# Bar News

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**Editor:** R S McColl S.C.

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**Contributions are welcome, and should be addressed to the Editor,**
**R S McColl S.C.**
**7th floor, Wentworth Chambers,**
**180 Phillip Street, Sydney NSW 2000**
**DX 399 Sydney**

**Barristers wishing to join the Editorial Committee are invited to write to the Editor indicating the areas in which they are interested in assisting.**

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# in this issue ...

# Bar Notes

## Bar History Committee

The Bar Council has appointed a Bar History Committee under the chairmanship of Mason QC SG. Its primary function is to identify, preserve and collect records and memorabilia about members of the New South Wales Bar, past and present. Arrangements are in hand to obtain a series of oral histories from senior barristers as well as retired judges and barristers' clerks. The Committee has a tentative list of interviewees, but if you are under 75 it will be a while before it gets to you.

In due course a detailed call will go out to all members for the deposit of memorabilia and information. In the meantime, any member who has useful information or memorabilia such as photographs, obituary speeches, etc. is invited to forward it to the Chief Executive. Suggestions as to how the Committee might go about its task will be gratefully received. ❑

## Leycester Meares Trust
### Letter to the President

I write this letter as a trustee of the Leycester Meares Trust on behalf of Judge H H Bell, my co-trustee, and for myself.

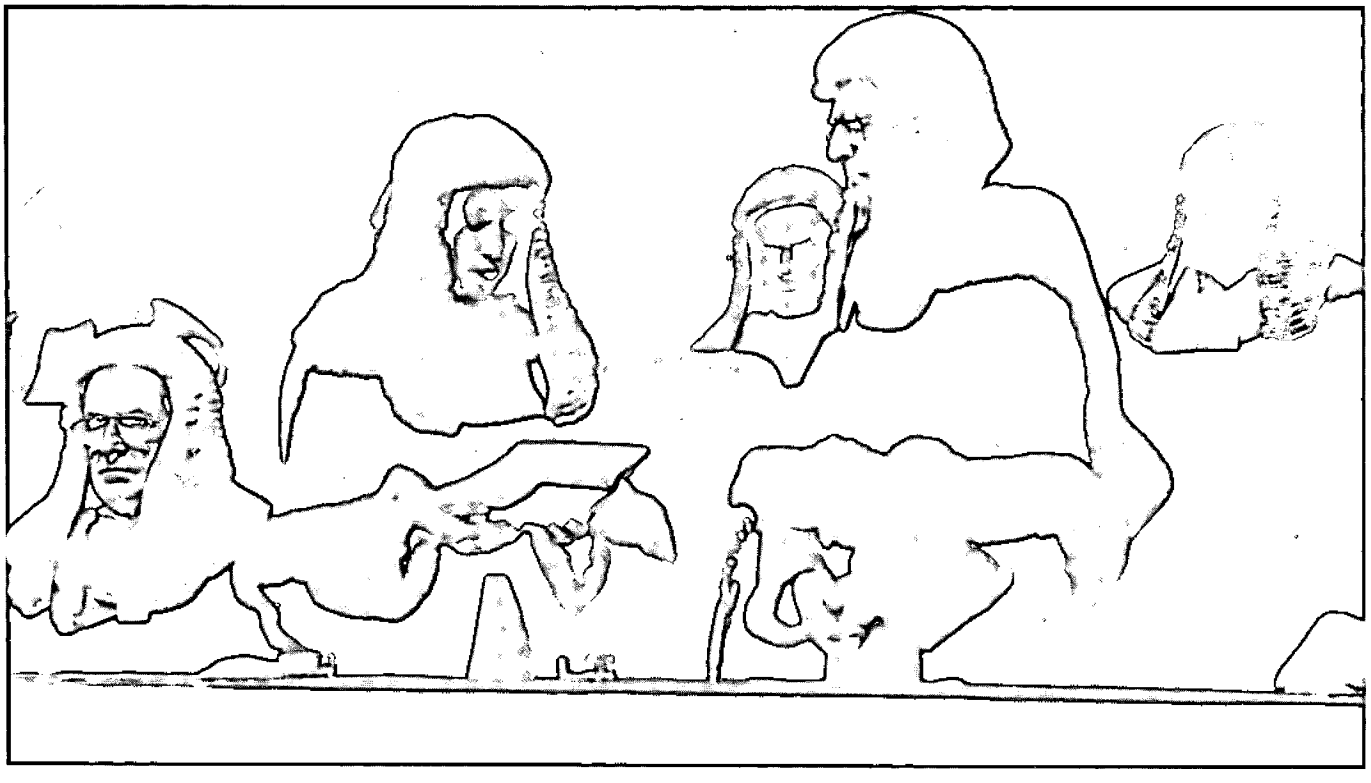
Your Association was good enough to nominate this trust to be the Bar Association's annual charity for 1995-6. This letter is intended to thank the Association for its choice of us as the recipient of its bounty as a body related to Kidsafe. Secondly and more importantly to show our appreciation for the splendid response made by the members of the Association to its appeal.

Leycester Meares gave a legacy of $50,000 to Kidsafe which body decided to use this money as the nucleus of a trust fund to be used to further its objects. The trustee decided that, this decision having been taken, an attempt should be made to augment the fund principally to make it a more effective producer of income.

This was the basis upon which we approached your predecessor in office and sought the assistance of the Association. The target set was to double the fund and such was the support of Murray Tobias QC, then the President, the members of the Bar Council and its officer Kimberley Ashbee and those who contributed, that the object has been achieved.

The name of the original benefactor, a former President of the Association, is on record and the Bar can feel confident it has helped in the continuing campaign to prevent children being killed or injured by accident and can take pride in having done so.

Ray Reynolds ❑



*Chief Justice Gleeson AC swears in Justice Beazley as a Judge of Appeal on 29 April 1996*

# From the President

**Excellence.**

We are not loved. Shakespeare said "first thing, let's kill all the lawyers". Many would agree and many of those members of the public who know the difference between barristers and solicitors would substitute "barristers" for "lawyers". To some extent this is inevitable. Half our clients lose their cases. Many of those blame their barrister or the opposing barrister and many of the remainder blame the judge or the system. We are perceived as elitist and expensive, overwhelmingly the produce of privileged WASP parents and male private schools. We know that these images are false, and given an appropriate tribunal we could prove them to be false, but there is no natural justice given in the courtroom of public opinion.

There is one thing we can do. We must pursue excellence not only in the skill with which we perform our professional duties but also in our client PR. We must demonstrate to our clients that we perform a socially useful role and we must deal with them in a manner which engenders respect rather than contempt for our profession.

Having put the proposition at this high level, let me descend to the particular.

The first impression most clients have of a barrister is of a waiting room. The barrister who is late, the barrister who keeps the client waiting without comment until the delayed solicitor arrives and, worse still, the barrister who always sees the solicitor in private before inviting the client in all give to the client an impression that the Bar is pompous, aloof and unconcerned with the welfare of its clients. Being late can usually be avoided and can always be apologised for. If the solicitor is late, it is an easy matter to go outside, introduce oneself to the client, apologise for the solicitor's lateness and offer a cup of tea or coffee. In most cases this would completely eliminate feelings of the type which I have described. Seeing the solicitor in private before the client is simply bad practice. In the very rare case where one does need to discuss something in the absence of the client, this should be done in a separate conference or over the telephone. One need only ask oneself what the client thinks is being discussed at the private confabulation to appreciate this point.

A second area is the importance of involving the client with the tactics of the litigation and the decision-making process. As with most professions, there are some decisions to which few clients can usefully contribute. One does not clear every question in cross-examination with one's client before asking it. On the other hand, many of us are too unwilling to explain to clients why one is calling or not calling a particular witness, what risks attach to the calling of a particular witness or the asking of a particular line of questions, the tactics of interlocutory motions and the like. Most clients appreciate being taken into the barrister's confidence in this way and their opinions should be given appropriate weight.

A third area is handling defeat. On average, most of us lose about half of our cases. The client who has lost his or her case is the client most likely to turn on the barrister or on barristers in general. It is important in this situation to be able to offer words of comfort to the client without putting down the solicitor, the opponent, the judge or the legal system. If the client has been properly advised in advance, the client will be prepared for the possibility of defeat and will appreciate that no legal system and no lawyer can guarantee that the right person is believed in every case. It is after a defeat that one really feels thankful for laying the ground in this way at an early stage.

None of the examples I have given are particularly controversial or particularly onerous. What is important is that if we all observed these simple approaches the community attitude towards barristers would be significantly more friendly than it is. We will not create a community in which everyone loves us, but we may create a community in which fewer people despise us. ❑

# New Silks on the Block

**Remarks by the Hon Sir Gerard Brennan AC, KBE on the occasion of the new Silks' welcome in Canberra on 6 February 1996.**

The Court congratulates those who have appeared today wearing their silk gowns for the first time in this courtroom.

Silk is a self-sought honour the application for which was restrained, in earlier times, by the two counsel and two-thirds rules of practice. Those rules have gone and the restraint has been largely removed. In some jurisdictions the issue of a Queen's Commission has been discontinued and some Bars have chosen to identify particular barristers as Senior Counsel.

The status of silk has altered but it does not necessarily follow that the grant of silk has lost its significance or that the institution of silk in any jurisdiction is without value.

The status of silk now depends upon the standards which are adopted by the authority in whom the discretion to grant silk depends. If silk is granted only to those counsel who have been put extensively to the test and have proved themselves to be men and women of integrity, committed to high ethical standards and possessed of superior skills as a legal advocate, silk will be seen as a recognition of high merit by counsel's own profession.

So long as the standards adopted by the respective granting authorities are maintained at a high level, there will be an incentive for recognition that can assist in the maintenance of professional standards to the benefit of the efficient conduct of litigation. And the community of silks will be marked by a camaraderie born of mutual respect. Then silk can be regarded as a warranty of competence to clients seeking counsel's services in complex or difficult matters.

The value of the institution of silk depends upon the way in which silks use the status and authority that is incidental to the honour. If, in their daily work, silks are seen to be men and women of integrity, committed to high ethical standards and manifesting superior skills as legal advocates, they acquire authority and influence. With that comes the responsibility of leadership - chiefly by example.

The status of silk cannot be justified as a merely personal accolade. It can be justified only on the footing that the silk will set and maintain high standards of professional work and conduct.

That is the kind of leadership that has moulded the ethos of the Bar. It is the kind of leadership without which the Bar degenerates into a service industry regulated by no more than market forces. There would be no place for the "cab rank" rule by which an independent profession sees to it that its services are available to the unpopular or the undeserving litigant and that the most demanding cases get their day in court.

It is appropriate to acknowledge here the assistance that this Court has received from senior counsel and their juniors, some of whom are present in Court today, who have appeared without fee and argued some of the more difficult appeals on behalf of impecunious parties.

The efficient conduct of litigation requires a mutual trust between Bench and Bar.

Without that trust, the Bench must start from scratch the work that the Bar should - and usually does - perform of identifying the issues, adducing relevant evidence and referring to relevant authority.

Without that trust, the adversary system would collapse and the public purse would have to meet the cost of a multitude of investigatory judges. Conversely, without the trust that the Bar reposes in the Bench, the curial system would be a waste of time and resources.

The mutual trust is preserved by competent, strong and fearless advocacy in open court.

The qualities expected of a silk enable counsel to be independent of inappropriate influences - and that produces the detachment essential to sound advice and powerful advocacy. It leaves the advocate fully committed to the same object as the object to which the court is committed. That object is the administration of justice according to law; not decision-making that will satisfy popular opinion. The court is not assisted, nor is a client's cause advanced, by courtroom advocacy that is a prelude to an ex parte appeal to a public audience. Nor does the court need the advocate's public comments on the court's acceptance or rejection of the advocate's submissions. Justice is not advanced by door-stop interviews. The competent advocate is not a public relations consultant for a client's cause, much less a touter of his or her own abilities.

The task that lies ahead of the new silk is not only successfully to build a silk's practice: it is to set and maintain the standards of a profession that has the important function of assisting the courts in the administration of justice according to law. To perform this function, the Bar is invested with the privilege of appearing for clients and the Bar is protected in ways that have been thought to be conducive to the public good. It is for the leaders of the Bar to ensure that the privilege is earned and the public good is served. You are entering on a more challenging and a more rewarding part of your career. The Court wishes you well and also extends its good wishes - perhaps tinged with a certain sympathy - to your spouses and families. ❑

# Mr Justice Kirby - Life After the Court of Appeal!

**Thirty years ago Justice Kirby and Gee QC had chambers on 8th Floor Wentworth. Then, as now, Gee stood in awe of Kirby's accomplishments, capacity for work, urbane charm and prodigal acquisition of university degrees. On his appointment to the High Court of Australia, Justice Kirby agreed to an interview, in which Gee had the opportunity to put questions from an advocate's viewpoint. Now, read on ...**

Q. *May I start by asking you what you miss most about the Court of Appeal?*

A. I miss the collegiality. In a sense, the daily re-configuration of such a busy court into benches of three judges requires a daily renewal of friendships and professional cooperation. There was a lot of community life with the Judges of Appeal. There was a sharing of the huge workload. I also liked presiding in the Court. Immodestly, I think I was quite a good presiding judge. You get used to that after more than a decade. Above all I miss the personalities. I came to know them all as friends. It is quite a wrench to sever my connections with them.

Q. *And Justice Meagher?*

A. In some ways, especially him. He mischievously feeds the rumours of a deadly enmity. I hate to shatter the illusions of your readers, but actually we are the closest of friends. The Bench and Bar daily demonstrate that you don't have to agree with a person's cause or philosophy to get on well with them. Meagher JA and I share a love of things outside the law - he is one of the best read, wittiest, quickest, most civilised people I have ever known. Actually, he's a secret feminist. Until now, he has just kept his real opinions in the closet. After his recent prolonged visit to the shrines of Eastern Europe, he has come back with quite dangerously radical views. On my departure for the High Court he even presented me with a plaque to the memory of V.I. Lenin which he had bought in Bulgaria suggesting that I would need it where I was going. What did he mean, do you think?

Q. *Who would try to second-guess Justice Meagher? Judge, there seems to me to be a great gulf between the way the High Court approached deciding cases yesteryear - with a legalistic approach - and what seems to me to be very much a policy basis of decision-making. The extremes are illustrated by the remarks of Sir Owen Dixon when he took office as Chief Justice in 1952 that he would be sorry if the Court became anything but highly legalistic, and the other represented by the almost naked policy-making of Mabo. Do you have a view about whether the High Court in particular, or any court, should be following one position or the other?*

A. I don't think we can stereotype either the "old" High Court of Sir Owen Dixon's time or the "new" High Court of the *Mabo*[1] case. Mabo raised some very important, novel and interesting questions. But all of the Justices reasoned to their conclusion by legal means. It is true that judges are more open and candid today than they were in earlier days. But policy was always there. Justice Deane in *Oceanic Sunline Shipping -v- Fay*[2] encapsulated it by saying that where we reach a point in a decision and the law is not clear then we look to the three guideposts of the law: decided authority, legal principle and legal policy. In Sir Owen Dixon's time the High Court of Australia was subject to appeals to the Privy Council. For that reason the legal authority that was ultimately laid down by their Lordships in London had a greater part to play in the troika for it was outside the High Court's ultimate local control. But policy was always there, particularly in constitutional matters. The big difference that has come about in our lifetime in the law, yours and mine, has been the greater candour. In fact that candour really began in England. It was encouraged by that great Scots lawyer, Lord Reid, who said that if you like to believe in fairy tales you could continue to believe that no decisions of policy ever intrude into court decisions at the highest level[3], but if you are honest you will acknowledge that, in some cases, choices have to be made. That is when courts have in the past, do at present and will in the future look to legal principle and legal policy as well as decisional authority.

Q. *May I explore a little further what you mean by legal policy. It seems to me that it can often merely be a dignified description for a statement by a judge of his personal position on a matter, frequently embroidering it with statements to the effect that he believes he is reflecting some community view. Would you care to delve a little deeper into what we might legitimately label legal policy and what merely becomes an idiosyncratic statement by a judge?*

A. Well, the common law has been built over 800 years by judges. Judges reach into past decisions to try to find guidance for the solution of current problems, many of them quite novel and different from those previously faced. They reason by analogy. No past decision will ever exactly parallel the present problem. Reasoning by analogy allows a degree of flexibility because of the way the human mind approaches the new problem. The common law is full of expressions that permit judges to give application to their views of what is "reasonable" or what is "public policy" or what is "fair", what is "just" - so that this is nothing new. This is the very reason

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1 (1992) 175 CLR 1.
2 (1988) 165 CLR 197, 252.
3 (1972) 12 JPTL 22.

that the common law has survived for 800 years and flourishes in a quarter of humanity. I think we were burdened by living in a period of legal teaching that celebrated the notion that there was no policy. You and I were effectively taught by some of our teachers, but not all, that not only was that what was, but it was what should be. Now, we have come to an appreciation of the fact that there are other sources such as legal principle and legal policy. And that because judges have always had them in mind when reaching decisions, it's much better to flush them out, encourage candid discussion about them, than to bury them in language which pretends that they don't exist. So I think that it's entirely appropriate that judges should be honest. It's appropriate that they should be candid. And this being the way of the common law, it's natural that it should be there for the dialogue between bench and bar. Otherwise we will pretend that for every problem there is an exactly applicable precedent and that analogous reasoning permits of one only logical result. In almost 12 years in the Court of Appeal I learned very early, under the instruction of Justice Glass, that virtually every case of statutory construction that came to the Court of Appeal could legitimately, and with powerful arguments, be decided either way. Similarly I've learned that many, many cases in the common law can properly be decided either way. Many cases depend upon what emphasis you put on particular facts. And if these choices exist, it's better that we be honest about them. Particularly that we be honest about them to ourselves and to the Bar because only by doing that will the dialogue be an honest one which will produce results that are convincing.

Q. *There will be occasions when the legitimate application of that process leads to a result which is in fact, unintentionally no doubt, out of accord with what the community is looking for, and it is of course open to Parliament always to step in. Is it your experience that you have known judicial processes which are impliedly if not expressly taking refuge in the proposition that they will make a decision and Parliament can clear it up?*

A. I don't think that is the way judges in Australia think. Certainly it's not the way judges with whom I've worked think. Judges know better than most that Parliament will not "clear it up" in most cases. Parliament, I hate to say this, is not always interested today in the nuts and bolts of the law. The obverse side of the coin is the assertion that you can just leave every problem of the law to Parliament and Parliament will fix the problem. My 10 years in the Law Reform Commission, before I joined the Court of Appeal, persuaded me that for many problems of law reform, Parliament is simply not interested. So what we need is a symbiosis between the creative element in Parliament which should have the dominant role, but also creative element in the judiciary which will fill the gaps that are left by Parliament wherever that can properly be done in a case which presents and which gives the opportunity for the achievement of a just and lawful result.

Q. *Is it in your view legitimate to suggest that, just as we were taught a generation ago that there was no such thing as policy in common law decision-making, perhaps the pendulum has swung too far the other way and that there is insufficient regard to the guidance of precedent. Do judges unshackle themselves from it and pursue what they regard as the true way?*

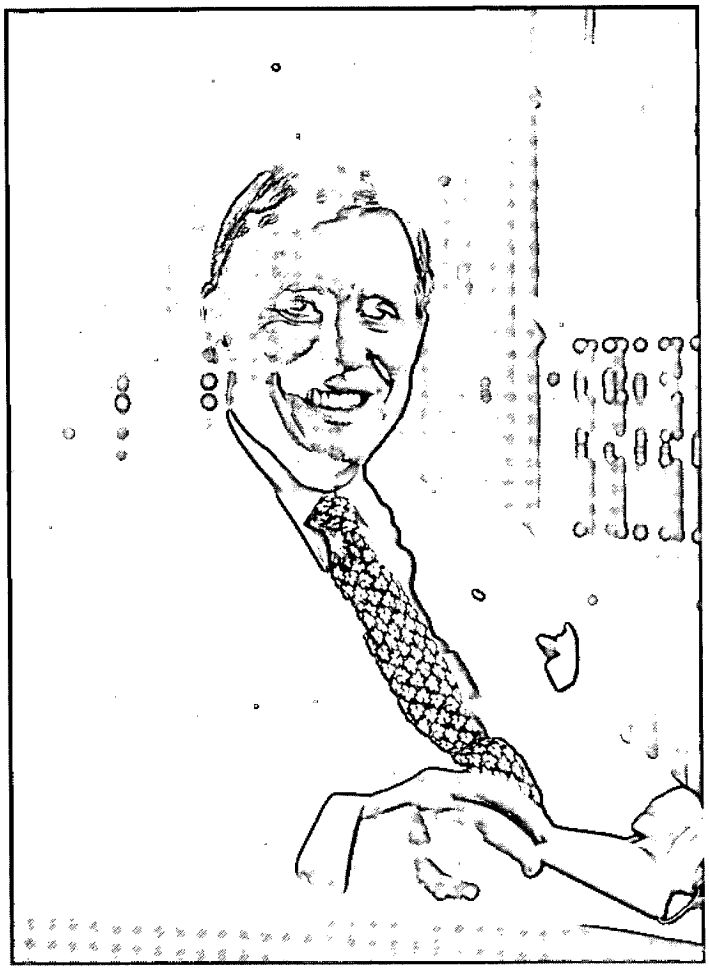
A. Obviously there is a balance to be struck between strict adherence to past doctrine and the development of doctrine for new circumstances and new challenges. The history of the common law has been one of periods, often prolonged, of stability and reinforcement of principle and then periods of very rapid growth. I'm thinking, for example, of the time of Lord Mansfield, the time at the end of last century of the great codes and the law that gathered around them. It's been the privilege of contemporary Australian lawyers to live through a period of rapid expansion of legal doctrine. We will probably mirror the past history of the common law. We will consolidate, strengthen. But it is just a mistake of the mind to pretend that the common law ever stands still. I've been in the dusty plains of India. I've been in the back-blocks of Malawi and Jamaica. In every little town there is a court-house which is doing its work in much the same way as we do in our courts in Australia. It is a humbling thing to see how the common law of England has adapted so brilliantly to changing circumstances, in the hands of different cultural traditions. It flourishes because of its malleability and adaptability. For generations we were locked very much into the values and perspectives of English Law Lords. We threw off that connection. Yet for a decade and more afterwards, and still in many minds, it remained a controlling force. But it was natural and, in a sense if you look at these developments historically, inevitable, that when the mind was released from that connection there would be a period of creativity. I say that not meaning to imply that the connection to English law was not overwhelmingly to our advantage. I agree with what Justice Hutley wrote about that[4]. Our link with the Privy Council rescued us from being a south-seas provincial backwater of the common law. It made us part of a great world mainstream of legal thinking. But, finally, we have now severed that link. It was a natural development that we would then have a period of readjustment as we adapted rules that might have been suitable for earlier times in other places to what was suitable for Australia.

Q. *I'd like to turn to a different topic, although ultimately it's related. There will inevitably be error in judicial decision-making and, equally importantly, there is often a perception of error, especially in the disgruntled losing litigant. You have been very prominent in requiring that appellate doors*

4 (1981) 55 ALJ 63, 69.

*are as open as it's possible to make them, subject to obvious limitations to keep out cases that simply have no business at appellate level. Would it be right to say that that has been one of the really central aspects of your approach to judicial office at appeal level?*

A. Well, I believe in access to justice. For example, I don't have the feeling of impatience for litigants in general, litigants in person in particular, that is quite frequent in our profession. My own background and life's experiences have made me sensitive to the rights of everybody to come to the law for equal justice. The rule of law means ultimately that people can do that. But at the level of the appellate courts, and particularly the level of the High Court of Australia, you have to find a balance between access to justice and the human capacity of the very few people who occupy the ultimate decision-making positions. The High Court of Australia simply could not have survived had it continued to absorb the work flow that came to it formerly as of right. Something had to give. Either the Court had to become like European courts, a body sitting at home or in their chambers deciding matters mostly on paper. Or, if it were to continue the open administration of justice by the oral adversary tradition inherited from England, it had to cut down the flow. The latter was the choice that was made[5]. And still the High Court of Australia absorbs a bigger workload than most of the other final appellate courts. A compromise has been struck between the special leave system which puts a gateway and a filter but with the continuity of the oral tradition of unlimited argument. I believe that that compromise, like all compromises, is open to re-examination from time to time. Perhaps we should move to a system whereby more is done on paper, more severe time limits are fixed, so that more people can get to the justice of the High Court of Australia. But that is a matter which is under the constant review of the Justices of the High Court.



Q. *There seems to me to be a fairly deep question of principle which is not immediately visible in all of this. It's illustrated by one of the very last cases on which you sat in the Court of Appeal. It was what appeared to be an everyday application for leave to appeal from a decision of a Judge granting an extension of time to sue under the Motor Accidents Act. It took a turn in which the majority, of whom you did not form one, took the view that as a matter of policy, in effect, that kind of application, independent of its individual merits, would not be entertained. You wrote, if I may say so, a persuasive contrary opinion to the effect that it was an abnegation of the rights of litigants that it should be dealt with in that particular way. Now, that case is the subject itself of an application for special leave to appeal to the High Court which has yet to be heard, obviously it can't be the subject of any particular comment, but it does raise the problem that in any filter system of the kind that you've spoken of, you have a great tension between whether you will not hear the case because a supervening policy is going to control you, such as whether it's important enough and whether you will not hear the case because, looking at the merits of that particular case, it doesn't seem to involve any question that should go higher. Granting that that choice is inherent, although often concealed, would you express a view about whether you have a preference for a choice based on what could be described as a wide principle, such as general importance, or whether that should give way to the idea of looking at the real merits of the instant case?*

A. The position is somewhat different in the High Court from the situation I faced every Monday in the Court of Appeal in the Motion List. In the High Court, the attention must be fixed upon the importance of the issue that is sought to be ventilated in a special leave application. It's of the nature of such an application that you have to consider, amongst other things, the potential significance of the point to be argued for the whole of the country. Although that is not a universal criterion, it's obviously an important one to get through the

5 See (1991) 173 CLR 194.

gateway. Already I've had to be reminded, ever so gently, by my colleagues that I am no longer sitting in the Court of Appeal where my task overwhelmingly was to endeavour to do justice in the particular case. My task now is to deal with special leave applications by different criteria. That is what is "special" about such leave. I have to confess to you that as I listen to the eloquent persuasiveness of the Australian Bar in such applications I would probably let at least 50% of the cases through and would find marvellously interesting the consideration of the points that are sought to be argued. Yet my colleagues are right. We simply could not cope, on present work systems, with the workload that would then ensue. This of course has quite significant implications for the nature of the workflow of the High Court and indeed for the kind of court that the High Court is. When its jurisdiction was litigant chosen it was, to some extent, a different court than it is where its jurisdiction is judge chosen. That is just a feature of a system which was introduced for survival's sake. It won't change significantly, I think, during my service. However, we should keep our minds open for the possibility of other systems. One of which might be that, at least in some cases, appeals are dealt with on written argument. I got a feeling on the last special leave list I heard from Brisbane by video link that at least two cases would not have required for a just and lawful conclusion much more by way of oral argument than the argument we heard in the half hour in the special leave application. It is wonderful to see barristers focusing so acutely on the real issues because of the time limit. My impression is that they do so even more so on video link than they do in oral presentation. One possibility which I raised at a legal convention 15 years ago is that one could supplement special leave type argument with draft judgments, prepared by the parties, which set forth the way in which a point should be resolved consistent with the legal principle urged by each side. For my own part, I am by no means mind-closed to the idea of new techniques of decision-making. We should all of us be concerned with access to justice. We should focus on ways in which we can adapt current techniques to providing greater access, not just to the chance of justice but to the judicial determination of cases by all courts, including the High Court of Australia.

Q. *May I press you a little on one of the inevitable outcomes of such a system? That is, the occasions which must arise from time to time where no point of general importance can be adumbrated but the decision below looks as though it was manifestly wrong and has caused injustice. Now the perception of practitioners is that that case won't get special leave and so the theoretical ultimate court of appeal for the citizens of Australia is closed to them. Could you give me a view about that?*

A. Well, one of the rather honeyed barristers in the Brisbane special leaves said in the video link, mournfully, "I must now mention some facts. I know that that is said to be the kiss of death in a special leave application". The facts were very critical. Special leave was not granted. But it isn't true that the High Court is indifferent to justice. The High Court is made up of judges who are sworn to justice. It's just that they have to keep their eyes on the workload of the Court and on the range of cases that possibly can be dealt with. Quite often the Judges have said, including in special leave applications that I've sat on, that cases will be brought up not because they raise any particularly novel point, but because there is a feeling that a classical point of our law has to be made, again, with clarity to ensure that justice according to law is achieved. You will remember the series of cases on the limitation on appellate intervention when primary judges have made findings of fact based on courtroom impressions[6]. The High Court specially said that it was returning to the re-expression of that principle because it saw symptoms, as it was implied, of rebellion on the part of appellate judges, one of whom on occasions was myself. Such cases do get through the gateway. I have to say to you that the justice of the case is never irrelevant to me, never.

Q. *Now I no doubt will form one of a very large number of people - there's an academic sub-industry devoted to the task - trying to work out whether you, in your appointment to the High Court, will take a States' rights position or a centralist position. For the same reason as you will be able to take part in exercises involving legal policy, it must be the case that you have at least some personal position - you're an Australian citizen conscious of the tension between those things. What can you tell us about it?*

A. I will just decide the case as judges should, on the arguments put to the bench in open court. Of course, I have my philosophy and my approach to the solution of problems. In the nature of things I have not been exposed in my judicial life to date to a large number of constitutional cases. We've had some in the Court of Appeal. But not a great number. In the High Court, already I've sat in a large number of constitutional cases. Virtually every week there are cases that concern the construction of the Constitution. I will just go on doing what I've been doing in the past, deciding the matter in hand on the basis of my understanding of the decided authority, legal policy and legal principle that are raised by the case. One of the interesting questions presented by constitutional decisions of recent years, particularly on the question of the implications of the Constitution, is that of the consequences of that development for the *Engineers Case*[7]. The *Engineers Case*, in a sense, turned its back on what had, until then, been the implications derived by the earliest Justices from the Federal nature of the polity. *Engineers* asserted that if the power was there in the Federal Parliament, then the consequences of the exercise of that power for the Federal/

6 E.g. *Abalos v Australian Postal Commission* (1990) 171 CLR 167 178.

7 (1920) 28 C.L.R. 129.

State polity had to give way in giving effect to the grant of legislative power to the Federal Parliament. One of the unexplored questions, it seems to me, when you return to implications, is what are the implications of the Federal nature of the Constitution that must now be given their place? I expect that we will see lots of argument about that in the years to come. It never seemed to me to be a particularly novel doctrine that you look to implications in the Constitution. Some people have found it shocking. But every lawyer knows that every document, whether it is a constitution or a contract or a will, has words, context and implications. Why one should exclude implications from a constitutional document, which necessarily is brief and terse in its expression, has never struck me as convincing. Given that there are implications, the question may be: what is the implication from the Federal nature of the Constitution for each matter in contest? That is something which may challenge the *Engineers* doctrine - an unexpected consequence of the revival of constitutional implications.

**" The Constitution is inescapably political "**

Q. *That proposition introduces the obvious in one sense, namely that between a court's apparently legal process in deciding a constitutional point and the judgment there lies the introduction, in effect, of politics - not party politics of course - but politics in the sense that a judge's personal perception of the way a Federation should work or the balance of relationships between the central power and members of a Federation must inevitably be introduced. My question therefore is this: what is the theory by which we conclude that a judge in your position is qualified to bring to bear that kind of "political" judgment?*

A. The Constitution is inescapably political. The Constitution establishes the High Court of Australia as the Federal Supreme Court of this country. It envisages the appointment of a limited number of lawyers as the justices of that Court. They have a constitutional, and in that sense political, function to perform. That is the nature of our political system. It cannot be escaped. The obligation has to be shouldered by each new Justice. It is just part and parcel of our political system, established by the Constitution.

Q. *Does it follow that in your view, because inevitably in the sense I've tried to use the term politics comes into it, a bench of the kind of which you are a member ought to be chosen in a way that produces internal balances or is that a factor that simply should be ignored on the basis that the justices make their way to your bench because they are the best or among the best of the lawyers in the land?*

A. I think that's a question for other people to answer rather than myself. The Justices of the High Court, when they get to the Court, are not completely free agents to give effect to their political whims or their consitutitional visions. They work within a framework of the Constitution and of legal authority on the Constitution. I was reading a wonderful passage in an opinion of Justice Windeyer recently. He is always a Justice who rewards re-reading. He quoted from an American authority which suggested that we should always remain open, with each new generation, especially in constitutional cases, to new insights because of the formal inflexibility of the Constitution and the changing perception of its language and of the system it introduces[8]. That is what the Justices have done in the past. That is what I will do during my service.

Q. *May I turn away from that to ask you a question or two about an area of the law that perforce is new to you, at least at appellate level, namely criminal law. Now, are there any particular views or ambitions that you bring to a court in which you will now from time to time be looking at important questions relating to the criminal law of the country?*

A. First, it's not true that this is entirely novel for me. In the Court of Appeal, by the prerogative process, we exercised quite a lot of judicial review of criminal cases. In more recent times the Judges of Appeal, including myself, sat frequently in the Court of Criminal Appeal. I did my fair share in that work. So I'm not unfamiliar with the criminal work of the High Court. A strength of the High Court in recent years has been its return to quite a lot of work in the field of criminal law. It tends to be a field that gets looked down on by the legal profession. That, in part, is because it doesn't tend to be an area where there's a lot of money to be made. Therefore, it doesn't tend to have the fashionable reputation of other parts of the law. But it certainly is the area of the law that the citizens think is the most important and the citizens generally are not wrong in these perceptions. So I will be looking forward to my work in that area. If anything could be said, it is that Justice Wood's work in the Royal Commission has borne out the wisdom of the High Court's steady but inexorable move towards the position finally adopted in *McKinney & Judge -v- The Queen*[9] where, after a number of earlier attempts to instil the need for warnings

8 The *Queen v Phillips* (1970) 125 CLR 93 at 115.
9 (1991) 171 CLR 468.

in judicial instruction to juries about the use of official evidence, the High Court ultimately took a very resolute position. At the time it seemed to some to be rather radical. In the light of recent revelations, it would seem to have been entirely justified. It was a natural legal development in the process of step by step evolution of a new legal principle. *You* might say it was pure policy and judicial invention. *I* would say it was in the high tradition of the common law: fashioning and developing principles for different and new problems in society in a way that best served justice. Anyone in any doubt about this should reflect upon the need for such principles that has been revealed in recent times.

Q. *Now I'd like you to give us, if you will, bearing in mind our readership so to speak, any quite specific hints or observations that occur to you about the way we, as advocates, should be going about our tasks, particularly in the High Court obviously but, if you think it appropriate, in the court you've just left.*

A. I put on paper my thoughts about appellate advocacy in a speech that I gave to the Australian Advocacy Institute. It has been published in one of the latest parts of the *Australian Law Journal*[10]. So there's no point in repeating what I said there. But I stumbled recently upon something that Sir Owen Dixon wrote about advocacy. He laid greater emphasis than I had upon looking at the court. I mentioned it in passing. But as I sit there in the High Court, no longer in the central chair which I occupied for more than a decade in the Court of Appeal, I realise how important it is that the advocate, however difficult it is in that great courtroom, should try to speak to every member of the court and to try to capture their attention. It is not an easy task. But where it is done well, it is a very fulfilling day both for the advocate and for the judges.

Q. *Is there any area of the law that you are, so to speak, itching to get your hands on and do something about that either rankles with you, nags you because you think it's gone wrong, or that you feel could simply be improved for the benefit of the citizenry?*

A. When I sat in the Court of Appeal I was sometimes shocked by the sensitivity of some judges who were subject to the Court of Appeal's review. Myself, I never thought it was a particularly distressing thing to be reversed. The judge who never does a bold thing and who dresses up every decision in terms of the impression of witnesses, will immure his or her decisions from appellate disturbance. But the judge may not do justice and almost certainly will not contribute to the development of legal principle. Over the years there are only two cases that I can think of in the Court of Appeal which disappointed me when I was reversed. One of them was *Osmond's*[11] case on the right to reasons for administrative decisions. The other was *Quin's*[12] case which was relevant to judicial independence. For the most part I simply accepted, on occasion, that I had been wrong; on occasion, that the matter was arguable and that perhaps I hadn't given enough weight to some issue of principle or policy that was revealed in the higher decision; and on occasion that that was just the opinion of the highest bench in the land and I could take it or leave it, but that it was binding on me. So I don't approach my new role with any agenda. I will just decide the cases on their merits with my best endeavour to find and apply the law, and to do justice. Every day I will be highly dependent on barristers. Justice Brennan once said they are the ministers of justice[13]. They are the indispensable co-actors in the great drama of justice. Without them our courts simply could not function.

*May I thank you for the time and of course on behalf of this august publication, wish you well for the future.* ❑

10 (1995) 69 ALJ 694.
11 [1992] 3 NSWLR 447; (1986) 159 CLR 656.
12 (1988) 28 IR 244; (1990) 170 CLR 1.
13 See also A T Kronman The Lost Lawyer - *Failing Ideals of the Legal Profession*, Harvard University Press, Cambridge, Mass, 1995, 109ff.

## At least he called something "a spade"!

| | |
|---|---|
| Puckeridge QC: | Did he indicate to you that he wanted to finish his shipwright's course or get a trade in the Navy? |
| A. | He was already, what you call a wood butcher as I call them, shipwright. |
| Q. | Were you aware —? |
| A. | That is what we call them. |
| Q. | In the Navy they call them the wood butchers? |
| A. | Yes, amongst other things. |
| His Honour: | You will have to excuse us laughing, the term is probably more familiar to you than to us? |
| A. | Sorry. |
| Q. | No need to apologise. I wanted to explain we were not laughing at you? |
| A. | There is too many of you anyway. |

*(McLean v The Commonwealth*, cor Sperling J, 8 July 1996)

# Bangladesh - When A meets B - 6 Incredible Days ...

**Clifford Einstein QC reports on the Clinical Legal Education and Advocacy Workshop conducted between 2 and 6 January 1996 in Dhaka, Bangladesh under the joint sponsorship of the Australian and New South Wales Bar Association and the Bangladesh Bar Council.**

On Friday 5 January 1996 Syed Ishtaq Ahmed, a distinguished looking former Attorney-General of Bangladesh, rose to his feet in a Thai restaurant in Dhaka. Speaking ever so quietly to his guests, who included Justice A T M Afzal, Chief Justice of Bangladesh, numerous other Bangladesh judges, senior advocates at the Bangladesh Bar and ourselves, the following words were said:-

*"We are very proud of our house of justice. It has been ravaged by many storms. Ill winds have swept through seeking to knock it down. It has withstood all of these elements and much, much more.*

*So it is that when you give up of your valuable time to assist in educating our children in law you assist in keeping our house in order and nourishing it for the future.*

*Thank you from the bottom of our hearts for your great kindness in travelling from the Pacific Ocean to the Bay of Bengal to strengthen the house of which we are so proud, and which we have and continue to endeavour to keep together through so much."*

*"Relaxing on the river cruise"*
*Front Row : Donovan QC, Chief Justice, Dr Kamaal Hossein, a justice, Mr Md. Amir-ul Islam Back Row: Ainslie-Wallace, Glissan QC, Einstein QC, Tilmouth QC and Laughton can just be made out*

Those sentiments said it all.

But back to the beginning.

From the moment we were met on Tuesday 2 January by colourful and immaculately dressed young law students at Zia International Airport, Dhaka, presented with bouquets and ushered into the VIP lounge, the hospitality and enthusiasm we were to receive during the ensuing week were revealed.

And the warmth, genuine sincerity and wonderfully friendly hospitality accorded to the New South Wales Bar instructors, Donovan QC (team leader), Glissan QC, Einstein QC, Tilmouth QC (South Australian Bar), Lindsay QC, Walmsley, Ainslie-Wallace and Laughton, made the visit possibly the most exciting and fulfilling days in our lives.

**Inaugural Ceremony**

The inaugural ceremony was held on the afternoon of 2 January in the now disused High Court building, once a magnificent mansion occupied by Lord Curzon, sometime Viceroy of India.

This auspicious event was well covered by the media, both press and television. The Chief Justice officially opened the workshop. The following excerpt is taken from the *Bangladesh Observer* of 3 January 1996:-

"Lauding the efforts of the organisers, Justice Afzal said the workshop unfolds an era of a very fruitful relationship between the professional bodies of the two countries belonging to different continents engaged in the establishment and sustainence [sic] of the rule of law. He thanked the Australian legal fraternity for its assistance in holding such workshop, first of its kind in Bangladesh and hoped this would serve the cause of peace and justice world over.

A number of resource persons, including Brian Donovan (Queen's Council) [sic] are in the city to conduct the workshop. Australian Bar Association and the Australian Advocacy Institute are also collaborating in holding the workshop.

Justice Afzal said - 'In Bangladesh, we live in a small territory with our aspirations and frustrations under a constitutional system with a promise to realise through the democratic process a socialist society, free from exploitation - a society in which rule of law, fundamental human rights and freedom, equality and justice, political, economic and social will be secured for all citizens'."

Brian Donovan QC's marvellous ability to reach out to, and to communicate with, young advocates in relation to the fundamentals of advocacy and in relation to the advocacy

HIERARCHY OF COURTS

THE SUPREME COURT OF BANGLADESH
APPELLATE DIVISION

SUPERIOR COURT

Appeals in both Civil and Criminal cases from the High Court Division are determined by the Appellate Division
WHERE
The Chief Justice of Bangladesh,
when he attends, presides

Appellate Administrative Tribunal

Administrative Tribunal

HIGH COURT DIVISION

Civil Jurisdiction | Constitutional or Writ Jurisdiction | Special & Statutory Jurisdiction | Criminal Jurisdiction

ORDINARY CIVIL & CRIMINAL COURTS

CIVIL COURTS

LABOR APPELLATE TRIBUNAL

The Courts of District and Additional District Judge

LABOR COURT

The Courts of Subordinate Judge

LOAN COURTS
Appeals to

The Courts of Assistant Judge

The Courts of Small Causes

CRIMINAL COURTS

SESSION COURTS

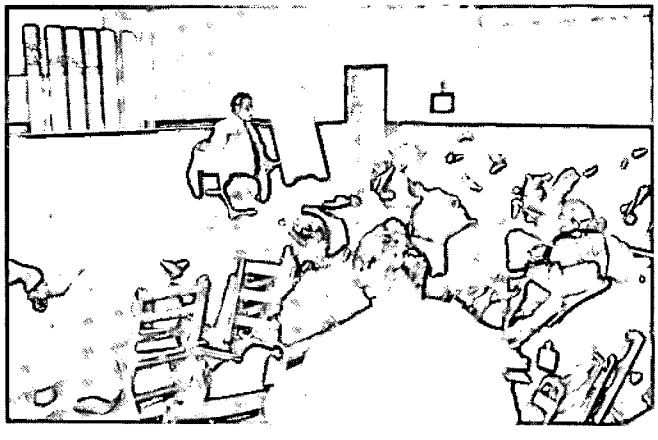
The Courts of Sessions and Additional Sessions Judge

The Courts of Assistant Session Judge

MAGISTRACY

TRIBUNALS & SPECIAL COURTS
Smuggling
Drugs
Anti-Corruption
Special Powers Act
Arms Act
Explosive Substance Act

*The inner courtyard of the disused High Court building*

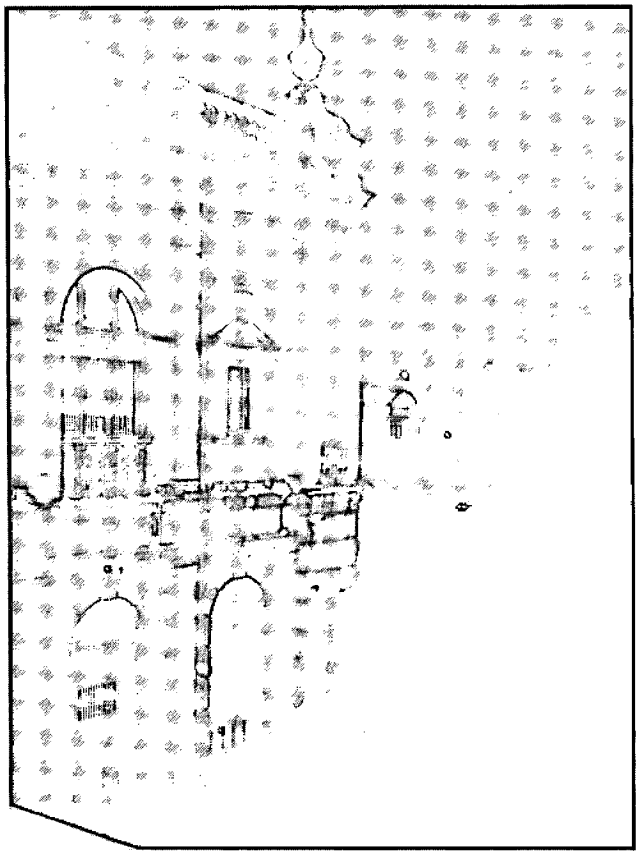


*Donovan QC at group session*

workshop concept was clearly demonstrated in his first address to all the advocacy students. Donovan QC's dedication in organising the workshop and the considerable time and effort expended by him during the many months before the event must be applauded and, plainly, enabled the workshop to be carefully, efficiently and successfully run in all respects.

Likewise, it was obvious that Mr Md Amir-ul Islam, ably assisted by Dr Mizanur Rahman, had expended the same considerable time and effort in Dhaka.

An impressive programme was distributed for the opening ceremony recording all the speeches. It also included a detailed schedule and breakdown of sessions for the workshop. The concluding pages gave a detailed CV of each member of the "International Faculty" in attendance. A most efficient team of student assistants and liaison officers was allocated to each tutor group to attend to their every need. They saw to it that each day ran extremely smoothly. We were ushered to morning tea, afternoon tea and all functions by this dedicated team.



*Disused High Court building at twilight*

**The Bangladesh Courts**

The Supreme Court of Bangladesh comprises an Appellate Division and a High Court Division. The functions of the two divisions are distinct and separate. The two divisions are governed by two separate sets of rules as regards practice and procedure. The courts apply the common law. The hierarchy of courts is as set out in the chart opposite.

The Bangladesh Bar Council is a statutory body, having as its primary role the licensing of lawyers for practice, the maintenance of a list of law institutions and the disciplining of those advocates who violate the ethical standards.

There are over 20,000 lawyers registered in Bangladesh with the Bar Council.

Continuing legal education is a new concept for Bangladesh and this workshop was conducted pursuant to the personal initiative of Mr Md Amir-ul Islam, the Chairman of the Bar Council's legal education program.

**The Workshops Begin**

On Wednesday 3 January the first of the workshops began in earnest. We had already experienced the difficulties of understanding one another's accents - as the Bangladesh accent is especially sharp in comparison with the very broad Australian accent. It took quite some time for both parties to "tune in".

The trainee advocates appeared to be incredibly shy and reticent as we commenced the first workshop. The initial problem posited was a simple question of an application for an injunction to restrain a golf club from permitting play on the 15th hole for the reason that the configuration of the hole constituted a serious hazard to safety of the person. The 15th was a dog-leg to the right and golfers had been in the practice of attempting to drive for the hole from the tee. A number of previous incidents had occurred whereby children living in a home unit complex situate directly between the tee and hole had been hit by the ever-hopeful golfers.

After enquiring as to whether the students whom Glissan and I were addressing, had read the materials, we were pleasantly surprised to learn that our students had indeed read the same. We then enquired "Well, what is the single most important factor which in your minds requires to be communicated to the judge in order for you to obtain this injunction?". The obvious expected answer was - "The danger of injury to the home unit complex residents". No such answer emerged. Indeed, no answer was forthcoming despite Glissan's and my several attempts to extract an answer to this seemingly simple question.

Finally, I elected to select one particular student and, addressing him squarely, said to him - "Well, what in your view is the single most important thing which you would wish the judge to know when you are explaining to the judge the need for this injunctive relief?".

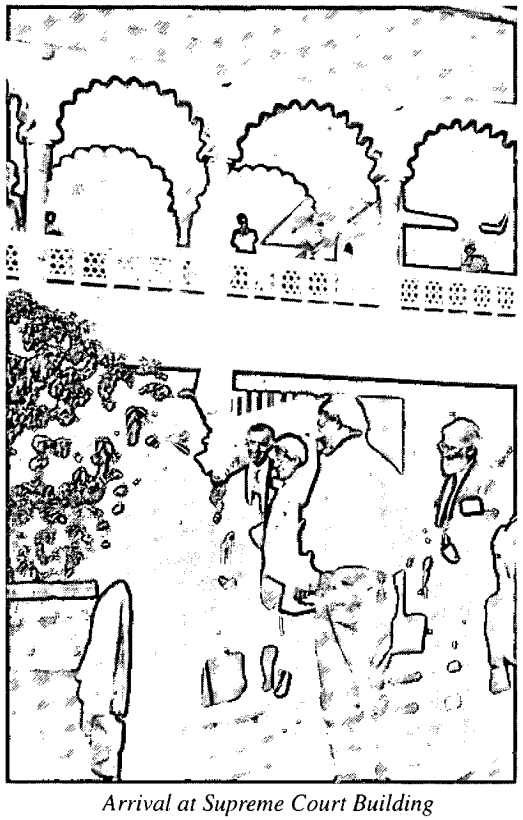
Answer - "What is golf!" !!!

"Where were you Maconachie?!!" Notwithstanding my friend's absence, it became incumbent upon me to take out my pretend driver, to demonstrate a golf shot and upon Glissan to draw on the blackboard a golf course and to explain how the game worked.

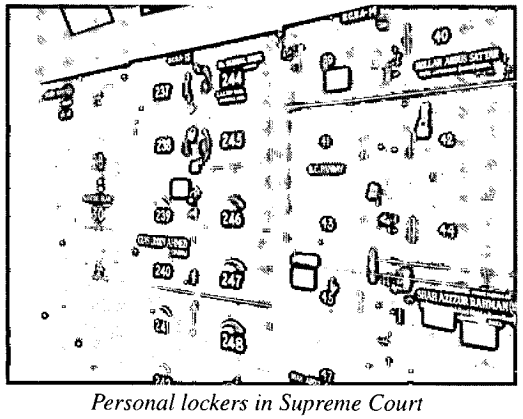
From that time on, things improved rapidly. Once the students understood the nature of the game of golf they had no difficulty whatever in addressing the court. During the ensuing days, most of the difficulty we experienced was trying to harness the unbounded enthusiasm of these students to learn.

**Six hours labour: six hours dining**

The daily routine was fairly rigorous. We worked very hard initially for three to four hours from about 9.00am to 12.30pm. We then had a solid three hour midday period of lunch, followed by a further three to four hours of solid workshop, usually resulting in our return to the hotel by about 7.45pm. We were then given 15 minutes (and no longer) within which to shower and change. Each night we were formally invited to dine at official banquet after banquet, with formal speeches held either in private homes or in 5-star hotels or top restaurants. On almost each of these occasions the guests in attendance included numerous justices of the Supreme Court, High Commissioners of India, Canada, Australia and the like, as well as present and former Attorneys-General. Our discussion with the judges, senior advocates and other guests at these dinners proved illuminating for us and, we hope, were of interest to those with whom we were speaking. For example, I had close discussions with Supreme Court Justice Naimuddin Ahmed on legal aid and on delay reduction programs in Australia and on the delay difficulties now being experienced in Bangladesh. When next Gleeson CJ or Clarke JA raise these issues, it may not be inappropriate to point out that, although our system can certainly be improved, according to some statistics there are almost 500,000 cases pending in the Bangladesh judiciary against a total strength of 710 judges. In the year 1990 there were 359, 652 cases pending in Bangladesh.



*Arrival at Supreme Court Building*



*Personal lockers in Supreme Court Bar Common Room*

In the course of these discussions we learned of a crucial and important fact. This is that, regardless of the difficulties which the judiciary and the legal system in Bangladesh labour under, there is a basic belief in the justice of the system held by the citizens. That belief, which is a tangible thing, augurs well for the future of the Bangladesh legal system and suggests that our work in Bangladesh is a very long way from a shot in the dark.

Let us now shortly revisit some of the aspects of the visit.

**Day 1 - 2 January 1996**
**5.30pm Inaugural Session**

Speeches were delivered by the Chief Justice, Donovan QC, Glissan QC (reading message from President, New South Wales Bar Association), and others. Printed booklets were also distributed containing the speeches, CVs and photographs of Australian barristers.

**8.00pm.** Dinner was held at the palatial penthouse - marble floors and walls - of Mr and Mrs Md Amir-ul Islam. Armed soldiers were stationed at gates, ground floor doors and top floor. The guests included many justices, high commissioners and senior advocates.

**Buffet Dinner**

We watched with interest as, although cutlery was provided, it seemed superfluous. A number of the guests used their fingers, although in deference to us, some used knives and forks. Note - it is customary to mix the rice and sauces delicately with one's fingers and then to carefully transport the food into one's mouth. We saw this seemingly difficult manoeuvre carried out with elegance and ease by many guests. We all delighted in trying the many highly spiced dishes and delicious desserts; but could not succumb to the "finger" technique.

**Day 2 - 3 January 1996**

**Midday**. Luncheon at a Chinese restaurant. Followed by a visit to the Supreme Court, where we watched our host, Mr Md Amir-ul Islam, argue an application to quash a suit commenced in a lower court for divorce before two trial judges. I had no difficulty in following the debate. The judges are pointing out to Amir that the Appellate Court will not entertain the matter when disputed questions of fact not yet determined below may affect the application.

What does excite one's interest is that every so often the debate switches from English to Bengali.

I enquired (both of Amir and of one of the judges whom we later met socially), as to the language switches. Apparently, the "official" court language is English, all pleadings and evidence and judgments are in English, but the occasions for lapse into Bengali are when some humour is or may be appropriate - almost like a voir dire that constitutes a type of break in the argument, an additional gear. Something like a Shakespearean "aside". But the discussion between advocate and judge, even in Bengali, remains relevant and I muse about the possibility of switching to Bengali in addressing, say, Meagher JA in the course of address when he seems to be getting the upper hand - "Now look, Rod - relax for a minute. Why is it that your proposition must be correct? Surely the High Court can't always be wrong!"

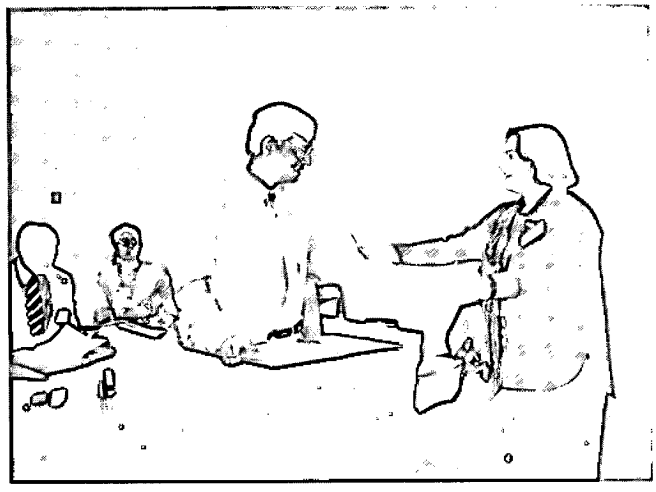
The argument ends. The judge begins dictating his judgment quietly and privately to a court reporter sitting near him. No-one is supposed to hear this. No-one does. The orders will be announced later.

As we moved along the Court corridor speaking with Dr Kamal Hossein (one of the most senior advocates at the Bangladesh Bar and a person well known to, for example, Mahoney P. and others who have had involvement with human rights in Bangladesh), a crowd began to close in on us. One really senses the natural curiosity of these local barristers and some onlookers who showed a keen interest in our visit to their courts. A small man pulled at my sleeve and handed me his business card. Indeed, I must record that from the second we walked into the inaugural ceremony until we left Bangladesh, I must have received at least 60 business cards from all manner of advocates, judges and others. Fortunately I had taken a number of my own cards with me, but my main problem through most of the time we were in Bangladesh was that I was never sure which card belonged to which advocate, judge or other individual. Hence I was forever consulting my sheaf of cards until one Bangladesh attorney suggested that I "put away all those cards - we don't want to see them again, and we know you have them!"

**Afternoon Session**

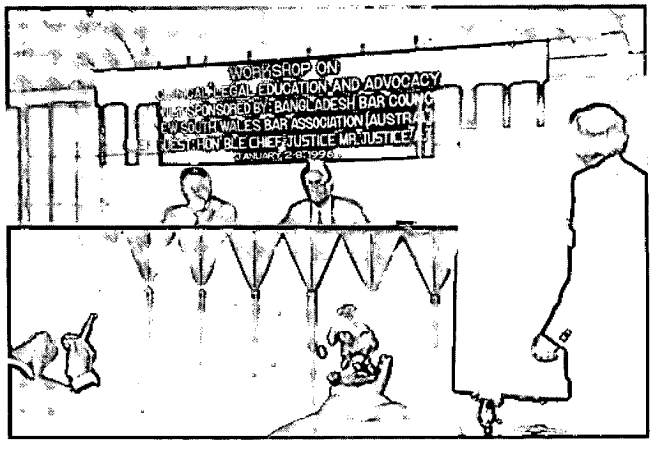
The first teacher training session with the law teachers and senior advocates. It went well. Insofar as the senior advocates were concerned, they had no difficulty in following how we approached the workshop. The procedure was that the student advocate cross-examines the student witness. The senior advocate then gives a critique of the student advocate's performance. We then review the senior advocate's critique.

We obviously had some additional difficulty in dealing with the law teachers' segment of the teaching session. The problem is that these law teachers at the University have never actually practised as advocates and do not intend to ever so practise. Thus, we are trying to teach those who have no practical courtroom experience how to teach advocacy concept and practice to young advocates. But the willingness of the academics to learn and to pass on what we can demonstrate and teach is clear.

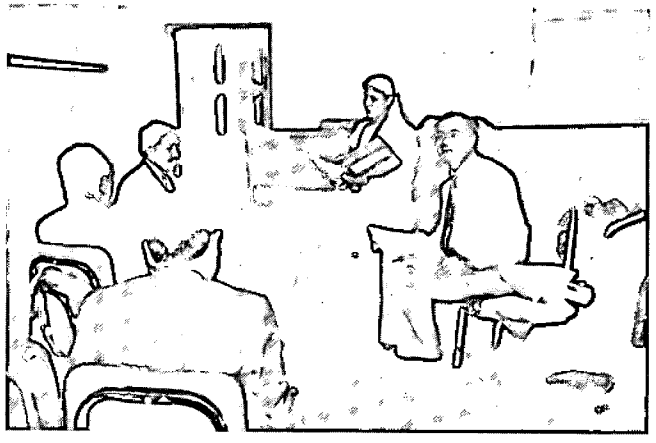


*Ainslie-Wallace making a point*

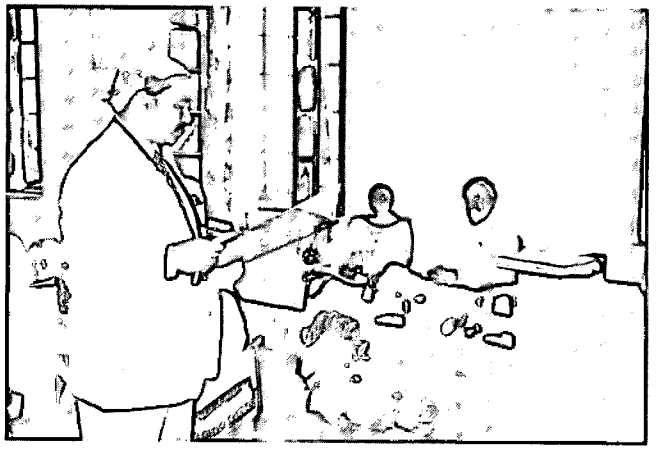
*Donovan QC capturing Ainslie-Wallace making a point*



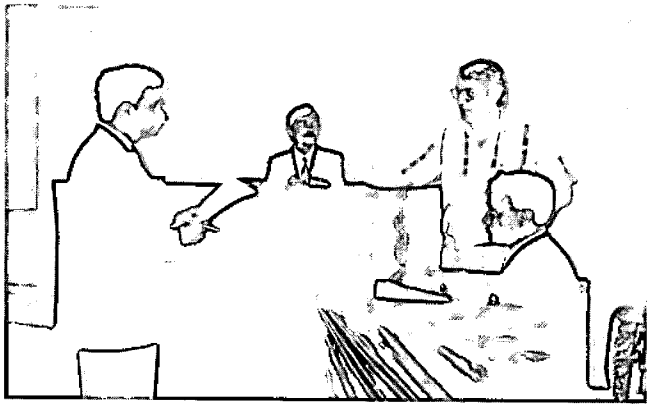

*Glissan QC and Tilmouth QC in workshop*



*Einstein QC in a light moment*



*Laughton and Lindsay SC in workshops*



**Day 3 - 4 January 1996**
**Morning Session**

Teaching followed the usual pattern and we were then taken to a most extraordinary luncheon at the invitation of the Metropolitan Bar Association - Dhaka.

This luncheon requires some careful description as it probably represents, certainly for me, the outstanding recollection which I will always have of the week.

We had, of course, received a formal invitation to this luncheon.

We were driven to the Metropolitan Bar Association premises from the High Court building in which we had been lecturing. The drive itself, like many others we had taken through the city, was incredibly interesting. We passed literally hundreds and hundreds of "baby taxis" - see the photographs. We passed through the markets and the abiding impression was one of people, people, people and colour, colour, colour - everywhere and very little space in which to move. Along the sides of each road there were open drains and men squatting over these drains to urinate as a matter of course. Seeing sights like this had become quite ordinary for us over the previous days. One even became immune to the incessant cacophony of horns, hooters and bicycle bells. Overtaking vehicles need only a hair's breadth clearance on either side. Sometimes it was necessary just to shut one's eyes and breathe in as our vehicle wormed its way through the traffic.

When we finally arrived at the area not far from the Metropolitan Bar Association we left our cars because of the narrow market-like streets through which we were escorted. We pass a dentist's office - which is a stall with an array of dental instruments and teeth. We pass the barber which is another stall with mirror and chair. Beggars were kept at a distance, although we were aware of their presence.

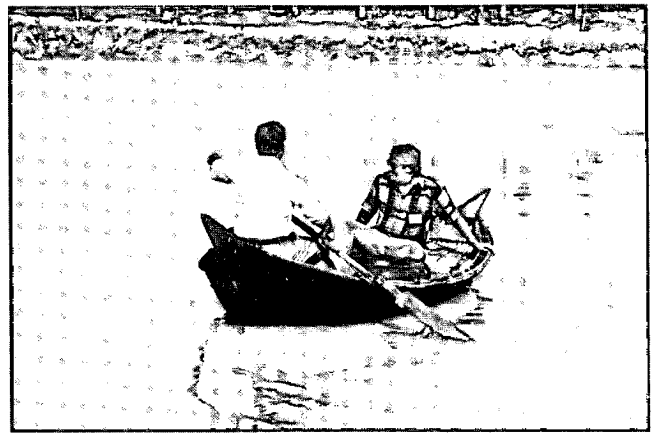
After coming to a huge banner over a doorway proclaiming our visit we were ushered into a large common room literally packed with senior advocates, judges and lawyers. Across one end of the room all of the Australian barristers and Amir-ul Islam were seated at an official table, just as if we happened to be a panel of chief justices of various countries. Then we received a lengthy introduction from the President of the Metropolitan Bar Association who is depicted in one of the photographs. He explained that the building in which we were sitting commenced construction in about 1910 and proceeded to give a careful description of each and every alteration to the building, its genesis and who was responsible for the same. The same secretary then, from time to time, introduced us to one or other of the judges or senior advocates in the room. Whenever such introduction took place the introducee stood, came up to the table and shook hands with each of us in turn and then usually delivered his own speech.

It took almost two hours to complete the formalities despite the fact that each speaker gave a solemn undertaking to be short. Finally we were taken upstairs to lunch prepared by our hosts.

To describe the Metropolitan Bar Association's

ceremony is very difficult. This is because you had to be there to feel the atmosphere, to hear the sounds and to experience the event. It was very difficult to speak over and above the sounds of outside horns and bicycle bells which seemed to permeate the room from beginning to end. The cultural and ethnic differences between us, the supposed dignitaries, and the judges and advocates sitting on the other side of the bar table was a tangible thing. When "thin Roger CJ Comm Div" was appointed to the Commercial Division of the Supreme Court he referred to the fact that there were but a few steps separating the bar table from the bench and to the enormous divide which crossing those steps actually represented. I felt the same in this room. There were only a few steps separating ourselves and the front row of those honouring our visit. But that separation on that day brought home to me and, I think, to the other members of the group, what an incredible difference of background experience, approach and general attitude to the law and to the world each group must have. Yet, notwithstanding that tangible divide, I learned during the course of my many discussions with advocates and judges in Bangladesh that, notwithstanding various problems particularly at lower levels in the courts - the fact is that the man in the street genuinely and sincerely does believe that a judgment by a judge is something important and formal and is something which lays down the law and is to be honoured. That single fact suggested to us that the goodwill with which we had been greeted, and the discussions that we had had on matters such as the rule of law, natural justice and fundamental human rights, were not misplaced. There is undoubtedly a future for any country, no matter how much assistance it needs, if there is already the structural backbone of a democracy, i.e. a belief in the rule of law. And our impression was of an incredible will to learn, improve and succeed.

*A crowd gathers around us in the court corridor*



*Picnic river cruise .... and*
*(below) Our host at the picnic - the newspaper proprietor*

**Day 4 - 5 January**

**Luncheon.** A picnic was organised by special invitation to a property outside Dhaka owned by a prominent newspaper proprietor. The grounds were set up as a demonstration "village" and "outdoor kitchen" to show VIP guests to the country, just how rural life is carried on. We were driven through a countryside of endless rice paddies, interspersed with brickfields - a large industry in Bangladesh as there is no natural stone.

This proved to be a most relaxing affair and our departure was possibly a little tardy.

On the wild trip home Anne nicknamed our driver "Fangio"! Tilmouth QC looked green. I decided to hold my video outside our car's window aimed at a passing bus to depict the crowding and how the passengers hang out of the windows - I did not pay close attention to exactly what was happening. Whilst videoing, Judith, my wife, pointed out that it might be indelicate to film the passenger who, unnoticed by me, was then throwing up out of the bus window. Judith then saw a dead body laid out behind a smashed-up car. We also passed two dead dogs lying by the roadside, their entrails

beside them. Somehow Fangio managed to deliver us back to the old High Court building in time for our afternoon session.

**Evening**

We were invited to a dinner at an excellent Thai restaurant hosted by the former Attorney-General, as mentioned earlier. As we drove through the back streets to dinner we saw two bodies laid out in the street in the middle of an intersection. As we approached the restaurant we saw a lineup of judges' gleaming white cars - each bearing a flag. Such were the contrasts.

**Day 5 - 6 January**

**River Cruise**

A large boat was hired for the day, catering for approximately 250 guests. Many justices and their wives, our students and their wives and children were aboard. The press also attended.

We were treated to a typical Bangladeshi lunch and then a cultural show followed depicting Bangladesh folklore in song and verse presented by young students in very colourful saris.

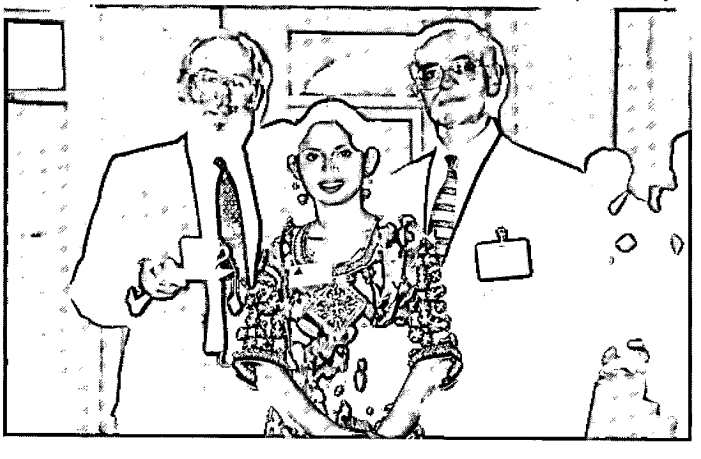
A ceremony then followed when we were each individually presented with gleaming medals encased in large perspex boxes approximately 40cm high. Our Bar Association was presented with a huge model depicting the maps of Australia and Bangladesh, "A" meets "B", which can now be viewed in the Bar Association Common Room. In many international bodies Australia and Bangladesh sit side by side.

The cruise then concluded with a press conference held on the upper deck in grand style.

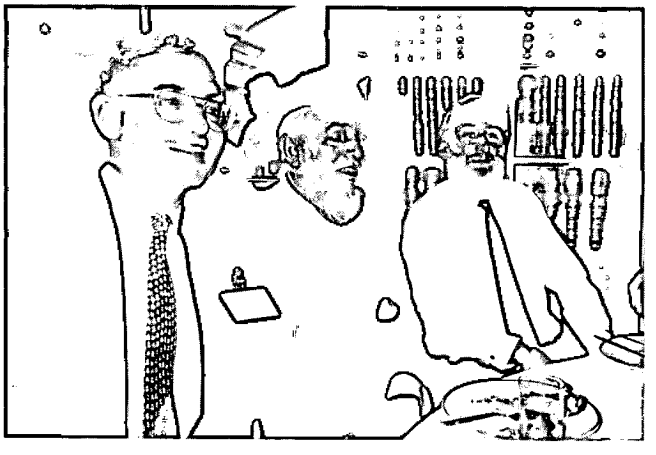
The overwhelming generosity of our new-found colleagues and acquaintances was most heartfelt.

Let us hope that the A-B link will be continued annually. Those who participate will obtain riches far exceeding money.

*Final press conference at the river cruise*



*Tilmouth QC, Liaison Officer and Einstein QC*



*Eistein QC, President Metropolitan Bar Asson, Tilmouth QC*

# A Letter from Dhaka

Dear Editor,

Late in October 1995, Brian Donovan QC asked if I would be interested in joining the team of counsel visiting Bangladesh in January 1996 to participate in a clinical legal education program. After a moment's reflection I agreed. Bangladesh is not usually on my itinerary and this sounded like an adventure.

I knew that Bangladesh was a Muslim country, had had a bloody breach with Pakistan in 1971 and that its heroic revolutionary leader and first Prime Minister, Sheikh Mujibur Rahman, had been assassinated by army officers in 1975. I knew the country was overcrowded, plagued by floods and subject to frequent changes of government, not necessarily by democratic means. That was about the extent of my knowledge of the country.

The *Lonely Planet Guide to Bangladesh* painted a gloomy picture, spending far too much time on the country's diseases for my liking. A helpful friend told me that the right-leaning American, P J O'Rourke, had included Dhaka in his book *Holidays in Hell.* As it happened, he had not done that, but he had in fact visited Dhaka and had written about it in another book called *All the Trouble in the World,* in a chapter immediately before one on Somalia. I read his chapter on Dhaka and saw that he had found many matters there worthy of praise. Once I read that the hard-to-please O'Rourke had found good there, I knew this visit would be a success.

For weeks before our departure we were being warned Bangladesh was experiencing political strife, with life being made especially difficult by a series of "strikes".

We all know that it was Ghandi's idea to harass the British with civil disobedience. This concept became part of the Indian (and now Bangladeshi) way of life. In Bangla, they call an episode of civil disobedience, a "hartal". It is a kind of a general strike, with chaps acting as picketers, ensuring that factories do not operate and that roads remain blocked. Well, Dhaka has been having a run of these. The Opposition (Awami League) led by Sheikh Hasina, the daughter of the late Sheikh Mujibur Rahman, says the current ruling party is incapable of holding an uncorrupted election. She says the Prime Minister should step down and allow a caretaker government to take over and only then can a free election be held. The Prime Minister disagrees. Anyway, the Opposition has just boycotted the election, with less than 10% of registered voters voting. (When I was there, a member of the Bangladesh Bar told me of a client being offered a large sum of money by the government party to register as a party so as to give the then forthcoming election some form of verisimilitude.) The Opposition has been using the hartal in its campaign. We experienced one at first-hand. But let us go back a little.

I felt uneasy as the plane landed in Dhaka. We had been warned that a hartal was to be held on the following day. I know the *Sydney Morning Herald* usually gets its facts wrong, but I was concerned that it had reported riots and the odd deaths during hartals held in Bangladesh shortly before Christmas.

Within a minute of our arrival, it was clear to me that most of our fears were misplaced. A large welcoming committee headed by the Bangladesh Bar Council's Chairman of its Executive Committee and Legal Education Committee, Md Amir-ul Islam, and Dr Mizanur Rahman, Associate Professor of Law at the University of Dhaka, gave us garlands of flowers and speedy conduct to the VIP lounge.

Allocated to minivans, our main transport for the week, we fairly soon found ourselves in the Dhaka Sheraton. I don't want you to think we then sat around drinking beers. In fact, the whole time we were in Bangladesh, I think I drank two beers. Drinking alcohol, whilst not forbidden, is not part of Islamic culture. It's amazing how quickly you get used to not having it at functions.

The next few days were a bit of a blur of teaching (9.00am - 1.00pm; 4.00pm - 7.30pm) and social activities (1.00pm - 4.00pm; 8.00pm - 10.00pm or so). There were lunches, formal and informal, but always lengthy because almost always distant or through difficult traffic. Ditto for dinner. Every lunch and dinner was the subject of generous hospitality, whether by members of the Bar in their homes, or by the Metropolitan Bar Council (where, I am sorry to say, some members of our party, when served at table by female members of the Dhaka Bar, compared this service somewhat favourably with what occurs in own Bar common room).

During our time there all eight of us (Brian Donovan QC, Clifford Einstein QC, James Glissan QC, Sydney Tilmouth QC, Geoff Lindsay SC, Anne Ainslie-Wallace, Greg Laughton and your correspondent) confessed to having had qualms, but having resolved within 24 hours of arrival, that we must return, and more, that this must become an annual event.

On the last night I was there, those of us remaining (Donovan, Tilmouth, Glissan and this writer) were entertained at the Dhaka Club, a slightly run-down reminder of the Raj. It was at that club we were told by our hosts that until 1947 a sign was erected warning: *"No dogs, women or natives past this point"*. The dinner was reflective. All of us made short speeches of farewell. A number of our hosts did too. James Glissan captured the mood of the relationship which had developed in the past week. In his speech he said that he thought the Bangladeshis may not like to hear him say this, but all present at that dinner owed it to the British for having imposed their legal system on Bangladesh and Australia, respectively, so that we had the British to thank for this beautiful friendship (or words to that effect). That night, and on every previous night, when speeches were made, by Bench and Bar, the importance of Bangladesh maintaining an independent judiciary was the recurring theme, with this workshop supported by the NSW Bar, playing such an important practical and symbolic role.

Our visit was by no means the country's first contact with Australian lawyers. I learned when I was there that one

of the great heroes of the Bangladeshi judiciary and Bar is our Court of Appeal's new President, Mahoney P. He had visited there through Law Asia in the early '90s, at a time when that country's judiciary was going through a difficult time and he had spoken up for its judiciary and the importance of its independence. The country's judiciary and Bar have never forgotten that and they never will. Sir Ninian Stephen also is highly regarded, having helped supervise the country's last free election. So with those links, perhaps it was not surprising that the Bangladeshis welcomed us as warmly as they did.

Despite Bangladesh having had a series of military coups over the years, it occurred to me, reflecting on the histories of Britain and Australia, that we should not be so surprised about the survival of Bangladesh independent judiciary, nor smug about our own.

After all, Britain's judiciary survived the time of Oliver Cromwell, and an independent judiciary emerged in New South Wales under a totalitarian military régime last century.

It occurred to me, too, that there was little that had occurred in Bangladesh and which had threatened the independence of its judiciary that had not already occurred to a greater or lesser extent in Australia.

During Bangladesh military régimes there have been attempts to interfere with the judiciary. Section 96(2) and (3) of the Bangladesh Constitution provides that a judge of the High Court division of the Supreme Court (the Bangladesh equivalent of our High Court) can only be removed for "incapacity or gross misconduct", on a report by the Supreme Judicial Council consisting of the Chief Justice and the two next most senior judges. This is a relatively new provision. The original one was similar to ours. (It is to be recalled that s.72(2) of our Constitution provides a High Court judge "shall not be removed except by the Governor General in Council on an address from both Houses ... on the grounds of proved misbehaviour or incapacity"). In the second of the three versions, passed by a military régime, it was provided a High Court judge could be removed by Presidential order.

In the second edition of his work on the Bangladesh Constitution: *Bangladesh Constitution: Trends and Issues* (published by University of Dhaka 1994), Mustafa Kamal J said (at page 31) that the current grounds of removal are on a more sophisticated plane and that a judge who holds a high constitutional office is now saved from holding an office removable by the chief executive and the ignominy of public exposure in a popular forum. He goes on to say:

*"The ... provisions accord more with the constitutional scheme of separation of powers. No judge has, however, been removed from office following the procedure in Article 96, but some judges have been removed under Martial Law ... ."*

As I read that, I wondered whether the late Murphy J would have survived a council consisting of his Chief Justice, Sir Harry Gibbs, and the then two most senior High Court Judges, Sir Anthony Mason and Sir Ronald Wilson. How would they have conducted such an enquiry? How much better might it have been for such an enquiry to be held by the judiciary and not politicised in the way it was in Parliament? Would less or more damage have been done to the High Court's standing?

The Bangladesh Constitution has undergone another, most significant, amendment concerning its judiciary. It is the 8th Amendment. Originally s.100 read:

*"The permanent seat of the Supreme Court shall be in the capital, but sessions of the High Court division may be held in such place or places as the chief justice may, with the approval of the president, from time to time, appoint."*

This was amended in 1988 by a substituted article, making High Court judges transferable to a permanent bench in whichever part of Bangladesh the President decided, after consultation with the Chief Justice. So the High Court judges could be separated and not cause as much mischief. This meant, as Mustafa Kamal J noted (p 98), that the plenary judicial power of the High Court was effectively destroyed. The judges of the High Court were less than happy. A constitutional challenge[1] was brought and succeeded. The Court (the then Chief Justice dissenting) struck down the amendment. The Court continues to sit as one and we are assured that at the moment its power remains uneroded.

When looking at Bangladesh 8th Amendment, I had in mind what not uncommonly occurs in this country for a *"troublesome"* judge or magistrate to be given a jurisdiction where he/she can cause more/less harm depending on the point of view of the person with power to assign that role. I reflected too on the recently demised Conciliation and Arbitration Commission and the assignment of one of its former members to a career of not sitting, and, after a change of government, of Victoria's Accidents Tribunal disbanded, its members sent packing. It idly crossed my mind that the plenary powers given to our courts/tribunals dealt with in that way are no less interfered with than occurred under a military régime in Bangladesh.

These and other random thoughts came to me on my way to the airport in a minibus packed with police, blowing whistles, followed by an army truck containing our luggage and chaps in army uniforms bearing sten guns. For this, our last day in Dhaka, coincided with a hartal. Our hotel manager had warned us to stay indoors. Some of us had not taken that advice. The city had been quiet. The smog had cleared a little. We took a last look at Dhaka from around the side of the army truck and headed for the airport lounge.

To those of your correspondents who have a chance to join another delegation, my advice is: don't go. There won't be room. The original team will want to return again, and again. ❑

Stephen L Walmsley

1. *Chowdhury v Bangladesh* 1989 BLD (Spl) 1 - 41 DLR (AD) 165.

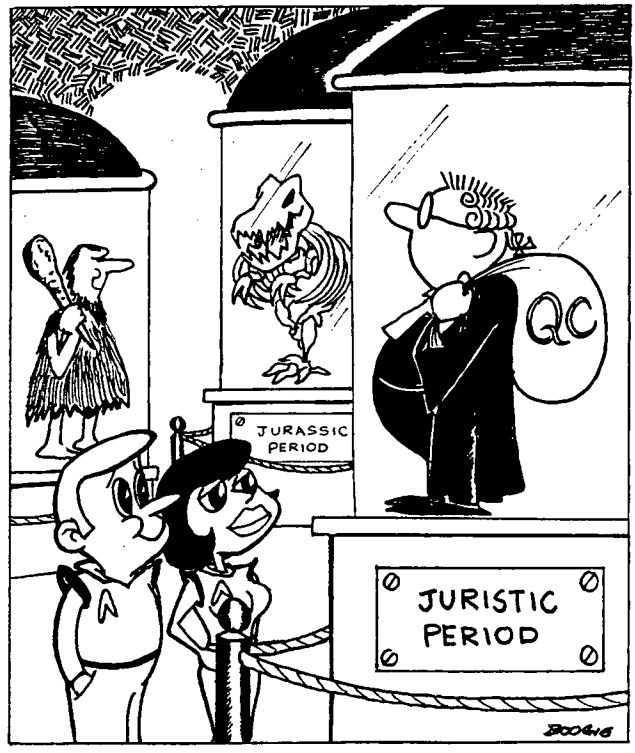
# The Last QC

**Lee Aitken casts an ominous eye to the future.**

A chill wind swept down the street, and in the Ministry of Truth the clocks were striking thirteen - it was late in the dreary October of a most immemorial year. From his eyrie on the 85th floor of the Babette Smith Memorial Tower, Bullfry QC could vaguely descry a hapless junior, caught in the wind's vortex, being blown helplessly against the glass spires of St Mary's.

"When had the rot really set in?" he wondered, as he struggled out of his all-in-one "Barzoot" (Ede and Ravenscroft pat. pen) in which, like a fireman's uniform, wig, jabot, bar jacket and stripey trousers were artfully combined into a single inelegant garment; it saved vital minutes changing before seeking special leave, a thing lately too little requested of him.

Certainly, the introduction of the new Part IVAAA provisions ("Barristers' Anti-competitive Practices") into the *Trade Practices Act* in the late '90s had caused some problems. The "competitive" requirement that the prospective client be advised to seek the services of a member of the large firms' own "in-house" advocacy "teams" as the junior had had a chilling effect on the lower levels of practice, to put it mildly. (The fact that this inevitably resulted in a much higher cost to the client because of the overhead involved had finally occurred to the gurus of the Commission, but not before the "experiment" had been judged a great success and a whole generation of the junior Bar had been wiped out.)




And had it been wise, Bullfry wondered, to allow direct client access to the Bar with the possibility of conveyancing and trust accounts thrown in? The huge Bar-led trust defalcations which had occurred during the early years of the new century, had caused a massive increase in the insurance premiums. (He had had a recent happy postcard from old "Sponger" Snodgrass who, beating the account inspectors, the world-wide *Mareva*, and the extradition proceedings, was living out life merrily with his catamite somewhere on the Costa Brava.)

A higher premium, however, was in any event probably inevitable with the judicial repeal of the "antiquated" notion of in-court immunity - a whole new profession, colloquially called "transcript traducers" had sprung up, devoted solely to a computer-assisted analysis of cases with a view to finding negligence in an unguarded aside, or a faulty question. (Poor old Blenkinsop had been bankrupted on a sexist joke in the Court of Appeal which had not found favour with the President and caused the appeal to be lost. Cover had been denied because of the "laughter-in-court" exclusion in the 2008 amendment to the policy. Blenky had thought of going "bare" against just such an eventuality many years before, but the marital vagaries of the third Mrs Blenkinsop had unwisely caused him to hesitate.)

Had the Australia-wide practising certificate been a good idea? Only the other day, after he had advised, copiously and irrelevantly, on a complicated point of Queensland constitutional law, had he remembered with horror that it was a unicameral legislature. On his last appearance in Victoria, in a befuddled state after too long a pre-trial sojourn in the "Gold Clipper Lounge", he had found himself involved in fisticuffs with his opponent over which side of the Bar table to occupy. Only an abject apology had forestalled his immediate imprisonment for contempt on view. No wonder they used to say, "Get me Bullfry, but get him before lunch".

He walked over and rebooted his "Jurimetron-9000" and put on the "virtual reality" wig. What a boon these new programs were. Nothing better than a hard workout with a difficult Court of Appeal - the hologram of the Chief Justice was particularly amusing! He carefully selected "Angry-Judge (3)" as the third member of the Bench and punched in *Foxwell v Van Grutten* as the precedent in issue. But somehow the argument wouldn't flow and he found himself back at the window.

Relations with the "cadet branch" of the profession - as he liked to call it - had been difficult of late, the more so because most of them were now junior "partners" in one of the "Big Six" accounting firms. He had always maintained a certain reserve between himself and his instructors, a reserve now increased because of their accounting associations. No matter how hard the forensic *sharia* had become, he had always followed the precept of Hemingway's hunter in *Francis Macomber* - "I'm still drinking their whisky!" he would reply to any inquirer in the express lift.

And court itself had become so difficult. The requirement that all argument be first reduced to writing and then submitted on disc for scrutiny under the COMPUJUDGE program (a Windows 2015 update) to exclude any sexist, racist or other exceptionable material had caused problems to the older players, as had the new Practice Direction [No 298 of

2030] that *only* unreported decisions could be relied on. He was wise enough to realise that he had long reached the age when any change to routine upset him greatly, as did the appointment of "whippersnappers" to the Bench. The thought caused him to cast an avuncular smile at the autographed ("To my raging bull with admiration") photo - bikini-clad - of the present President, a former reader, taken years before at a Bondi Floor Bar-B-Q - "what winsome dimples". But what of these other new jurists?

The introduction of general quotas in appointment to judicial office had been bad enough, but the requirement that a certain percentage of particularly gullible people be appointed (selected by a refined version of the Luscher colour test) in order to be fair to applicants in section 52 claims had been the last straw. (An attempt to appoint a specified number of recidivists to sit as "assessors" in the Court of Criminal Appeal had only been rejected by a single vote.) The old days, when ascent to the "velvet footstool" was a reasonable expectation for those who did not linger too long over their potations, had long passed.

In any event, as old "Snorter" had been saying to him only this afternoon in the Common Room, the "ten-minute" rule on oral argument, rigorously enforced by the strobe light and the klaxon, had eliminated much of the pleasure of advocacy, in the same way as the abolition of common juries had removed the possibility of its exercise.

But, then, financially at least, practices had been revived by the introduction of the Legalcard in 2006. Those wonderful judges on the High Court, reinterpreting section 80, had managed to find an implied right to senior counsel in every matter, civil or criminal, which would have involved a jury had the case been tried in 1900! The S-G, over lunch, had put it down to a new view on "denotation". The subsequent run on the dollar had been unfortunate, but it had introduced "bulk billing" to the Bar which had saved the day for many. He had also been fortunate to be retained in the "mesothelioma-led" recovery among his own comrades early in the new century as a result of some strange material escaping into the cooling and air-conditioning units of the old Supreme Court building before its final destruction by fire.

And the class actions! Only the other day he had received a letter before action from one of the biggest "contingency" firms in the city, intimating a claim on behalf of 22 students in his Legal History class who had failed the course and, consequently, been deprived of the chance of attending the College of Law. What was the point of being the Challis Lecturer in Late Twentieth Century Jurisprudence if you couldn't fail people!

Regrets? He'd had a few. Ever the jurist manque, his only real chance destroyed after that unfortunate breach of the "Meagher Rules" on sexual harassment - as he had told the Tribunal, it had been a *very* crowded lift. At least he had "made" some new law on the defence of irresistible impulse - the condition of practice that in future he keep his hands in his pockets had subsequently caused its own difficulties before a comely Deputy Registrar, but that was best forgotten.

He felt a sudden malaise. He glanced up at his favourite objet d'art, the skull on his bookshelf, incautiously purchased from the executrix of a former appellate judge, with its mordant brass caption, "hodie mihi, cras tibi". It seemed to be speaking to him - what was it: "the horror, the horror" - or "Part 8 rule 12"? - or were they the same thing?

He must have fallen; through the astro-felt underlay of the carpet he could but faintly hear the fading beat of his heart. ❑

## The Referendum We Had To Have

I am probably the only person still alive today who knows the inside story of the successful referendum which led to an amendment of the Australian Constitution empowering the Parliament to legislate with respect to domestic air travel. I was, at the time, 1928(?) a law clerk articled to Alfred Stephen Henry, a solicitor carrying on a sole practice in Pitt Street. His brother, Goya, was a most likeable, happy-go-lucky fellow who had a passion for flying and a strong dislike of civil aviation officials.

One morning he stormed into his brother's office and said, "The bastards are after me again. They reckon they'll probably slap another summons on me for something they didn't like last Saturday."

Alfred said, "I suppose you'll want me to go down to court again and plead guilty when they do".

Goya replied, "I hate this pleading guilty business. Isn't there some way we can fight them?"

His brother said, "Only if you're prepared to take it to the High Court and possibly the Privy Council. It's my belief the regulations are ultra vires."

"What are we waiting for?" was Goya's response.

"Well, first you have to get a summons" said his brother. "If you were to take that crate of yours up over Mascot some Saturday and spend the afternoon doing anti-clockwise turns or whatever it is you're not supposed to do, that might start the ball rolling."

"No problem", said Goya with a happy grin.

He was duly summoned and Alfred briefed senior counsel who argued that when the Constitution was adopted there was no civil aviation in Australia and it followed that Parliament could not have been given power to legislate with regard to it. The High Court reserved its decision for a very lengthy period and finally upheld the argument, holding that the regulations were ultra vires except as to those covering international flights which were covered by the treaty-making powers of the Commonwealth: *Henry v The Commonwealth* (1936) 55 CLR 608.

The decision made it essential that the Constitution be amended to give Parliament the necessary power and in the referendum which was subsequently held, a majority of voters in a majority of States approved the amendment. ❑

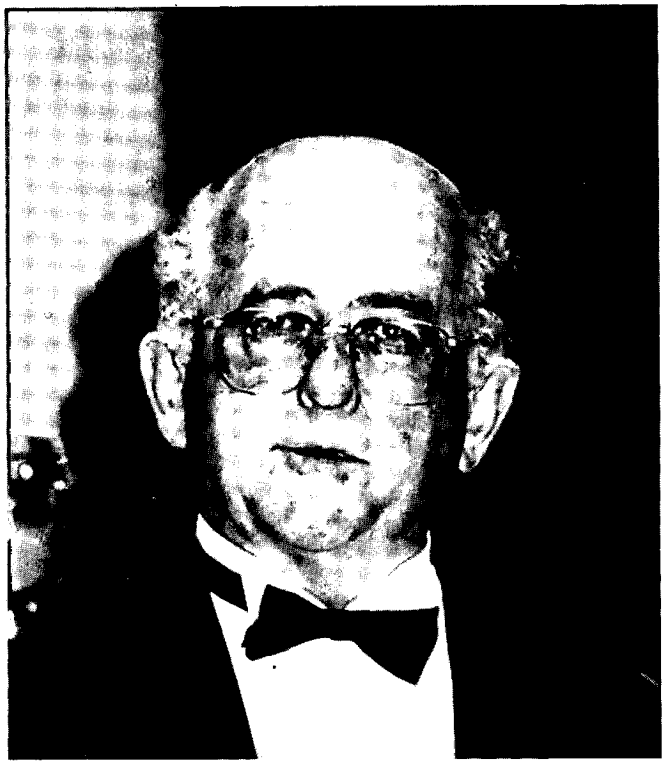
David Selby QC

# Nightmares and Notoriety?

**The 1996 Bench and Bar Dinner in honour of Mr Justice Gummow was held on 24 May 1996 at the Wentworth Hotel. Speakers were Ian Barker QC and Tricia Kavanagh, followed by the guest of honour.**

## Ian Barker QC

Mr. President, Your Honours, honoured guests, fellow toilers in the forensic killing fields. Probably because of many years of a misspent life, possibly because of an increasingly uncertain intellect which I've trawled behind me through life in a very unrigorous way, I have of late been afflicted by two recurring nightmares. The first one is this: I'm on the outer door of the court, on the doorstep of the court, fully equipped to present a brilliant argument, it's about 5 to 10, and I suddenly realise I'm wearing pyjamas. I'm therefore faced with an exquisite dilemma. Can I go into court, and be there on time, wearing pyjamas, or am I going home to be properly attired and then be late for court. There is nothing in Walker's beautifully drafted Bar Rules about pyjamas. At all events it's about that time I usually wake up and the dilemma remains unsolved. The other nightmare is having to address the Bench and Bar Dinner. I have so far, until this occasion, avoided doing that. I've sat and watched others and wondered at the posture of frigid politeness with which they acerbically insult others and settle old scores. It's quite an art. I decided I perhaps shouldn't do it so I won't hold to public ridicule all those barristers, manifestly my professional inferiors, against whom I lose cases. Neither will I be critical of judges as a class, although they have reduced me to the point where I have this dreadful nightmare. And it is sometimes, crossing Phillip Street in the morning, I think "I wonder if I could decently be run over without it hurting too much?" But it never happens. I will say nothing of the Court of Appeal and its grim sibling the Court of Criminal Appeal. How often have I left, light of heart, its precincts, their merry laughter ringing in my ears, secure in the knowledge that the client may want to go further, which of course brings me to the High Court, an institution about which I'm deeply respectful. I know where it is. For most practical purposes the price of admission is a grant of special leave and, after all, obtaining special leave is no more difficult than ascending the north face of Everest in midwinter ... wearing thongs. Which of course brings me to our guest of honour, Justice Gummow. So far, unfortunately for me, our paths have not really crossed. Now this is probably because my knowledge of the law of trusts rests at the level at which it was when, with the help of Finch and Weber, I spent two happy years in equity pursuing a client's uncle before that stormy petrel of equity John Kearney. Finch and Weber were not merely disrespectful of me, they were indeed from time to time hurtful, suggesting that I might at least have a look at "Equity in a Nutshell" - they thought there was an illustrated edition put out by May Gibbs called something like "Snugglepot goes to Chancery".



So in order to prepare myself for tonight I have read some of the things about you, Justice Gummow, that others have said. Many people were willing to say something upon your appointment. I notice that P.P. McGuinness observed that you were a favourite son of the Commonwealth Attorney General's but I'm prepared to overlook that myself. He didn't object to your appointment. He merely complained that it was made without having you paraded before the public in order that everybody might know you and how you thought before you took such an important decision. He went on to say that in the unlikely event of your becoming increasingly eccentric, or undergoing a Paulian conversion like Sir Anthony Mason he would then say "Well I told you so, we should have had a better look at him". It seems to me that an increasing eccentricity suggests as its starting point some condition of eccentricity. I don't know what he had in mind but he will apparently be watching you closely for any manifestation of any significant degree of whatever eccentricities now burden you. Burbidge Q.C. sagely observed that you would prove cautious in embracing radical ideas. I suppose you would, or would hope so. Someone else said that you were chosen in order to restrain the adventurousness of the High Court which means, I suppose, you'll be having lunch with Justices Dawson and McHugh. Somebody else said you were probably a centralist literalist lawyer and Maurice Stack said that your ten years in dealing directly with the public at Allen Allen and Hemsley, gave you the common touch, and Stewart Fowler observed that

you were shy but pleasant and not given to dancing on tables. Senator Minchin contented himself with complaining that four-sevenths of the High Court came from Sydney. However, Sir Maurice and Hughes Q.C. set the record straight, both praising your honesty and intellectual skills, and Sir Maurice said in a very Sir Maurice sort of way that you would undoubtedly be precisely the sort of High Court judge which you turn out to be.

I notice that Justice Meagher, I think writing in the Australian Law Journal, pointed out that you had been a pupil of Hely and his baleful influence had become apparent. I imagine whatever else you learned from Hely you learned to keep one step in front of your opponent without letting him know how you got there. I once litigated at some length against Hely in a criminal trial of a well known eastern suburbs businessman. During the course of it Hely muttered to me one day that all he wanted to do was to return to the warm cocoon of equity. It may be a warm cocoon, I haven't been there often enough. You once wrote that it was said of the Irish Court of Chancery that no case was certain but none hopeless. I must say my own limited experience of equity suggests that there is a maxim, a working everyday maxim which is not found in the texts; there seems to be an unwritten precept that when all else fails, equity will sit under a palm tree.

You will remember of course that public accounts of judges have not always been flattering. Any judge these days who gives public utterance to a thought which is not entirely fashionable is bound to draw fire. History has many examples of public disrespect shown to judges. For example, Judge Docker of the District Court was habitually referred to by John Norton when writing of court cases in "Truth" as "Dingo Docker" and I read a description the other day, I stumbled upon an article about the late Judge Roy Bean who kept law west of the Pecos. The author said that you could see at a glance that he was as rough as a sandburr and tough as a boiled owl, but you realised also that he was a genuine character with plenty of salt in him. If you came back more than once and really got to know the old man you found that he was a curious mixture of qualities. I don't suggest you should recognise yourself in all this. First you notice he was almost innocent of book learning, that he was egotistical and opinionated, that he regarded cheating as good clean fun, that he drank too much and washed too little. While perhaps Roy Bean was not a judicial role model, his right to be addressed as judge was a little uncertain. He wasn't paid much by the state so he did the best he could. One of the anecdotes about him is that he held an inquest over a corpse. He found on the body $40 and a pistol and fined the corpse $40 for having a concealed weapon.

But enough of this your Honour. Let me say that although our paths have not crossed I have admired you from afar. I admire your ability to communicate in the written word. Although I don't pretend to have read all of your judgments, those that I have read I think I understood. I admire your hairstyle. And let me express my public dismay about the provocative decisions of the High Court and the Federal Court to become bare headed. Sadly I find myself part of a dwindling minority with a genuine interest in the preservation of the solemn traditions. Even Phillip Greenwood, even Greenwood, has said he doesn't want to wear a wig. I find I become increasingly isolated. What of the danger of cranial melanoma? What will the Bar Council do? Will it permit me to go to court robed, wearing a large straw hat? It may be, your Honour, that you can help. According to R.P. Meagher, who seems to be somewhat of an authority on you, you eschew frivolity and any tendency towards wildness of thought is tempered by proper respect for antiquity. Well, I beg you to save the wig because some of us need it.

It seems to be common ground that you are a judge of intellectual rigour. According to Garnsey any case involving a prospectus is one in which you are unequalled. It seems to be common ground that you are quick to assess the true significance of a set of facts. That of course can be an uncertain quality in a judge. I don't suggest in you. The quickest assessor of facts I ever met was the late Justice Ted Dunphy. Justice Dunphy was always on the move, going from Norfolk Island to Lord Howe Island to the Northern Territory to Christmas Island and back again, and I suppose he had to make up his mind quickly about facts because he was always about to go somewhere else. His judgment was not necessarily right all the time, and not necessarily not preposterously wrong, but I did once see the exercise of it in quite a spectacular way. I acted for a man who was tried at Alice Springs for killing a heifer. He was a cook at the Warrego Mine about 10 miles out of Tennant Creek and one evening he went into Tennant Creek for an evening's

cultural entertainment and on the way back this animal crossed the road and he stopped and shot it, and then cut it up and took it back to the mess. Somehow the owner found out about it and he finished up being tried for cattle killing. But his defence was quite simple. He said "As I was driving along I thought I saw a kangaroo. And I stopped the car and decided to shoot the kangaroo." I don't know why the kangaroo filled his heart with murder but that was the story. He shot it and he said "When I got close to it I discovered to my horror it was a heifer. I couldn't restore the creature to life so I did the next best thing and cut it up so as not to waste it." Well, he gave evidence of this and Justice Dunphy watched him with naked hostility for about 10 minutes, in the way judges sort of go on when they think someone's not telling everything that might be told about a subject. He suddenly said, quickly assessing the facts, "What nonsense. Everybody knows that cows don't hop." Well, it was 1965 and it was Alice Springs, I think that observation secured my client's freedom.

It seems to be common ground, your Honour, that you are exceedingly energetic, which I commend you for. May I at the same time in passing commend Justice Young as a model in this regard. On the one occasion I appeared in his court I was awestruck by this manifestation of energy in its purest form, when he came onto the Bench like an Exocet missile, almost overshooting the runway. I commend you your Honour on your fine sense of timing. It was wise to come onto the Bench post-Mabo. You thereby have avoided the public ignominy of being categorised by Justice Meagher as a sort of intellectual Quisling; a judge who protects rights we never had and who is likely to be guided in his endeavours by the siren song of the chattering classes. I'm uncertain precisely who constitutes the chattering classes. I'm a little uneasy that I may be myself included in them. But whatever he really meant it seems to me to come down to this; that if, as a judge, you feel that community attitudes are something which may be taken into account, you should listen carefully to those who remain silent. Additionally of course, you have avoided the public humiliation of being called a pissant by the Member for Kalgoorlie. But I think you should be warned that he may move on you yet, depending on the result of your examination of the effects of pastoral leases on native title. Whatever happens in that case, you'll be insulted by one side or another, or possibly both. I'm afraid that no amount of intellectual rigour will save you from insult in this increasingly boisterous era where experts seem to abound and everybody seems to be shouting at once. I do not imagine however you will be affected or disturbed. For my part if you ever feel like dancing on a table, I will not be critical.

I would like to say something about the Bar while I have a captive audience. I notice Bennett touched upon the same subject. But there's a certain tension at the Bar between those who think that we should promote our public image and those who think it's not worth the trouble. I agree that as a class, we are not loved, we have bad press. Journalists either don't understand or don't want to understand. I find it difficult enough to explain things to my own clients, without explaining to the general public, why I do things and why I make decisions. Sometimes it's practically impossible.

A barrister I know once appeared for a client charged with murder, the murder being the shooting of a young woman in the back of the head. It was a long time ago in a distant place. He spoke to the client and advised him that maybe the Crown would accept a plea of guilty for manslaughter. Were there any witnesses who could give evidence to his good character? It seems that the client heard what was being said but did not quite understand why it was being said. He said "Yes, there is this friend who I've got in Brisbane - he would come here if he could. Matter of fact, I've got a letter from him." He's pulled the letter out from the pocket of his shirt and handed it to the barrister, who looked at it, and the first thing he read at the top were the words "Wolstone Home for the Criminally Insane". He said "Why is he in there?" and the client said "Oh, he murdered a sheila - but he'd come if he could." Clearly, he didn't have the faintest idea of what a character witness was for. How do we explain to the general public why we do things for our clients and why should we anyway? We have many arguments about this at Bar Council meetings - my own view is that we should give up the struggle. Because whatever we say, we will from time to time be judged by those vile corporations and people we are required to act for and nothing will ever change that.

There is a notion abroad that legal principles are really impediments to social progress, that legal protections ought not exist for the very wicked. It seems to me that the measure of a civilised society is the extent to which it is prepared to accord procedural rights to the vilest of its members, and I

think the fight is not about whether we should be popular, it's about whether we should be securing the rights which people now have - even if they don't know they have them. You see, the legal profession generally has never been loved, either here or anywhere else as far as I can see, and it is instructive to look at some of those who have publicly disliked it.

I found it instructive to look at the treatment of the German legal profession by the National Socialists in an article by an historian called Kenneth Willig called "The Bar and the Third Reich". Some of the things I read I find eerily echoed, in an entirely innocent way, in the writings of some contemporary journalists in Australia. The German Bar, the advocates, were subjected to enormous pressure and control. I'll read part of the article: "For all the pressures and controls exerted on the Bar, lawyers never seem to overcome the inherent hostility of the Nazis to their profession. As late as 1942 after the reorganisation of the Justice Ministry, Martin Bormann was complaining about the continued objectivity of lawyers and even submitted a list of offending lawyers who had been punished for statements made during defence arguments. Hitler himself certainly left no doubt as to his personal feelings both before and after his 1942 public tirade against the legal profession and revelled in calling lawyers 'traitors, idiots and absolute cretins'. 'The lawyer's profession', he said, 'is essentially unclean for the lawyer is entitled to lie to the Court. The lawyer looks after the underworld with as much love as owners of shoots take care of their game during the closed season. There will always be some lawyer who will jiggle with the facts until the moment comes when he finds extenuating circumstances'."

Perhaps the most galling to the Führer was the failure of the German Bar to completely disassociate itself from the traditions of the Normandig Reichstadt. "The lawyer doesn't consider the practical repercussions of the application of the law. He persists in seeing each case in itself. They cannot understand that in exceptional times new laws are valid." Well, the Führer said: "Let the profession be purified, let it be employed in public service. Just as there is a public prosecutor, let there be only public defenders." Consequently, by the end of the Third Reich the Nazis had solved their problem of how to handle the German lawyer. There were no longer any servants of justice - just servants of the State.

So why do we worry about the criticism we now receive? If people didn't want barristers to act for them we wouldn't have a Bar. What we should be doing is saying "You do not realise how erosive it is of our ordinary rights to say, well, that person is so bad that he doesn't deserve to have any rights at all" - which is the prevailing climate of thought. Should we not be saying how erosive it is of our rights that so called victims of crime take part in the trial process? It is very difficult to articulate these things publicly because people don't like lawyers and matters of legal principle are always for someone else, because most people go through life resolutely believing they will never be arrested.

Let me stop by reading something else. You have probably all read or seen Robert Bolt's play, "A Man For All Seasons" about Sir Thomas More. There was a dialogue between More and his prospective son-in-law, Roper. It went this way. Roper said "So now you give the devil benefit of law", and More said "Yes, what would you do, cut a great road through the law to go after the devil?" Roper said "I'd cut down every law in England to do that." And More said "Oh, and when the last law was down and the devil turned round on you, where would you hide Roper, the law all being flat? This country's planted thick with laws from coast to coast. Man's laws not God's and if you cut them down, and you are just the man to do it, do you really think you can stand upright in the winds that blow then? Yes, I'd give the devil the benefit of law - for my own safety's sake."

It ought to be compulsory reading at the Bar's education course. ❑

# Tricia Kavanagh

Chief Justice, Presidents', Justices, Judges, Members of the Bar

At first I was surprised that the President, whose familiarity with Equity is well known, if not notorious, should ask Barker (few of whose clients have clean hands) and me (many of whose clients seek damages for the loss of theirs) to speak on this occasion having, as we do, that fine Equity lawyer, his Honour Justice Gummow as our guest of honour.

However, "whispering", even with the charming lisp that our President affects from time to time, is plainly out of place and common lawyers *are* more likely to express brutal truths more frankly, if less elegantly, than equity lawyers. Their daily task seems to be the drafting of affidavits designed to avoid the facts or, if that cannot be achieved, to obscure them. Of course, the Bench & Bar would not want that tonight.

I am naturally conscious of the flattery implied, at my time of life, in asking me to give the junior's speech. Asking Barker to give the senior's is more obviously justified. However, this is not an appropriate occasion for personal references, except of course so far as they relate to the guest of honour, the Honourable Justice William Charles Montague ("slap-me-on-the-back-and-call-me-Bill") Gummow. In an endeavour to deliver, as instructed, a witty speech, I began my enquiries and I thought I would tell you a little about the process.

Naturally, I consulted his Honour's friends and acquaintances to hear what they could tell me of the real Gummow and his life. The first stop, of course, was Justice Meagher, who not only knows his Honour well, but is notoriously discreet. As you all know, he collaborated with


# The New South Wales Bar Association

The New South Wales Bar Association was formed in July 1896. However, the barristers of New South Wales trace their history back to 1835 when the legal profession in New South Wales was divided into two branches - barristers and solicitors. This has enabled barristers to become specialists in advocacy.

The New South Wales Bar Association is the corporate representative and professional association of the barristers of New South Wales - a body which is composed of Queen's Counsel and junior barristers. It is a member of the Australian Bar Association. Presently there are some 180 barristers who are Queen's Counsel and some 1400 junior barristers.

The legal system in which The New South Wales barristers practise, both in the New South Wales State system of Courts and Tribunals and in the Federal Courts and Tribunals, is recognisably an "English" legal system.

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The Bar Association in New South Wales is anxious to help in meeting those needs. In the modern world the craft of the advocate extends beyond the traditional forum of the law courts and into the hearing rooms of commercial arbitration and conference rooms of mediation.

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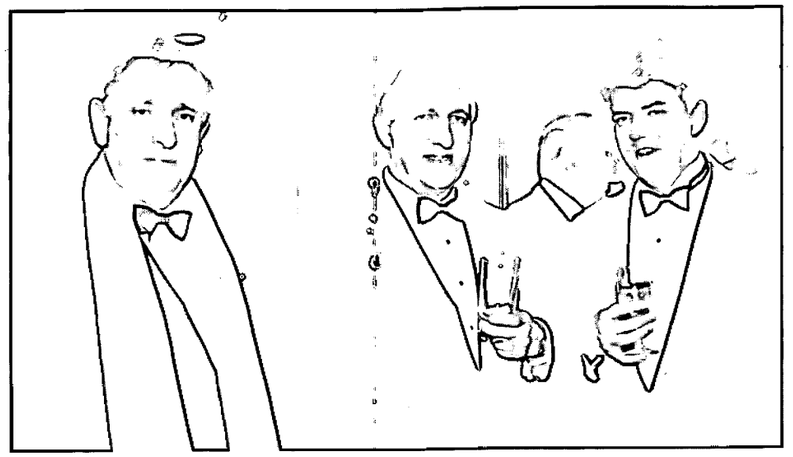
For more information:

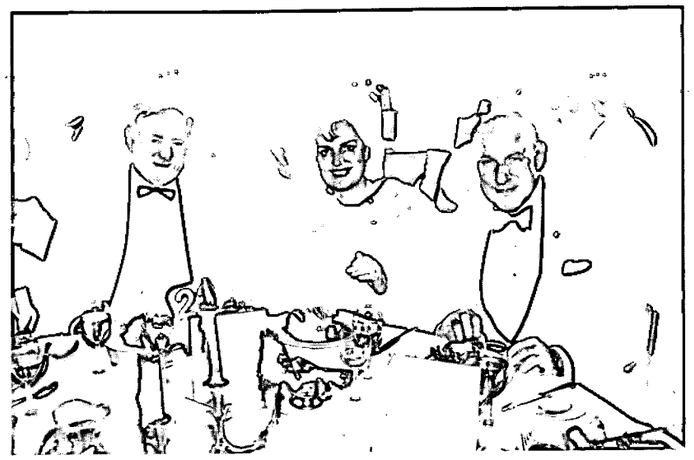
The Registrar,
The N.S.W. Bar Association
174 Phillip Street
SYDNEY NSW 2000

Tel: 02 232 4055.
Fax: 02 231 1904

*(L to R) Chief Justice Brennan AC, KBE, David Bennett QC, Chief Justice Gleeson AC*

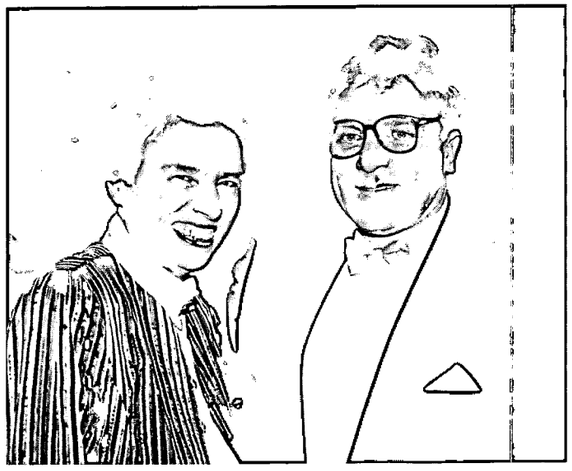


*(L to R) Bob Sorby, Justice Madgwick, Mark Richardson*

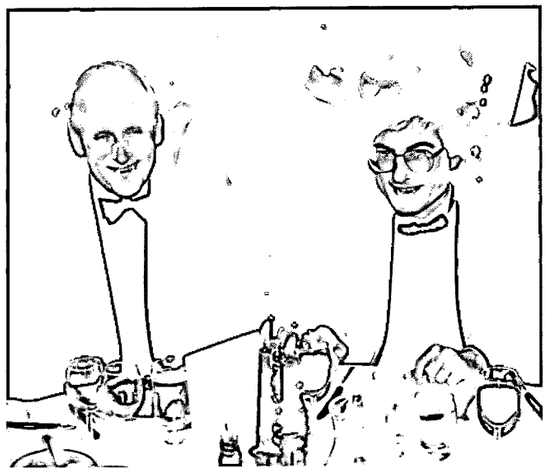


*(L to R) Justice Mahoney, Sue Crennan QC, Sir Laurence Street KCMG, K St J.*

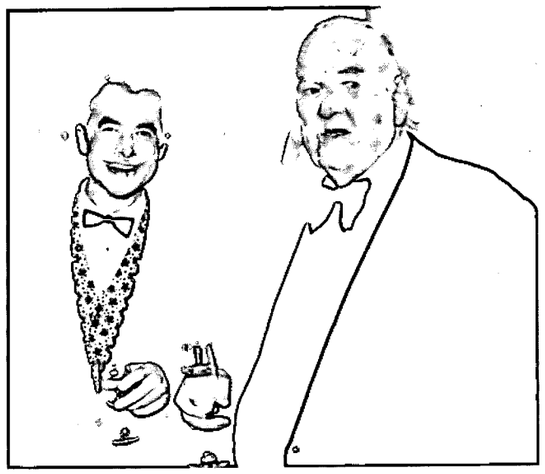
*Anna Katzmann, Brian Dooley, Lorna McFee*



*Judge Backhouse QC and Jim Thompson*

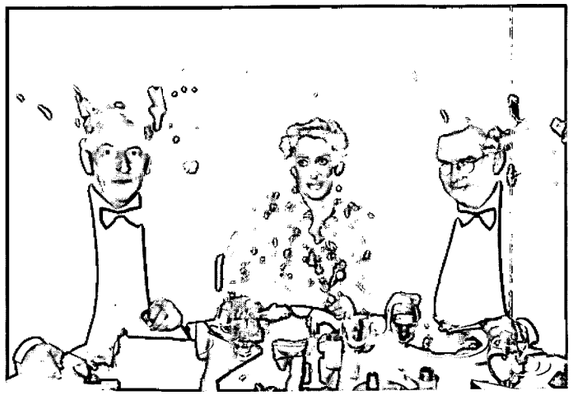


*Ian Pike, Chief Magistrate and Steven Rares SC*

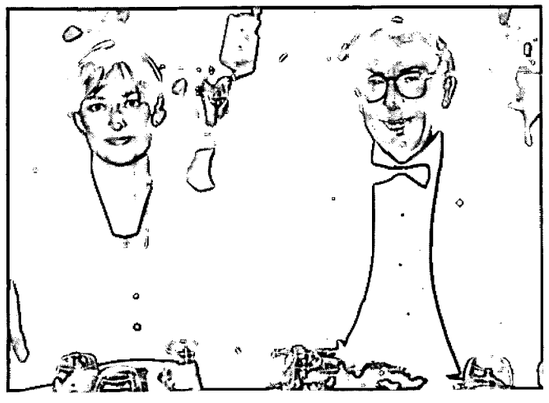


*Martin Gorrick and Sir Morris Byers CBE, QC*

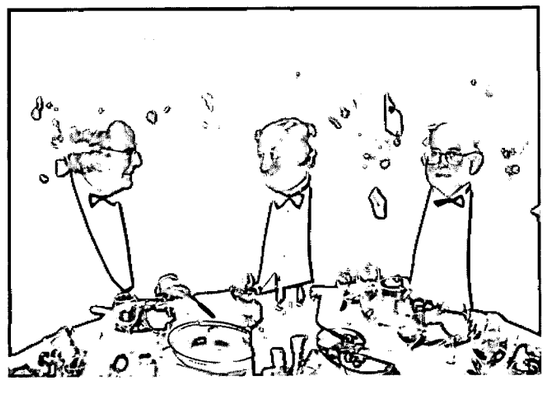
*(L to R) Richard Cobden, Sophie Goddard, Peter Callaghan SC*



*Michael Phelps, Tricia Kavanagh, Jeff Shaw QC, MLC*



*Jacqui Gleeson and Justice McHugh AC*



*(L to R) Chief Justice Black, Norman Lyall, Ian Barker QC*

that people in Baghdad said, when a TV camera was turned to their faces during the Iraqi-Kuwait war, "Mr Hussein is a brilliant general and a very nice man besides. Everyone says so."

I did learn one curious fact. The Federal Court Judges had decided to drop the "Mr" before their title "Justice". His Honour, taking the libertarian line, moved rescission and urged that the use of "Mr" be optional. He won the vote. But of the deals struck, the arms twisted, the threats, the promises, the manoeuvring in smoke-filled back rooms, how the factions voted, who did the number crunching, who did the toe-cutting, history does not relate. Was Gummow the Senator Richardson or a Barry Jones? Did he say to Michael Black - "all right, no more Mr Nice Guy? ". All is silence. We know he became "Mr" again for a short while before he had to relinquish it. Perhaps the acquisition of "the Honourable" makes up for it.

But I hear he is not nearly as disappointed as the Hon Justice Kirby is reported to have been when he was told on leaving the NSW Court of Appeal, he had to relinquish his role as President of the Court of Appeal of the Solomon Islands, an office I'm reliably informed which carried with it the certainty of a knighthood!

However, all this was a bit thin. Frantically I contacted the Law School. I was informed that his Honour played the piano at Prawn Night Singalongs. Oh really? Frank Curran does that! He is said to have stared down a student bold enough to ask him to speak up. He obliged, of course, by speaking up in the same monotone. Yes, and ...?

More desperate than ever, I returned to Meagher and to his article -

> "His Honour (I read) is widely read in areas outside the law. He eschews frivolity. Any tendency towards wildness of thought is tempered with a proper respect for antiquity ... his discourse is incisive but not charitable."

Then it came to me. This was a precise description of the footnotes and comments in *Equity, Doctrines and Remedies*, those footnotes and comments are clearly, "incisive but not charitable". Was Gummow Meagher's speech writer, the straight man? Was he Abbott to Meagher's Costello? So he was the real author of such gems as -

> "Many liberal, that is woolly-minded judges, of whom Hunt J had gratuitously named himself one" ;

or

Referring to Lord Denning's Curious raid upon a field of Equity noting, perhaps, unsurprisingly this has been taken up with reverential wonder in Canada by the Courts. (*Lloyds Bank v Bundy* [1975] QB236 ...) or

The reference to hapless Lord Denning describing his views as palpable nonsense and adding another criticism of the Canadians as lacking intellectual rigour; or

Whilst likening the appellate judges who invented the Mareva injunction to the leaders of the Gadarene swine (possessed by demons) is certainly incisive and not charitable, there was that strange lapse that indicated ignorance of the fact that it was the Second Person of the Trinity who manoeuvred them to the cliff's edge. Quite clearly, such a lapse must have been made by someone with a Sydney Grammar education, rather than that of the Jesuits at Riverview, where Justice Meagher was leader of the ton and naturally on much better terms with the Trinity. Poor Justice Meagher taking the blame for these incisive but not charitable comments all this time.

And this could explain the strange reticence of his Honour's colleagues. It was not that there were no stories. Rather, they were terrified of revenge, swift, terrible, incisive and uncharitable.

To confirm my impressions I reached up to his Honour's present colleagues, who shall remain nameless. Except the former Chief Justice, Mason, who said; "Oh, Bill, he was just saying there are a number of decisions he'd like to have changed - maybe 100 of them".

But then I learned of a softer, more self-indulgent side of his Honour's personality. I discovered that he has revived the old custom of wearing carpet slippers to Court and he takes six spoonfuls of sugar in his tea.

A new, gentler and more amiable Justice William Charles Montague Gummow (born in Sydney in 1942) comes into view. Residing in the pastoral simplicity of Canberra, far from the malign influences of his youth as a gadabout co-author, his Honour will hopefully return to the simple pleasures of lunch-room gossiping, piano playing at prawn nights and be free to entertain us with his fancies about the law of equity, secure in his knowledge that, if he is amongst the majority, he must also be right.

I will not bother to defend his Honour from the absurd motion of Senator Nick Minchin (the Newt Gingrich of the Australian Senate) that "the Senate regrets the domination of the Sydney Bar on the High Court".

I believe his Honour Justice Kirby is still writing a brief response which we will undoubtedly read in the *Herald*, *The Australian*, the *Telegraph* and the *Canberra Times* and hear on ABC, 2UE, 2GB and see him deliver on the ABC, Ten, Nine, etc.

I prefer to rely on his Honour's own words given on his swearing in to the High Court. He described a judge he admired and clearly hopes to emulate as

> "... a sceptical descendant of the enlightenment with an intellectual detachment and a belief that the road to the result can only be along the quiet path of reason and reflection".

Such a person is a most worthy member of our High Court and, if he typifies the NSW Bar, I am proud indeed to be a member of it.

I give you a toast to the witty man, the ordinary man, the man of intellectual rigour, a sweet man, once a friend of Justice Meagher's ... ❑



his Honour on that "amusing fantasy" (but now canonical) *Equity, Doctrines and Remedies*.

Australia's most famous 19th Century Equity lawyer (as Meagher calls himself) did his best to cheer me up.

"It's a terrible task", he said, and then confided to me, "He's really Gummoff".

"Gummof, Vladimir, Born in Harbin, China. You know, Rene Rivkin and all that."

The only truth in this (I later found out) related to Rene Rivkin, who was born in Harbin, but who, of course, is completely irrelevant.

Meagher then added, "Became 'Bill' very quickly at Sydney Grammar - lost the accent very quickly, very bright."

Perhaps this is what his Honour meant when he wrote of Gummow in an article about which he did not tell me but which I unearthed in the *ALJ* -

"He speaks no language except English and his native tongue."

I felt a little like saying, as Meagher himself said when appearing as Counsel before Justice Kirby and was asked whether he knew of any Commonwealth or American authorities on a particular point.

"Your Honour is such a tease."

I fled his Honour's chambers wondering why he was trying to make his friend seem a more colourful identity? Or was it an attempt to head off a suggestion that the book should be retitled in order of judicial precedence? The 4th edition will undoubtedly be by Gummow, Lehane and Meagher.

The 3rd edition of this text has had an extraordinary influence on all areas of Barristers' Practice since the authors pronounced:

"It would be a bold lawyer who would assert knowledge of what the law of 'estoppel' was today in Australia and this is because, rather than despite the fact that the High Court of Australia has on at least *four* occasions in the past decade examined the doctrine."

These judgments were the talk of the bar common rooms in all jurisdictions and we all agreed that it would indeed be a very bold lawyer who asserted a knowledge of the law of estoppel.

However, all Judges should be comforted in the knowledge that if they make some foolish error clarifying this or other murky areas of the law of equity, their erstwhile colleague will be in a position to correct it and restore doctrine to its orthodox uncertainty.

But on with the search ...

Allens was the next stop. I attempted to call the various partners of his Honour, to be told "retired", "runover", "read the book". Frantically, I dived on Valerie Lawson's book, but there was only one mention of Justice Gummow. Apparently at Allens there was an Upstairs/Downstairs system: the partners had a dining room and the clerks a lunch room. It said that his Honour used to eat with the clerks and gossip.

Well, this *was* something. Gummow as a man of the people! And a gossip as well. No wonder Meagher had warmed to him.

I rushed to the 8th floor and spoke to Bill McMahon, his clerk for the ten years he practised at the Bar - "Knew him well. Can't remember a single story", said Bill. "Dyson Heydon gave a witty speech at the 15 bobber, speak to him."

"Lost it", said Dyson, "can't remember a thing in it. Made most of it up. Trevor Morling took my only copy, ask him. Please feel free."

Rang Trevor Morling, "Did I, wonder why I wanted that - can't remember a thing about it - will search and ring you back."

Another equity pleading, I thought.

Desperate now, I ordered the press clippings to be taken out. He must have said something that was newsworthy! Not a single published comment from his Honour, but a statement released through the Federal Court's Director of Public Information -

"His Honour's only regret in taking up the High Court appointment was that it would bring to an end his role as a University Law School Teacher."

What? No regrets at leaving the Federal Court? At coping with the endless panorama of bureaucratic obfuscation and unreasoning obstinacy, the fascinating riddles of the *Tax Act* and their present strange obsession with wealthy, grown men whose lives are taken up with placing an air-filled leather bladder between two sticks? (Or do they call them posts?)

But on with the search.

One of his Honour's Federal Court colleagues said illuminatingly, "he delivers clear, concise judgments, very speedily".

I got the impression that this was said in the same way

# Justice Gummow

I too have had a similar problem to the other speakers who preceded me, which is faced with this task, what on earth are you going to say. The first thing I did was to approach my Chief Justice (all Chief Justices are sagacious people and omniscient) and I said "What on earth will I do?" and he said "Exercise tact." Of course he was speaking as a person not of New South Wales origin in the law so it was useful. He said "Now, for example, use some tact. Don't for example compare them to Queenslanders. Don't say when compared to Queenslanders they're uncouth and savage people". I thought about that and then I realised what it was that had brought David Jackson among us. He's at home now.

So encouraged by the Chief Justice to be tactful I thought a bit more and I thought "That won't get anywhere because what they want is brutality, not tact". I asked somebody else and they said "Well, tell them what you think of them". I said "That wouldn't be a good idea at all, particularly since I started off and was for many years a member of Norman Lyall's branch of the profession". Then a wiser person said "Well, what you've got to do, and its quite simple, at any NSW Bar function all you've got to do is make personal attacks on particular individuals. It's got two things about it: firstly you'll enjoy it, secondly there's just an endless supply of material".

I thought about that, then I thought about my first dealings with the Bar as an articled clerk at Allens. I don't think it's the same now but then there were real live human clients to be observed with individual problems to be advised and not all cases were mega-cases. The litigation department had two notable senior solicitors, the first real live litigators I ever came upon. One was Jane Matthews and one was John Bryson. I can't think of anything unpleasant to say about them. They were fun people then and they're amusing now. Jane Matthews in particular assisted a ferocious senior partner with defamation work with Frank Packer. There was a special trick at the High Court which was that the Registry shut at 12.30 and unknowing solicitors of course, on the last day to file an application for special leave would turn up at 2 o'clock. But smart people like us at Allens (and this is what the clients paid for) we would get up there by half past 12 and Frank Packer would ring up and abuse the senior partner for the clerk having taken a taxi rather than one and sixpence for the bus, which is how you become and stay rich.

Through the instrumentality of these senior litigation people one got to know some of the junior bar and one first entered the chambers of my later fatter coauthor to be greeted by an amazing sight, of course, and an ambience as they say now of genial squalor, basically. Then one went downstairs to the chambers of A.M. Gleeson, another edging ahead junior. The atmosphere there was brisk. My note says "bleak" but I think brisk really, if not chilly. One' s eye on entering the room immediately went up towards the ceiling and on top the row of bookshelves immediately between that and the ceiling there was a series of prints and they were of people with swords slashing one another. About 20 of them. That set the tone. Now, it's always said that the room was grey, which was not true. The chairs were black. Black vinyl. It was impossible to sit on them with any comfort. This of course, as I realised later, is a great trick for barristers to adopt. It keeps the clients on their edge. It keeps them edgy. In addition to slipping around from the general construction of these chairs, the vinyl itself seemed oleaginous. Only after a while did I work out much much later that this was the congealed sweat of nervous litigants and incompetent solicitors who had ventured in for advice. Later, in the fullness of time, the chairs were part of the equipment purchased by David Jackson I think when he arrived. He said "They've got to go" and he sold them as a job lot to Morton Rolfe. It's quite true. He rang me up and he said "I've flogged them for $75 to Morton Rolfe, would you believe it. He's quite happy with them". I don't know what's happened to them since but Spigelman should get one of them for the Powerhouse I think. As an indication of a particular form of indoor furnishing of an unhappy period.

Then one got to know from a distance some of the leading silks and they had speech problems. The first was Hope QC. It was not really a speech problem but his brain worked so fast that his power of speech could barely keep up with it; an extraordinarily quick thinking individual. Then there was Aickin QC. Sir Keith tended to keep below an equity whisper as it was called here. On one memorable occasion Gleeson and some senior partners from my firm and some captains of industry went down to see Mr. Aickin QC. in Victoria. Why do people go to Melbourne? Well, they go to Melbourne because the barristers have read the brief before they arrive. When they get there they're ready for them and when they go in and sit down they're not on the telephone all the time to other clients looking for a better brief. These, as well as great skill of course, were characteristics of Sir Keith. Anyhow they sat there and he had got an air conditioner installed - it was whirring away - and he was whispering all this wise advice about this takeover problem. It was only when I got out at the end of course that each had sat there nodding at the others, they got out and of course the inevitable was that none of them had heard what he'd said.

Each was too genteel to disclose this to the others as they sat there nodding assent.

Then there was Mr. Byers QC. No speech problems there. One heard for the first time in court this amazingly mellifluous voice, a beguiling advocate, luring judges into the acceptance of propositions I'm not sure they always fully understood. But they were conjured into the net. I was sitting in the High Court one day next to Murray Gleeson and Sir Maurice was addressing them. There was a look of less than full comprehension I must say looking across the whole seven of the Justices. As Sir Maurice kept speaking, Gleeson said to me "Look at him, what's he doing. I know what he's doing. He's saying to the judges 'You know and I know what this point is. Let's not tell anybody else'." And that was a real problem for his opponents, a real problem.

On one occasion I was very happy to be briefed with him. We were charged with going off to the Equity Court to persuade an Equity Judge that for some constitutional reason this judge did not have jurisdiction. McHugh, who I spoke to beforehand, said to me "Look, never tell a judge he hasn't got jurisdiction, they don't like it". He's dead right. Off we went, so I said "Well what are you going to do?" to Sir Maurice, "what are you going to do?". He said "I'll persuade him". And I said, "Well, there's only one thing to do" because I knew the judge better than he did, having toiled away in the horror of the equity duty list. "The only thing to do" (and in this I used before their currency really, words later put into popular use by our late prime minister) "you've got to take it right up to this bloke, take it right up to him". And he looked at me and he said "You forget why we're here". I said "What's that", and he said "We aim to please". He was right of course and I often think about that, particularly in more recent times as I sit through special leave applications.

Then I thought "Well there has to be more to this than making personal attacks" so I asked somebody else what to say and the answer was "You've got to talk about some subject that's right out of fashion, that's absolutely taboo, something that's right off the map for lawyers these days". I thought "God, what's that". I said "What can that be?" and he said "Legalism, they don't have it any more. They're not into it". I thought "That's probably right". I thought about it and I thought of three examples of legalism or, as one of those newspaper writers would say, "black letter law". One of them in the solicitors' firm where I started off and two of them observed from a very great distance in the High Court.

The first one, which I observed as a not then ageing person at Allens, involved the trial of *Portnoy's Complaint*. No-one remembers *Portnoy's Complaint* now. It was a novel by an American called Phillip Roth and in Australia in 1970 it was banned as obscene. Penguin got the bright idea that if they couldn't import it, they could print it here, and in great secrecy they printed 70,000 copies which were snapped up. Then there was the prosecution brought in every State by the State governments for obscenity and the trial in New South Wales went on in the District Court. There were two trials; in each case there was a hung jury and then the authorities gave up. And in the biography of Patrick White, who was a witness, there's an account of this in the biography at page 503. It says the Crown Prosecutor (it doesn't disclose his name) was an Irish Australian. Well at the New South Wales Bar that doesn't tell you anything. Then it says "with a nasal delivery". That doesn't tell you much either. It said "He jabbed at the witness as he put the questions, he jabbed an old, long, crooked index finger". Now who had an old, long, crooked index finger? Only much later I was lucky enough to be on his floor at the Bar and of course it was Jack Kenny and, yes, if you read the biography of Patrick White at 503 he's the man. He gave a rather different account of the trial than what appears in the book if you asked him.

Now what's that got to do with legalism? Well the answer is that part of a skilled legal technique is giving succinct and comprehensive advice. It's out of favour now. It's got to go for pages, and tell people "maybe this" and "maybe that". Not one thing or the other. The whole of the *Portnoy* thing only ever happened because the then senior partner at Allens, Norman Cowper, was a solicitor of the old school as well as being a good lawyer and a person with an interest in books and publishing. The Penguin people came along to him and they showed him *Portnoy's Complaint*. He was aged 71. He sat down and read it. I saw the letter of advice which he gave and on which they acted, and it was two paragraphs long. The last paragraph was "I've read this book. It's a book about a neurotic New York man who seems to have a series of erotic adventures. Some of it's quite disgusting. But no jury, properly instructed, could convict on any charge of obscenity. Yours faithfully." It was on the strength of that advice that those people acted and they were proved right in the end. It wouldn't happen today. There'd be roomfuls of little people producing memos in these big firms. The client would end up in a total state of confusion and advanced poverty and nothing would have happened, but there would have been a lot of chatter about community values.

The other two examples of legalism in operation involve the High Court and I observed them as a student and they struck me then as significant and they still do. One of them involved the death penalty and it's a case some of you will know about. It's called *Tait -v- The Queen*[1]. Of course we don't have the death penalty in Australia now, haven't had for many years, but it was certainly in existence in Victoria in 1962 and Mr. Tait had committed a rather nasty crime and he'd been convicted and his avenues of appeal had been

1 (1962) 108 CLR 620. On 31 October 1962 the High Court granted an injunction staying the execution of Tait. By the time Tait's application for special leave to appeal came before the High Court on 6 November 1962 the Chief Secretary of Victoria had made an order under s.52 of the *Mental Health Act* 1959 acknowledging Tait was either mentally ill or intellectually defective and his sentence of death had been commuted to life in gaol. *Ed.*

exhausted. It was then thought that he'd gone mad and thus, maybe, at common law one shouldn't and indeed couldn't hang a lunatic (another word you can't use now). You couldn't hang a lunatic. So further proceedings were instituted in the Supreme Court of Victoria. Whilst this further motion was still in the Supreme Court on 30 October 1962, the Victorian Executive Council fixed the execution for 1 November. The Supreme Court, under enormous pressure of time, sat until 10.30pm on the night of the 30th, and produced a judgment. The Premier of the day, who rightly said, I guess, that he had popular opinion behind him, gave no instructions to counsel to offer the Court any undertaking to defer the execution until there had been time to get the matter to the High Court on a leave application. So it was in that state of affairs that on 31 October 1962 Sir Owen Dixon and the other High Court judges, and Sir Owen Dixon was then quite an old man, managed with some speed to assemble a Full Court in Melbourne. This was on the morning of the 31st. The execution was for the next morning and they restrained the officers of the Victorian government from carrying out the sentence and there are some wonderful gloomy passages in the transcript where Sir Owen Dixon enquires whether they understand that if they did not obey the order they won't be just in contempt, but they will have committed murder themselves. Starting, I think, with the Premier. The transcript also shows it was the unhappy lot of (the now) Brian Shaw Q.C. to go along and tell the High Court that Sir Henry Bolte had told him not to give any undertaking whatever and indeed actively to resist any suggestion that the matter should be delayed beyond the 31st of October. Now of course at that time there was an enormous popular outcry for and against but predominantly I think, if one ignored those chattering classes, in favour of the carrying out of the execution and what this illustrates then is that aspect of legalism if you like to use that word which requires the lawyer, whether it's an advocate or a judge, to stand aside from the tumult of the moment and what is shouted about as being the felt and pressing need and concern of the day and to think more deeply about it and to take a longer view of just what's involved.

The other example is another decision of the High Court in the Communist Party Dissolution case[2]. It seems absurd now, but in 1949 and 1950 Australians en masse were enormously scared of what they saw as the "red peril". It wasn't just as we think now a few funny MPs who thought there were reds under the bed. There was an enormous feeling of panic really throughout the western world - this was the time of McCarthy in the United States for example - and there was brought of course in legislation here, the *Communist Party Dissolution Act* which would have most severely impacted upon civil liberties. The High Court held that the Act was beyond power. One might very much doubt whether the United States Supreme Court of that day and in those circumstances would have reached the same result. It required, I think, an enormous act of courage or enormous detachment.

Then there was the referendum to try and change the Constitution. The High Court judgment had been delivered on 9 March 1951. The referendum failed on 22 September. Six months later, on 21 April 1952, when he was sworn in that Sir Owen Dixon used the words "strict and complete legalism is the only safeguard to resolving great disputes"[3]. It is inconceivable that anyone in that Court on that day did not know that he was saying that against the background of what had happened in the previous year with the Communist Party litigation. And what he was saying, in a Delphic fashion of course, but in unmistakable fashion if one thinks about it, is that in the sort of position he occupied one has to take a longer view, both a longer view backwards and a longer view forwards and of course the hindsight of history would say he was absolutely correct that Communism now seems a rather absurd doctrine. How on earth, one says, could it ever have taken hold? What was the great fire that needed to be put out by these drastic measures?

***"Strict and complete legalism is the only safeguard to resolving great disputes"***

People keep asking me: "what's it like on the High Court". That's usually preceded by "How do you like living in Canberra?" as if you've been sent to Siberia or somewhere. I quite like living in Canberra some of the time, but not all of the time. On the one hand there's this view that we just loll about looking at the occasional special leave application, trotting down the corridor saying to one another "Look, have you seen this one?" with references to some intermediate courts of appeal that we won't name. The other view of it all is that we live in some sort of cellblock where we're chained up writing judgments day in, day out in hideous grime. The truth of course is that it's somewhere in between and it is, I think, the most enjoyable if rigorous occupation in the law anyone could hope to enjoy.

And next time there's a judgment that comes out which attracts criticism from all sides, no-one is happy with it because it doesn't manage to satisfy all these tumultuous needs that appear to be pressing at the time, just think about what was done in cases like the Communist Party Dissolution case. ❑

2 *Australian Communist Party -v- Commonwealth* (1951) 83 CLR 1.

3 (1952) 85 CLR xi, on the occasion of his swearing in as Chief Justice of the High Court. *Ed.*

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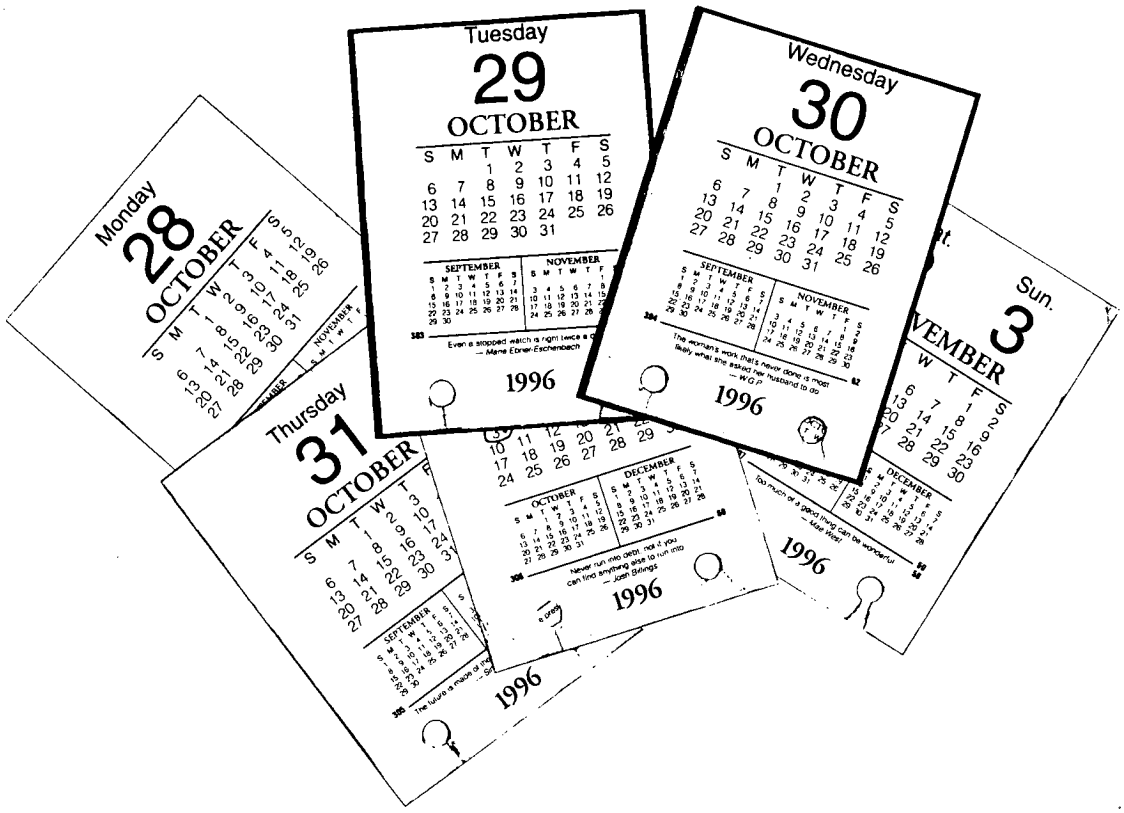


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# Capital Gains and Litigation

**Bar News makes no apologies for dealing with the issue of Capital Gains Tax so frequently. Now the Commissioner of Taxation has issued a Ruling on the question. Michael Inglis, Blackstone Chambers, considers the implications.**

Most clients think capital gains tax (CGT) has nothing to do with them. Most clients are wrong. This is as true with litigation as with other areas of legal practice.

I have been asked to provide a practical guide to the impact of CGT on litigation, from counsels' point of view. This I am pleased to do.

The subject is complex. So I have focused on three principal matters:

1. The choice facing counsel
2. The basic issues which arise
3. Further reading.

**The Choice Facing Counsel**

At the outset, counsel need to be clear on the scope of their retainer:

- Who is to advise the client as to the possible tax consequences (including CGT consequences) of the litigation ?
- Who is to advise the client (plaintiff) as to whether special relief should be sought in the originating process to cover the tax (CGT) effect on any judgment?
- Who is to advise as to whether settlement monies will be received free of tax, or be subjected to tax ?
- Who is to advise as to the *terms* of settlement, so that the monies will be protected from tax as far as possible?

Questions such as these require answers. For counsel to let the matter go by default, to say and do nothing, is to run considerable risks. The effect of CGT on compensation receipts (including damages and settlement monies) is now quite notorious.

There can be no legitimate assumption that - because the instructing solicitor, or client, do not raise the issue - counsel need not address it.

If counsel do not wish to accept responsibility for advising in this area, that should be made explicit.

If counsel do wish to accept responsibility, then counsel need to be very, very careful about what they are doing.

**The basic issues which arise**

Before CGT was introduced, with effect from 20 September 1985, much litigation was "an affair of capital". In the pre-CGT era, questions did arise as to whether litigation costs were deductible or not, whether so-called "undissected lump sum" receipts were received entirely free of tax, whether damages for loss of profits (or income) were fully subject to tax, and so on. There were also leading cases on the subject of whether the effect of tax should be taken into account in quantifying damages, both in respect of past and future years of income, and the year of income in which damages were received.

But, as a general principle, and subject to reasonably well-defined and well-known exceptions, litigants and their advisers could, and did, ignore the effect of tax in the institution of proceedings, and in obtaining judgment or proceeding to settlement.

*Ever since 20 September 1985*, the situation has been quite different. Because Australian CGT is, in essence, a tax on capital (gains), and because much litigation was previously "an affair of capital", it is perhaps not surprising that CGT has a profound effect on litigation: it was intended to do just that.

This whole subject - CGT and litigation - has been controversial for years. What has brought things to a head is the issue, late last year, of a Taxation Ruling by the Australian Taxation Office (ATO), giving the Commissioner's considered views on the subject: TR 95/35.

In light of TR 95/35, the effect of CGT on damages and settlement monies, in particular, cannot be ignored.

**What Does the ATO Say?**

Australian CGT is all about the DISPOSAL of ASSETS which were ACQUIRED on or after 20 September 1985. Where you have such a DISPOSAL of a post-CGT ASSET, then the possibility of a taxable CAPITAL GAIN or a CAPITAL LOSS arises.

Where the CONSIDERATION ON DISPOSAL exceeds the INDEXED COST BASE, or the COST BASE, as appropriate, of an asset, a CAPITAL GAIN accrues.

Just about everything you can imagine in Australian CGT has a special (defined) meaning. The whole of CGT is an artificial construct, replete with deeming provisions: for example, if a taxpayer disposes of an asset and there is no actual CONSIDERATION ON DISPOSAL, the CGT provisions *deem* the taxpayer to have received the full market value of the relevant asset subject, as you would expect, to certain (very limited) exceptions.

CGT has it own timing rules, both for acquisitions and disposals. With corporate taxpayers (and trusts) a change in "beneficial interests" can deem the fresh (post-CGT) acquisition of assets actually acquired before CGT.

What the ATO says, in light of these extensive definitional, deeming and operative provisions, is that:

1. The right to seek compensation (including the *right to sue*) is an "asset" for CGT purposes, and has been such ever since 20 September 1985.
2. The right to seek compensation (including the *right to sue*) is acquired at the time the damage, monetary loss or injury occurs.
3. The obtaining of judgment, or the settlement of an action, is a disposal of the relevant asset, being the right to sue.
4. The cost base of the right to sue (to the plaintiff) may include legal fees and charges connected with the proceedings and incurred during the course of proceedings. It does *not* include any deemed market value of the right to sue. It may include other money,

property, or money and property paid or given in respect of the acquisition of the right to sue if there is some direct and substantial link between the money or property and the acquisition of the right to sue.

5. The consideration on disposal of the right to sue is the amount ordered to be paid by the Court, or the settlement monies obtained.

These views of the ATO have been widely accepted as a proper interpretation of the CGT provisions.

If these were the only principles, the effect would be catastrophic, making most damages and settlement receipts directly subject to CGT.

There are two main limiting factors. *First*, the CGT provisions (in Part IIIA of the *Income Tax Assessment Act* 1936) contain an express exemption:

> "160ZB(1) A capital gain shall not be taken to have accrued to a taxpayer by reason of the taxpayer having obtained a sum by way of compensation or damages for any wrong or injury suffered by the taxpayer to his or her person or in his or her profession or vocation and no such wrong or injury, or proceeding instituted or other act done or transaction entered into by the taxpayer in respect of such a wrong or injury, shall be taken to have resulted in the taxpayer having incurred a capital loss."

The precise scope of this exemption is a subject in itself. The two most common cases within s160ZB(1) are compensation or damages for personal injury, and for defamation. As to the former, the ATO has this to say in paras 214-217 of TR 95/35:

214. We consider that the terms 'to his or her person' and 'in his or her vocation' should be read as widely as possible to cover the full range of employment and professional type claims, and include claims for discrimination, harassment and victimisation (or any directly related claims) arising out of State and Commonwealth anti-discrimination legislation, and wrongful dismissal.

215. We have considered the potential width of the exemption in Taxation Determinations TD 14 and TD 92/130. TD 14 considered payments made under accident and health assurance policies, while TD 92/130 considered payments of compensation amounts for defamation, for loss of support following wrongful death, and for the professional negligence of a solicitor in failing to institute personal injury claims. Draft Taxation Ruling TR 94/D20 also considers compensation for personal injury and makes it clear that damages in this context are generally received for the loss of earning capacity (and for claims such as future care costs) rather than for loss of income. In all of these circumstances the exemption provided by subsection 160ZB(1) applies.

216. Compensation for any wrong or injury suffered by a company does not fall within the scope of the exemption. We consider that the use of 'his or her' in connection with the taxpayer suggests that the application of subsection 160ZB(1) is intended to be limited to taxpayers who are natural persons. Similarly, we consider that compensation received by a trustee in his or her capacity as trustee does not fall within the scope of subsection 160ZB(1). Of course, amounts received by the trustee in respect of the surrender of a personal injury claim of the trustee continue to be exempt.

217. Exemption under subsection 160ZB(1) is also available for an undissected lump sum compensation amount which is received by a taxpayer wholly in respect of the personal injury of the taxpayer. Refer to paragraph 207 of this Ruling."

Two other important elements of TR 95/35, in this regard, are as follows:

3. For the purposes of this Ruling the following terms are used:

*Undissected lump sum compensation receipt*

An undissected lump sum compensation receipt is any amount of compensation received by the taxpayer where the components of the receipt have not been and cannot be determined or otherwise valued or reasonably estimated.

...

207. Of course, if the taxpayer can show that all of the separate heads of claim relate to the personal injury of the taxpayer, and that there are no other non-personal injury elements of compensation within the total claim, the exemption under subsection 160ZB(1) continues to apply to the compensation.

208. It is likely that some information is available when a compensation claim is made which can be used to dissect a lump sum amount of compensation. Alternatively, the components of the lump sum ordinarily are able to be estimated or valued on a reasonable basis.

209. The principles relating to the assessability of dissected and undissected amounts apply equally to lump sum compensation amounts received for personal injuries claims, whether by way of settlement or under a Court order."

These are selected passages only, and any counsel interested in the s160ZB(1) exemption, needs (as a starting point) to become familiar with the terms of TR 95/35 *as a whole*.

The second limiting factor is that the ATO has adopted a "look-through" approach in TR 95/35, essentially an analysis of all the possible assets of the taxpayer in order to determine the asset to which the compensation amount is most directly related. This approach is also called the "underlying asset" approach.

Disposal, for CGT purposes, includes the loss or destruction (in whole or in part) of an asset: s160N. So where you have an underlying asset, such as a building, which is partially destroyed due to the negligence of a lorry driver, the ATO is prepared to relate the damages, the settlement monies, or the insurance proceeds, to the *underlying* asset, the building. The immediate (or intermediate) asset - being the right to sue - is effectively ignored for CGT purposes. The CGT

consequences are determined by reference to the underlying asset's partial destruction (and partial disposal), its date of acquisition, its cost, any available roll-over relief, and other relevant factors.

Paragraph 29 of TR 95/35 contains this outline of the Ruling:

A Actual disposal of the *underlying asset.*
Includes a disposal of part of the *underlying asset.* This also includes loss or destruction of part or all of the underlying asset. The taxpayer uses the general disposal provisions of Part IIIA, including any roll-over relief and exemption.
Sections 160M and 160N

B No disposal of the underlying asset; *permanent damage* to, or *permanent reduction* in the value of, the underlying asset.
This requires a reduction of the total acquisition costs for so much of the amount received as represents compensation for the permanent damage or permanent reduction in value.
Subsections 160ZH(11) and 160ZD(4) (dissection basis)

C No disposal of the underlying asset; disposal of the *right to seek compensation.*
Consider this under the general disposal provisions. In some cases an exemption may be available.
Section 160A (pre and post-amendment), subsection 160M(6) (post-amendment), paragraph 160M(3)(b) and subsection 160ZB(1)

D Act, transaction or event not covered by A, B, or C.
Subsection 160M(7) will apply.
Subsection 160M(7) (pre and post amendment)"

TR 95/35 is 80 pages long. It contains *pages* of definitions. Each of the four cases (A-D) can produce significant CGT consequences. Each of the four cases is dealt with at length in the Ruling.

In the nature of things, it is case C (No disposal of the underlying asset; disposal of the *right to seek compensation*) which will prove of greatest concern in the litigation area. This is where personal injuries claims fit in, and where the s160ZB(1) exemption (when available) is so valuable.

Over the years, various plaintiffs have been concerned at the prospect of CGT being payable on their damages, and have sought relief from the Courts. Some judges have been prepared to grant relief, a number have not. It will be interesting to see how things develop now, in light of the ATO's considered views as expressed in TR 95/35.

The relief granted by the Courts has included the following:

- Indemnity against possible CGT liability, on conditions: *Provan v HCL Real Estate Limited* (1992) 92 ATC 4644
- Increase in damages to compensate for probable CGT, on conditions: *Tuite v Exelby* (1993) 93 ATC 4293
- Liberty to apply to have any CGT liability (if assessed) included in the claim for damages: *Rabelais Pty Ltd v Cameron* (1995) 95 ATC 4552.

At the end of the day, CGT cannot be ignored in litigation. Clients deserve to be told what they will receive from the litigation *in after-tax dollars*, as best that can be estimated.

Clients don't like surprises. If they expect to receive damages (or settlement monies) free of tax, and they don't, then they will not be happy. They might even sue.

**FURTHER READING**

CGT does not stand still. Indeed, as a new and significant area of law, CGT law and practice is growing at an astonishing rate. In recommending some further reading, I particularly emphasise that any counsel wishing to accept responsibility for advising in this area needs to master the subject of "CGT and Litigation" and then keep up to date. Counsel might care to read:

- Taxation Ruling TR 95/35 (Income tax: capital gains: treatment of compensation receipts), issued 6.12.95 by the ATO.
- NSW Bar Association CLE Seminar Paper "Taxation of Judgments Awards and Settlements" (9.10.95) by A H Slater QC and J W Durack SC.
- The Taxation Determinations and Draft Taxation Rulings referred to in TR 95/35 (see, for example, para 215 quoted above).
- The huge CGT literature available in this country, published by CCH Australia Ltd, The Law Book Co, The Taxation Institute, and others. ❑

**ADDENDUM**: CGT is a tax of last resort. It applies in circumstances where (or to the extent to which) income tax in the ordinary sense is not payable. So, as a practical matter, it is always desirable in the first instance to ask whether the relevant damages or settlement monies are assessable to income tax in the ordinary sense. CGT is important but it is not the only consideration.

On 5 June 1996 the ATO issued PRE-RULING CONSULTATIVE DOCUMENT No 10 (PCD 10) on the following topic: " Income tax: how are compensation or damages payments for personal wrong and injury treated under sub-section 25(1) and paragraphs 26(e) and 26(j) of the *Income Tax Assessment Act* 1936?"

This is an exceedingly important document and, despite its preliminary nature, deals with the assessability or otherwise of, for example, periodical receipts of workers' compensation and commutations of periodic workers' compensation receipts into a lump sum amount. As to the latter, the ATO has this to say:

" We do not consider that a commutation of the income stream results in the amount losing its identity as income ..."

PCD10 will be followed by a Draft Taxation Ruling and then a final Taxation Ruling. For anyone interested in the taxation treatment of compensation or damages payments for personal wrong and injury, PCD10 is a vital document. ❑

Michael Inglis
Blackstone Chambers

# A View from the Bench

**John Spender QC spent 1995 as an Acting Justice of the Supreme Court. He shares some insights into the judge's lot, offers some advice to advocates and some modest proposals for the bench.**

Judges and advocates look at things differently. This is obvious, basic, and easily forgotten. Advocacy is adrenalin-driven, judging is not - or shouldn't be. The advocate's aim is to win; that is the raison d'être of his craft. The judge is there to find the truth. This means first and fundamentally to get the facts right - in my view the most difficult task in complex cases, where core factual issues are in dispute, and where other issues which illuminate the probabilities of finding core facts one way or another may also be in dispute.

Having found the facts, the judge must get the law right, and then apply the law correctly to the facts as found. If there are discretionary judgments to make, they must be made wisely, and a judgment then given which is just according to the laws of our society, and the values they reflect.

Truth in courts is an elusive quality, and the search for it is an art in which experience, perception, intuition, a feel for the probabilities of events or human conduct, and the subterranean influences of the unconscious on the mind's conscious, rational processes, all play a part, even if sometimes unacknowledged.

***"Truth in courts is an elusive quality ..."***

In a difficult case there can be so many variables and imponderables, events clouded by time or corrupted by partiality, prejudice, self-interest or the imperfections of memory, and contingencies and possibilities that cannot be accurately quantified or reduced to a formula, and which in the end and despite the protective colourations of legal language may be resolved by the judge through what is little more than an inspired guess. For example, how long is a severely brain-damaged 11-year-old boy injured when three, likely to live, and what kind of care will he need for the rest of his life, and what earning capacity would he have had as an adult if he had not been injured? (Issues I had to decide in *Mundy v GIO*, judgment 5 June 1995.)

So much can depend on such things as how one assesses witnesses (including that slippery and chimerical quality "demeanour" which can so mislead even the most experienced judges), or the probabilities of human behaviour, or what percentage one places on the likelihood that action not undertaken allegedly because of an opponent's conduct would otherwise have been pursued and profitably exploited, or how one weighs contingencies that might or might not occur some time in the future.

Serious litigation is a hazardous, uncertain business fought on grounds and over issues which can change dramatically in the course of a day - or which may change in the judge's *perception*, for it is how the judge sees things that counts. In courts, truth - and by this I mean how the judge sees the case and ultimately chisels it into final shape in his judgment - is never objective: it is to be found in the judge's mind. This is the battlefield that must be captured.

Good advocates make a difference. They win cases bad advocates would lose. Cases are not presented by the skilled advocate as though he was working in some kind of sterile, legal laboratory. He shapes his case, and how he puts it, to interest, beguile, and persuade the judge - the only man or woman in court in a non-jury case who counts, if you are really interested in winning, rather than impressing your solicitor, or client, or other counsel, or getting a few seconds' fame through being noticed by the media.

To persuade the judge to find for you, it helps to have some idea of how judges feel about their work, what they like and don't like, and what pressures they are under.

At the start of the day in court the judge comes onto the bench in a frame of mind different from the advocates before him. It was once explained to me by an experienced and highly regarded judge in these words: "There's no crunch. At 10 o'clock I simply go onto the bench and start judging". The judge is, or should be, attentive, curious, and non-combative (this last, a state of mind and spirit some judges find difficult to attain, or maintain).

Whatever a judge's temperament or intellect, one thing you can be pretty sure of: he takes his work seriously. (The exceptions are so few they don't matter - unless you have the bad luck to be appearing before one.) They may sometimes wish they were doing work that was less hard, or earning more money (but it is a rare judge who thinks seriously of returning to the strain of the Bar), or that the cases were easier, or counsel quicker, or that they had fewer reserved judgments weighing on their minds. But these are merely the occupational hazards of a demanding life. It is their life by choice and they rightly believe their work is important. This, I think, is the cardinal feature of the psychology of judges.

The skilful advocate understands and capitalises on this state of mind. He makes the court feel *good* about its work: that the court's work has worth and purpose and the case before it, no matter how slight or simple or how commonplace the issues, has its own intrinsic importance as an instance of the way our system of justice works, and that getting it right justifies all the time and labour and struggle that has gone into the development of that system. Each day in court must, for a judge, be a justification for his life as a lawyer.

Attitude, it was said in the navy, is the art of gunnery. If your attitude is right, if you *want* to be a good gunner, you will be; if it isn't, you won't. So it is, I think, in an advocate's

attitude to his work and to the bench.

Good advocates lift a judge's spirits; they are welcome in court precisely because they are good. The judge knows the case will be well presented, the issues focused on, the law explained, the irrelevant excluded, and that time (or not too much time) will not be wasted. The bad advocate is a depressant and an irritant. Dear God, you think, not him again. Who do you have in front of you? another judge may ask. (Judges, like barristers, talk about their cases and the advocates in them.) "X" you reply. "Commiserations, the case will never finish", or "Hopeless. You'll have to do it all yourself", or "She knows her stuff".

If the question is asked: How do I persuade this man or woman to do what I want him or her to do? I would answer that the guiding rules are to make the judge feel that the day's work is a worthy task, and to make easier the job of getting things right.

Judges don't have to worry about where the next case is coming from - the litigation river never dries up. What they do worry about is getting through and getting right the case at hand, and all the ones to follow, and the ones they have reserved on and which may be banking up, and which may worry them at the end of the day, or disturb their nights or weekends. Their core concern is to get things right, and to get the judgments out.

Most advocates have heard judges complain about the time spent on reserved judgments; most, I suspect, think this is an exaggeration, a piece of judicial self-justification. It isn't. I found the writing of reserved judgments to be pretty much a common and major cause of concern among judges, and undoubtedly the principal labour outside court. The time needed and the demands of this task surprised me. It is a quite different dimension to writing an opinion which, no matter how difficult, is not determinative of events. The judge, when giving judgment (subject only to an appeal), is the final arbiter of issues whose outcome may in the true meaning of the word, be fateful to the disputants.

Getting things right - or trying your best and expressing your findings logically and in clear English - is a demanding grind. A half-day case may throw up points of law that take two days at your desk to resolve. The facts in another case may waver on a knife edge and you spend hours looking for the key, the bits and pieces of evidence that, jigsaw-like, you seek to put together and make sense of to get the right result.

I am sure that these days far more judgments are reserved, and generally are longer, than was the case, say, 30 years ago. The reasons aren't hard to find. Juries have largely disappeared; an avalanche of legislation, often of great complexity, has come out of the State and Commonwealth Parliaments to redress perceived injustices, create new remedies, close down practices thought to be wrong or unfair, and to level whatever playing field is the flavour of the time. The courts themselves, led by the High Court, have been far more adventurous in the creation of remedies and discretionary defences and generally in extending their grasp - sometimes assisted by the legislature - for example, in the exercise of the inherent and invested supervisory jurisdiction of the superior courts.

Let me give two examples.

Take a secured loan between a bank and a customer, supported by a third party mortgage and guarantee. Not too many years ago, if the principal debtor defaulted the bank would have little trouble realising on its security or getting judgment on the guarantee.

Today, the mortgagor-guarantor might be able to pray in aid any one or all of the following as defences or cross-claims: negligent advice (*Evatt v MLC*, 1969); misleading and deceptive conduct (*Trade Practices Act* 1974, *Fair Trading Act (NSW)* 1991); unconscionable bargain (*Amadio*, 1983); relief under the *Contracts Review Act* 1980; perhaps an estoppel of some kind (*Waltons Stores*, 1988, *Verwayen*, 1990).

Look at a major growth area: administrative law. Not long ago, when the public perception of an individual's private rights was more limited and attitudes to authority perhaps more submissive and the tidal wave of administrative review and the developments in the rules of natural justice had yet to appear on the law's horizon, two cases I heard would probably never have reached the courts. One concerned a challenge to the stewards' decision over a protest in a trotting race (*Tippet v The Harness Racing Authority of New South Wales*, judgment, 16 June 1995), the other a complaint that procedural fairness had not been observed in disciplinary proceedings in a TAFE Institute (*Burns v TAFE Commission of New South Wales*, judgment 15 November 1994).

As remedies proliferate and issues multiply, so has the task of judging, and of judgment writing, become harder.

And let us not forget the advances of the information

highway (one of the most misleading descriptions of our times): mountains of documents, voluminous submissions, acres of case references. An exaggeration perhaps; but contemporary electronic aids can encourage in complex cases an absence of selectivity and the kitchen sink approach to advocacy - when in doubt, throw it in.

How does the advocate take advantage of the burden this puts on judges? He *helps.*

In all but the simplest of cases a chronology puts things into immediate perspective, and saves the judge from the tedious task (and one that can distract attention from the oral argument) of noting dates and events in his bench book. The same applies to a written submission: it gives (or should give) an immediate distillation of the issues of fact and law. Clarity, relevance, compression, and accuracy of exposition of facts and law are the guides. The aim of written submissions is not just to make the judge's task easier, and to get him or her to understand more quickly the case you are putting, but to so put the case that the judge can use them (and is persuaded to do so) when giving judgment. The best written submissions may be adopted by the judge to structure the judgment: this is intellectual seduction (of the judge by the advocate) at its highest.

In my view, long written submissions are to be avoided. This can be more a matter of style than anything else: some advocates prefer to spell things out in greater detail. But the trouble is that length and completeness can be bought at the expense of clarity, and the argument can become turgid and convoluted and not attract the eye to the key points. Quoting evidence may sometimes be necessary; but as a rule should also be avoided. Simply refer precisely and accurately to the evidence and what you say it spells out. The same applies to cases. I think it is better to state the principles the cases decide, and keep quotations to the minimum. And be selective in choice of authorities. I recall one judge who was about to go into court. It was a few minutes before 10, and we were both waiting in the corridor behind the courts. The day was sunny and brilliant and there was good reason to feel happy with the world. He looked most unhappy. Nearby, ready to be wheeled into court, were two or three trolleys piled with books and folders. "What do you have?" I asked. "A strike out application", he said. "What are these trolleys of books for?" I asked. "Someone has listed over 90 authorities for me to look at", he said. There was a grim tone to his voice; I don't think it was a very happy day in his court. The point is: if the High Court has said it, or the Court of Appeal has said it, don't go further. Citing a whole number of authorities which really go to the same point is a burden on the judges and a burden on their staff - and one they don't welcome.

Another irritant in written submissions - and one which should always be avoided - is when a gloss is put on facts or law which they don't bear. When it is said that the effect of evidence is A, but it turns out to be B when the judge looks at it, or it is submitted the High Court has said C, when it hasn't *quite* said that, the worth of the submissions can be wholly destroyed. This damages the case the advocate seeks to put, and the advocate's standing.

Integrity and honesty of advocacy are fundamental. Nothing does an advocate so much harm as to get a reputation for lacking honesty or integrity in his or her approach to the court. Advocates who put assurances to the court which aren't honoured, who claim prejudice when obviously none exists, who will assert that some evidence was given or some statement made by counsel on the other side when it wasn't given or wasn't made, do themselves a great deal of damage. Courts have to be able to rely on advocates; but some gain the reputation among the judges (and don't think judges don't discuss these things - they do) as disingenuous, or willing to bend the truth, or simply as dishonest. An advocate who gets this kind of a reputation will rarely lose it. Not a ripple of distrust may disturb the judge's demeanour; on the surface he may be just as affable to the advocate he distrusts as he is to the ones he trusts; but the question mark over the advocate's honesty remains in the judge's mind.

Anything that makes the judge's task easier should be done: summaries, cross-indexes, a dictionary of medical terms, or whatever. And don't think that the business of writing judgments is necessarily left until the case is over. Some judges will begin roughing out a judgment from day one of a longish case, starting perhaps with a statement of the issues, and a chronology of events which don't appear in dispute. When you see the judge industriously writing on the bench on day three, he may not be simply taking notes of evidence; he may be writing his judgment. So, if you want to win, think how from the first moment of the first day you can begin the process of persuasion.

Incidentally, I think that starting to write a judgment early in a case has distinct advantages. It focuses the judge's mind upon the main issues; it allows him to make provisional assessment of the facts, and witnesses - all of which can be revised. And it gives him a framework in which to work, and in which to assess the case and define and refine the issues with counsel as the case proceeds.

Last, in what is in some ways a statement of the obvious: avoid the urge to put bad points. There is always the temptation to believe that a point you think to be absolutely without merit may somehow save the day. If it is that bad, it won't, and if you put it, it's very badness *may* detract from the quality and acceptance of the essentials of what you think to be the best of your case. In an ideal world this should not happen; a bad argument shouldn't by association damage a good one. But our world isn't, and never will be, ideal.

Now for one or two less obvious things.

Sitting on the bench can be dull; evidence can be tedious; cross-examination repetitious to the extreme; the mind can glaze over and attention wander. As it does, so the eye wanders. And whether the day is dull or not, the judge's eye will move about the court: judges have their fair share of curiosity. What are the sorts of things judges may be looking at?

Body language attracts attention. Advocates know - or should know - more about their cases than judges do. If a question is asked and when the answer is given, the instructing solicitor reels back in horror, or the junior looks distressed and agitatedly grabs hold of the leader to whisper words of advice into his ear (such as why did you ask that question, you damn fool?), be sure this will jog the judge's attention. Why such a reaction; what is the importance of the question - what have I *missed* which so excites them? The rule is, I think, to play a poker face. If the answer given is the last one you want, whether from your plaintiff-in-chief (as you think how to dig yourself out of the hole in which he has just planted you and his case), or in cross-examination, look unruffled and unsurprised, as though what you have been told is just what you wanted to hear.

Incidentally, your opponent will also be watching your body language, and listening to the timbre of your voice. His or her ear will be acute to detect stress in your voice. Moral: never let your defences down.

One other less obvious thing: never underestimate the judge. The advocate, complete in the assurance of his own brilliance and the rightness of his cause, may come to court with the opinion that old so and so (with a bit of spoon feeding) is all right, but not half as smart as he is. The advocate may be right; but what he forgets, is that the judge has been sitting there for a long time. The bench, like advocacy, is a learning curve without end. But on the bench, unlike advocacy, you are constantly being force-fed law from at least two competing sides and you will usually spend far more time in court than the great majority of advocates. Instead of having to do all the research yourself, the research is (or should be) put before you. Each side contends for superiority; you sift, examine, evaluate. By this process the judge is taught, and if the judge is a busy one, that man or woman will be taking in a great deal of law in a judicial career. Hence, even a pedestrian lawyer - assuming, contrary to all evidence, that a pedestrian lawyer has ever been appointed to our superior courts - can, by the simple process of being there and having to do the work, become a very sound and knowledgeable judge, particularly on matters of daily practice, procedure and evidence. And so, no matter how smart you may be, never underestimate the human being sitting on the bench. If you do, you may be in for a very unpleasant surprise.

***"Judges ... are the closest to absolute rulers that we know"***

Now, if I may borrow from Swift, one or two modest proposals for the bench.

When I went to start my year on the Supreme Court I was surprised to find there was no guidance on how a judge should run things. There was no short course on case management, nothing on how to write a judgment, no guidance on the merits of reserved as against ex tempore judgments, nor how to go about the task of giving an oral judgment as soon as a case finishes (an art form all of its own and a most difficult one), nor on how to run a court. How should you *act* when you get on the bench? What latitude should you give to advocates to argue points of evidence or procedure, when and how should you intervene to question witnesses in examination or cross-examination, how do you cut short a cross-examination which is going nowhere without leaving open a ground of appeal or (which can be worse) giving the impression that you have made up your mind? Nor did I find any internal guidance on such everyday but important things as what cases should get expedition or how you should go about fixing cases in your own list.

Judges were uniformly helpful when I asked for advice. But I believe the truly fundamental point is that we need to move away from what I think to be an outdated approach to judicial appointments which assumes that any competent counsel can go onto the bench without any kind of training as a judge. Like anything else, judicial techniques can and, I believe, should be taught, and the notion that you can pick them up as you go along, or from a seminar of a couple of days should be wholly discarded. Judges should be trained *before* they take up their appointments, and that training should be highly professional and exacting.

Next, there is the question of judicial attitudes. While there is no crunch of the kind that advocates experience when they stand up in court at the start of the day, running a court is not without strain. You may have to make decisions on the run on issues that arise suddenly and without adequate argument or without as much knowledge of the law - for example, a difficult point of evidence - as you would like. There is also the strain that comes from a long case, or from difficult issues, or from arguments which are badly put. All this can result in one feeling less than happy with those who are appearing, or about the completeness of one's grasp of the issues. But no matter what you may feel, I think it is of great importance - and no doubt a counsel of perfection which I don't suggest I always met - to run as pleasant a court as possible. The word "pleasant" may seem odd in this context; courts are not pleasant places. They are hard and demanding, and can be brutal on those who have to appear in them. The strain on the lawyers can be considerable; the strain on their clients and witnesses in these alien and intimidating places is usually far greater.

It is because of the strains inherent in the adversarial system that judges should try to run as pleasant and relaxed a court as possible. I believe this is the way to get the best out of those who appear before you, whether lawyers or witnesses, and it also leaves people more likely to think that they have had a fair day in court. And, how the courts are perceived by those who are the consumers of justice - litigants who may come before the courts only once in their lives but for whom that occasion may make or break their futures - is all important.

Judges in their courts are the closest to absolute rulers that we know; courtesy and restraint should be the mark of those with such power.

My last word is on the subject of judicial accountability. This is the age of accountability, none of us is exempt. If asked what they want from a judge, I think most litigants would say a fair hearing and a quick result. There is a serious question to be asked about judges who fall too far behind, who have too many judgments outstanding and who take too long a time - absent compelling reasons like ill-health - to hand down decisions. When a judge gets into difficulties, like anybody else, he or she should be helped.

This could be done in various ways. Informally, at first by the Chief Judge of the Division to find the causes of the problem. Has the strain of too many reserved decisions eroded the confidence and order of mind the writing of judgments demands? Are there other reasons: emotional, temperamental or intellectual?

Once the causes are determined, there should be a thoughtful and professional programme of assistance which would give the judge in trouble time off the bench to get up to date and, as it were, to start afresh.

But if it turns out that, for whatever reason, the judge simply is not capable of processing cases in a reasonably timely fashion, then it must be acknowledged that a mistake has been made and another occupation should be found for that person, perhaps by the allocation of simpler cases, or by the mechanism of a form of early retirement.

A challenge to judicial independence?

I agree that this kind of approach to judicial failure would amount to a fundamental change to the way we do things, but I would argue that such a change would recognise that judges are also liable to be judged, and if a man or woman on the bench is incapable of doing things in the way they should be done, the judiciary and the government of the day owes a duty to the public to do something about it. ❑

## Best-Kept Secret

"The Medico-Legal Society of NSW is the best kept secret in Sydney", said President Dr Jennifer Alexander. "While the Society has nearly 600 members and regularly attracts more than 100 people to its academic meetings, most doctors and lawyers do not know of its existence."

The Society holds four (4) academic meetings each year at which medical and legal speakers debate current issues of interest to the two professions. In March of this year the topic under discussion was euthanasia. On that occasion, two medical speakers, Professor Malcolm Fisher and Professor Peter Baume, who hold opposing views, and lawyer, Caroline Marsh, debated five propositions which were aimed at encouraging discussion on the ethical and legal aspects of the Euthanasia Debate to the exclusion of the religious and moral concerns.

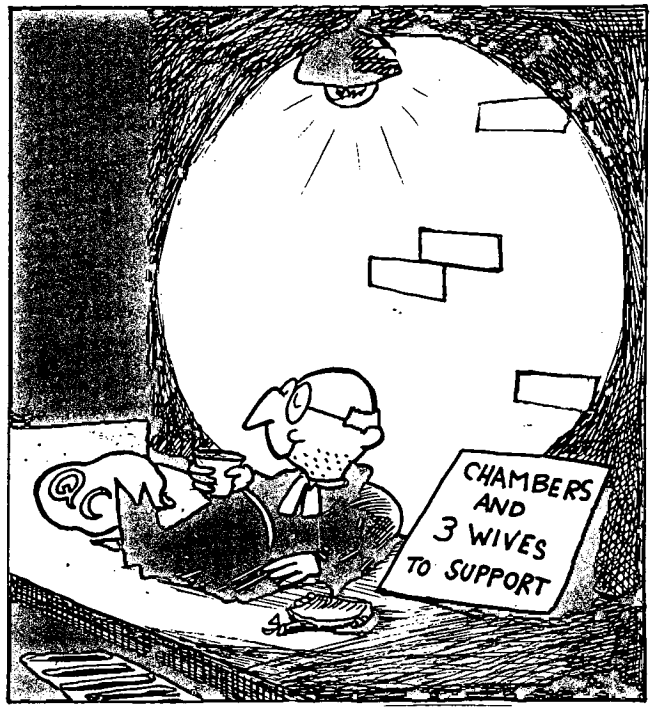
The five propositions were:-

1. Legislation to legalise voluntary euthanasia is essential to protect doctors from charges of murder or manslaughter.
2. Legislation which clearly defines the boundaries of voluntary euthanasia would ensure there is no 'slippery slope' to non-consensual terminations of life.
3. The doctor-patient relationship will be enhanced by the legalisation of voluntary euthanasia.
4. Voluntary euthanasia is not necessary in a society in which good palliative care is practised - and,
5. The right to choose one's manner and time of death, should be enshrined in law.

The debate itself and the questions which were later put to the speakers, covered a wealth of views.

The proceedings of all scientific meetings are published quarterly and mailed to all members. To join this unique Society write to:-

The Medico-Legal Society of New South Wales
PO Box 1215,
Double Bay NSW 2028,
or contact the Executive Secretary on (02) 363. 9488,
Craig Lilienthal, Hon. Secretary-Medical
Peter Dwyer, Hon. Secretary-Legal ❑



# God and the Legal Profession

**Joanne Harrison, Registrar of the Supreme Court, reviews the religious ceremonies which herald the opening of the Court year.**

The Court year starts on an uplifting note with church services for the judges and legal profession. This year I attended all four in Sydney and here is my potted version of them. The purpose of this article is not to compare each service but to generate some interest and discussion about them. Some parts of each service are similar, some are quite different.

It all started when I told my mother over the Christmas break that she should go to at least one opening of Law Term church service before she died. Not leaving anything to chance, she travelled down from the country to attend a service at the start of this law term. We stood outside the Supreme Court undecided as to whether we should go to St Mary's Cathedral or St James' Church. We decided to go to both. After attending both services on the first day of term, I thought that this year at least I would attend the ones held at the Great Synagogue and the Greek Orthodox Church. There is an ecumenical service held at Parramatta and various others held around the countryside.

At this point, I suppose that I should disclose my bias in case it flavours this article. I was brought up in a fairly strict religious household. I attended Sunday School when it was the done thing and even managed to win the Sunday School prize at the end of the year. After that stultifying experience, I tune out when I hear readings from the *Bible* as (to my ears, at least) they often sound like a string of clichés. However, I do find it comforting to think that there might be some higher power over and above the decision makers of this country - judges , politicians and others. So when I attended these services, I was hoping to find a sermon that was relevant to me as a lawyer, to encourage me, to achieve higher standards and to give me something to go away and think about during the year.

For those who have never been to an opening of Law Term church service all four services follow a similar format. It is not correct to call a synagogue a church so where Church is mentioned, please read church and synagogue. It starts with a procession followed by prayers and *Bible* readings, musical accompaniment, sermon and closing prayer. The Catholic Church has a Red Mass and the Greek Orthodox also has mass.

**The Procession**

Imagine the scene. The surroundings are majestic and elaborate. The buildings are beautiful. The service starts with a procession, the Cross (except in the Synagogue) followed by the clergy in their vestments; the Judiciary comprising the Chief Justice and Judges of the Supreme Court, Industrial Court and Environment Court and Masters, Judges of the District Court, and Magistrates and members of the legal profession who are to participate in the service. They walk down the aisle with music being played in the background.

The Supreme Court Judges wear crimson robes with fur, and long horsehair wigs, the District Court Judges black robes with a purple sash and shorter wigs. Other Judges wear plain black robes and wigs. Some of the Judges of the High Court and Federal Court wear their usual day wear and sit down at the front of the congregation. The clergy also wear traditional dress which varies from the mitre, white robes with gold embroidery to the more spartan white and black robes with no headdress.

Barristers also wear their robes, long or short wigs and black gowns, and solicitors in their normal court attire. Barristers sit together towards the front of the church. Solicitors do not necessarily sit together as they are not as easily recognisable as those who are robed.

In the Synagogue, women sit upstairs, the men downstairs. The Archbishop of the Greek Orthodox Church had the most ornate robe and a black round hat with a black veil down the back ("Kalimafchi"). In the Synagogue, in addition to the normal robes, the males wore a black and white striped prayer shawl ("Tallit") and wore a skull cap ("Yarmulke") on their heads. The clergy wear a smaller version of the "Kalimafchi".

**The Musical Content**

Although St Mary's had hymns on their programme the congregation could join in, it was the Cantor with a most beautiful voice who carried the musical interludes. The processional hymn was accompanied by the organ. I found the audience participation in the hymns minimal and the proceedings somewhat distant. On the other hand, St James' Church had the most wonderful organ and the congregation joined in the singing of the hymns. This is probably because the organ made the music come alive in the church. Credit must be given to the organist, David Blunden. The Synagogue and St James' Church also had a Cantor. The Greek Orthodox had a small choir, but no other musical accompaniment. There were bells and incense in the Catholic and Greek Orthodox Churches which of course added to the atmosphere.

**The Sermon**

I understand that two of the four speakers had legal qualifications, not that it is necessarily relevant. Here, I should point out that if I was asked to speak to a group of theologians, I wouldn't know where to start. The sermon at St Mary's started off on a good note with reference to Sydney 2000, Eva Cox in the Boyer Lectures and other contemporary writers. Father John Jago talked about the fact that a truly democratic society does not go hand in hand with a consumer-based society. Unfortunately, the acoustics in St Mary's were such that while I could hear the first few words of a sentence, the rest was hard to distinguish because of the echo (maybe I

was not paying enough attention).

The speaker at St James', the Right Reverend Paul Barnett, crafted his sermon well by contrasting a lawyer's job in preparing a case for a client to that of Paul when he went to see Peter (Cephas) in Jerusalem for 15 days to seek the truth about Jesus.

Both the lawyer and Peter prepared a case by gathering the evidence from both written and spoken word, then analysing it objectively to ascertain the truth.

The speaker's conclusion was that if each of us was to apply the same process to the existence of Jesus, the evidence would hold up. While the idea was a good one, it took rather a long time to explain.

I enjoyed Rabbi Apple's sermon the most. He quoted the philospher Martin Buber's distinction between two types of relationships and then asked whether the role of a good lawyer should be either "I/thou" (the empathising caring part of a person) or the "I/it" (the objective rational part). His conclusion was that a good lawyer should be both. I found this sermon relevant, thought provoking and felt that it gavc me something specific to ponder over. It satisfied the criteria I considered important.

Archbishop Stylianos spoke sincerely and relevantly. Not only should we be looking to the year ahead but we should be grateful for the year just past. According to St Paul we are only given the temptations that we can bear. I wonder what 1996 holds.

**Prayers, Readings and Responses**

Of course, all churches had prayers, some of which were used in regular church services.

In the Catholic Church, a woman sitting near me didn't have to refer to her programme once, yet knew every response. St Mary's still has kneeling during prayers. I thought it was out of favour. Communion was offered and dispatched with the utmost efficiency.

The Greek Orthodox clergy read the prayers in both Greek and English. The Jewish prayers, although mostly in Hebrew, had English translation.

The Catholic and Anglican churches had the Presidents of both the Bar Association and Law Society giving a reading from the *Bible*.

In the Synagogue, the Honourable Gordon Samuels, Governor General designate read a special prayer.

The Anglican Church had acts of dedication with responses specially designed for the Judges, the Crown, barristers, solicitors and corporate solicitors, followed by prayers.

The response of the corporate solicitor (who was to seek the promotion of values which uphold the common good and dignity of our society) was hardly audible. The congregation was much smaller that I expected. The other churches had good attendances.

**Refreshments**

Probably because of the constraints of time, there was no chance to mingle at either the Catholic or Anglican services. St Mary's service started at 9.00am followed by the Anglican one at 10.30 on the first day of term. The Judges sit in Court at noon.

The Jewish service is held on the first Saturday after term starts and the Greek Orthodox the Tuesday evening of the second week. I was made to feel welcome at both the Synagogue and the Greek Orthodox Church.

After the service both provided a welcoming introduction from the church members followed by a response by the Chief Justice. Then food, drink and a chance to talk to others. I have to say that the food at the Greek Orthodox function was absolutely delicious, so much so, I couldn't eat my dinner when I got home.

I took my four-year-old son to the Synagogue and thankfully they provided childminding. It was a brave move as my son's other venture to church resulted in him singing "Mr Natural" (Mental as Anything) at the top of his voice after the congregation had finished a hymn.

**Highlights**

The most enjoyable parts were the spectacle of the robed clergy and Judges walking down the aisle of a hurch, the beautiful buildings and their interiors, the beautiful voice of a church, the Cantor at St Mary's, the organ at St James', the sermon of Rabbi Apple and the Greek Orthodox Church.

I found the hospitality forthcoming at the Jewish and Greek Orthodox services welcoming, in what to me is an unfamiliar environment.

May I suggest that next year it is worth taking the time to attend one or more of these services and you might find time for reflection. It is also an opportunity to gain a sense of community and recognise that a good legal profession may make society a better place. ❑

## What Crystal Ball?

It seems that some judges expect that there will always be weeping in life's "vale of tears".

An award was made by a Master under the *Family Provision Act*. Within a month the plaintiff's husband was slain by her son, who was later convicted of manslaughter. The son committed suicide in gaol. Shortly afterwards the plaintiff was diagnosed with cancer. The plaintiff attempted unsuccessfully to obtain leave to adduce fresh evidence of these sad events on appeal. Referring to them, Handley JA (Gleeson CJ concurring) said:

*"The fact that some of life's contingencies occurred sooner rather than later and in a violent rather than natural manner does not require this Court to hold that the Master's decision has been falsified."* (Allan v Public Trustee, CA (NSW) 25 August 1995.) ❑

# Siberia Calling

**Notwithstanding the funereal depiction of my likeness on the cover of the last edition of Bar News, suggestions of my demise have been greatly exaggerated. Perhaps in part to dispel them, our learned editor has invited me to contribute again.**

## Juries

The acquittal in London of the sons of Robert Maxwell and others after a long and complex trial and a long retirement by the jury prompted predictable responses by some calling for:

- the abolition of jury trial for such offences; and
- the abolition of the Serious Fraud Office for failing to secure convictions.

I had the experience of visiting the trial in progress last year and of talking frankly and at length with lawyers on both sides, some of whom are friends (of mine, that is: not necessarily of each other). I saw how the jury was treated and the facilities and procedures that were in place to ensure that they understood and were able to assimilate the evidence, the issues and the arguments. The trial judge was particularly astute in facilitating the whole trial process.

There were six computers for the jury (one between two) and they were regularly and apparently satisfactorily used to view documents and refer to exhibits as the trial progressed (as all participants could via their own terminals).

The demand that juries be abolished in such proceedings seems to me to flow from a number of false or unverifiable premises:

1. that the critic knows the mind/s of the jury;
2. that literate and apparently normal jurors are unable to understand evidence presented largely in documentary form and to appreciate issues and assess the strength of arguments arising out of and based upon such material;
3. that advocates and judges are unable to satisfactorily explain ideas and events proved by such evidence that might be outside of the jury's daily experience;
4. that judges (perhaps assisted by expert assessors) are the only people who can - or should - make decisions based upon such evidence and that the community therefore should be excluded from doing so;
5. that if a jury's decision does not accord with the critic's opinion the jury must have been wrong.

One message, however, is strongly reinforced by such cases: there is a heavy burden on all advocates to know the evidence, identify the issues and argue their cases in a way that will be understood by the tribunal (whether it be a jury or a judge). That process will be facilitated by early attention to the task.

As to the second demand: while the SFO may have its difficulties, what possible basis can be provided for its abolition by an acquittal reached after a lengthy jury retirement? Or are we to assume that every person charged must be guilty and that acquittals only occur through prosecutorial incompetence?

## Majority Verdicts

One improvement to trial by jury might be to allow majority verdicts of 11:1.

My Office prosecutes in about 1,000 District Court trials each year. In about 6% of them the jury fails to agree. It is not possible to know how the voting has gone in such cases, but there is anecdotal evidence of the one member holding out (either way) and apparently against the weight of evidence and reason.

A juror in a recent trial which ended in a disagreement (11:1) and discharge wrote to the trial judge to explain what had happened. The letter described an extraordinary performance by the one dissentient, revealing irrationality, extreme and unreasonable bias and two days of futile discussion. The juror was apparently incapable of reasoning on the basis of the evidence presented and constantly referred to extraneous events.

Recently I received a letter from a former solicitor in a foreign country who served on a Sydney jury. It was stated that one member was receiving psychiatric treatment and was severely overborne by the trial process.

The juror constructed an artificial and totally unrealistic theory of the facts as proven. After a four-week trial it was only the ability of another juror to demonstrate to the inventive one that logic should prevail that prevented a hung jury.

Another correspondent has written that it is precisely because juries are representative of the community that they are dangerous. For example, what would a foreigner think of the chances of a representative jury in Mississippi or Tennessee doing justice in a fair and rational manner?

The NSW Parliamentary Library is publishing a briefing paper on majority jury verdicts in criminal trials, canvassing the main issues and arguments. There needs to be action taken, however, to obtain data on the jury split in hung trials.

A jury is a random selection of 12 members of the community (subject to certain qualifications). There is no magic in the number 12. If 12 are able to acquit or convict, why not 11? Especially if they can test the strength of their conclusions against those of a dissentient?

## Defence Openings

I would like to see a requirement introduced that the defence make an opening statement or address immediately after the Crown opening in trials.

Until such an arrangement can be formalised I have instructed prosecutors not to object to any application made by the defence to make such a statement. By way of assistance to the judge in deciding whether or not to permit it, they may submit that an address in the true character of an opening of the defence case, which serves to identify the issues to be determined, might be of great assistance to the Crown, the Court and the jury.

It should be noted, however, that in cases where an unsworn statement may still be able to be made s. 405 of the *Crimes Act* needs to be considered. It may prevent a defence opening where no evidence is to be called and if an opening is made it may prevent the making of an unsworn statement.

**Judge Alone Trials**

Whatever the attractions of juries, many accused elect for trial by judge alone. As I noted in the December issue, guidelines for consenting to such elections have been published and copies are available from the Bar Association and my Office. The power to give consent has been delegated to all Crown Prosecutors and other lawyers prosecuting in trials.

Recently a decision not to consent to an election by an accused for a trial by judge alone was challenged in the Supreme Court. It was held that the decision was not reviewable; and that in any event the decision in that case was proper.

Recent figures indicate that Statewide in the District Court judge alone trials are occurring in about 15% of cases. They are more common in child sexual assault cases and less common in white collar crime. While the conviction rate in jury trials is about 50%, in judge alone trials it is about 60%.

(In Japan, where there are no juries, it is 99.998%!)

**Summary Prosecutions**

You have have heard or read that the Royal Commission into the New South Wales Police Service recently gave its approval to my Office conducting a pilot scheme prosecuting summary offences in the Local Court in place of police prosecutors.

The details are now being decided and such a pilot will begin soon.

The Commissioner also invited submissions from any interested persons or bodies on the subject of my taking over the conduct of summary prosecutions Statewide. I have suggested that the Bar Association may be interested in making one.

In my view this is a development that is well overdue and should be pursued with vigour and dispatch. ❑

N R Cowdery QC
Director of Public Prosecutions

# Not Café Bar !

**Since the early 1990s Sydney has risen to fame as the chrome and foccacia capital of the southern hemisphere. Given that barristers ingest obscene amounts of caffeine and seem to spend more than their fair share of time in the numerous cafés surrounding our courts, the editor of Bar News thought that a brief review of what is available might be of some help to those wishing to expand their caffeine horizons.**

## Federal/Supreme Court District

**Bar Association,**
**Lower Ground Floor, 174 Phillip Street**
The Bar Association café has the advantage of a captive audience. The coffee is good and the scones come highly recommended by Campbell Bridge. The café's big advantage is that Annie, Anne and Gordon know the customers by name and face, so that when hung over or tired, and speech is all too much effort, there is no need to articulate your order as they already know it.

**Level 14, Supreme Court Building**
Our advice is, don't go for the coffee - go for the views!

**Carruthers, Macquarie Street (next to the Supreme Court)**
The café is named after the famous boxer and it is all we can do to resist a tacky one liner like "coffee that packs a punch". The coffee is, however, wonderful and the vegetarian food is nothing short of sensational. Carruthers' serves the best vegemite toast in Sydney. The café is also a great place to hide.

**Simpatico, 140ish Phillip Street**
This café has recently changed hands and, though the food remains at a high standard, the coffee is now served weak. Not the place to go for that caffeine hit. Has the major disadvantage of being full of solicitors that you have recently lied to in relation to the work you are supposed to have done on their particular brief.

**Café Due Mondi, Chifley Tower**
Coffee is good. Food, though not sampled, appeared quite good. Has the same disadvantage as Simpatico. Same goes for any café located in a building full of solicitors. Worse still, you will probably end up having to buy them all coffee.

**Hyde Park Barracks, Macquarie Street**
When we first came to the Bar, we thought the Hyde Park Barracks was an extension of the Bar Common Room. The food is simple and effective and the service is always excellent and prompt. Not the place to go to get away from other barristers (or to conduct a discreet affair).

**Loreto's, Martin Place Circle**
One of our favourites. Located in the Martin Place Circle, Loreto's continues to serve the best coffee and foccacia in Sydney.

**Coluzzi, Cnr King and Elizabeth Streets**
Has the advantage of being next to the bus stop and on the way back from the Downing Centre/John Maddison Tower. Great to drop in when you just can't face going back to chambers or are getting off the bus in the morning. See comments for Bar Association café. It is always crowded, which can only mean that others agree with our assessment of the coffee as being excellent.

**Castle King, Cnr King and Castlereagh Streets**
Harry is gone, but the legend lives on. The new owners have attempted to maintain the same formica paradise that was Harry's domain. Coffee, at last attendance, was still excellent and the cakes make a visit worthwhile. Breakfast is the high point of the day, with the "pig and chicken" being a real winner.

**Paradiso, MLC Centre, Cnr King and Castlereagh Streets**
The food is great and the service is excellent. The coffee is very good, but the outdoor tables may be a bit cold for winter.

**The MLC Centre, Cnr King and Castlereagh Streets**
The MLC Centre is chock full of places to get coffee. We haven't tried them all as we are too lazy to walk that far.

## Around the Downing Centre

**The Piazza, Ground Floor, Downing Centre**
The Piazza is conveniently located on the ground floor of the Downing Centre. The coffee is good and the cakes edible. We haven't tried the hot food as we are usually too upset to eat after taking yet another pasting in the motions list. Has the big disadvantage of also being full of people you lied to. If you are lucky, you may get to run into some of the more famous members of the legal profession. Our advice is not to get between a camera and Chris Murphy.

**The Maddison Café, Ground Floor, John Maddison Tower**
The Maddison Café is located on the ground floor of the John Maddison Tower. It tends to get crowded but is very good. See Comments for The Piazza.

**Bambini, Liverpool Street (opposite Downing Centre)**
David Pritchard insisted that we get away from all the horrible lawyers and head to a groovy little café which also turned out

to be full of horrible lawyers. *Bambini* is located opposite the Downing Centre and is run by the people who used to run *Simpatico*. The food is therefore excellent and the coffee sensational.

**Stanley Street, East Sydney**
On any Saturday morning Stanley Street contains more barristers than a Paddington art gallery on opening night. It's a great place to read the paper and watch implausibly built human beings waddle back from the City Gym. Take your choice of cafés, but *Divinos* is our pick.

There is, of course, the alternative of making coffee in chambers. We advise against this as it provides for only a minimum amount of time wasting.

As pointed out, it is important to attend these cafés with a litany of lies so as to be able to explain the whereabouts of various pleadings and advices, not to mention articles for *Bar News* that you have promised to an editor hanging out for a strong coffee! ❑

*Three struggling juniors who prefer to remain anonymous.*

## Around Parramatta

Even travelling to the centre of the universe (Parramatta, of course) from the city's eastern sea port (Sydney) need not involve bringing one's cut lunch and thermos anymore.

For a decent coffee, whether it is the new Dairy Farmers Friend (café latte), or the old Dairy Farmers Friend (Cappucino), or even the short black for medicinal purposes only, when at Parramatta try *Zucchini's* at 144 Marsden (for District, Local and Family Court attendees) or *Rami's* at the corner of Charles and Macquarie Streets (for proximity to the Compensation Court).

Both eateries offer new café food, with *Zucchini's* offering a mix of Middle Eastern wraps with the more usual Italian-style foccacia, pasta of the day, lentil soup, etc.

For no coffee, but a quick Thai lunch, try the *Thai Soup Kitchen* at the rear of the Parra-Mall off George Street. This is "back to the laminex tables" good, no fuss food, especially the laksas. ❑

*Robyn Druitt*

# Circuit Food

## Walk to Lunch

How far you want to walk is a matter for you. I think *The Rocks Dynasty Chinese Restaurant* at the very end of Kent Street is well worth the 20 minute stroll. Try the steamed dumplings, the mermaid's tresses, the crab in silk and the whole fish steamed with ginger and shallots.

A little shorter walk, but the other way, takes you to *Casa Asturiana*, the best Spanish in town. Squid in its own ink is a fabulous Tapa, but all are spicy and good; prawns in garlic, chilli and tomato sauce my second favourite, but have six at least between four.

A Roddy Meagher-length walk will take you to *Alex's Italian Restaurant* which opened only this year. I have been three times. The first time I was very disappointed. Although some bits were good, the service was very poor. I ordered the baked lamb and was told 30 minutes later that it was all gone.

Somehow, and I truly don't know how they heard I was disappointed, I received a very nice note offering me that thing that there is no such thing as - and for two!

The antipasto was excellent this time, varied, and if you choose your own, can be almost fat-free. I chose trout pieces, mussels, tomato vinaigrette with basil. This I followed with the arrosto del giorno which was tender baby lamb roasted in a piece - part rib, part shoulder - with potatoes and rosemary and crisp on the outside in the Mediterranean manner. This was perfect, as befits the Specialty of the House.

Let me tell you that by "free" they *meant* free! They filled me and my companion to the point where one had to have a sleep before driving home, on white and red wine of excellent quality and would not even let us tip.

Feeling a trifle guilty, I went back again and it was, if anything, better than the second time. The minestrone was absolutely in traditional style and the house special pasta for the day was penne with a spicy sauce of Italian sausage slices, tomato, garlic and chilli. I only had the entrée size but after the soup that was plenty.

I tasted the rabbit casserole, which was gamey in a nicely thickened sauce and wonderful for the winter.

Wines by the glass are readily available and of excellent quality.

Chris Hickey and Lyn join me in recommending *Alex's*.

*The Rocks Dynasty Restaurant*
35 Kent Street , Sydney
Telephone 252 3010

*Casa Asturiana*
77 Liverpool Street, Sydney
Telephone 264 1010

*Alex's Italian Restaurant*
161 King Street, Sydney
Telephone 223 7677

## Out of Town

Intrafamilial accusations of patricide took me to Murwillumbah for a few days and common sense dictated camping in Byron Bay. Nachos at the *Beach Hotel* made a great late lunch the "short" day, and the fish and chips on the beach make the best fast food in town.

But back to the very top of the tree goes *The Rocks* in the *Byron Bay Resort Motel*, which was the subject of my very first *Bar News* restaurant review.

This casual but elegant restaurant has seen many circuit dinners indeed, and I for one have never had a disappointment, but Tuesday night there was a stunner. We were three and shared fresh green Yamba king prawns grilled with bacon and served with a light Hollandaise on the side which were just perfect, and a large serve for an entrée - we had two each.

Next, Corsican seafood soup, a creamy tomato, tarragon and garlic soup with white fleshed fish chunks, local prawns and mussels, garnished with crispy garlic croutons, which was tangy fresh and delicious.

A ravioli stuffed with potato and garlic and served with tomato, parsley and basil sauce was a surprisingly light and very tasty addition.

Whilst sharing these we also shared garlic foccacia, "chat" potato skins, tiny and crisp and served with a perfect aioli.

The wine list is short, but excellent. We drank Pikes Clare Valley Riesling and black beer!

Don't go if you hate garlic, but for everyone else it is a "must do" if you are up that way.

The dead father, you ask? A Santa Gertrudis bull done it.

*The Rocks*
Cape Byron Resort Motel
16 Lawson Street, Byron Bay
Telephone 066 857 663

John Coombs QC ❑

## Silence is Golden

*" I must confess to an enduring admiration for those advocates who retire to the monastic silence of the Bench. I found, and still occasionally find, my opponent's address to be unendurably boring and I have only to listen to one: the judges suffer many. Indeed you might say listening is their vocation and for men and women accustomed to having their say, their behaviour is exemplary and too seldom applauded."*

Sir Maurice Byers CBE, QC,
speaking at "The Mason Court and Beyond"
conference held in September 1995. ❑

## Electronic Services in the Bar Library

The Bar library has added to its range of online and electronic services over the past six months and further expansion is planned. We are currently considering subscriptions to Lexis, Info-one and Ausinet (a full text newspaper and journal database) and welcome any comments on potential use of these services.

These electronic services increase the range and accessibility of resources available to all users. Searches can be made in the library, or requested by phone or e-mail.

The following is an overview of the services currently available in the library.

**Foundation Law**

Foundation Law is a database of legal information available on the Internet. The information provided by the Law Foundation and AustLII and is accessible via the World Wide Web. Primary legal information currently available includes:

*Decisions from the:*

- High Court
- Federal Court
- Family Court
- Administrative Appeals Tribunal
- Supreme Courts of Tasmania, ACT and Northern Territory
- Land and Environment Court judgments
- Industrial Relations Court
- Human Rights and Equal Opportunity Commission
- Native Title Tribunal
- Immigration Review Tribunal
- Refugee Review Tribunal.

*Legislation from:*

- Commonwealth
- New South Wales
- ACT.

Legislation related to particular topics is also available in Practice books.

Legal organisations have Web pages with relevant information. The Bar Association has a Home Page with details of its staff, Bar Council, Bar Rules, Library Rules and catalogue.

There are also indexes to sources of secondary information on the Internet and international sites.

**First Class Law**

First Class Law is an electronic mail and bulletin board service, which facilitates discussion groups on different subjects and secure transfer of documents between members of the legal profession.

First Class Law also posts the daily Court Lists, which are usually available at 3pm the day before.

Full text of High Court judgments are also available, generally within 48 hours of the decision being handed down. The NSW Court of Appeal Judgments Bulletins, which are published monthly, are also available.

**SIS - Sentencing Information System**

SIS is a database developed and maintained by the Judicial Commission. It is designed to assist judges and magistrates in the process of sentencing and to facilitate legal research in the area. The database consists of :

- Penalty statistics - provides details, in graph or table format of the nature of sentences imposed in relation to criminal offences.
- Sentencing law - provides a reference system to the law on sentencing including:
  Case summaries - relevant facts of Court of Criminal Appeal cases concerning sentencing
  Principles of sentencing
  Purple passages - selected passages of judgments which embody principles of sentencing
  Full text of judgments
  Sentencing options and orders
  Current NSW and Commonwealth legislation on sentencing
- Sentencing facilities - provides a list of service providers by type and location
- Sentencing calculator - enables easy calculation of sentence terms.

The Bar library has a direct line to the Judicial Commission's database and the system is available to barristers for searching and for printing results from the database.

**ESTOPL**

The electronic version of ESTOPL CaseFinder which began in 1982 as a loose-leaf case digest service is a quick and easy way to search through more than 16,000 cases from the High Court, Federal Court and NSW Supreme Court (including Court of Appeal, Court of Criminal Appeal and decisions of single judges and masters).

Entries on ESTOPL are composed of catchwords for judgments *which contain some question of principle.* New cases and citations are added as soon as judgments and reports are made available. CaseFinder is updated monthly.

**ABN**

The Australian Bibliographic Network is a database containing over 11 million cataloguing records for monographs, serials and nonbook material. The collections of most Australian libraries are held on ABN and subjects range across all fields of research and interest.

If you are searching for an item not held in the Bar library, we will search this database, locate the item for you and arrange an inter-library loan.

**Uncover Australia**

Uncover is a database of the table of contents of more than 17,000 journal titles. These are supplied to Uncover by US, Australian and New Zealand universities.

The database can be used as a source of information regarding the latest research on a subject. Articles can be ordered from Uncover, who electronically transmit the request to the participating university from where it is faxed to the requester.

Access to this database is via the Internet and supply within 36 hours is guaranteed, although it is usually much faster than this.

**E-Mail**

For remote users of the library, a subscription to First Class Law and/or Foundation Law not only increases your access to legal information, it also provides an alternative method for requesting information from the library. Sending information by e-mail is a faster, cheaper option than fax.

If you have Internet e-mail, you can contact the library by sending a request to **lallen@fl.asn.au**

The library also has a mailbox on First Class Law. Just address your request to **Bar Library**.

We check these twice a day and will answer your requests as soon as possible. Any information that is available electronically, subject to copyright and licensing provisions, can be return e-mailed.

The staff of the Bar library are happy to assist users who wish to learn how to use Foundation Law, First Class Law, SIS and ESTOPL and to demonstrate ABN and Uncover Australia. ❑ Lisa Allen and Chris Winslow

## Correction

The December '95 issue of *Bar News* records on page 25 that: "

" On 8 May The Hon. Justice G.F. Fitzgerald, AC Chief Justice of Queensland ..."

Justice Fitzgerald is not the Chief Justice of Queensland, Justice Macrossan is.

Justice Fitzgerald is the President of the Queensland Court of Appeal.

*Bar News* apologises for the error. ❑

## Are You Using CaseBase? If not, Why not?

While it might not be completely true to say that manual legal research has become passée, it is appropriate to reflect on that one computer program which has, for me, revolutionised the way I do my work. With electronic services flooding the market at a frightening pace, and with much overlapping content in those services, it is difficult and time-consuming sorting out exactly what we must have in chambers or on our computers. CaseBase, produced by Pink Ribbon Publishing, was the first electronic legal research program to live on my computer. I have used it since February 1993. Of course, I have now added several other electronic services to my computer library, but if I had to choose just one obligatory program from those currently on offer, CaseBase would definitely be it. It is the first program I go to when I start my research. In many cases, it is the only program I use. I use it every day as:

- an annotator;
- a case citation finder/checker;
- a law reports index; and
- a legal research tool.

I have not used a hard copy law report index since I started using CaseBase (not even the indexes inside the covers of individual law reports). The program indexes about 56 law reports and 56 law journals. It also includes unreported judgments from most jurisdictions. There are a variety of search methods to choose from and there is practically no training needed - five minutes should do it.

CaseBase also has the most comprehensive citator/ annotator of any other program or published service I've seen. It contains something in the order of 40 law reports fully noted up and backdated to the set's first volumes. I understand the remaining early volumes of the other reports from the company's scope of research will be fully annotated within the next few months.

It is a monthly service and is available in Dos, Mac, Wins 3.1 or Windows 95 (all on the same CD). It costs about $1,450 per annum for a single user or $3,000 per annum for networks. There is a special price for barristers in the same chambers who do not use a network of $750 per person per annum (minimum of 4 persons). Whether we like it or not, we are all going to be dragged, some of us kicking and screaming, into electronic research. The emphasis now seems to be on publishing in computer format first and hard copy second.

CaseBase is not produced on paper. It exists as a computer program and is, in my humble opinion, a compulsory resource for every legal practitioner. If you don't believe me, see for yourself and ask for a free demonstration by contacting Pink Ribbon Publishing on (02) 9918 9288.

❑ Mark Robinson, 3rd floor Wentworth Chambers

# Book Reviews

## Restitution in Australia

**Keith Mason and John Carter**
**Butterworths 1995 RRP $145.00**

*On 19 December 1995 the Hon. Sir Anthony Mason AC, KBE launched "Restitution in Australia".*

*Restitution in Australia,* by Keith Mason and John Carter, is the first major publication in Australia on the important topic of restitution.

Restitution, like telecommunications, is a growth industry. So much so that I have been predicting for some years that it is only a matter of time before all the titles in *Halsbury's Laws of England* will be subsumed in just one title - "Restitution". Measured against this prediction, Keith Mason's and John Carter's work, magnum opus though it is, is not quite as lengthy as it seems. Of course, as we all know, length is not a measure of worth.

Until now, restitution has been very much an English preserve, though the English foundations, as we know them, may well have been appropriated from the United States. Beginning with Lord Goff and Professor Gareth Jones, English restitutionary theory has advanced a long way. Just as London was the capital of a far-flung empire, so Oxford, under the leadership of Professor Birks, has become the capital of a restitutionary empire that threatens to sweep all before it. His Oxford apostles are migrating to other universities where they are spreading the holy word. There are, of course, pockets of resistance, and wild colonial boys like Justice Gummow and Justice Finn have been heard to doubt the word of the true prophet. Surely divine retribution awaits them.

As a result of a series of High Court decisions, it can be said that the new restitutionary theory is part of Australian law. That is one reason why *Restitution in Australia* is to be welcomed. There is nothing more frustrating for the judge and the practitioner than dependence on an English text book which inevitably fails to take into account, and to shape principles by reference to, Australian decisions. That was a handicap under which we laboured until Australian legal publishers took their courage in both hands and satisfied the demand for Australian text books and monographs. In the course of that publishing revolution, some outstanding Australian works were published, of which the most notable was Meagher, Gummow and Lehane's *Equity: Doctrines and Remedies.*

Whether *Restitution in Australia* will achieve the fame and infamy of that celebrated work only time will tell. The two books look alike as they sit side by side on my shelves, though as the reader savours the contents the reader detects a difference in style. One is acerbic, caustic and intolerant of error; the other is informed by the spirit of Christian forgiveness and charity. That is perhaps as it should be. *Equity: Doctrines and Remedies* deals with an area of law in which the principles were thought to have been settled until the law came under the searching scrutiny of the High Court.

The law of restitution, on the other hand, is in a state of development so that the authors cannot speak from that platform of certainty and conviction which infuses the writings of Justices Meagher, Gummow and Lehane.

The concept of unjust enrichment, which is at the heart of the modern law of restitution, has been criticised on various grounds, including the ground that "unjust" is a vague notion incapable of principled exposition. The authors meet that criticism head-on and, in my view, their discussion of this problem is a valuable response to the criticisms that have been made, even if it does involve the concession that the High Court may have gone too far in speaking of the unconscionable retention of a benefit, too far in the sense that to say that retention of a benefit is unconscionable adds nothing if you take the view that the initial enrichment of the defendant at the plaintiff's expense must be unjust.

Incidentally, the authors make the point that unconscionability looms larger on the Australian scene than it does elsewhere and in saying that they are correct. If you

attend overseas conferences and seminars on Equity, you notice that lawyers from other jurisdictions tend to be sceptical about too much reliance on unconscionability, largely because they fear that it will degenerate into idiosyncratic notions of unfairness.

Launching a book is a much more difficult exercise than launching a missile. In the case of a missile, you think only of the target which you hope to destroy. With the book, you think of the reader whom you hope to inform. This book will certainly achieve that object. It is comprehensive and instructive; it is detailed and, in the footnotes, contains references not only to the relevant Australian and overseas decisions, but also to text books, monographs, academic writings in journals, here and overseas. The book therefore provides a solid basis for those who wish to develop an argument on a particular point by engaging in further research. All in all, *Restitution in Australia* will add greatly to our understanding of restitution.

I thoroughly commend it, not least the opening which sets in its correct context the development of the modern law of restitution. Dissatisfaction with legalism and the old forms of action, in particular the money counts, which had become encrusted with precedent, gave way to a new emphasis on substance rather than form. This proved to be a suitable climate for the development of the modern law of restitution.

*Restitution in Australia* succeeds in integrating modern theory with the established body of case law. Those lawyers whose habit of mind accustoms them to thinking in forms of quantum meruit, quantum valebat and the old common money counts, will not feel that they are struggling with alien and deleterious matter in the pages of this book. There is a harmony here that will appeal to even the most rugged and lantern-jawed of common lawyers.

In conclusion, I congratulate the authors on producing a splendid book which will be of inestimable value to lawyers in Australia and elsewhere. My only regret is that the publishers have not provided me with a magnum of champagne with which I can drench the authors in the manner befitting the winners of a Grand Prix. Without the champagne, I declare *Restitution in Australia* duly launched. ❑

## Principles of European Community Law

**Simon Bronitt, Fiona Burns and David Kinley**
**Law Book Company, 1995, Pages i-lxi; 1-587**
**RRP $95.00( SC) $130.00 (HC)**

It is, no doubt, somewhat unusual for a student casebook to be reviewed in this Journal and, no doubt, even more unusual when that casebook is entitled *Principles of European Community Law*. Yet it is the very subject matter of this book which may make it of interest and value to the practitioner.

The first point to note is that the book has been written for an Australian audience. As such, it makes few assumptions as to the reader's knowledge of or familiarity with the history of, and progress towards, European integration and the institutions and treaty structures which have been central to this process. Indeed, in this reviewer's opinion, one of the book's most valuable chapters is that which deals with the institutions and legislative process of the Community. The work is divided into five parts: the Constitutional Structure of the European Union; the Internal Market and Free Movement of Persons, Goods and Capital; Competition Law; the Community's Social Dimension (including a lengthy chapter on Gender Discrimination); and the Environment.

Each chapter contains a mixture of treaty and statutory material, extracts from case law and academic writings, and the authors' accompanying commentary. Given the size of the subject and the relative scarcity in Australian libraries of both official and academic materials on the field, this work is more than just a "convenient compilation". It makes accessible, in a well ordered and discriminating manner, a wide range of materials which provide an excellent entrée to the subject. Unlike many casebooks, the interconnecting commentary is not sparse and perfunctory. Rather, it adds both coherence and insight into the various subjects treated.

Although by no means common, European decisions and doctrines have been cited and discussed in Australian courts in recent times. This has especially been so in the areas of competition law (dealt with extensively in Part 3 of the book) and civil liberties. The concept of "proportionality", discussed in an excellent chapter entitled "The Jurisdiction and Jurisprudence of the European Court of Justice", has also found its way into some recent Australian decisions. One can only assume that, given rapidly improving technology and the growth of legal databases, resort to principles of European law and decisions of the Court of Justice and the Court of First Instance, will increase rather than diminish, especially in an appellate context. With regard to the specific subject areas it addresses, the book is a convenient first port of call for comparative research. Moreover, it provides much useful background material which may assist in placing particular decisions in their proper context or else enhance an understanding of a particular decision. The chapter on "The Jurisdiction and Jurisprudence of the European Court of Justice", already referred to, is particularly useful in this respect. By way of illustration, one is often struck, when reading a decision of the ECJ, at the minimal level of reasoning disclosed. It is only when the role and significance of the preceding Opinion of the Advocate-General is understood that the "whole" decision may be properly appreciated. Moreover, it is both necessary and important to understand the ECJ's teleological approach to law-making, and to appreciate the larger imperatives of European integration which underpin many of its decisions, sometimes explicitly, sometimes *sub silentio*, before the full import of a particular decision can be assessed.

The authors have had to strike a balance in the length and quantity of the material chosen for inclusion in view of the breadth of the subject which, in truth, subsumes a number

of discrete subjects. Where the authors have been especially conscious of necessary truncation of treatment, this is acknowledged and the reader is referred to more detailed accounts. As a general proposition, the many references to primary and secondary material contained throughout the book provide a valuable starting point for more detailed research if the occasion for such research arises.

There are some areas of European law which have not been treated in this book although the reviewer at once acknowledges the difficulties of confining a project of the kind undertaken to sensible proportions. One particular area the omission of which is perhaps to be regretted is that addressed by the Brussels and Lugano Conventions on Jurisdiction and Judgments. These Conventions have played and continue play an important practical role in European integration, prescribing as they do jurisdictional limitations on national courts and providing a mechanism for the virtual automatic recognition and enforcement of judgments throughout Europe. The occasional involvement of Australian companies in litigation in Europe or with European companies makes an understanding of this régime, radically different to common law rules on jurisdiction, recognition and enforcement, of importance and relevance to Australian lawyers. As acknowledged above, however, the book's ambit had to be sensibly confined so that the omission of this somewhat technical aspect of European law is no major criticism.

This book is a very useful, well written and valuable project. Its subject matter may mean that its appeal and attraction will extend beyond that of the audience to which it has been primarily directed. ❑ Andrew S Bell

## Principles of Remedies

**Wayne Covell and Keith Lupton**
**Butterworths, 1995**
**RRP $49.00**

The authors of this work state in their Preface that their:

> "... aim in writing this book has been to provide a practical but not entirely uncritical discussion of the principles comprising the law of remedies."

The Preface and the title of this book are entirely reflective of its contents. The book falls into that category of "practitioner's handbook" on which it is becoming increasingly convenient to rely as a starting point in any inquiry.

The book discusses the remedies available at common law, in restitution, in equity and under statute. This work is not, nor does it attempt to be, a learned dissertation on the remedies that it discusses. The authors have taken each of the remedies above and neatly and succinctly laid down a template from which the reader can glean what remedies are available, the elements of those remedies, any exclusionary factors and the practical application of those remedies in the standard situations.

In relation to statutory remedies the authors have concentrated on remedies available under the *Trade Practices Act* and under the *Contracts Review Act*. The chapter relating to the *Contracts Review Act* consists of eight pages in which the authors succinctly analyse the purpose of the Act, the concept of the unjust contract and its application to the more common facts situations, exclusions and relief. The chapter is well researched, referring to the standard authority from which the readers can obtain the basic principles and commence the necessary research to apply the principles to the situation with which they are faced. The book is one of the few available that deals with the *Contracts Review Act*.

The chapters on contract and tort successfully deal with recent developments in the general approach to these areas of law. For instance, the chapter on Damages in Contract has an analysis of Assessment in which reference is made to concepts such as reliance damages and damages for the loss of an opportunity or chance in the light of more recent decisions such as *The Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64. Similarly, the chapter on Restitution gives a brief dissertation of the principles, the remedies available, the measure of any restitution and the defences that are applicable.

Covell and Lupton have, in 270 pages of text, condensed four vast headings that are capable of being the subject of extensive works in their own right to their basic principles and in doing so have referred to the major lines of authority on which those principles are based.

The book is a useful tool for practitioners and practically minded students and one which has been of use on several occasions since it was received for the purpose of writing this review. ❑ Michael Fordham

# Motions and Mentions

## You Can Help

Law Council President Michael Phelps has urged lawyers to contribute to a Trust Fund set up to encourage and assist indigenous Australians to study law.

The John Koowarta Reconciliation Law Scholarship Trust Fund was established in 1994 with Commonwealth Government seed funding of $200,000 and is now valued at $300,000. With the Law Council acting as trustee, it provides scholarships each year to indigenous Australians who are currently studying, or intending to study, law. The scholarships recognise academic achievement and commitment to the process of reconciliation between indigenous and non-indigenous people.

Terri Janke, a final year law student at the University of New South Wales, was awarded the inaugural scholarship in 1995. It is likely that two scholarships will be awarded in 1996.

The scholarships honour the memory of John Koowarta, a traditional custodian of part of the Archer River region of Cape York Peninsula. He fought a long, courageous battle with the Queensland Government when it refused to allow the Aboriginal Land Fund to purchase his people's land. His 1982 High Court victory remains an inspiration to many Aboriginal and Torres Strait Islander people. John Koowarta died in 1991, without seeing his Archer River land returned to its traditional custodians.

**How to Contribute:** Lawyers in all States and Territories *except Queensland* should send contributions to Law Council of Australia Holdings Limited, PO Box 1989, Canberra ACT 2601, indicating that the payment is a donation to the Fund. *Queensland* lawyers can lodge donations in the "Law Council of Australia Holdings Limited as Trustee for the John Koowarta Queensland Trust Fund" account (BSB 034 002, account number 191 686) with Westpac at 250 Queen Street, Brisbane.

Contributors are asked to advise the Deputy Secretary General, Law Council of Australia, PO Box 1989, Canberra ACT 2601 that a deposit has been made into the Westpac account, as this is the only way the trustee will know who has made the donation.

Donations are not tax deductible. For more information contact Barrie Virtue at the Law Council on 06 247 3788. ❑

## Annual Inter-Church Law Service 1997

The Annual Inter-Church Law Service for the western region will be held at St Johns Cathedral, Parramatta on Monday 3 February 1997 at 9.30am. The preacher will be Dr Ruth Shatford, D de L'U (Stras), MA, Dip.Ed., FRSA, MACE, MACEA, Principal, Tara Anglican School for Girls. Members as are able to be, or who are in, Parramatta on that day are invited to attend the Service. ❑

## Berlin: A Chance to Win

The International Bar Association, of which the Law Council of Australia is a member, is holding its twenty-sixth biennial conference in Berlin, Germany, from October 20-25.

By requesting a copy of the 72-page Berlin Preliminary Program, lawyers in Australia will be automatically entered into a prize draw for one of six IBM VoiceType dictation systems, which come with a 25,000-word vocabulary for legal dictation designed for corporate and private practice lawyers.

The Berlin conference will feature a Plenary Session on "Freedom of Expression - Privacy versus Freedom of the Press" and separate working programs covering a plethora of topics on business law, general practice, energy and natural resources law and many other areas. There will also be a special program for guests.

Requests for the Preliminary Program must arrive at the IBA in London by September 1 to qualify for entry in the draw. Contact the International Bar Association, 271 Regent Street, London W1R 7PA, England. Fax: +44 (0) 171 409 0456. Phone +44 (0) 171 629 1206. ❑

# This Sporting Life

## Cricket: A Win and a Loss

**The New South Wales Bar team played two matches this year, for a wine and a loss. Bruce Collins QC reports.**

**Victorian Bar**

The Victorian Bar hosted their traditional opponents in competition for the Sub-Standard Trophy at Brighton Cricket Ground on 23 February last.

Some of the New South Welshmen were downcast at the prospect of beating the Victorians without the redoubtable E W Gillard QC. Those fears were dispelled when Gillard arrived resplendent in MCC striped blazer shortly before the toss. The stakes were down.

New South Wales won the toss and, with King SC in a frisky mood, elected to bowl on a good wicket. After his spell of 8 overs, the Novocastrian outwinger returned to his accustomed position at deep fine leg with the figures of 4 for 15.

King SC was assisted by eight other bowlers to dismiss Victoria for 146. Lachlan Gyles, the master of exaggerated flight, dropped in with two wickets. E W Gillard QC 27, Donald 25 not out.

New South Wales passed the Victorian total with the loss of four wickets. Former Sheffield Shield player Trevor Boyd top-scored with 55. Robert Weber made 23 and Collins 34.

**Queensland Bar**

At Sydney University, on 21st April, the New South Wales Bar hosted the Queensland Bar in what will become known as Traves' match.

New South Wales won the toss and asked the Queenslanders to bat on a flat track reclaimed from Rugby training. The theory was that the Blues were stronger with the bat than the ball on this day and could chase a respectable total and win.

After exchanging his boots with another New South Wales player, Hamman took the valuable wicket of Egan, the Queensland captain. This brought Roger Traves, a Queensland Sheffield Shield player, to the crease. To his dying day Hamman will contend his off cutter, striking Traves on the knee roll when on eleven, would have hit all three. A Lindfield cricket identity, and former friend of Hamman's brought along to umpire, did not agree.

Some time later, with Traves resting on 111 not out, Queensland reached 200. Lewis with 35 and Wilkin with 25 were the other successful Queensland batsmen.

At the beginning of the last over New South Wales required six runs to win. Priestly (27), Cheney (11) and King (17) had played spirited rear guard hands to bring us that close. We fell four short at 9 for 197. Maddocks played well for 29 until exhaustion overcame him. Laughton 17 and Collins 42 scored early runs. ❑

## Report on Bench & Bar v Solicitors Golf Day 1996 - The Sir Leslie Herron Trophy

On Thursday 25January, 1996, 69 golfers hit off at Manly Golf Club in the time-honoured tradition of Brown's Cows, allegedly adhering to the "draw", as it is affectionately known, not being anything more than the merest first draft of the eventual pairings, despite the Herculean work of the organiser, Roger Williams, Solicitor.

Instead of the usual thunder and lightning, the weather was perfect, though hot, having regard to our recent summer weather.

Malcolm Young, in particular, complained about the heat (having just flown in from Vail, no doubt, after a heavy mediating session on the slopes). Wheelahan QC (after his tilt at the 1995 Coolum Classic) put in a cameo appearance which led to Sinclair DCJ mumbling about ex officio indictment for either goods in custody or larceny by finding in respect of the possession of the Sir Leslie Herron mace. Wheelahan denied liability and asked for a permanent stay.

Judges Wall, Christie, Gallen and Freeman also represented the District Court Bench which always supports this event. All the Supreme Court Justices must have been kept away "conferring about the appointment of the next President of the Court of Appeal or writing ancient judgments". It is understood a Petition will be put to the AG to only appoint golfing judges in future (is this discriminatory? - are golfers a minority?).

The usual whingeing of the Solicitors about rigged handicaps when the Bench and Bar win the best score award is usually muted by the fact that the Solicitors win the overall trophy by 30 matches to one! However, on this occasion, the Bar "romped" home to win for the first time for a number of years by seven matches to five. Harry Stoyles, President of the Solicitors' Golf Society said that not even his creative accounting could rob the Bench & Bar of victory on this occasion. Judge Sinclair accepted the mace with only a hint of gloating.

The famous victory was made possible by James (Braveheart) Duncan playing two matches instead of one (both with Irishmen, Flaherty and Delaney) and also with Delaney taking out the best 4-ball score with 45 points. Young, despite the heat, fluked nearest the pin.

An excellent dinner was provided by the Club and good relations with the Solicitors were preserved for another year.

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**Note:** The New South Wales Bar cricket team is desperately feeling its age and seeks an injection of young hearts and minds. Please contact Larry King (telephone 231 1294) if you are interested.

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# Legal Forum on the Proposed Republic

The Forum is establishing working groups around Australia to consider various legal and constitutional issues in the public debate on whether Australia should become a republic. These working groups will draft discussion papers for presentation and analysis. The working groups include barristers, judges, academics and other legal practitioners, including Crown law officers and other public office holders. Participation is in a private capacity as a result of a common interest in the subject matter and the objects of the Forum.

The Forum takes no position on whether or not Australia should become a Republic. It invites participation from all, regardless of their personal or political views.

In New South Wales the following working groups have been established:

Clifford Einstein QC
(telephone (02) 232 1525 fax (02) 221 3724)
is the convenor of "The Constitutional Role of the Head of State" working group.

Keith Mason QC
(telephone (02) 228 7575 fax (02) 235 0829)
is the convenor of the "State Issues" working group.

Stephen Gageler
(telephone (02) 233 1209 fax (02) 356 3021)
is the convenor of the "Amendment Mechanisms" working group.

Father Frank Brennan
(telephone (02) 356 3888 fax (02) 356 3021)
is the convenor of "Whether it is necessary to incorporate a constitutional Bill of Rights in a change to a Republic" working group.

Susan Phillips
(telephone (02) 223 7011 fax (02) 233 6060)
is the convenor of the "Recognition of Indigenous Peoples and the Source of Sovereignty in a Republic" working group.

**For further information**

The Forum seeks to encourage the coordinated establishment of working groups throughout Australia on all of the issues involved. A detailed briefing paper, *"Call to Participate"*, is available on request from all members of the Steering Committee. A copy has been placed in the Bar Library.

If you are interested in convening a working group on one of the other issues involved, please contact Robert Lovas, the Forum's Steering Committee Secretary, on telephone (02) 231 4988 fax (02) 233 6469.

If you are interested in joining one of the working groups which have already been established, please contact the convenor.

For general information on the Forum inquiries should be directed to Malcolm Holmes QC, telephone (02) 232 8409 fax (02) 232 7626 or Keith Mason QC telephone (02) 228 7575, fax (02) 235 0829.