a NSW representative of the network who can be contacted for further information at Lachlan Macquarie Chambers, 16 George Street, Parramatta NSW 2150. DX 28500 Parramatta. Telephone (02) 635 1000. ❑

## Gay and Lesbian Legal Rights Service

A newly community legal service known as the Gay and Lesbian Legal Rights Service has been established at 74 Oxford Street, Paddington. The need for such a specialised service was identified by members of the gay and lesbian communities of Sydney. It was established in response partly to the increase in violence against gay men and lesbians, but also to provide a specific sympathetic service and better equip the community to address continuing discrimination in the law and through the operation of the law. Members who wish to act as volunteers to provide information about the law and available options for resolving particular legal problems and, where appropriate, to refer people to other lawyers, should contact either Bruce Grant or Carol Ruthchild at PO Box 9, Darlinghurst NSW 2010. Phone (02) 360 6650. ❑

## Fourth Australian Business Lawyers' Conference

The Business Law Section of the Law Council of Australia is holding its Fourth Australian Business Lawyers' Conference at the Manly Pacific Hotel, Sydney from 22-24 March 1992. The theme of the Conference is "Opportunities - The Way Ahead". For additional information contact Carol O'Sullivan, Law Council of Australia.

Telephone (06) 247 3788 Fax (06) 248 0639.❑

## NSW Therapeutic Medicines Information Centre

The Centre provides comprehensive and current information on drugs and disease states to professionals. The term drugs is all encompassing and may refer to therapeutic medicines or substances of abuse.

To facilitate the rapid retrieval of information, the Centre has a variety of sophisticated resources which are constantly updated. Resources include an extensive medical reference library, medical and pharmaceutical journals, on-line computer access to a number of medical and toxicological databases (for example Medline, Toxline, Embase) together with microfiche services.

The Centre is located at St Vincent's Hospital, Darlinghurst and is staffed by two clinical specialist pharmacists, a medical librarian and a secretary. A panel of specialist consultants from NSW hospitals and universities are also available to the Centre for expert clinical advice.

If you would like to obtain more information about this service, please contact Debbie Leibbrandt, NSW Therapeutic Medicines Information Centre, PO Box 766, Darlinghurst NSW 2010. Telephone (02) 361 3011 Fax (02) 360 1005. ❑

## Alternative Dispute Resolution

In November1991 , the Chief Justice's Policy and Planning Subcommittee on Court-Annexed Mediation (Clarke JA, Wood and Bryson JJ and Mr W Soden, the Court's Chief Executive Officer and Principal Registrar) issued a long and detailed report. The main recommendations are:

- A three-year pilot project in use of court-annexed alternative dispute resolution.
- The project's aims are to use ADR to reduce existing case backlogs and to establish ADR structures within the Court on a long-term basis, with emphasis on mediation.

The pilot project will involve many of the cases in the Equity and Common Law Divisions. In the first year, cases will be allocated to mediation or arbitration, if appropriate, at callovers and directions hearings. Where mediation is ordered, a case will not be able to proceed to hearing unless the parties first attempt with reasonable diligence to mediate their dispute. In the second year, referral officers will vet files after the defence is filed and make recommendations to the Court about the appropriateness of ordering ADR.

In the third year, proceedings will not be permitted to be commenced in the Common Law Division in motor vehicle and industrial accident personal injury cases and occupier liability cases without certification that pre-filing mediation has been attempted. Mediation will also be required in most Equity Division cases, except perhaps complex company law cases. In particular, mediation will be required in family or neighbour cases; vendor/purchaser cases; partnership disputes and Family Provision Act cases.

The report recommends the use of registrars and deputy registrars (after mediation training) as mediators and also the use of a panel of external mediators appointed on the basis of nominations by the Law Society, the Bar Association and ADR organisations.

It is understood that the Subcommittee's report has been approved by the Chief Justice for submission to the Department of the Attorney General. ❑

## Graphic Evidence

Photographs, graphs, plans and models have long been an integral part of presenting and explaining evidence in Court. However, the preparation of these graphic aids has mostly been on an 'ad hoc' basis.

A recently established company, appropriately named "Graphic Evidence", specialises in the visual presentation of evidence, using a range of media from conventional ink drafting to video film.

Operating from the office of an architectural company in Balmain, Graphic Evidence combines technical and presentation skills with the experience gained from involvement as advisers and witnesses in numerous cases. Accordingly, they are familiar with Court procedures and, in particular, they are aware of matters which relate to the proof and admissibility of documents and models.

Importantly, they are also aware of the time constraints which are often imposed by the Courts (and Counsel) and have the resources to ensure that deadlines are met.

"Experience has shown that well presented physical evidence creates credibility as well as ensuring easy comprehension", said John Greenwood, Director of Graphic Evidence.

"We believe that most cases can be assisted in some regard by graphic display, provided the display is professionally prepared. And it CAN make the difference between winning and losing."

Graphic Evidence Pty. Limited is at F11, 1 Barr Street, Balmain. Phone (02) 818 2177. ❑

# *This Sporting Life*

## Touch Football

Earlier this year, largely due to the machinations of Francis Curran, a team of touch footballers was formed to compete in the Law Week celebrations.

Selection being based on the age-old Barristers' criteria of seniority and weight our two teams presented an awesome aspect.

After a series of stirring speeches before the statue of Queen Victoria, one being delivered by means spiritual by Winston Churchill, the other by means corporeal by team Chaplain B S J O'Keefe QC, President, our team proceeded in echelon down to the Domain. With Churchill's "Beaches" speech still being played and the front ranks consisting of Ryan, Sheldon, Curran and Kavanagh (Tricia) the other participants (solicitors and their ring-ins) could not have failed to have been awestruck.

Two teams were entered, one dubbed "The Head Highs", the other "The Running Actions".

Ably organised by Curran and O'Dowd we proceeded to play our own idiosyncratic style of football, a style based on uncompromising defence (see Part 22 Supreme Court Rules) and an aggressive use of pre-match interlocutory devices.

Unfortunately, as ever, the lists were supervised by umpires who failed to pay close enough heed to the submissions that were put to them.

For example, many of the umpires considered Ryan's method of "double-handed" touching to be inconsistent with the rules. Similarly, it came as a great surprise to Willis, Sheldon and Curran that touching with the upper part of the arm, namely the point of the shoulder, had recently been proscribed. See *Margo v The Touch Football Association* (13.3.89 unreported).

After Sheldon was asked to retire to the sidelines for two minutes during one match the rule became somewhat more clear to us than it had previously been.

One of our teams managed two draws and a win to get through to the semi final. In passing one should notice the efforts of the younger and more fleet of foot who included K F Morrissey, D O'Dowd, R J H Darke and the writer. In the latter's case his speed was prompted by the desire to avoid being sandwiched between Ryan and Curran, the former of whom did not seem to care while the latter was playing without the assistance of glasses.

The competition was won by a team who had quite obviously flouted the rules by selecting, under cover of them being solicitors, triallists for the Springboks, Olympic sprint events and such like.

Photos of the team are available from Curran at a very reasonable $500 per colour print. Proceeds will go towards purchase of a rule book and the team's tour to the south of France in 1992. ❑ J Poulos QC

## Bench and Bar Services Golf Day Elanora Country Club Friday 9 July 1991

This report is made difficuilt by reason of the fact that O'Connor misappropriated not only the prizes, but the results sheet. It would appear that Judge Smyth won nearest pin on the 5th and the longest drives were, A grade R Skiller and B grade L Stone. The highest Bar team points were Judge Nash and R Yunken with 42 points, runners up Skiller and R Seton and J Harris and B Hrouda.

The overall result was another win (7 matches to 6) to the military, who on my count since 1933 have won 30 to the Bench and Bar's 20.

There were those who thought that as we lost so narrowly, the result might have been different had Wheelahan been available to play, even although his best golf is said to be behind him. ❑ Tony Hewitt

Back Row: S C Russell, G B Beveridge, D P O'Dowd, M P Cahill, J H Pearce
First Row: K F Morrissey, K J Ryan, G Jones, S E Torrington, F D M Curran, R S Sheldon, R J H Darke, T F McKenzie
Seated: T J J Willis, G D Hodgkinson, C Steirn, W P Y Austron,
B S J O'Keefe AM QC (President/Coach), J Poulos QC (Captain), C Stomo, T M Kavanagh, J A Kearney.