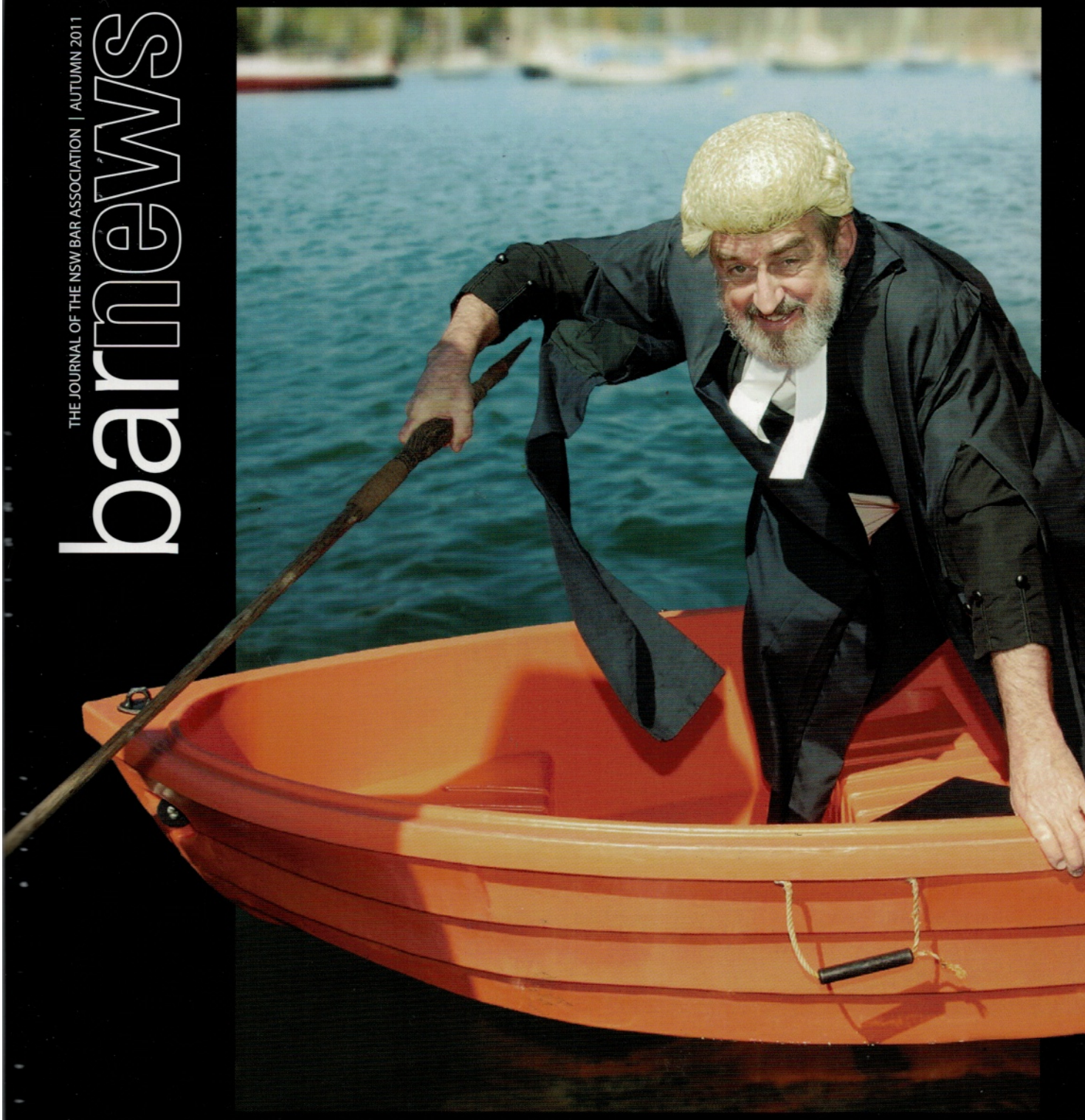
THE JOURNAL OF THE NSW BAR ASSOCIATION | AUTUMN 2011

barnews



Sir James Stephen and the law of evidence

The price of a ride on the tiger's back

Sir Adrian Knox

Global engagement by Australian lawyers

Vale Malcolm Duncan

CONTENTS

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Views expressed by contributors to *Bar News* are not necessarily those of the New South Wales Bar Association. Contributions are welcome and should be addressed to the editor, Andrew Bell SC.

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Cover: 'Rocking the boat' by Mark Tedeschi, courtesy of Josef Lebovic Gallery.

This is the first of what will be three issues of *Bar News* for 2011 following the welcome decision by Bar Council to endorse the tri-annual publication of *Bar News*. I have no doubt that that the quality of the publication will be able to be maintained over three issues and encourage contributions from all members of the bar to ensure that *Bar News* remains both interesting and informative. The current issue, I trust, satisfies both of those criteria.

The centrepiece of this issue is Justice Heydon's lecture on the subject of 'The influence of Sir James Stephen on the law of evidence', a survey of the life and work of one master of the law of evidence by another. Indeed, reading this account of Stephen's prodigious output and academic energy, coupled with the discharge of teaching responsibilities, an active practice at the bar and then judicial office, certain parallels may be detected. The author's well-known and unabashed fascination with late Victorian England and its values also shines through and informs the narrative of a remarkable and influential life.

The redoubtable David Ash also weighs in with the next instalment of his project of profiling, in always diverting way, the life and times of those New South Wales barristers who have been appointed to the High Court of Australia. His subject in this issue is Sir Adrian Knox who was acknowledged by Sir Owen Dixon as one of the greatest appellate advocates the High Court has known. As the essay reveals, Knox was no mere lawyer but had diverse interests and abilities beyond the law, and a wide engagement in Australian society in its transition from a set of disparate colonies to federal union. Ash is correct to describe his work as 'prosopography', defined by one source 'as an independent science of social history embracing genealogy, onomastics and demography' and by another as 'concerned with the person, his environment and his social status, that is, a person within the context of family and other social groups, the place or places in which he was active and the function he performed within his society.' What one reads, therefore, is much more than a standard biographical account but rather high quality social and economic history of the most fascinating kind. I was also going to add 'painstakingly researched' but one's strong impression is that researching these pieces gives Ash no pain at all but only pleasure!

Also published in this issue is the text of Chief Justice Spigelman's Opening of Law Term address on the subject 'Global engagement and Australian lawyers'. No one has been more consistent or insightful in his appreciation of this topic than the current chief justice who in this address brings together a number of themes that he has pursued with vigour over the last decade. A full tribute to his contribution as chief justice of New South Wales will appear in the next issue of *Bar News* following the announcement of his retirement at the end of May.

This issue also includes a 'self-interview' by Nicholas Cowdery QC, the prominent and highly respected outgoing director of public prosecutions, reflecting on his 16 year 'tenure' - a deliberately provocative description.

This issue also includes a 'self-interview' by Nicholas Cowdery QC, the prominent and highly respected outgoing director of public prosecutions, reflecting on his 16 year 'tenure' - a deliberately provocative description. For those wishing a 'compare and contrast' experience, the 1995 issue of *Bar News* in which the director interviewed himself some 16 years ago on taking up his post

under the heading 'DPP: Hot Seat or Siberia?' can be electronically consulted on the New South Wales Bar Association website. His has been a very distinguished term as DPP and his regular insistence on the need for independence of his office from executive interference has contributed significantly to the wider community appreciation of the rule of law throughout the country. It may confidently be predicted that Mr Cowdery QC will continue to be a prominent and highly articulate public commentator.

On a lighter note, Bullfry contemplates the end of orality, a matter that is not, on reflection, such a light-hearted topic. As ever, Lee Aitken's sharp perceptions about aspects of the modern profession examined through the sometimes jaundiced, sometimes melancholy and occasionally bloodshot eyes of Jack Bullfry QC are on show. Poulos QC's brilliant illustrations are reproduced in full-blown colour.

David Jordan has invoked the spirit of the late John Coombs QC by re-establishing the 'Bar Cuisine' section in a whimsical reflection on a long lunch with someone referred to only as 'Rabbit'. That in itself ought be sufficient to whet the appetite to read his piece and work out Rabbit's identity.

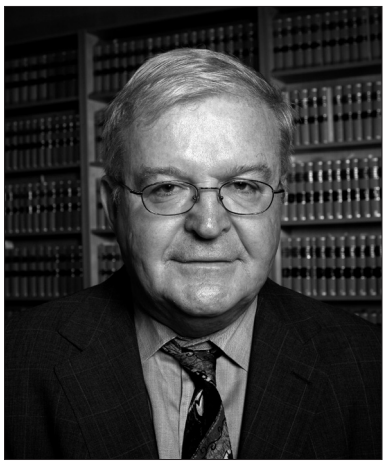
The next issue of *Bar News* will take as its theme 'The state and practice of criminal law in New South Wales'. Any contributions, particularly in the form of short opinion pieces on that topic, are invited.

Andrew Bell SC

Editor

An interesting year

By Tom Bathurst QC



Dear Sir

Only a lawyer of the stature, experience and acumen of the Hon Roger Gyles AO QC could write the comprehensive review of the Senior Counsel Protocol published in the *Bar News* Winter 2010 edition. Duncan Graham's interesting analysis under the title 'Stop pretending' in the *Bar News* Summer 2010–2011 edition says the letters 'SC' tell a consumer nothing about the qualification, training, or experience of the particular barrister, that the majority of solicitors probably have no idea how senior counsel are selected and that there should be a further review of the process to consider, inter alia, whether the system of silk selection should be abolished.

The appointment of senior counsel should not be abolished or abandoned as it is the best steppingstone to judicial office. It is probably too late and perhaps naïve to suggest that the number of applicants would be reduced, the current complicated system of selection simplified, disgruntled unsuccessful applicants mollified, and the best candidates appointed if the compulsory two counsel rule was reintroduced for silks for all matters in which silk are briefed, save for opinion work: junior counsel's fee to be not less than one half of the leader's fee.

Ultimately, it is the financial risk involved in taking silk and what the 'consumer' or marketplace comprising shrewd and experienced solicitors are prepared to advise their clients to pay for the specialist and unique services that the senior bar offers, that is probably the best criterion for ensuring that only the most suited candidates apply for and are appointed silk.

I took silk in 1973 in the Republic of South Africa when the two-counsel rule applied. After being appointed queens counsel in New South Wales in 1988, my practice of requesting to be briefed with a junior in all work other than opinion work was invariably acceded to. My lay clients benefited from this practice. Matters requiring the briefing of silk justify the advantage of paying for two specialised minds that the separation of bar and side bar offers.

Roy Allaway QC

Dear Sir

In his opinion piece, 'Stop Pretending' (*Bar News*, Summer 2010-11, p.10), Duncan Graham submits a compelling case as to why the annual selection of senior counsel, 'although revamped and much improved, remains fundamentally unfair'.

He has not, however, identified the critical factor as to why this is so.

Put simply, whilst the process purports to identify counsel of outstanding merit it is, in truth, an exercise in providing a quota of higher fee-earning services for those litigants (being mainly business and government) who are prepared to pay such fees in the belief that they are receiving the best advocacy services that money can buy. It is simple market doctrine. It has little to do with the discernment of superior merit between counsel of equivalent competence and experience.

If this were not so then it defies belief that highly experienced candidates for silk who are not worthy of selection one year miraculously become outstanding the next.

Clearly, those who are selected are well worthy of recognition. But on merit alone, so too are many more who are just as competent, just as experienced and just as worthy. The unspoken problem is that to appoint more silk than is needed to serve and maintain the demand would dilute the status of senior counsel and over-supply the market, especially in some areas of practice where the need is not as high as others.

Unfortunately it is a problem the bar has created for itself. No other profession ranks its members so as to cater directly to the market in this way. No other profession selectively limits and withholds its recognition of merit for pecuniary reasons.

The status of senior counsel should be its own reward and not for the greater financial reward it may bring. If it has purpose at all it should recognise demonstrable competence and experience based on objective criteria devoid of opinion and patronage, and without regard to market considerations.

This is still not the case. Not only is selection limited by quota, the perpetuation of taking into account information and opinion about candidates that is not disclosed nor able to be addressed by them is fundamentally wrong. In any other profession it would be condemned at Equity.

By having a distinction between senior and junior counsel, notwithstanding that after long and meritorious service at the bar a barrister may still be regarded as 'junior', what it says to litigants and the public is: if you don't have silk then you don't have the best. That just stigmatises all other equally competent and experienced barristers as being of some lower quality.

It would be to the immense credit of the bar if it were to either abandon the annual selection of senior counsel altogether (and the discriminatory concept of an 'Inner Bar' is long overdue for posterity), or to extend the status to all worthy candidates irrespective of any commercial reasons for maintaining a quota system; *or* to at least 'stop pretending' (as Graham puts it) and openly acknowledge that non-selection is not to infer that those candidates are less worthy, but that sensible commercial (if otherwise indefensible) considerations limit the number of senior counsel to market requirements and that candidates, with regard to their respective areas of practice, should regard their applications accordingly.

John de Meyrick

Note: The author submitted to Roger Gyles QC a comprehensive review of the protocol in which a number of observations and suggestions were put forward, some of which Mr Gyles seems to have addressed in his report. A copy of that submission is available upon request to: jdem@unwired.com.au

Dear Sir

I have just read Duncan Graham's interesting piece 'Stop pretending' (*Bar News* Summer 2010–2011) providing the benefit of his thoughts on a suitable selection protocol for the appointment of silk.

The purpose of my letter is not to comment on his personal view, but rather, without breaching in any way, shape or form Selection Committee confidentiality, simply to assure your readers from my personal knowledge as a member of the 2010 Committee that no applicant was rejected 'on the basis that an unidentified third person has told a member of the Senior Counsel Selection Committee that the applicant is not skillful, diligent, independent, disinterested or honest enough (sic)'.

I am sure that no reasonably informed observer with some knowledge of the Senior Counsel Selection protocol would regard that hypothetical outcome as in any way justified by the current selection system.

Anyone with a passing acquaintance with the bar and barristers would regard the prospect of five senior practitioners from disparate areas of practice, not to mention an eminent Australian like the Hon Keith Mason QC, going along with the rejection of an application on the basis of the say so of an unidentified third person as farfetched or fanciful.

Yours faithfully,
SG Campbell SC

The price of a ride on the tiger's back

By John de Meyrick. This article is based on a talk given to a recent conference of senior company managers on the subject of legal costs.

An old vaudeville sketch, repeated in the 1946 film *Ziegfeld Follies*, has the client (played by Victor Moore) and his lawyer (Edward Arnold) riding the New York subway. A ticket inspector arrives. The client has lost his ticket and he is asked to pay a $2 penalty. The lawyer tells his client it's unjust and not to pay.

An altercation follows between the ticket inspector and the lawyer in which the client offers to 'pay the two dollars'. But the lawyer takes the money and persists in arguing the matter. Thereafter the sketch progresses through a series of escalating situations in which the case proceeds to court, and then on appeal from court to court, at every stage of which the client repeatedly pleads with his lawyer to 'pay the two dollars' and be done with it.

The sketch concludes with the client behind bars and still begging his lawyer to 'pay the two dollars'. Yet the lawyer presses on until he too is seen to join his (by then) bankrupt client whilst vowing to appeal to the State Governor for clemency.

The notion that most, if not all, lawyers are more interested in running up costs than in looking after their client's interests, is a persistent problem with which lawyers continually have to contend.

It is true that some cases prove to be very expensive. Not because the lawyers are greedy and are off on a 'lawyers' picnic' (as commonly said), but because the contending parties are determined to fight to the bitter end, often despite the advice they are given as to the merits of their respective positions. Indeed, some litigants do not want to hear or accept negative advice and just lose faith in their lawyers. In many cases it becomes a psychological imperative that must be played out in court for the sake of inner resolution.

Even then, for some litigants, the umpire's decision is never to be accepted and when all avenues of appeal have been exhausted, if it were possible to invoke the intervention of The Queen, or even some heavenly arbiter, they would still want to pursue that option.

Personal pride and reputation are often the driving influences in litigation. This is particularly true of wealthy individuals and companies where the jobs of senior executives can be on-the-line, and where the ability to pay and to claim costs as tax deductions is also a negative factor.

Inevitably, those lawyers who cater for the 'big spenders' (being mostly the 25 or so large commercial law firms in Australia) and the higher fee earners at the Bar, will strive to

provide the kind of services their clients expect.

That does not mean that clients are giving lawyers the green light to rack up unnecessary costs; nor does it mean that lawyers take the opportunity to do so. It is simply that all clients want the best job done on their case, large or small, and depending on the importance of the matter, as well as the client's expectations and demands, some matters will involve a greater concentration of professional attention and resources than others.

But the most cogent reason why costs become a problem in cases at all levels, is that once the litigants are on the tiger's back and the matter is well advanced, the parties find it hard to get off. Each party by then has far too much at stake to give up.

As costs mount, the initial perceptions of the merits of a case and of what a party has set out to achieve inevitably shifts to the cost of failure. Objectivity gives way to an obsessive need to win. Clients stop listening to advice. The parties dig in for the long haul. The costs escalate. The matter takes on a life of its own.

Just how intensely determined some litigants can become is illustrated by that famous old NSW case in 1906, in which a gentleman put a one penny fare in the turnstile at the Balmain wharf then, not having joined the ferry, changed his mind and wished to leave the wharf. He then refused to pay a second penny to go back out through the

turnstile onto the street. He took the company to court. The jury found in his favour. But he then lost the case on appeal and the matter went to the High Court and on to the Privy Council in London (as was then permitted) where he still lost, with costs awarded against him. His determination and belief had cost him a 'pretty penny' indeed.[1]

Personal pride and reputation are often the driving influences in litigation.

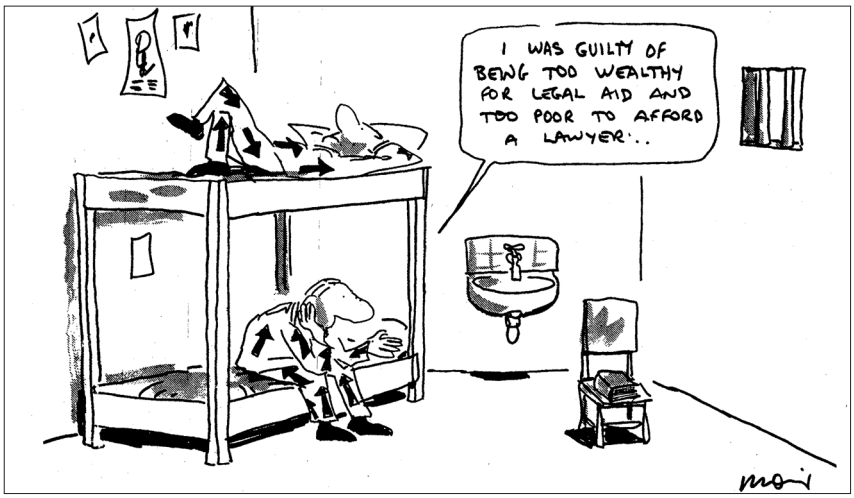
It is this psychological imperative that the legal profession is well able to serve but not able to control in the best interests of the parties or the effective administration of justice when it comes to the costs involved.

Of course, the system can, and does, provide certain access barriers and limits to legal process, including the right of appeal, based on the nature of the litigation, the issues involved and the size of the claim. But within the respective jurisdictional limitations in which each case may be played out,

there is not a lot that the profession can do to bring good sense to the process and to control the costs involved if the parties want to fight on regardless.

Except to offer some alternative means of dispute resolution (which most litigants find to be an unsatisfactory diversion from the real thing), the legal system provides the boxing ring, the officials, the trainers and managers, and even the spectators if they want to come, so that the parties can slug it out to the last dollar, or worse, to the biggest debt they can incur.

Legal representatives, at the outset of each matter, will invariably be asked to crystal-ball the outcome of the case they are retained to handle, even though the facts are not fully known, not yet tested, and the client in most cases, is not ready to accept anything other than that their cause is both just and winnable. Beyond professional opinion, speculation is, of course, unwise. Yet clients



look for assurances and often assume certainty of outcome when qualification and caution may have been the reality of the advice that was given.

In many cases, even so, to win may be all the satisfaction a litigant will achieve as the costs and inconvenience, as well as the personal stress and diversion from one's ordinary affairs, often outweigh the worthiness of the original cause. What starts out to be a matter of principle can end as a costly folly.

Society puts a high value on justice. But justice has its price. Some litigants have the means to pay for it. Few really can afford it. Most think that, like Medicare, the government should underwrite it. In many ways our governments do. The cost of providing courts and tribunals is significant.

Yet as every lawyer knows, the costs of most cases for most litigants are beyond what they are easily able to pay, or to pay without incurring some detriment to their financial position; and in an imperfect world where divine justice is unobtainable and man-made justice is not assured, many cases just prove to be an expensive exercise in futility for all concerned.

What starts out to be a matter of principle can end as a costly folly.

Even though costs may be awarded (and they are never certain), they are not usually recovered in full, and quite often they are not recovered at all; or they become another long-running dispute with which to contend. Certainly, whatever the outcome, when the sums are done, few litigants can say that they have come out in front.

Neither the legal system nor the legal profession can deny litigants their day in court; nor do they create the disputes that they are asked to fix. The best they can hope to achieve for most litigants is to provide quick, cheap and effective justice. But if justice is to prevail then the other factors of 'quick and cheap' must be of lesser consideration.

This also raises other issues: What standard of justice should a government provide, and is able to provide, to satisfy the needs of its citizens? Is justice served if access to the system is contingent upon how much the parties can afford to pay? Is it served where one party has the means to pay and the other does not? If justice is dependent on costs can it be truly just?

From the outset or shortly thereafter, many cases go astray as the parties, or more often just one of them, runs out of money. Mortgaging assets and going deep into debt to fund litigation adds anxiety and stress to the process, as well as problems for the legal representatives who, in many cases are faced with having to abandon the client or to carry the matter financially.

Courts also are affected when the orderly administration of cases is stalled and directions and timetables, etc., are not met, and where unpaid lawyers have to contend between their duty to the court and their duty to the client in not revealing to the court and the other side, their client's inability to pay. To do so will usually have a detrimental effect on a client's case.

Although many parties of moderate means will still want to fight on to the bitter end whatever it takes, the most unfortunate and unfair situation that arises is where one party is financially weak and the

other can say that 'money is no object'. This is a very common situation where the imbalance in financial capacity and the marshalling of larger legal resources by one party against another is a cogent costs factor in many cases where the wealthier party will use every interlocutory means and exhaust every possible process to drive their opponent into debt and failure.

The legal system has tried in various ways to achieve the objective of quick, cheap and effective justice without reduction in standards. Various arrangements have been introduced for seemingly sensible and short-cut ways of settling disputes, as well as a range of costs-control measures, including fee scales and costs regimes, in the hope of curbing the excesses of litigious spending.

Also, early attempts at knocking heads together within a formal legal setting can simply entrench the determination of parties to press on. The feeling that they are being side-tracked from ready access to justice is an irritating factor for many litigants.

Few litigants ever envisage the time, work and costs involved in managing their disputes. They see the system itself, and all that goes with it, as an impediment to justice. They find it hard to understand why the process is so complex. They cannot see why it should not be a simple matter of appearing before some kind of Judge Judy, telling their side of the story without any need for interrogation or proof, and then coming out the other end having been vindicated with a decision in their favour.

Certainly, whatever the outcome, when the sums are done, few litigants can say that they have come out in front.

Unfortunately, such alternative processes as early evaluation, court ordered mediation and negotiations, informal arbitration, orders for parties to exchange costs estimates, use of court appointed experts and referees, exchange of position statements, etc, do not always best serve their purpose. This is especially so where the bargaining power between the parties and their ability to effectively engage in such processes is uneven.

If unsuccessful, these well-intended measures may only add to the costs.

Also, few litigants are able to understand and accept the raw reality that, in many cases, justice declared is not always justice achieved. For once the order of things has changed, and once wrong has been done, a court may not be able to put it right; and whilst in some cases compensation may be awarded with interest and costs, it is another thing to know if the money will ever be collected. In many cases it isn't.

Thus, it is understandable that the public can so easily regard the legal system as antiquated, over-complex and ineffective and that lawyers are just there to make money. Their money.

That insinuation has also prompted a number of politically-driven costs-control measures that are aimed at legal practitioners on the implied notion that they may not be serving their clients well nor listening to their cries to 'pay the two dollars'.[2]

Lawyers' clients are now regarded as 'consumers of legal services' with lawyers being required to provide clients (oops! customers) with detailed information contained in formal disclosure statements setting out their fees and conditions, formal costs agreements if requested, and estimates of costs where sought (which, having regard to the exigencies of most cases, is a hopeless task). At the same time lawyers are required to advise legal consumers of their rights and the avenues for making complaints about their services and fees, etc., which is all somewhat off-putting and distracting in the building of consumer/lawyer confidence, as well as adding to the costs.

In some states lawyers are also required to assess the merits of their consumer's case at the outset, without knowing the strength of the other side's case or being in possession of all the facts, and to certify under oath at the time of filing, that there are reasonable grounds for believing on provable facts and a reasonably arguable view of the law that the claim has reasonable prospects of success. If found to be otherwise the costs

may be awarded against the lawyer.

Then there is the ever present threat in certain jurisdictions that a judge may decide that a case is taking too long and has become all too expensive, and to cap the costs. That is, to fix the amount beyond which the successful party may seek its costs from the other side.

This has the unfortunate inference that some one or more of the legal representatives may be to blame for the burgeoning costs when, unknown to the court, the facts may be very much to the contrary.

How capping the costs recoverable by a deserving litigant serves in any practical way to save money or to shorten trials is difficult to envisage (and is probably the reason why most judges are reluctant to impose such orders).

The burden of these various measures, especially for small legal firms (the vast majority of which comprise only one or two practitioners) is both onerous and uncompromising. They also add to the premiums lawyers have to pay for professional liability insurance, which in turn adds to the costs of legal services.

Courts and the legal profession, of course, are there to serve the community. Without them, order and justice in society would simply disintegrate (a situation to be observed in many third world countries). But unlike health and medical services where governments provide significant financial subsidies and support, justice is not well funded.

As is often pointed out, there are no votes in providing more courts or improved legal services and legal aid, no matter how important ready justice may be to the well-being of an orderly democratic society.

Some countries are more litigious than others. Australia has over 38,000 lawyers (one per 573 of the population) compared to the USA where there are, on last count, some 1,116,960 (one per 272 of the population). Asian countries are much less 'lawyer-polluted'. Japan has some 22,000 (one per 5,790 of pop.) and China has over 110,000 (one per 12,100).

The only country where anything like an ideal system of legal aid exists, is Sweden.

Of course, not all lawyers are engaged in litigation. The majority of legal services do not involve courts. But what these figures suggest is that access to justice in many countries has a long way to go, whilst some would say that, in prosperous justice-conscious countries like Australia, it may have gone too far already.

Yet the desire for access to justice is patent. In China, for example, where there are lawyers in only 206 of its more than 2000 counties, the number of lawyers is increasing by around 16 per cent a year.

But whether a legal consumer lives in an emerging justice-conscious nation or one with long-established legal systems and traditions, the costs of providing legal services to a high standard and degree that is still within the means of the ordinary litigant, is a perplexing problem.

In a country like Australia, where the tendency is to look to the government for financial assistance in all areas of social detriment, a cogent case could well be made for a greatly expanded provision for legal aid, especially in cases involving public interest. But such worthy contentions are low rumblings on the political Richter scale. The only country where anything like an ideal system of legal aid exists, is Sweden.

In Sweden, quite generous legal aid is available to about 85 per cent of the population, whilst a very large percentage also has personal legal expense insurance (something that has never really caught on in Australia but is widely adopted by companies in the USA).

Such legal aid that governments provide in Australia (there being eight legal aid commissions) is means tested and only granted to the marginalised and economically disadvantaged members of the community. Such funds are used in the main for persons involved in family law matters, immigration issues, indigenous claims, veterans' affairs, human rights and equal opportunity proceedings and the defence of persons charged with crimes.

Australian governments provide an estimated $485m pa for legal aid. This represents only $22 per capita. Much less than most other developed countries (England for example provides $77 per capita.) Federal government expenditure on legal aid has declined in real terms since 1997 by 12 percent; from $176m per year to $155m; whilst the states and territories' contribution has increased in proportion from 28 to 40 percent. Legal aid commissions are also relying more and more on funding drawn from the interest earned on solicitors' trust accounts. [3]

The legal profession and various community services also provide a significant amount of free legal advice to the public, whilst most solicitors and barristers conduct pro bono cases for charitable and community organisations, and other worthy causes.

For example, the top 25 Australian law firms provided in 2008-09 over $52m of pro bono legal work, whilst overall the profession provided an estimated $134m of legal services, free.

More than any other profession, lawyers also lose considerable sums in unpaid fees and in interest on fee-deferred payments. Lawyers are also permitted to take cases on a 'no win no fee' basis, and whilst this is really only practical where liability is not in issue (being mostly personal injury cases against insurance companies) a considerable element of costs is carried at the risk of those lawyers who are prepared to work on that basis. This too adds to the costs of litigation.

One of the unfair aspects of legal costs, is that where legal expenses relate to companies and businesses, they are usually able to be claimed as tax deductible expenses, and with the offset of GST; whereas ordinary private litigants have no such advantage unless they can show that those expenses were in some way directly related to the earning of their income. This puts many ordinary citizens at an added disadvantage.

Another unfair feature of legal costs is that, whether a matter involves important principles of law and justice or is only an ordinary run-of-the-mill case, a litigant with limited finances will not usually have the means to pursue the matter on appeal, whereas a wealthy and dissatisfied litigant will more often waste valuable court time and resources in exhausting every avenue of the law for little or no reason than to assuage their injured pride.

This is demonstrated in the extreme by the 2007 case in which Channel Seven sued News Limited, PBL, Optus, Telstra and other parties in relation to its contention that they had conspired to prevent Channel 7's access to the broadcasting rights to certain sporting events. The case took more than 120 days in court. The costs exceeded $200m, which Justice Sackville of the Federal Court described as 'not only extraordinarily wasteful, but borders on the scandalous'.[4]

His Honour's view of that case was surely justified, at least as to its cost to the court system and the taxpayer. By contrast, some important matters of law can go unchallenged and/or not be reviewed for years because the parties are financially unable, or unwilling, to pursue the issue further than the decision at first instance.

For example, thousands of

businesses, mostly small, have for years been convicted and heavily fined unfairly for workplace injuries under occupational health and safety laws on the assumption that breach of those laws was absolute. Thus, if an injury or death occurred on the job then *ipso facto* the employer had not provided a safe place, or a safe system, of work.

It took a determined Picton NSW farmer called Graeme Kirk, risking his own money, to pursue this issue to the High Court where, in a recent judgment, the court held that it was not enough to deem someone guilty and in breach of such laws unless it could be shown in what way they might have reasonably prevented the accident occurring. These were not just minor absolute breaches but in some cases serious offences.[5]

In that case, Mr Kirk had employed a friend and part-time experienced farm manger to work on his property. He died when driving an all-terrain farm vehicle that overturned. Mr Kirk was charged with several offences relating to occupational health and safety laws and fined a total of $121,000 by the NSW Industrial Court.

The case, which has clarified the law for other litigants, cost Mr Kirk approximately $1.5m in legal expenses. Yet, even though his case has made a valuable contribution to justice and the community generally, he recently told an ABC reporter that he expected to recover only about one-third of his costs. As well, the case had caused him considerable emotional stress, anxiety, and remorse in being held responsible for the death of a close friend.[6]

Graeme Kirk and his wife Kay celebrate their High Court victory. Photo: Kym Smith / Newspix

There is surely a case to be made for litigants who, in establishing important precedents which enlighten the law for others, and especially in the interpretation and application of statutory law, to have their costs at least partly met by the government. If the minister or the draftsman has not made the law plain, why should a litigant have to pay for its clarification?

The critical issue for litigation today is this: Although the door of the court is open to all comers, there is now an increasingly high entrance fee; and once inside, an even higher cost of participation. This is a significant access barrier to justice. With litigation being driven by costs-considerations, the door to the court for many, will slowly close. For some it is already shut.

Unfortunately, it is the lawyers who are being blamed. Not only by politicians and the media, but also by the judiciary. Neither the system nor the users, it seems, are in any way at fault. Yet, as managers in the commercial world would recognise, litigation is not a mass-produced product or straight forward process that can be easily applied and managed in a cost-effective way. Each case is a journey into the uncertain. No common principles of management apply.

The lawyers' role is to prepare and bring the cases of two (or more) squabbling parties into court through an ever-changing and burgeoning maze of complex rules, regulations, acts, provisions, precedents, forms, orders, directions and other requirements involving detailed conflicting evidence (expert and otherwise) and to then 'lock horns' with their opponents to the satisfaction of the clients and the demands of the court.

Of course, once elevated to the bench a lawyer may see these contests from a different perspective. But it is of little help when some judges who, whilst in legal practice have had to contend with the problems relating to clients and costs and the many requirements of the system, then become overly concerned about the costs being incurred by the parties in matters before them. This says even more surely to the public that lawyers are perhaps not listening to their clients' pleas to 'pay the two dollars'.[7]

The fact is, if parties want to fight, notwithstanding the advice they are given, and the courts are ready to accommodate them, then it is not unreasonable for lawyers to do their best to represent them. But the real issue in the end, no matter what the case may have cost the parties, is that most will come away saying to their lawyers (or thinking), 'Why didn't you know all this at the beginning before so much money was spent on the matter?'

And, that is the problem: How to bring about this realisation and acceptance at the outset of a matter rather than after so much time, effort and expense has been given to it?

Like any contest, in the ring, on the football field or in the court, one cannot predict the outcome with certainty. We can all be the wiser after the case is over. Until then only the judge has the answer. But the judge does not greet you at the door of the court. It can be a long, difficult and expensive preparation and lead-in time before the contest begins (for which the system is to blame, not the lawyers); and even then, if the judge does not have the answer the parties want to hear, the real game may just be starting.

The legal profession in recent years has endeavoured to find solutions to providing a quick and cheap - but above all a just - outcome for the evergrowing demand for legal services. But alas, the answer remains elusive.

There is surely a case to be made for litigants who, in establishing important precedents which enlighten the law for others, and especially in the interpretation and application of statutory law, to have their costs at least partly met by the government.

Meanwhile, lawyers seem ever to be blamed for the ills of the system, and are the butt of cartoonists' jibes as a scheming lot of pettifoggers and shifty operators. It has been so since the Peasants' Revolt of 1381 in England when

Wat Tyler and his rowdy mob ran through the streets vowing to 'kill all the lawyers', and blaming judges for enforcing the law in regard to higher poll taxes, and other grievances.

The sentiment has changed little since 1381. Being a lawyer is still a largely thankless, and often unrewarding, occupation.

Addendum

I was once asked: 'When two people want to fight over some issue, it is better to get the heat out of the situation and have it resolved as soon as possible. Courts just drag things out and get in the way. People become frustrated and their anger turns on the courts and the lawyers. Why can't you have some sort of informal trial run with a judge up front without all the paperwork and delays? Surely that would settle many cases before they got started?'

The situation at the lower court level is not the problem. However, it must surely be agreed that, in regard to matters dealt with by the higher courts, the time has come to consider whether the system should continue to operate, without reservation, on the basis that if the parties want to fight then that is what the courts and the legal profession are here to facilitate.

Surely it is just as important that valuable court resources are not wasted on cases that are likely to involve arduous preparation and/or unsatisfactory outcomes as it is to see that litigants are not spending money on the pursuit of unrealistic expectations. As indicated, few clients want to hear anything negative from their lawyers. But they do listen to judges.

So perhaps if 'litigious waste' is to be tackled, then the answer

lies with the courts. Also, perhaps there is merit in relation to higher court matters, in considering some way to bring judicial in-put to bear 'up-front', as suggested by the questioner. That is, some kind of early judicial intervention based on (say) the pre-arbitral conciliation model used in industrial relations to deal with workplace disputes.

Unlike mediation, the conciliation model allows for outcomes and practical solutions to be suggested in an informal, private, and more intimate small-court setting. At an early stage a judge (not being one who would decide the matter should it proceed to trial) could hear the parties and their legal representatives, together and/or separately and, based on preliminary material, give an 'informed' indication of the practical and problematic issues that may be involved and of how the matter might be played out. Considerations could also be given to the likely costs involved and whether a case might end up being less than satisfactory for either side. Attempts at settlement might be made including assistance in assessing appropriate outcomes, etc.

It is important in this process if it is to satisfy and assure parties that they are not being side-tracked away from justice, that a judge should undertake this role; and if it is deemed that such functions are derogative of judicial office, then perhaps the role might be served by retired judges, or those nearing retirement who would be prepared to undertake such work.[8]

In any event should a matter not be resolved at this early stage, the process should be followed up at regular and appropriate intervals to ensure that it has not bogged down or 'gone off the rails', and in order to monitor and case manage its progress.

At the risk that such a process might only add yet another layer of costs to the system, if it disposes of a significant number of matters that may otherwise end up becoming expensive long-running and largely futile sagas, then it will be worth the effort.

These footnotes were not part of the talk. They have been added later.

Endnote

1. *Balmain New Ferry Co Ltd v Robertson* [1906] HCA 83; (1906) 4 CLR 379.
2. *Access To Justice (Civil Litigation Reforms) Amendment Bill 2009* (Cth) now Part VB *Case Management in Civil Proceedings, Federal Court Act 1976* (Cth) sections 37M-37N; also s 56 of the *Civil Procedure Act 2005* (NSW). These provisions impose strict controls with penalties on legal practitioners to meet stringent 'overarching' and 'overriding' purpose requirements in the preparation and conduct of litigation. See also: Access to justice: will the costs regime in the Federal Court change? Brenda Tronson. NSW *Bar News* Summer 2009-10, p.30.
3. The federal government's 2010-11 budget has provided an additional $38.5m pa in legal aid contributions over four years. This is the first increase in 15 years.
4. *Seven Network Limited v News Limited* and Ors (2007) FCA 1062.
5. *Kirk v Industrial Relations Commission of NSW; Kirk Group Holdings Pty Ltd v WorkCover Authority of NSW (Inspector Childs)* [2010] HCA 1 on 3/2/10.
6. The Law Report on radio ABC-RN, 16/3/10.
7. The chief justice of South Australia, John Doyle CJ, is reported to have told a recent conference of the SA Bar Association that the costs of litigation are 'closely related to the efficiency of the key participants - and in particular the advocates - and to the time taken to deal with cases'. He was unable to provide any answers, but predicted that whilst it was not too late for barristers to change, which he thought would be difficult, he concluded that the situation would 'probably lead to the system strangling itself'. (*The Australian* Newspaper, Legal Affairs Section, 11 February 2011, page 29. Art: Chief Justice Doyle warns the Bar - Lift Your Game or Disappear). In that same report, the chief justice of the NSW Supreme Court, Jim Spigelman CJ, is quoted as having told a conference of barristers in Sydney, four days earlier, that they risked 'killing the goose' unless they helped clients reduce their legal costs.
8. Judges of state and federal industrial commissions are not fazed by performing these kind of conciliatory functions in appropriate matters.

Fiduciary obligations in commercial dealings

John Alexander's Club Pty Ltd v White City Tennis Club Ltd [2010] HCA 19; (2010) 241 CLR 1; 266 ALR 462

The land at White City, best known as being the site of many tennis competitions involving leading international players, has recently been the subject of a complex dispute concerning various parties' rights to the property.

On 26 May 2010 the High Court, constituted by French CJ, Gummow, Hayne, Heydon and Kieffel JJ, granted two appeals from decisions of the New South Wales Court of Appeal. In so doing, the High Court has provided guidance as to the law surrounding fiduciary relationships alleged to arise between contracting parties.

The facts

The plaintiff in the case (respondent in the two appeals) was White City Tennis Club Ltd (the club). The club had for many years operated a tennis club on a part of the White City land, pursuant to a series of leases and licences granted by the then owner, New South Wales Tennis Associated Limited (Tennis NSW).

After the Sydney 2000 Olympics, Tennis NSW moved its activities to the newly constructed facilities at Homebush and, accordingly, wanted to sell the White City land. It ultimately chose to do this via public tender.

The club desired to continue its activities at White City after the sale of the land. In an attempt to allow this to occur, on 28 February 2005, it entered into a Memorandum of Understanding with John Alexander's Clubs Pty Limited (JACS), an organisation in the business of developing sites for use by sporting clubs. The MOU was premised on the White City land being purchased by the Trustees of Sydney Grammar School (SGS), which ultimately turned out to be the case.

Relevantly, the MOU provided, in effect, that JACS would seek to obtain an option to purchase part of the land, either from Tennis NSW or from SGS. JACS promised, in effect, that if it succeeded in obtaining an option, it would exercise it on behalf of White City Holdings Limited (WCH) upon WCH simultaneously granting John Alexander's White City Club Pty Ltd (JAWCC) a 99-year lease of the relevant land and entering into an operating agreement. Both WCH and JAWCC were companies to be established by JACS, although neither

entity was ever ultimately formed.

Subsequent to the MOU being entered, three agreements (the White City agreements) were entered into between the club, JACS, SGS and Sydney Maccabi Tennis Club Ltd (Maccabi). Maccabi was another organisation that had been conducting a tennis club on part of the White City land and desired to continue doing so.

Pursuant to each of the White City agreements JACS was granted an option to acquire part of the White City land (the option land). There was no reference in any of the White City agreement options to WCH or to the relevant conditions set out in the MOU option. In each White City Agreement the club agreed to surrender its rights in relation to the White City land.

There was no reference in either the first or second White City agreements to the continuation of the MOU. However, the third White City agreement provided that the MOU was terminated to the extent of any inconsistency, and a new clause, to prevail over the option clause in the MOU, was introduced.

Dispute arose between the club and JACS and on 12 April 2006, JACS served on the club a notice of termination of the MOU, on the supposed ground that the club had evinced an intention not to be bound by the MOU.

On 27 June 2007 Poplar Holdings Pty Ltd (Poplar) exercised the option granted to JACS by the third White City agreement, as JACS'nominee. The purchase was financed by Walker Corporation Pty Limited (Walker), with security given in the form of an unregistered

mortgage over the option land and a floating charge over Poplar's assets.

First instance proceedings

On the same day that Poplar exercised the option, the club commenced proceedings in the Supreme Court against JACS and Poplar. The club alleged that the MOU gave rise to a fiduciary duty that JACS had breached and that Poplar held its interest in the option land on a constructive trust for the Club. The club also made allegations of equitable fraud, unconscionability and breaches of the *Trade Practices Act 1974* (Cth).

Young CJ in Eq dismissed the club's claim.

Court of Appeal proceedings

The club was successful on appeal. The court ordered Poplar to transfer the option land to the club upon the club paying the price at which Poplar exercised the option.

After the Court of Appeal's decision, Walker applied to be joined to the proceedings and sought an order that the Court of Appeal's declaration of a constructive trust be set aside or alternatively, that it be without prejudice to Walker's interests. Walker's applications were refused.

The High Court's decision

Two appeals were brought to the Court of Appeal's decisions, firstly an appeal by JACS and Poplar, and secondly, an appeal by Walker.

The JACS/Poplar appeal

The High Court found that the MOU did not create a fiduciary relationship between JACS and the club.

The court considered Mason J's dissenting judgment in *Hospital Products Limited v United States Surgical Corporation* (1984) 156 CLR 41 and appeared to accept that this judgment correctly stated the relevant principles regarding the existence of a fiduciary relationship which does not fall within an established category.

The court agreed with the principle stated by Mason J's as follows:

> It is the contractual foundation which is all important because it is the contract that regulates the basic rights and liabilities of the parties. The fiduciary relationship, if it is to exist at all, must accommodate itself to the terms of the contract so that it is consistent with, and conforms to, them. The fiduciary relationship cannot be superimposed upon the contract in such a way as to alter the operation which the contract was intended to have according to its true construction.

It was held that where a term to like effect as the suggested fiduciary obligation cannot be implied into the contract, it will be very difficult to superimpose the fiduciary obligation upon that limited contract. In this case the club disavowed any attempt to imply a term into the MOU to the effect of the fiduciary obligation for which it contended.

The club's submission that a fiduciary relationship existed, which the Court of Appeal accepted, rested heavily on the twin ideas of vulnerability and reliance. In determining these issues, the High Court took into account, amongst other matters, that the club consented to the unconditional nature of JACS's option - it could have used its ability to refuse to surrender the lease to bargain for more precision in the option clause but it did not; that the club was not relying on representations by JACS or depending on JACS to do anything and that the club was not overborne by some greater strength possessed by JACS.

The High Court found that the MOU did not create a fiduciary relationship between JACS and the club.

The court held that 'the only vulnerability of the club was that which any contracting party has to breach by another. The only reliance was that which any contracting party has on performance by another…'

It was held that there was no justification to convert the contractual relationship between JACS and the club into a fiduciary relationship. If the club was able to establish that JACS had breached a contract it had an ample array of contractual remedies available to it, but it chose not to so protect itself.

The Walker appeal

In relation to the appeal by Walker, the court found that the Court of Appeal erred in failing to take into account the effect of the declaration of a constructive trust on a third party, namely Walker.

The court agreed with Walker's submission that, as a general proposition, if a court makes an order affecting a person who should have been joined as a necessary party that person is entitled to have the order set aside.

The court allowed the appeals and set aside the orders of the Court of Appeal.

Conclusion

This decision raises a question as to the extent to which equitable relief, founded upon an asserted fiduciary obligation, will be available to parties to commercial contracts. The case demonstrates the difficulty such parties will face in seeking to establish a fiduciary relationship. It will only be in the rare case that a party to a commercial dealing will be able to demonstrate vulnerability and reliance such that a fiduciary relationship may be found.

The decision also highlights the importance of all parties affected by the court's orders being joined as a party to avoid the orders later being set aside.

By Lyndelle Brown

The appeal by the James Hardie directors and officers

Morley v ASIC (2010) 274 ALR 205; [2010] NSWCA 331

In December 2010, the NSW Court of Appeal handed down judgment[1] in the appeal by the non-executive directors, the chief financial officer and the secretary/general counsel of James Hardie Industries Ltd (JHIL) from the decision of Gzell J.[2]

Background – the misleading ASX Announcement

In February 2001, JHIL issued an announcement to the ASX that it had established a foundation to meet the compensation claims of asbestos sufferers against former subsidiaries of JHIL. The announcement stated that the foundation had sufficient funds to meet all legitimate compensation claims and was 'fully funded'. Gzell J found this to have been a misleading statement likely to affect market behaviour.[4]

At first instance, it had been found that the non executive directors had breached their duty of care and diligence in approving a draft of the ASX announcement at a board meeting on 15 February 2001. JHIL's secretary/general counsel (Mr Shafron) and CFO (Mr Morley) were also found to have breached their duties as officers by failing to provide advice and information to the board in connection with the announcement.

The appeal

The Court of Appeal[5] delivered one judgment. The non executive directors succeeded in their appeals. Mr Shafron had some success but the court nevertheless declared that he had breached his duty as an officer of the company. The CFO, Mr Morley, failed in his appeal.

The principal issue for the non executive directors was whether ASIC had established that the draft ASX announcement had been approved by the board at the meeting (as the minutes indicated had occurred). One of the non executive directors denied that he had voted in favour of any such resolution and the others did not admit it.

In particular, the court was required to consider the implications of ASIC's failure to call three witnesses who had been present at the meeting. They were Mr Robb, a partner of Allens, (JHIL's solicitors at the time), and two representatives of UBS, JHIL's adviser in connection with the establishement of the foundation.

Before the hearing, ASIC had provided the appellants with lists of the witnesses it proposed to call at the trial. These included Mr Robb and the UBS representatives. However, a week or so into the hearing, ASIC informed the trial judge and the other parties that it did not intend to call Mr Robb or the UBS witnesses.

In this context, the court considered the obligations of a government regulator, such as ASIC, in the conduct of proceedings to enforce the civil penalty provisions of the Corporations Act.

No prosecutorial duty, but a duty to act fairly

The Court of Appeal rejected a submission that ASIC, in taking proceedings to enforce civil penalty provisions, was under a duty akin to a prosecutorial duty.[6] However it did find, and indeed ASIC did not dispute, that, as a government agency enforcing civil penalty provisions, ASIC had an obligation to act fairly in the conduct of the proceedings. The particular content of the obligation would depend upon the circumstances of the case, although it could not rise higher than the duty imposed on prosecutors to call material witnesses.

The court concluded that ASIC had breached its duty of fairness in failing to call Mr Robb.[7] The court then had to consider the implications this had for ASIC's case.

Gzell J had, at first instance, come to conclusions on each of the issues raised without the need to draw, against ASIC, a *Jones v Dunkel* inference in respect of the evidence of Mr Robb and the UBS witnesses.[8]

The Court of Appeal noted that the application of *Jones v Dunkel* leads only to an inference that the evidence of witnesses not called would not have assisted ASIC's case.

Such an inference would be entitled to some weight but would not be of high, let alone determinative, significance.[9] The court found that ASIC's failure to call Mr Robb went beyond a *Jones v Dunkel* inference. It affected the overall assessment by the court of the cogency of the evidence adduced by ASIC.

Significantly, there was no dispute that *Briginshaw* principles (and their statutory embodiment in section 140 of the Evidence Act) applied to ASIC's case, having regard to the gravity of the consequences of adverse findings against the directors.

The court described the consequences of a breach of the duty of fairness in the following terms:[10]

> In order to be satisfied on the balance of probabilities within the meaning of s.140, the tribunal of fact must reach an affirmative conclusion, or a definite conclusion, or an actual persuasion. This state of mind turns on the cogency of the evidence adduced before it. Relevant to the cogency of the evidence actually adduced is the absence of material evidence of a witness who could have been called and in fulfillment of the duty of fairness should have been called. In *Whitlam v Australian Securities and Investments Commission* it was said that, absent diligence in calling available evidence, a court is left to rely on uncertain inferences. The case of the party in default suffers in its cogency, and it is made more difficult for the tribunal of fact to reach an affirmative conclusion, a definite conclusion or an actual persuasion: the more so if the Briginshaw principles involving the gravity of the consequences apply.

ASIC's failure to call Mr Robb critically undermined the court's assessment of the cogency of its evidence. It could not discharge its burden of proving that the non executive directors had voted in favour of the draft ASX announcement. Without this factual basis, the findings of breach against the non executive directors could not stand.

Findings of breach would have been made against the non executive directors if ASIC had discharged its burden of proof

The court held that, if ASIC *had* established that the non executive directors had approved the announcement, they would have been in breach of their duty of care and diligence. They could not, in the circumstances of this case, have avoided liability by reliance on management. Even those directors who had joined the meeting by telephone would have been in breach of their duty by failing to familiarize themselves with the resolution (failing which, they should have abstained from the vote).

General counsel and CFO were 'officers' of JHIL

The Court of Appeal also confirmed the finding of the trial judge that the general counsel and CFO (neither of whom were directors) were both 'officers' of JHIL and therefore subject to the relevant statutory duties. The court did not accept that their role was limited to advising or informing the board and found that they had sufficiently participated in the decision to render them liable as officers of the company.

Special leave application

ASIC, Mr Shafron and Mr Morley has each filed applications for special leave to appeal the decision of the Court of Appeal.

By Vanessa Thomas

Endnotes

1. *Morley & ors v Australian Securities and Investments Commission* [2010] NSWCA 331.
2. *Australian Securities and Investments Commission v MacDonald (No 11)* [2009] NSWSC 207. On the appeal, this was referred to as the *Liability Judgment*. In a separate judgment, *Australian Securities and Investments Commission v MacDonald (No 12)* [2009] NSWSC 714, Gzell J made orders in relation to applications for relief from liability for contravention and on pecuniary penalties and disqualification orders. One of the directors, the CEO, Mr MacDonald, did not appeal from the findings of Gzell J.
3. In a separate judgment handed down at the same time (*James Hardie Industries NV v Australian Securities and Investments Commission* [2010] NSWCA 332), the Court of Appeal dismissed an appeal by the company from this finding.
4. Spigelman CH, Beazley and Giles JJA.
5. At [678] to [700], seeing no reason to depart from its earlier rejection of it in *Adler v Australian Securities and Investments Commission*
6. A majority (Spigelman CJ and Beazley JA) did not consider that the same duty required that ASIC also call the UBS witnesses. Giles JA did not agree, but this had no affect on the overall result of the appeal.
7. *Liability Judgment* at [1139], see Court of Appeal judgment around [633]. Gzell J considered that Mr Robb and the UBS witnesses were equally available to all of the parties.
8. At [731] to [732].
9. At [753].

Costs obligations when acting for multiple parties

Bechara v Legal Services Commissioner [2010] NSWCA 369

It is axiomatic that a legal practitioner may charge a client only once for any work that is done. The New South Wales Court of Appeal has confirmed that, where a practitioner acts for several clients in the same hearing, each client is not to be charged separately for the same item of work. A failure to apportion the cost of work done for all clients will constitute excessive charging and is capable of being unsatisfactory professional conduct or professional misconduct.

The facts

Ms Bechara, a solicitor, acted for three members of the same family who had suffered injuries in the same premises but on different days. Separate claims were commenced for each client against the same defendant in the District Court and it was agreed that the proceedings would be heard together, with evidence in one being evidence in the others.

At the hearing, the parties were represented by the same barrister and a junior solicitor at Ms Bechara's firm attended each day of the hearing. Ms Bechara attended to take judgment in the matter, in which her clients were successful and obtained orders for costs in their favour.

Ms Bechara prepared three itemised bills of costs for each client and charged each separately for the time her junior solicitor spent at court and for her attendance to take judgment. The effect was that the costs for the one attendance by each practitioner were trebled. Ms Bechara received no complaint from her clients in relation to the bills of costs she issued.

Ms Bechara then prepared and served three party/party bills of costs for the same amounts as the costs charged to her clients. She engaged in negotiations for an agreed sum of party/party costs with the defendant's solicitor in which she offered to reduce her fees. Negotiations were unsuccessful and the costs were assessed by a costs assessor, who called for the solicitor/client bills. The costs assessor referred the matter to the legal services commissioner.

The commissioner initiated a complaint under the *Legal Profession Act 1987* (NSW) alleging deliberate charging of grossly excessive amounts of costs, then declared to be professional misconduct by s 208Q(2) of the Act.

Issues

The crux of the commissioner's complaint in relation to Ms Bechara's conduct was that she failed to apportion common costs across the three matters. In proceedings before the Administrative Decisions Tribunal, the commissioner alleged that this conduct was contrary to:

- the terms of her costs agreement with each client, which provided that she would charge for the work performed for that client;
- her obligation at law[1] to charge only for the work actually performed for each client; and
- her obligation at law and under the *Legal Profession Act 1987* (NSW) to charge only a fair and reasonable fee for the work.

According to the commissioner, because the time spent in court was not apportioned, each client was charged for time spent in court exclusively for another client, was charged an inflated fee for work that did not relate to all three clients, and was charged without reference to the nature of the actual work undertaken by the junior solicitor during the hearing.

Ms Bechara's evidence before the tribunal was that she did not intend to overcharge her clients. She genuinely believed that the terms of her costs agreement entitled her to charge each client separately for the costs of the hearing. She did not intend her clients to pay the amounts set out in the bills of costs she rendered, she intended to charge them according to the amount recovered as party-party costs. The full bills of costs were rendered so as to enliven the 'indemnity principle' grounding her client's entitlement to party/party costs.

The tribunal found that Ms Bechara was guilty of professional misconduct and she appealed to the Court of Appeal.[2]

Findings

McLellan CJ at CL delivered the judgment of the Court of Appeal, with which McColl and Young JJA agreed. His Honour reviewed a number of decisions relied on by Ms Bechara in support of the proposition that she was under no obligation to apportion the costs of the hearing between her clients.[3] From each of them the

judge derived the principle that in cases heard together (whether formally consolidated or otherwise) work that is required to be done once for all of the cases should be apportioned. McLellan CJ at CL stated the relevant principle at [138]:

> ...where a solicitor is retained to act for multiple clients whose proceedings are heard together with evidence in one being evidence in the other (regardless of whether the proceedings are formally consolidated), and the clients are charged on a time-costed basis, there must be an apportionment of time spent on matters common to two or more of the proceedings. One unit of time cannot be charged more than once.

The principle identified by McLellan CJ at CL is consistent with the solicitor's fiduciary duty, and in particular the duty to avoid conflicts between his or her interests and those of the client.

His Honour accepted that the precise mechanism of apportionment would vary depending on the circumstances of the case. In some cases a simple division of time between each matter may give way to an allocation of the time spent exclusively on a single matter, and an apportionment of the time spent on common issues. In the present case, his Honour found that the attendance of Mr Bechara and her junior solicitor at court would, for the most part, be instructing counsel in relation to the same evidence in each proceeding, so that the work done was common to each client. It should have been apportioned in those circumstances.

McLellan CJ at CL also upheld the tribunal's finding that a proper construction of Ms Bechara's costs agreement, which read 'we will charge you... at the following hourly rates for each hour engaged on your Work...' provided that they could be charged only for work relating to their own matter, and that it was not necessary to imply the word 'exclusively' into the agreement to achieve this.

McLellan CJ at CL also rejected Ms Bechara's argument that she never intended to charge the fees set out in the bills of costs, and instead intended to reduce her fees in accordance with her clients' recovery of party-party costs. Ms Bechara's bills of costs did not contain any indication that she did not intend to demand payment until the assessment of party-party costs was complete (they in fact stated that the fees would be charged from trust moneys if no objection was raised).

His Honour found that Ms Bechara's offer to discount her fees did not address the original mischief of triple charging for the same work, and in any event there was a likelihood that, if she the full amount of each bill of costs was allowed on assessment, she intended to charge that amount.

Conclusion

The *Legal Profession Act 2004* (NSW) does not deem intentional overcharging to be professional misconduct. Section 498(1)(b) of the 2004 Act provides that charging of excessive legal costs in connection with the practice of law is capable of being professional misconduct or unsatisfactory professional conduct. This obviously captures a wide range of excessive costs practices, and whether the act of charging clients in the same proceedings without apportionment constitutes professional misconduct or unsatisfactory professional conduct will depend very much on the circumstances of the case.

The decision of the Court of Appeal does make clear that to charge clients in the same proceedings more than once for the same work is excessive, and most likely deliberate. Following this decision, the practice of charging multiple clients without apportionment is likely to attract disciplinary consequences.

By Catherine Gleeson

Endnotes

1. *Law Society of NSW v Andrew Brian Fegent* (unreported, judgment delivered on 24 April 1989); *Veghelyi v The Law Society of New South Wales* (Unreported, Court of Appeal , 6 October 1995)
2. Ms Bechara raised 16 grounds of appeal, many of which related to the conduct of the complaint and the proceedings before the Tribunal, and the penalty imposed by the Tribunal. This note focuses on the grounds going to liability.
3. *Oppenshaw v Whitehead; Mucklow v Whitehead* (1854) 9 EX 384; *Tucker v Graham* (1869) 8 SCR (NSW) 341; *In re Metropolitan Coal Consumers' Association (Grieb's Case)* (1890) 45 Ch D 606; *International Financial Society v Smith* (1896) 22 VLR 114; *Price v Clinton* [1906] 2 Ch 487; *Carter v Newcastle Wallsend Coal Co* (1909) 9 SR (NSW) 474; *Boguslawski Anor v Gdynia Ameryka Linie (No. 2)* [1951] 2 KB 328; *R v Hore; Ex parte Brisbane City Council* [1969] Qd R 75; *Meade v Queensland Ambulance Service* [1996] QSC 62; *Pester; Leslie v Hydro-Electric Corporation* (1997) 7 Tas R 233.

Costs applications in the High Court

Aktas v Westpac Banking Corporation Limited (No.2) [2010] HCA 47; (2010) 273 ALR 118; 85 ALJR 302

A small oversight can cost you dearly

A recent decision establishes a short but significant point in respect of seeking special orders for costs following the hearing and determination of an appeal to the High Court.

The substantive proceedings (which were noted in the Recent Developments section of the Summer 2010 – 2011 edition of *Bar News*) concerned an action in defamation. Mr Aktas sued Westpac in relation to 30 cheques that Westpac had wrongfully dishonoured and returned with the words 'refer to drawer' stamped on the reverse side. A jury found that Westpac had defamed Mr Aktas, however the trial judge (Fullerton J) and three members of the Court of Appeal (Ipp, Basten JJA and McClellan CJ at CL) upheld the defence of qualified privilege.

A majority of the High Court (French CJ, Gummow and Hayne JJ) allowed the appeal by Mr Aktas and assessed his damages at $50,000. The court ordered Westpac to pay the costs of the appeal, as well as costs in the Court of Appeal and costs before the trial judge. These costs were likely to be considerable. Heydon and Kiefel JJ dissented.

Some five weeks after the judgment in the substantive proceedings had been delivered, Westpac filed a summons in the High Court, seeking a variation of the costs orders. Westpac disclosed that, three years earlier, it had offered to pay Mr Aktas $620,000 plus costs, together with an apology, on the basis that such settlement be confidential.

The same majority accepted that the High Court, as a court of final appeal, had the discretion to recall its substantive orders and grant a rehearing. However, their honours declined to do so on the basis that Westpac had had ample opportunity to foreshadow a special costs order, but had failed to do so. The majority pointed out that Westpac had clear notice that Mr Aktas sought costs as it was contained in his notice of appeal and was repeated in his written submissions. Westpac only had itself to blame for 'not having raised those facts earlier, or at least foreshadowed the need to consider further facts before costs orders were made' (at [7]). Westpac's application was dismissed with costs.

Heydon and Kiefel JJ dissented on the substantive judgment and neither proposed any orders on the costs application. However, Heydon J opined that there were three possible courses open to a party who sought a special costs order:

1. In contrast to the usual practice in the High Court, the party could brief counsel to take judgment, and to raise the issue then. However Heydon J noted that it is now extremely rare for parties to appear before the High Court to take judgment, although not uncommon a few decades ago, and also observed that it would significantly increase costs if parties had to brief counsel familiar with the matter to appear in Canberra merely for the purpose of taking judgment;
2. The party could disclose the existence of the offer to the court at the hearing of the appeal. Heydon J said that there was much to be said for the view that this course should not be adopted, because it would be inappropriate to violate the 'without prejudice' nature of such documents; or
3. The party could foreshadow prior to judgment that there may be a need to have separate argument as to costs.

Ultimately, it would seem that it was Westpac's failure to adopt the third course identified by Heydon J, namely to foreshadow prior to judgment a need to have further argument as to costs, which formed the basis of the majority's decision to refuse to grant a rehearing. Heydon J noted that the majority's view is now binding and said that it was neither necessary nor appropriate for him to discuss the majority reasoning.

Presumably, the requirement identified by the majority would be satisfied if a party indicated either in its written submissions or at the hearing of the appeal that it will seek the opportunity to make further arguments as to costs. This author suggests that a party could also foreshadow seeking such relief in its written summary of argument and notes that the template in Part IV of form 19 in the *High Court Rules* 2004 (Cth) specifies '[Any special order for costs sought by the respondent.]'; cf Order 3 in form 23 for applicants.

By Charles Alexander

Apprehended bias

British American Tobacco Australia Services Ltd v Laurie (as administratrix of the estate of Laurie) [2011] HCA 2; (2011) 273 ALR 429

In allowing this appeal, a majority of the High Court[1] held that a reasonable observer might apprehend that the court might not bring an impartial mind at trial to allegations of fraud in circumstances where the trial judge had found similar fraud allegations against the appellant to be substantiated in unrelated interlocutory proceedings determined several years earlier. The court ordered that the trial judge be prohibited from further hearing or determining the proceedings.

The Laurie proceedings

The proceedings were instituted in 2006 by Mr Donald Laurie against British American Tobacco Australia Services Ltd (BATAS) in the Dust Diseases Tribunal of New South Wales (tribunal). The case management and trial of the action were allocated to Judge Curtis of the tribunal. Mr Laurie's case against BATAS was that, in the decades in which he smoked BATAS' tobacco products, BATAS knew, or ought to have known, that smoking tobacco products could cause lung cancer. It was alleged that BATAS was negligent in the manufacture, sale and supply of its tobacco products. In May 2006 Mr Laurie died from lung cancer. Subsequently, his wife, Mrs Claudia Laurie, continued the proceedings.

One issue in the proceedings involved allegations that BATAS had developed and implemented a policy of destroying documents which might be adverse to BATAS's interests in the event of legal proceedings brought against the company. Allegations of that nature were not novel, either to BATAS or Judge Curtis.

The prior ruling

In 2006, Judge Curtis heard an interlocutory application in which orders were sought that BATAS give further discovery in unrelated contribution proceedings brought by Brambles Australia Ltd (Brambles) against BATAS (Mowbray proceedings). In determining the application the Judge had to consider whether BATAS's claim for legal professional privilege had been lost by reason of misconduct pursuant to s 125 of the *Evidence Act 1995* (NSW).

Brambles argued that the allegedly privileged communications had been made in furtherance of the commission of a fraud. The alleged fraud comprised the implementation of a policy of destroying documents adverse to BATAS's interests in anticipated litigation and the dishonest concealment of such policy by cloaking it in the guise of an innocent and non-selective housekeeping policy known as the 'Document Retention Policy'. Judge Curtis found that BATAS had adopted the policy as alleged and held that the communications were not privileged as they had been made in furtherance of the commission of a fraud within the meaning of s 125(1)(a).[2]

In his Honour's reasons for judgment, it was observed that:[3]

- the application was interlocutory and the question of whether BATAS maintained a document destruction policy as alleged remained a live issue for trial;
- the oral testimony of Mr Gulson, a former in-house counsel and company secretary of BATAS, adduced by Brambles was not contradicted or tested by BATAS;
- there could be good reasons why BATAS did not contradict or call evidence to contradict the evidence of Mr Gulson; and
- the determination was made on the evidence before the tribunal at the time and different or other evidence might be adduced at trial so as to lead to a different conclusion.

In the event, the Mowbray proceedings did not go to trial.

Recusal application

In March 2009, BATAS filed a motion in the Laurie proceedings seeking an order that Judge Curtis disqualify himself from further hearing the proceedings on the ground that his findings in the Mowbray proceedings gave rise to a reasonable apprehension of pre-judgment in respect of the allegations concerning BATAS's adoption of a document destruction policy. Judge Curtis dismissed the application.[4]

NSW Court of Appeal

The NSW Court of Appeal refused leave to appeal and dismissed a summons filed by BATAS seeking

prerogative relief in the nature of prohibition to prevent Judge Curtis from further hearing or determining Mrs Laurie's claim.[5]

Appeal to the High Court

The subsequent appeal to the High Court was allowed by Heydon, Kiefel and Bell JJ, French CJ and Gummow J dissenting. The apprehension of bias rule was articulated as follows: [6]

> The rule requires that a judge not sit to hear a case if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question that the judge is required to decide.

The function of the rule was explained in this way:[7]

> It is fundamental to the administration of justice that the judge be neutral. It is for this reason that the appearance of departure from neutrality is a ground of disqualification.[8] Because the rule is concerned with the appearance of bias, and not the actuality, it is the perception of the hypothetical observer that provides the yardstick.

The court held that the hypothetical fair-minded observer is a lay person who, in a case of alleged pre-judgment, is assumed to have knowledge of the earlier decision and to have read the reasons for such decision.[9] In some cases (though not in the instant case), it might be appropriate to assume that the hypothetical observer has taken into account later statements by the judge which withdraw or qualify earlier comments that might otherwise indicate pre-judgment.[10] The hypothetical observer understands that the judge is a professional judge but is not presumed to reject the possibility of pre-judgment.[11]

In contrast to French CJ and Gummow J, the plurality was of the view that the finding of fraud in the Mowbray proceedings was expressed without qualification or doubt (save for an acknowledgment that different evidence may be led at trial) and, while the judge did not use violent language, he expressed himself in terms which indicated extreme scepticism about BATAS's denials and strong doubt about the possibility of different material explaining the difficulties faced by the judge.[12] Further, the nature of the fraud finding was extremely serious and it was a finding of actual persuasion of the correctness of that conclusion.[13] In such circumstances, a reasonable observer might apprehend that, having determined the existence of the alleged document destruction policy in the Mowbray proceedings, Judge Curtis might not bring an impartial mind to those issues in the Laurie proceedings.[14]

None of the exceptions to the apprehension of bias rule – necessity, waiver or (possibly) special circumstances – applied.[15] As such, the court ordered that Judge Curtis be prohibited from further hearing or determining the Laurie proceedings.

By Jenny Chambers

Endnotes

1. Heydon, Kiefel and Bell JJ, French CJ and Gummow J dissenting.
2. *Brambles Australia Ltd v British American Tobacco Australia Services Ltd; Re Mowbray (No 8)* (2006) 3 DDCR 580 at 602 [56].
3. *Brambles Australia Ltd v British American Tobacco Australia Services Ltd; Re Mowbray (No 8)* (2006) 3 DDCR 580 at 599 – 601 [45], [52], [53]. Relevant passages are reproduced in *British American Tobacco Australia Services Ltd v Laurie* [2011] HCA 2 at [120].
4. *Laurie v Amaca Pty Ltd* [2009] NSWDDT 14.
5. *British American Tobacco Australia Services Ltd v Laurie* [2009] NSWCA 414 (Tobias and Basten JJA, Allsop P dissenting).
6. Heydon, Kiefel and Bell JJ at [104].
7. Heydon, Kiefel and Bell JJ at [139]. See also French CJ at [1], [32] – [37].
8. Heydon, Kiefel and Bell JJ at [139], citing *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 344 – 345 [6]-[7] per Gleeson CJ, McHugh, Gummow and Hayne JJ; *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 at 77 [66] per Gummow, Hayne and Crennan JJ .
9. Heydon, Kiefel and Bell JJ at [140], French CJ at [50] – [51], Gummow J at [97].
10. Heydon, Kiefel and Bell JJ at [136] – [139], French CJ at [52].
11. Heydon, Kiefel and Bell JJ at [144].
12. Heydon, Kiefel and Bell JJ at [145].
13. Ibid. In the *Mowbray* proceedings Judge Curtis found that BATAS had committed a fraud (thus satisfying s 125(1)(a) of the Evidence Act) when, for the purposes of the application, he equally could have found that there were reasonable grounds for finding that fraud had been committed so as to come within the terms of s 125(2)(a).
14. Ibid, agreeing with Allsop P in *British American Tobacco Australia Services Ltd v Laurie* [2009] NSWCA 414 at [8]- [11].
15. Heydon, Kiefel and Bell JJ at [146] – [152]. The plurality observed that, despite Judge Curtis having case-managed the Laurie proceedings for almost three years by the time that BATAS applied for the judge to disqualify himself, Mrs Laurie did not submit that the delay in bringing the recusal application amounted to a waiver of BATAS's rights. The appeal did not raise for consideration the question of what special circumstances might justify a judge sitting to determine a case despite being reasonably suspected of having pre-judged an issue.

Competition and Consumer Act 2010

By Victoria Brigden

On 1 January 2011, the *Trade Practices Act 1974* (Cth) became the *Competition and Consumer Act 2010* (Cth). The changes to the Act went far beyond its title. A detailed review and analysis of the changes is beyond the scope of this article. Rather, the aim of this article is to provide a brief overview of the new statutory regime, and to provide readers with guidance as to where to locate key former provisions of the Trade Practices Act in the new Act.

Overview of the changes

The changes to the legislative trade practices regime were brought about in two phases. First, the *Trade Practices Amendment (Australian Consumer Law) Act (No 1) 2010* was assented to on 14 April 2010, with all provisions commencing by 1 July 2010. The major development introduced by this Act was the introduction of a national legislative scheme relating to unfair terms in standard-form consumer contracts. Secondly, the *Trade Practices Amendment (Australian Consumer Law) Act (No 2) 2010* was assented to on 13 July 2010. Most provisions of that Act commenced on 1 January 2011. Major changes brought by that Act include the following:

- the introduction of a national product safety law, which ensures the national application of permanent product bans and mandatory safety standards apply nationally (although states and territories retain recall and temporary ban measures);
- amendments to the old s 51A of the Trade Practices Act, now s4 of the Australian Consumer Law (located in Schedule 2 to the Act) (ACL), to reverse the effect of some past decisions in relation to the section;
- amendments to the old s52 of the Trade Practices Act, now s 18 of the ACL, so that the prohibition on misleading and deceptive conduct applies not only to corporations but to persons generally;
- the introduction of a national legislative scheme for statutory consumer guarantees to replace conditions and warranties that are implied into consumer transactions by the former Trade Practices Act and corresponding state and territory legislation;
- the inclusion of a single set of enforcement powers, penalties, remedies and redress provisions applicable to breaches, which applies nationally; and
- the provision of increased powers for the ACCC and other Commonwealth agencies and increased surveillance enforcement powers in the product market.

The Australian Consumer Law will only apply to transactions taking place from 1 January 2011. The previous national, state and territory legislation continues to apply to transactions taking place prior to that date.

Changes to the structure of the Competition and Consumer Act

The structure of the Competition and Consumer Act is substantially similar to that of the Trade Practices Act, except that the former Part V of the Trade Practices Act (relating to consumer protection) is no longer located in the body of the Act, and instead forms part of the ACL, located at schedule 2 to the Act. The old Part VA (liability of manufacturers and importers of defective goods) and Part VC (offences) are also no longer in the text of the Act, but are now located in Parts 3–5 and Chapter 4 of Schedule 2 to the Act.

The key provisions in Part VI (Enforcement and Remedies) of the Trade Practices Act, such as s 80 (injunctions), s 85 (defences), s 86 (jurisdiction of courts), and s 87 (other orders) remain in the new Act, with some amendments. However, the old defences provision under s 85 has now been amended such that the section now provides only for the defence of acting honestly and reasonably in relation to conduct in contravention of Part IV. The former defences set out in s 85 relating to conduct in contravention of Part V are now contained in Chapter 5 of Schedule 2, for example, the publisher's defence, formerly located at s 85(3) of the Act is now at clause 251 of Schedule 2.

Rather unhelpfully, this means that practitioners must learn the new section numbers of the old Part V provisions, yet cumbersome numbering of sections in

respect of other parts of the Act remains, for example, s 44ZZOA.

The Australian Consumer Law

The ACL is split into five chapters.

Chapter One is introductory and sets out various definitions, including the definition of consumer (clause 3). The former s 51A (misleading representations with respect to future matters) is now clause 4 of the Schedule. It still includes the rebuttable presumption that a person is taken not to have had reasonable grounds for making a representation with respect to any future matter unless evidence has been adduced to the contrary, but it has now been amended to provide that the presumption does not mean that merely because a person adduces evidence to the contrary, the person has been taken to have reasonable grounds for making it. The section also specifies that the provision does not have the effect of placing an onus upon any person to prove that the person who made the representation had reasonable grounds for making it.

Chapter Two sets out general protections in relation to misleading or deceptive conduct (part 2-1), unconscionable conduct (part 2-2) and unfair contract terms (part 2-3). This chapter includes the former section 52 (misleading or deceptive conduct), which is now found at clause 18 of Schedule 2. The only changes to the section include the substitution of the word 'person' for 'corporation', and the word 'must' for 'shall'. 'Person' is defined in the Act to include a partnership. Section 19 sets out the application of the section to information providers.

The unfair contract terms provisions (contained at clauses 23 to 28 of Schedule 2) provide that a term of a standard form consumer contract is void if the term is unfair. The meanings of 'consumer contract' and 'unfair' are set out, along with examples of terms of consumer contracts which 'may be unfair' in clause 25. Clause 27 sets out factors the court must take into account in determining whether a contract is a 'standard form contract'.

Chapter Three sets out specific protections in respect of unfair practices (part 3-1), consumer transactions (part 3-2, which deals with consumer guarantees and unsolicited consumer agreements), safety of consumer goods and product related services (part 3-3) information standards (part 3-4) and liability of manufacturers for goods with safety defects (part 3-5).

The former ss 53 (false or misleading representations in relation to the supply of goods or services), 53A (false or misleading representations in relation to land) and 53B (false or misleading representations in relation to employment) are now found at clauses 29, 30 and 31 in part 3-1 with significant expansions.

Chapter Four sets out offences relating to unfair practices (part 4-1), consumer transactions (part 4-2), safety of consumer goods and product-related services (part 4-3), information standards (part 4-4), substantiation notices (part 4-5), defences to the offences (part 4-6), and miscellaneous provisions (part 4-7).

Chapter Five relates to enforcement and remedies, and includes provisions relating to defences to conduct in breach of Part 2-1 and 2-2 or Chapter 3 (formerly found in s85 of the Trade Practices Act).

For further information about the ACL, please see the ACCC website at www.accc.gov.au and in particular, the 'Australian Consumer Law – Ready Reckoner' quick-reference guide.

The influence of Sir James Stephen on the law of evidence*

By J D Heydon

Stephen's career in summary

He was the grandson of James Stephen, who assisted his brother-in-law, William Wilberforce, in the campaign to end the slave trade. He was the son of Sir James Stephen, under-secretary of the Colonial Office from 1836 to 1847, who played a key role in the abolition of slavery itself, drafted the Slavery Abolition Bill in 48 hours in 1833, and was acclaimed by Deane and Gaudron JJ for anticipating the doctrine there recognised by 150 years.[1] His younger brother, Leslie Stephen, became a highly respected man of letters, and was the father of Vanessa Bell and Virginia Woolf. His eldest daughter was the first principal of Newnham College, Cambridge. He and his family were or became related to many leading intellectual and political figures like members of the Macaulay, Dicey, Trevelyan, Strachey and Thackeray families, and knew or came to know many others – for example, Carlyle (whose executor Stephen became), Maine (who taught him while he read for the bar), J A Froude, Harcourt and G H Lewes. He was educated unhappily at Eton. He claimed there to have learned 'the lesson that to be weak is to be wretched, that the state of nature is a state of war, and *Vae Victis* the great law of nature.'[2] He then went briefly to Kings College, London on his way to Trinity College, Cambridge. He left that latter university prematurely. He then read for and was called to the bar. Being conscious of the slightness of his legal education, he then read for an LLB from the University of London. In 1855 he married, and was to have nine children, of whom four predeceased him.

Until 1869 he practised at the bar on the Midland Circuit. Success was at best mild and inconstant. He did, however, appear in two causes célèbres. One was the defence, with mixed results, of the Rev Rowland Williams at trial on charges of heresy, one relating to a denial of punishment in the next world.[3] Stephen did not appear on Williams's successful appeal to the Privy Council,[4] when in the words of a mock epitaph, Lord Westbury LC had:

> … dismissed Hell with costs
>
> And took away from orthodox members of the Church of England
>
> Their last hope of everlasting damnation. [5]

The other cause célèbre took place later in the decade, when Stephen was involved in the unsuccessful attempt to prosecute Edward Eyre, governor of Jamaica, for murder after his savage suppression of rioting in that colony in 1865.[6] His ability struck a young and then quite unknown screw manufacturer, Joseph Chamberlain, for whose firm he acted in a patent arbitration in the later 1860s.[7] In 1863 he published *A General View of the Criminal Law of England* – an able and original work, still well worth reading. Although it was not intended for students or practitioners of law, Mr Justice Willes 'kept it by him on the bench, … laid down the law out of it', and called it a 'grand book' .[8] Stephen took silk in 1868. In the same year he produced the seventh edition of *Roscoe' s Digest of the Law of Evidence in Criminal Cases*. Throughout the 1850s and 1860s he published an enormous quantity of the higher journalism on a range of subjects, partly because of financial pressure and partly because of a strong urge to mould public opinion.

On the recommendation of his predecessor, Maine, Stephen was in 1869 appointed as legal member of the viceroy's Legislative Council in India – for five years, though he only stayed two and a half. That body comprised the most senior British officials in India, some

unofficial members and a couple of Maharajahs. It was unelected. It was not responsible to any legislature save, indirectly, the Imperial Parliament at Westminster. But for the rest of his life Stephen admired its unity of purpose, the expertise of the officials it relied on, and its efficiency. He there drafted twelve Acts and had a part in eight other enactments. Among his leading achievements were the *Indian Evidence Act 1872*[9] and the *Indian Contracts Act 1872*.[10] His term of office was regarded as an astonishing triumph by most contemporary and subsequent Indian and English opinion.[11] His career had turned the corner.

He returned to the bar in 1872 and practised there until 1879. In 1873 he published *Liberty, Equality, Fraternity*, an attack on John Stuart Mill. He resumed periodical journalism. But he also prepared an evidence code, a homicide code and a criminal code, introduced into parliament but not enacted, respectively, in 1873,[12] 1872 and 1874[13] and 1878-1882.[14] From 1875 to 1879 he was professor of common law at the Inns of Court. He published *A Digest of the Law of Evidence* in 1876,[15] which ran into 12 editions, *A Digest of the Criminal Law (Crimes and Punishments)* in 1877, which ran into seven editions, and, with his brother, Herbert Stephen, *A Digest of the Law of Criminal Procedure in Indictable Offences* in 1883. From 1879 to 1891 he served as a judge of the Queen's Bench Division. Despite the hard labours and harder responsibilities of that post, and despite other calls on his time, in 1883 he published *A History of the Criminal Law of England* in three volumes – a work some have criticised, but not the immortal Maitland.[16]

Up to this point in his life – when he was aged 54 – his prodigious labours had been sustained by excellent physical and mental health. But from this point onwards his health and vigour began to decline.[17] He seemed to find the burdens of judicial office, particularly in capital trials, oppressive. He still managed to publish, in 1885, *The Story of Nuncomar and the Impeachment of Sir Elijah Impey*, a defence of Chief Justice Impey against Macaulay's charge that he had committed judicial murder during the time of Warren Hastings's governorship of Bengal. But in that year he had his first stroke.[18] Six years later ill health compelled his retirement. Three years after that he died at the age of 65. He might have lasted longer if he had managed his life more carefully.

On 21 November 1877, Leslie Stephen wrote of his brother to the future Mr Justice Holmes: 'Nobody has worked harder for every step & has been less favoured by good luck.' [19] The second limb of that statement is probably true. The first limb is certainly true. All his life he recklessly and prodigally expended titanic energy in everything he did. These efforts led Stephen to become a towering figure in late Victorian England. For example, although Stephen's political activities had not extended beyond unsuccessful attempts to achieve election to the House of Commons in the Liberal interest in 1865 for the seat of Harwich and 1873 for Dundee (when he was bottom of the poll, with about 10 percent of the votes),[20] the dying Disraeli in 1881 told Lord Lytton: 'It is a thousand pities that J F Stephen is a judge; he might have done anything and everything as leader of the future Conservative Party.'[21] In 1873 Sir John Coleridge, Liberal attorney-general, urged the prime minister, W E Gladstone, to appoint Stephen, then aged 44, as solicitor-general on the ground that he 'is a very remarkable man with many elements of greatness in him.'[22] The vacancy in fact went to another highly regarded coming man, Sir Henry James. Stephen became regarded as a great authority on legal and Indian affairs. He had been the secretary of a royal commission on education in 1858-1861, he sat on royal commissions on copyright (1875 and 1876) and he sat on commissions on fugitive slaves (1876) and extradition (1878). He gave a great deal of advice to Lord Lytton, viceroy of India from 1876 to 1880. He was heaped with academic honours, both English and European, and state honours.

Stephen's appearance and character

Stephen was a man of striking and formidable personality. A Cambridge friend observed:

> his singular force of character, his powerful … intellect, his Johnsonian brusqueness of speech and manner, mingled with a corresponding Johnsonian warmth of sympathy with and loyalty to friends in trouble or anxiety, his sturdiness in the assertion of his opinions, and the maintenance of his principles, disdaining the smallest concession for popularity's sake. [23]

Until his decline late in life, those qualities never changed. He had a 'resounding, deep bass voice' and a 'knock-down manner'.[24] Radzinowicz said: 'In physical appearance [Stephen] bore a strong resemblance to a cliff, and his mental makeup was no less craggy.'[25] The warmth and affection he displayed in private life contrasted with his public image:

> A head of enormous proportions is planted, with nothing intervening except an inch-and-a-half neck, upon the shoulders of a giant. Force is written upon every line of his countenance, upon every square inch of his trunk … [H]e lacks geniality and play of fancy, but in their stead he has a grim and never-flagging perception of what he means and what he wants … [He treats] toil as if it were a pastime.[26]

Lytton Strachey, nephew of his friend John Strachey, said: 'His qualities were those of solidity and force; he preponderated with a character of formidable grandeur, with a massive and rugged intellectual sanity, a colossal commonsense.'[27] He was 'Johnsonian' not only in conversational style – the Johnson who said: 'Well, we had a good talk', to which Boswell replied: 'Yes, sir, you tossed and gored several persons.' He was also Johnsonian in his conservatism, his moral interests, his tragic sense of life, his contempt for praise.[28] He had a pitiless dislike for what he saw as sentimentality.[29] He did not merely refuse to evade unpleasant consequences, he welcomed them. He was a master of many methods of thought and styles of writing – precise analysis, vitriolic ridicule, ferocious invective, soaring rhetoric. Radzinowicz said of him:

> There was a puritan side to Stephen; and his Puritanism derived viability from an almost physiologically reasoned acceptance of the survival of the fittest. He was convinced of the damned unworthiness of mankind and of their incurable apathy towards salvation. He was a preacher of the inevitability of pain and sorrow, our everlasting companions from the cradle to the grave, and of the individual insignificance of human life, especially when conceived, felt and assessed in terms of a pleasurable experience. [30]

His whole life was dedicated to duty as he saw it. For him virtue and happiness flowed only from active, restless and endless struggle:

> He could see no alternative for mankind but to lead a life of submissiveness and rectitude, in heroic self-abnegation, like a regiment of soldiers engaged in battle, or a ship's crew bringing their cargo home in the teeth of a tempest.[31]

What is to be made of the many paradoxical aspects of Stephen's career? For it is paradoxical that a man who did so badly at Cambridge that he chose to leave prematurely because he knew he would never do well enough to be elected a fellow ended up writing two books on criminal law that continue to be read many decades after those of his contemporaries have ceased to be. It is paradoxical that a man whose long career at the bar wavered between failure and insecurity wrote three books – his digests – that influenced generations of barristers. It is paradoxical that so successful a legislator in India departed halfway through his term to spend the next decade failing to persuade the Westminster Parliament to follow suit. It is paradoxical that a man with his unpopular views on the government of India devised so many laws for India that are still in force today. It is paradoxical that someone who was never elected to any public position achieved a great national reputation based only on highly specialised legal studies and polemical periodical journalism. What was the key to this strange life? That is not a question for examination this evening. Instead the question is: what was Stephen's influence?

It is paradoxical that a man whose long career at the bar wavered between failure and insecurity wrote three books – his digests – that influenced generations of barristers.

The question can be approached from eight angles, some overlapping. They are: barrister, academic lawyer, publicist, political thinker, judge, criminal lawyer, advocate for codification and evidence lawyer. The first seven will be dealt with only briefly.

One: Stephen's influence as barrister

It seems that Stephen was a distinguished speaker, and a better barrister than solicitors thought him to be. His oratory at the Cambridge Union brought him some fame.[32] Chamberlain regarded his final address

in the arbitration in which he had engaged Stephen as 'most masterly'.[33] Mr Justice Wills remarked in open court that Stephen had defended an accused person, charged with murder, 'with a force and ability which, if anything could console one for having to take part in such a case, would do so', and a newspaper report of Stephen's speech at that trial stated that it 'kept his audience listening "in rapt attention" to one of the ablest addresses ever delivered under such circumstances'.[34] Leslie Stephen informed his friend, the future Mr Justice Holmes, in a letter of 25 June 1868, that his brother's 'talent is specially in the speaking line'.[35] An address by Stephen at Eton in the late 1870s had so powerful an impact on George Nathaniel Curzon, future viceroy of India, that Curzon recalled it all his life.[36] But whether or not he could be called 'great' as an advocate, he established no school. No particular tradition flows from him.

Second: Stephen's influence as academic lawyer

Stephen's time as an academic lawyer tends to be overlooked. But his tenure has some significance. To begin with, it seems that he was a successful teacher. His professional achievements as counsel gave him the background for it.

It is almost certain that the sole mode of instruction adopted by Stephen as professor of common law at the Inns of Court was lecturing. Someone of impressive physique and forceful personality who was good at riveting the attention of juries, judges, large assemblies and small groups is likely to have been capable, with practice, of lecturing well.

According to Leslie Stephen:

> He invariably began his lecture while the clock was striking four and ceased while it was striking five. He finally took leave of his pupils in an impressive address when they presented him with a mass of violets and an ornamental card from the students of each inn, with a kindly letter by which he was unaffectedly gratified. His class certainly had the advantage of listening to a teacher who had the closest practical familiarity with the working of the law, who had laboured long and energetically to extract the general principles embedded in a vast mass of precedents and technical formulas, and who was eminently qualified to lay them down in the language of plain commonsense, without needless subtlety or affectation of antiquarian knowledge. [37]

But Stephen's career as a teacher of law was only part-time, and too short to enable him to build up the kind of reputation which leads to influence. Its real significance is that it stimulated his interest in other activities in which he did establish a solid reputation – his digests and codes.

Third: Stephen's influence as publicist

Sir Keith Thomas recently remarked:

> By the end of the century, there had emerged in Britain a recognisably modern academic profession. The torch of literary culture, previously carried by the metropolitan man of letters and the serious Victorian periodical, was taken over by the professor and the learned journal. [38]

Stephen was a bridge between those two worlds. One of the many torches Stephen carried was the torch of literary culture, taking that expression in a broad sense. He was certainly a metropolitan man of letters. And if ever a man helped keep the serious Victorian periodical going, it was him. Although those activities were largely anonymous, it was through them that he first became well-known. Despite the bar being supposedly his primary career, between his youth in the early 1850s and his decline in the late 1880s, save for the period from 1869 to 1872 in which he was in India, he contributed on a prodigious scale to serious Victorian newspapers and periodicals, some published daily or weekly or fortnightly, some monthly, some quarterly. Some of the articles in those periodicals were on legal subjects, and there were also learned publications on legal questions in legal journals. In addition, he wrote numerous letters in his characteristically dramatic style to *The Times* in the 1870s and 1880s on Indian and Irish affairs. The quantity of these periodical contributions was enormous. For example, between 1865 and 1869 he contributed approximately 850 articles, 200 notes and 50 letters to *The Pall Mall Gazette*.[39] Between 1855 and 1868 he contributed at least 200 articles and notes to *The Saturday Review*.[40] Their range was wide, extending far beyond legal subjects to literary, historical, ecclesiastical and philosophical topics. At least to this reader, the quality seems high. Leslie Stephen, on the other hand, criticised them in various respects. Thus he said of the 55 articles published in *The Saturday Review* in the 1860s and collected in *Horae Sabbaticae* (1892):

> These articles deal with some historical books which interested him, but are chiefly concerned with French and English writers from Hooker to Paley and from Pascal to De Maistre, who dealt with his favourite philosophical problems. Their peculiarity is that the writer has read his authors pretty much as if he were reading an argument in a contemporary magazine. He gives his view of the intrinsic merits of the logic with little allowance for the historical position of the author. He has not made any study of the general history of philosophy, and has not troubled himself to compare his impressions with those of other critics. The consequence is that there are some very palpable misconceptions and failure to appreciate the true relation to contemporary literature of the books criticised. I can only say, therefore, that they will be interesting to readers who like to see the impression made upon a masculine though not specially prepared mind by the perusal of certain famous books, and who relish an independent verdict expressed in downright terms without care for the conventional opinion of professional critics. [41]

Although Leslie Stephen seemed to intend a pejorative element in the last sentence, the qualities there referred to may be thought to be quite attractive ones. Leslie Stephen also informed Charles Eliot Norton on 23 September 1894 that in fields of which he did not know much, his brother was 'like an elephant trampling through a flower garden'.[42] On the other hand, in the same letter he spoke of his brother's 'extraordinary powers'. On 19 May 1894 he told Norton that his brother was 'a very big man, with a great deal to say that was very valuable, even when he was apparently outside his proper ground.' [43]

There is considerable force in what Maitland said of Leslie Stephen's biography of his brother:

> a trifle too much may have been written of the great jurist's 'limitations' …. [T]hose who are better able than Leslie was to appraise what Fitzjames did in the field of law and legal history will wonder at the amount of vigour, industry and literary power that was displayed by him in other provinces. [44]

But Stephen as a publicist has had no influence beyond his own age. In his own lifetime he published four volumes containing 88 of his articles from *The Saturday Review*.[45] These volumes have not been reprinted, nor have any of his other articles. His position is similar to that of his contemporary at Eton, another of history's losers, Robert Cecil, future Marquess of Salisbury and prime minister,[46] whose many articles in *The Saturday Review*, *The Quarterly Review* and other journals were republished only to a small degree in book form shortly after his death,[47] and never reprinted. Yet in the case of both Stephen and Salisbury the enterprise of republication of all their works, or at least significant parts of them, would be at least as worthwhile as enterprises which have been or are being carried on in our age – the publication of the whole of Gladstone's often fragmentary diaries, and the publication of the whole of Disraeli's often trivial letters.

Fourth: Stephen's influence as political thinker

The most striking product of Stephen's role as a polemical journalist was *Liberty, Equality, Fraternity*, a collection of articles composed while, and after, returning from India, originally published in *The Pall Mall Gazette*, a daily newspaper, and appearing in book form in 1873, with a second edition in 1874.[48] Its lack of influence may be gauged from the fact that there was no further edition until 1967. There was a brief revival of interest in the work during the 'Hart-Devlin' controversy of the 1950s and 1960s. H L A Hart said in 1962[49] of *Liberty, Equality, Fraternity* and Sir Patrick Devlin's Maccabean Lecture on 'The Enforcement of Morals'[50] in 1959: 'Though a century divides these two legal writers, the similarity in the general tone and sometimes in the detail of their arguments is very great.' Devlin, having never read *Liberty, Equality, Fraternity*, was not conscious of any influence, and could only obtain a copy from the Holborn Public Library 'with great difficulty'; it was 'held together with an elastic band'.[51] John Roach, a sympathetic analyst of the work in the 1950s, said it was 'not easy to come by'.[52] The book has been described as the 'finest exposition of conservative thought in the latter half of the 19th century'.[53] Even a foe like Hart thought it ' sombre and impressive'.[54] It is an attack on various of the writings of John Stuart Mill and his sympathisers, particularly *On Liberty*. But Leslie Stephen put his finger on a difficulty in grasping its virtues. On 30 March 1874 he wrote to Charles Eliot Norton: ' It is good hard hitting, but I think rather too angry, and not intelligible unless one remembers all that he said, and all that they said – which one doesn't.'[55] Naturally, modern readers are even less able to remember all that Stephen said, let alone

all that his critics and targets said. However, its bleakly unsentimental hostility to democracy and liberalism only shocks such few modern readers as it has. It is of outstanding quality, but quite lacking in influence.

Fifth: Stephen's influence as judge

Stephen retired from judicial office in 1891 after Lord Coleridge CJ drew to his attention press criticisms of his performance, which led him to seek medical advice and to resign in consequence of it. The justice of this criticism of his closing years on the bench has been questioned,[56] but it has tended to overshadow his judicial reputation as a whole. There seems to be no doubt about his capacity to control his court. His 'strong physique, and the deep voice which, if not specially harmonious, was audible to the last syllable in every corner of the court, contributed greatly to his impressiveness.'[57] Twining described him as 'a forceful, if somewhat simple-minded, judge'.[58] Radzinowicz more justly said that Stephen's judgments had the same characteristics as his other work – ' an uncanny faculty for sifting the grain from the chaff, for brushing aside a multitude of details, irrelevant, inconsistent and confusing, and for dissecting out the nucleus of a legal argument.'[59] But while he was a criminal judge of real quality, he sat towards the end of a period which Sir Owen Dixon thought the future would hold to be the 'classical epoch' of English law . Sir Owen's ground was that '[a]mong legal historians, jurists and judges of that period the qualities of scholarship, penetration, clearness of exposition and felicity of expression appeared to an extent and in a degree that had not before been equalled.'[60] These qualities were revealed in Stephen's judgments, but not so as to make them pre-eminent amongst those of his contemporaries. Another factor which may have led to a discounting of Stephen's judgments is that on the bench he appears to have thought it right to have diluted and restrained the striking literary style he employed for other purposes.

Cross praised Stephen's judgments in crime thus:

> No one interested in *mens rea* can ignore Stephen J in *Tolson*[61] just as no one interested in possession can ignore his judgment in *Ashwell*.[62] The summings-up in *Doherty*[63] and *Serné*[64] are important on drunkenness and the felony-murder rule respectively, but none of these cases is a landmark in the sense in which *Rylands* v *Fletcher*[65] and *Donoghue* v *Stevenson*[66] are landmarks in the law of tort. Indeed, *Woolmington*[67] apart, it may be doubted whether there are any such cases in the criminal law. In the absence, until 1907, of a satisfactory appellate jurisdiction, the subject has been built up by judicial practice, legislation and authoritative textbooks rather than by climacteric judgments. [68]

In short, nisi prius judges largely engaged in trying crime, in the period before the Court of Criminal Appeal was introduced in 1907, tended to lack the opportunities to achieve a reputation which were open to those involved in civil non-jury work, like Sir George Jessel MR, or appellate work, like Bowen LJ. Despite the clouds over Stephen's judicial achievement, no thorough study of it has ever been undertaken, and the time for dispelling those clouds or identifying them precisely will not arrive until it is undertaken.

An estimate of Stephen's judgments on evidence will be postponed to a consideration of his influence on that subject as a whole.

Sixth: Stephen's influence on criminal law

As recently as 2005, Lord Bingham of Cornhill, in discussing the scope of duress, referred approvingly to Stephen's 'immense experience'.[69] That experience has generated respect. Respect has brought Stephen influence in this field. That influence proceeded down three channels. One was the influence of his judgments – limited, but real. A second and greater influence lay in his bills for a homicide code and a criminal code. Neither were enacted, but the latter had substantial influence on legislation adopted in Canada in 1892, New Zealand in 1893, Queensland in 1899,[70] Western Australia in 1902, Tasmania in 1924 and the Northern Territory in 1983. Thus Stephen's criminal code, despite rejection in England, has been the primary influence on the criminal law of half the North American continent and most of Australasia. Thinly populated though these vast territories might be, this was not a trivial achievement.[71] A third was the extensive literature he produced on criminal law, particularly *A General View of the Criminal Law of England* (1863) and *A History of the Criminal Law of England* (1883). Here some of his personal ideas were more striking than influential, for example his theory that the primary goal of punishment is not reform, deterrence,

incapacitation or retribution, but strengthening society and respect for the rule of law by denouncing the wrong done[72] – although Cross, writing in 1978, thought this was still influential with English judges.[73] Others of his proposals for change have come to pass many years after his death, though it is uncertain whether a direct line of influence is always traceable – abolition of the felony-murder rule (a campaign he began in 1857 and continued for over 20 years[74]), abolition of the felony-misdemeanour distinction, abolition of marital coercion, the recognition that words may constitute provocation, and simplification of the law of theft. Some of his ideas were rejected by future lawmakers. In 1883 he expressed the view that the criminal law should recognise a defence of necessity of the kind rejected the next year by the decision of five judges of the Queen's Bench Division in *R v Dudley and Stephens*.[75] Perhaps inconsistently, he did not favour a defence of duress, although he did consider that the lessened moral guilt of an accused person who committed a crime under duress should be punished less severely.[76]

Seventh: Stephen's influence on codification

Despite his failures to persuade parliament to enact his homicide, evidence and criminal codes, he had a marked indirect influence by changing the climate of opinion. Mr Justice Holmes rightly called him 'the ablest of the agitators for codification'.[77] It is doubtful whether major English commercial statutes like the *Bills of Exchange Act 1882*, the *Partnership Act 1890* or the *Sale of Goods Act 1893*, which were widely copied throughout the common law world, and remain in force essentially in their original form to this day, would have been enacted but for Stephen's work in familiarising English legal opinion with the idea of codes. Sir Frederick Pollock, the framer of one of those statutes and the author of a Civil Wrongs Bill for India drafted in 1882-1886 which was never adopted,[78] said they were 'distinctly attributable to his example',[79] and this was also acknowledged by the framer of others, Sir Mackenzie Chalmers.[80]

Eighth: Stephen's influence on evidence

The sources of Stephen's influence on evidence are to be found to a limited extent in his decisions, but primarily in the *Indian Evidence Act* and his *Digest on the Law of Evidence*. He drafted an evidence code for England, but for reasons to be given, its influence has been nil.

Influence of Stephen's decisions

Some of Stephen's evidence decisions concern rules that have changed,[81] or are mere illustrations of established principle.[82] But others continue to be cited in that diminishing number of jurisdictions in which the common law of evidence has preserved its substantial immunity from codification or other statutory change – which rules out half the Australian jurisdictions, New Zealand and to some extent England. Some have interest in illustrating particular distinctions.[83] The principal judgment for which Stephen is remembered is *R v Cox and Railton*.[84] In that case he prepared the judgment of the court for Crown Cases Reserved (the other nine judges being Grove J, Pollock and Huddleston BB, Lopes, Hawkins, Watkin Williams, Mathew, Day and Smith JJ) on the exclusion from legal professional privilege of communications to guide or help the commission of crimes. The court saw the case as being 'of great general importance',[85] and it was argued twice, the second time before an enlarged court. The judgment contains a full analysis of authority, and has been cited many times since. It remains the leading case in jurisdictions where the common law prevails. However, it must be said that if Stephen's influence rested on his evidence judgments alone, it would be as slight as that which his brethren

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on the bench in *R v Cox and Railton* have had.

Direct influence of the Indian Evidence Act

The second source of Stephen's influence is the Indian Evidence Act. No one person has ever had so much influence on so important and far-reaching a piece of legislation affecting so many jurisdictions and so many people.[86]

The Indian Evidence Act, a compact, terse and forceful enactment, 69 pages in length. It is the result of a complex and subtle combination by Stephen of parts of English law, some adopted without change, some modified; parts of earlier Indian legislation, some adopted without change and some modified (particularly Act II of 1855 and to a much lesser extent the *Code of Criminal Procedure* of 1861); to a limited extent parts of an Evidence Bill 1868 prepared by the Indian Law Commission in London; and numerous original ideas of Stephen's own. It was to be applied to the circumstances of India – the home of many races, tribes, castes, privileged and exclusive callings, communities and classes, adhering to a wide range of creeds and customs, living in varied regions and climates, and speaking innumerable languages. Indian circumstances, various as they were, were very different from English circumstances. In particular, in India there was, and is, little use of jury trial. Evidence was a field in which nineteenth century English law had been heavily influenced by the use of juries.[87] Despite English evidence law having grown up in a jury environment, the adoption of parts of it by the Act has largely survived in the non-jury environment of India.

The Act was enacted, fifteen years after British rule had nearly been ended through force, by an imperial government which, while in some ways open and sensitive to public opinion, was not democratic, representative or responsible. The Act remained in force under the relatively authoritarian governments of the late nineteenth century, under governments increasingly liberalised by a movement towards democracy and by the introduction of federal government from 1935, and in the independent federal democratic republic which has existed since 1947. Yet its creator was opposed to democracy anywhere, and opposed to independence for India. He saw Imperial rule as the rule of a trustee – but the duration of the trust was, if not perpetual, at least indefinite. From time to time after he left India he made public pronouncements along these lines, offering, as Sir Penderel Moon said, a 'sophisticated exposition of the views of the man in the street'.[88] His opinions on how India should be governed politically, as distinct from judicially, may have corresponded with those of the man in the street in England, but they began to fall out of favour, both with English establishment opinion and with Indian opinion, almost from the time they were enunciated. Modernising trends of a revolutionary kind came to invalidate them – the introduction of Western ideas; the rise of the press; an increase in tertiary education; an acceleration of Indian participation in administrative and judicial work; the development of a middle class which favoured liberal democratic institutions; the unifying influence of the telegraph, the road, the canal and the railway; and the growth of capitalism on a scale which made India one of the world's largest commercial and industrial powers by 1918. Nonetheless the Act – the work of so great an imperialist as Stephen – was retained after British rule ceased in 1947.

After independence the Act was extended to, and remains in force in, the whole of the Republic of India (save for Jammu and Kashmir). It is also in force in Pakistan, Bangladesh, Sri Lanka and Burma. It has heavily influenced the laws of Malaysia, Singapore, Brunei, Kenya, Nigeria, Uganda, Zanzibar, parts of the West Indies and even, for a time, parts of Australia – the Christmas and Cocos (Keeling) Islands.

Some of the drafting has caused disputes. But the Act has never been repealed. Although it has been amended it has not been changed substantially. It was examined twice with great thoroughness by the Law Commission

of India, in 1977 and 2003, but no proposal for radical amendment was made then, or at any other time. It was enacted only for British India (and thus for places like Aden which were technically part of British India). But it also went into force in numerous other parts of India (in some of the princely states) before 1947. After independence the Act was extended to, and remains in force in, the whole of the Republic of India (save for Jammu and Kashmir). It is also in force in Pakistan, Bangladesh, Sri Lanka and Burma. It has heavily influenced the laws of Malaysia, Singapore, Brunei, Kenya, Nigeria, Uganda, Zanzibar, parts of the West Indies and even, for a time, parts of Australia – the Christmas and Cocos (Keeling) Islands. T O Elias said it 'is a model of its kind', and he said of Stephen's *A Digest of the Law of Evidence*, which was partly based on it, that it 'seems to have become a kind of model for nearly all subsequent colonial legislation on the subject'.[89] So Stephen's vision of evidence law continues by regulating the litigious affairs of nearly two billion people. His immense stature in India is captured by a saying of Mr Gopal Subramanium, solicitor-general for India: 'We in India think that Stephen wrote Keats's 'Ode on a Grecian Urn'.'

On the strength of the *Indian Evidence Act*, Stephen may be described as being in some senses the greatest evidence codifier since the age of Bentham – perhaps the greatest in history. What explicit influence has he had on his modern successors? Very little. In Australia, the 639 pages of the Australian Law Reform Commission's *Interim Report on Evidence* (1985) (ALR 26) refer to Stephen only in relation to relevance. The Report said:

> The attempt by Stephen to elucidate in detail particular types of relevant evidence, while providing a useful guide, tends to be misleading. Since relevance is largely a matter of logic and experience, and since the variety of relevance problems is co-extensive with the ingenuity of counsel in using circumstantial evidence as a means of proof, it is suggested that any attempt to detail the kinds of relevant evidence is doomed to failure. Questions of relevance cannot be resolved by mechanical resort to legal formulae. In the circumstances of each case, the judge must be allowed flexibility in evaluating the probabilities on which evidence turns. [90]

ALRC 26 also joined the long line of those who had criticised Stephen's 'declared relevance' technique.[91] The only work by Stephen referred to in the bibliography is the second edition (1890) of *A General View of the Criminal Law of England*, which, unlike the first, contained little material on evidence. The 320 pages of the Australian Law Reform Commission's *Final Report on Evidence* (1987) (ALRC 38) did not refer to Stephen at all. The controversial *Eleventh Report of the English Criminal Law Revision Committee on Evidence (General)* in 1972, which after many years has come to have a decisive impact on the modern statutory law of evidence in England, only referred to s 26 of the *Indian Evidence Act* (confessions made while in custody of a police officer only admissible if taken before a magistrate)[92] but declined to follow it, and quoted the criticism made in the *Digest*[93] of the common law rule permitting evidence of the good reputation of witnesses.[94] The Law Reform Commission of Canada did not mention Stephen – nor, indeed, anyone else – in its brief *Report on Evidence* (1975). The American Law Institute's *Model Code of Evidence* (1942) did not mention Stephen. Nor does he appear in the copious citations in the 1970 *Report of the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States*, which led to the Federal Rules of Evidence.

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But the influence of one lawyer can be felt by later lawyers even though the latter make no express acknowledgment of it, and even though the latter are unaware of it. An idea can insensibly enter the consciousness of an age, even when those who come to share it are ignorant of where it came from.

Some techniques in the *Indian Evidence Act* are suitable for Indian conditions, but not elsewhere (eg s 165). One or two are not suitable elsewhere, and have been changed (eg s 54) or read down (eg s 30) in India. But quite a number of techniques in the *Indian Evidence Act* have been adopted in the West. In the *Indian Evidence Act* Stephen followed the earlier abolition in India of the 'Exchequer rule' by Act II of 1855, s 57.[95] That is, he favoured the rule not adopted in criminal cases in England until 1907 that errors in admitting or rejecting

evidence should not justify an appeal being allowed if 'independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision' (s 167). But the 'Exchequer rule' began to depart the scene in England shortly after Stephen returned from India: it was abolished in civil cases by r 48 of the Rules enacted by the *Supreme Court of Judicature Act* 1873.[96] It is unclear whether this step was in imitation of s 167 of the *Indian Evidence Act*, or whether it followed the earlier Indian legislation on which s 167 was based, or whether it had an independent source.

The *Indian Evidence Act* also contained provisions (ss 32(2) and 34) for admitting business records not introduced in the West until many decades had passed. But the authors of those reforms do not seem to have used the *Indian Evidence Act* as an explicit source.

The modernity of the *Indian Evidence Act* can be illustrated in numerous other ways. The *Indian Evidence Act* relaxed the hostile witness rules in ss 154-155 in a manner very close to modern provisions like s 38 of the *Evidence Act 1995* (Cth). Section 157 also anticipated modern legislation permitting certain prior consistent statements to be used not merely on credit but as evidence of the fact. Section 58 anticipated modern legislation in permitting agreed facts in all cases, not merely non-felony cases. Section 158 anticipated modern legislation permitting challenges to the credit of hearsay declarants not called to give evidence. Section 19 widened the admissibility of statements by agents to a point beyond that marked in s 87(1)(b) of the *Evidence Act 1995*. Another example is s 132. The effect of s 132 was to abolish the common law rule that once a claim was successfully made in relation to self-incrimination, the witness was excused from answering and the evidence was unavailable. That common law rule had been subjected to various exceptions by English statutes commencing in 1849 in relation to bankrupts under compulsory examination. Under those exceptions, bankrupts could not claim the privilege, but the answers could only be given in prosecutions for offences against the bankruptcy law. A similar regime applied under various other statutes. That technique was adopted in Indian in s 32 of Act II of 1855, but on a completely general basis. Section 32 was substantially followed in s 132 of the *Indian Evidence Act*. The English exceptions were taken up in Australian state legislation in a manner which eventually led to s 128 of the *Evidence Act* 1995, which achieves a result equivalent to that achieves by Stephen in the *Indian Evidence Act*, and by the Indian precursor of 1855 on which he relied.

Another example of anticipation is found in s 24. It provided that, if an inducement was to preclude reception of a confession, the inducement had to be sufficient to give the suspect reasonable grounds to hope for an advantage or fear an evil. This was a marked break from the formality of the 'inducement' test at common law. Something like s 24 came to be the common law in England in the 1970s, and elements of s 85 of the *Evidence Act* 1995 correspond with s 24, at least in its general effect.

Another example of Stephen's anticipation of the *Evidence Act 1995*, s 41, was his concern for the protection of witnesses. In *A General View of the Criminal Law of England*[97] he criticised rules permitting excessive attacks on the credit of witnesses. He introduced s 148 of the *Indian Evidence Act*, which provides that the court has a discretion not to compel an answer to a question as to credit, and in exercising that discretion was to have regard to the following considerations:

> (1) Such questions are proper if they are of such a nature that the truth of the imputation conveyed by them would seriously affect the opinion of the court as to the credibility of the witness on the matter to which he testifies;
>
> (2) Such questions are improper if the imputation which they convey relates to matters so remote in time, or of such a character, that the truth of the imputation would not affect, or would affect in a slight degree, the opinion of the court as to the credibility of the witness on the matter to which he testifies;
>
> (3) Such questions are improper if there is a great disproportion between the importance of the imputation made against the witness's character and the importance of his evidence.

Section 149 then imposed what is usually thought of as an ethical obligation not to ask s 148 questions

unless there are reasonable grounds for thinking the imputation well-founded, and s 150 empowered the court to report the offending questioner to the appropriate professional disciplinary body. Although it is unorthodox to put provisions like ss 149-150 into a statutory code, and although an amendment was unsuccessfully moved in the Indian Legislative Council on 12 March 1872 to remove s 150, their inclusion is salutary. They back up Stephen's imperative of preventing an abuse of the power to cross-examine. On 12 March 1872 Stephen informed the Legislative Council:

> The Bill as originally drawn provided, in substance, that no person should be asked a question which reflected on his character, as to matters irrelevant to the case before the court, without written instructions; that if the court considered the question improper, it might require the production of the instructions; and that the giving of such instructions should be an act of defamation.… To ask such questions without instruction was to be a contempt of Court in the person asking them, but was not to be defamation.

This proposal caused a great deal of criticism, and in particular produced memorials from the Bars of the three Presidencies. [98]

Sections 148-150 represent a retreat from that position, but they do reveal Stephen as determined to enhance the dignity and fairness of trials from the point of view of the witness. In 1929 s 148 was adopted by Sankey LJ as reflecting English law in *Hobbs v Tinling (CT) & Co Ltd*.[99]

That is a relatively rare event. The *Indian Evidence Act* has not had much direct influence outside the jurisdictions in which it applies. The *Indian Evidence Act* has been discussed in the High Court of Australia a few times.[100] Section 25 was the subject of detailed argument by Sir Dingle Foot QC for the Crown in relation to the meaning of 'confession' in *Commissioners of Customs and Excise v Harz and Power* and this is reflected in the judgment of Thesiger J in the Court of Criminal Appeal and the speech of Lord Reid in the House of Lords.[101] A disquieting sign of changing times, however, is offered by *R v Horncastle*,[102] a decision on the compatibility of United Kingdom hearsay legislation with the European Convention on Human Rights. In Annex 1 the House of Lords surveyed the treatment of the hearsay rule in certain Commonwealth jurisdictions. But, despite the status of India within the former Empire and since independence, and despite the stature of Stephen, nothing was said about the *Indian Evidence Act*. This is simply an illustration of the profound, crippling and tragic amnesia which has increasingly come to afflict English legal memory ever since the United Kingdom entered Europe – that is, became merely part of a large Continental bureaucracy. Its courts no longer administer the law of their own country and the laws of an Empire from Westminster, but administer laws of foreign origin, sitting, as George Orwell put it in *Nineteen Eighty-Four*, in 'London, chief city of Airstrip One, itself the third most populous of the provinces of Oceania'.[103]

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Stephen has had more influence on writers. The early editions of *Cross on Evidence* contained criticisms of the common law hearsay exceptions which depended on the death of the declarant. Each of these criticisms had been met in s 32 of the *Indian Evidence Act*, and it is submitted that this circumstance prompted Cross's analysis. The Act has had some influence in the United States. The Act, and 'An Introduction on the Principles of Judicial Evidence' which Stephen published with it, are discussed in Wigmore occasionally, sometimes with high praise.[104]

The most striking feature of the *Indian Evidence Act* is its attempt to be clear and rational. While Stephen thought that the English law of evidence was 'full of the most vigorous sense, and is the result of great sagacity applied to vast and varied experience', he disliked its 'unsystematic character and absence of arrangement'.[105] Stephen saw the Act, and his other codificatory enterprises, not as freezing development, but as providing starting points for future growth in the law. Stephen thought that codes should be revised every ten years. He said:

> The process of codification consists in summing up, from time to time, the results of thoughts and experience. One of its principal merits is that in this w ay it continually supplies, or ought to supply, new points of departure; and this, instead of hampering or fettering the progress of the law towards the condition of a science, would contribute to it enormously. [106]

It is thus paradoxical that the Indian Evidence Act, though twice examined with great thoroughness by the Indian Law Commission, has never been systematically revised.

One aspect of the Indian Evidence Act turned out to be not only uninfluential, but much attacked. But a closely related feature of the Act has had near universal acclaim. It concerns Stephen's approach to relevance. The Act calls for three inquiries into relevance. First, s 5 makes evidence admissible if it goes to the existence of a fact in issue, which is defined in s 3 as meaning and including:

> any fact from which, either by itself or in connection with other facts, the existence, non-existence, nature or extent of any right, liability or disability, asserted or denied in any suit or proceeding, necessarily follows.

The Act does not describe this evidence as 'relevant', though it is a primary category of relevant evidence at common law, and Stephen's language is often relied on. Secondly, s 5 makes evidence admissible if it is 'declared to be relevant' under ss 6-9, 11 or 13-16. These are provisions which seek to express in statutory form the reasoning processes to be employed in relation to circumstantial evidence (including that major category known at common law as 'similar fact evidence'). Again, this is a type of relevance familiar at common law. Stephen claimed that these 'circumstantial evidence' sections were based on J S Mill's *System of Logic* (1843).[107] Practical comprehension of how they work, however, is assisted by reading the 'Introduction' to the Act published by Stephen in 1872. In it he explained how all the evidence in five murder cases would have been treated under the Act. Thirdly, the Act renders evidence admissible if it is 'declared to be relevant' by ss 10, 12 or 17-55. These provisions do not use the word 'relevant' in a common law sense. Rather their function is, for the most part, to codify various hearsay exceptions in a streamlined form – though the word 'hearsay' is not used in the Act.

In 1875, three years after the Act was enacted, a member of the Bombay Civil Service published a pamphlet – *The Theory of Relevancy for the Purpose of Judicial Evidence*. Its capable author, G C Whitworth, deserves to be more widely known. He criticised the Act in two respects. The first criticism was that the meaning of 'relevant' differed as between the 'circumstantial evidence' sections and the 'hearsay exceptions' sections. In the circumstantial evidence sections the word 'relevant' referred to the natural probative tendency of the evidence. In the hearsay exceptions sections the word 'relevant' referred to the question of whether inherently probative evidence should or should not be excluded for prudential reasons – reasons other than its lack of probative tendency. Employing the term 'relevant' in the latter context strained language. Whitworth's second criticism was that the theory of relevancy employed in the circumstantial evidence sections was too narrow. It rested on the view, stated in the 'Introduction', that relevance depended on a relationship of cause and effect. Yet one fact can be relevant to another, even though neither caused the other: they can be the effects of a single cause, for example.

Whitworth' s two criticisms were repeated by others over the next 20 years. The criticisms are generally thought to be sound. But the aspects criticised do not seem to have caused practical trouble in India. The

scheme has not been changed. This seems to be a result of Stephen's skilful transposition of hearsay exceptions into categories of evidence 'declared to be relevant'.

In 1876, in his *Digest*, Stephen generously accepted Whitworth's second criticism, and stated the definition of 'relevance' in Art 9 accordingly.[108] It provided:

> Facts, whether in issue or not, are relevant to each other when one is, or probably may be, or probably may have been
>
> the cause of the other;
> the effect of the other;
> an effect of the same cause;
> a cause of the same effect:
>
> or when the one shows that the other must or cannot have occurred, or probably does or did exist, or not;
>
> or that any fact does or did exist, or not, which in the common course of events would either have caused or have been caused by the other ….'

The following year Stephen modified this structure by abandoning that definition and inserting a new definition of relevance in Art 1.[109] That definition was:

> The word 'relevant' means that any two facts to which it is applied are so related to each other that according to the common course of events one either taken by itself or in connection with other facts proves or renders probable the past, present, or future existence or non-existence of the other.

There is here a combination of the elements of the definition in s 3 of the Indian Evidence Act and Art 9 of the *Digest* as it stood in 1876. That definition of relevance has been cited with approval innumerable times. Lord Oliver of Aylmerton said that 'relevant' could not 'be better defined',[110] and Brennan J agreed.[111] Other members of the High Court have approved it several times – in 1912,[112] 1998,[113] 2002[114] and in 2008.[115] The Privy Council approved it in 2003[116] and 2005.[117] So have members of the Supreme Court of Canada.[118] Despite the criticism in ALRC 26 of some aspects of Stephen's approach to relevance, the definition appearing in s 55(1) of the legislation modelled on the *Evidence Act 1995* (Cth) (which can be found in cl 43(1) of the Bill in ALRC 26 and cl 50(1) of the Bill in ALRC 38) was said by Gleeson CJ not to be materially different from that of Stephen in the *Digest*.[119]

Stephen's Digest

This discussion of Stephen's treatment of 'relevance' has moved from the Act to the *Digest*. What has been the influence of the *Digest* in other respects?

Stephen's *Digest* owed its origins to the following circumstances.

While in India he had decided that the works of the then current writers on evidence were unsatisfactory for use in India by practitioners or courts. That decision impelled his solutions in the Indian Evidence Act, particularly in relation to its structure and style. When he began lecturing on evidence at the Inns of Court, he concluded that those works were unsatisfactory for law students as well. Those works even now, with respect, are far from contemptible, and repay examination on particular points, but Stephen was right. The fourth edition of Starkie (*A Practical Treatise on the Law of Evidence*) was published in 1853, with 880 pages of text. The fifth edition of *Taylor on Evidence* published in 1869 was a substantial work in two volumes, containing 1,598 pages of text. The sixth edition, 1872, contained 1,596 pages of text. The fifth edition of *Best on Evidence* published in 1870 was 910 pages long. Stephen's own seventh edition of *Roscoe' s Digest of the Law of Evidence in Criminal Cases*, published in 1868, was 984 pages long. Of these works, Stephen said:

> The knowledge obtained from such books and from continual practice in court may ultimately lead a barrister to acquire comprehensive principles, or at least an instinctive appreciation of their application in particular cases. But to refer a student to such sources of information would be a mockery. He wants a general plan of a district, and you turn him loose in the forest to learn its paths by himself. [120]

When Stephen returned from India in 1872, the attorney-general, Sir John Coleridge, asked him to use the *Indian Evidence Act* as the basis for a bill for an evidence code for England. He had completed it by 7 February 1873.[121] Coleridge introduced the Bill to the House of Commons on 5 August 1873. He made a speech acknowledging Stephen's authorship, after saying:

> He had never proposed to do more with the Bill this Session than to introduce it, print it for the consideration of Members, and, if he should have the opportunity,

> endeavour to pass it into law in a future Session. [122]

The Bill – number 274 – was then withdrawn, and was never reintroduced after the fall of the Gladstone government. Despite Coleridge's statement that he proposed to print it, and Stephen's statement that he believed it was ordered to be printed,[123] it does not in fact appear to have been printed.[124] This author has never seen the 1873 bill, nor any discussion of it by anyone who claims to have done so. To examine a copy of it, if one still exists and can be located, would be of profound interest. On the evidence scholar it would have the same impact as the discovery of one of the lost books of Tacitus would have on the Roman historian. That is because it contained reforming elements, which, if we knew them, would reveal what Stephen thought English law ought to have been, as distinct from what he thought Indian law should be (as reflected in the Indian Evidence Act) and what he thought English law was (as reflected in the *Digest*).

Since the bill never proceeded and appears to have been lost, it had no direct influence on the law of evidence. But Stephen decided that his Evidence Bill could be used as the basis for a short work – *A Digest of the Law of Evidence*. He omitted the amendments to the law contained in the Evidence Bill, since, he claimed, the *Digest* was 'intended to represent the existing law exactly as it stands'. That statement is to some degree questionable, but the *Digest* is certainly much closer to received English law than the Indian Evidence Act. But the Privy Council was wrong to say, as it once did, that the *Digest* 'reproduced' the Indian Evidence Act 'in substance' for England.[125] They appear to have been misled by Stephen's statement in the first edition of his *Digest* that it was 'intended to represent the existing law exactly as it stands' – a reference to the *Digest*, not the Act. They may have been misled by Stephen's statements that the *Digest* was based on his Bill, and that the Bill 'was drawn on the model of the' Indian Evidence Act.[126] Many parts of the *Digest* are the same as the Indian Evidence Act, but many other parts diverge from it. This was partly because some of the origins of the Indian Evidence Act lay in earlier Indian legislation, and partly because Stephen often chose to modify English law. As just noted, the Bill probably diverged from Stephen's *Digest*. He saw the *Digest* as being:

'such a statement of the law as would enable students to obtain a precise and systematic acquaintance with it in a moderate space of time, and without a degree of labour disproportionate to its importance in relation to other branches of the law.' [127]

He also said:

> I have attempted … to make a digest of the law, which, if it were thought desirable, might be used in the preparation of a code, and which … will, I hope, be useful, not only to professional students, but to everyone who takes an intelligent interest in a part of the law of his country bearing directly on every kind of investigation into questions of fact, as well as on every branch of litigation. [128]

Although the *Indian Evidence Act* is different in detail from the *Digest*, the goal of each was similar, for Stephen's aim with the Act was as follows:

> By 'boiling down' the English law, and straining off all the mere technical verbiage, it would be possible to extract a few common-sense principles and to give their applications to practise in logical subordination and coherence. That which seems to be a labyrinth in which it is hopeless to find the way until experience has generated familiarity with a thousand minute indications at the various turning points, may be transformed, when the clue is once given, into a plan of geometrical neatness and simplicity. [129]

Maine in 1873 saw the object of the *Indian Evidence Act* as being:

> to alleviate the labour of mastering the law of Evidence, whatever form it might take, and, so far as might be possible, to place the civil servant overwhelmed by multifarious duties, the native judge and the native practitioner on a level with the English lawyers of the Presidency towns, who have hitherto virtually claimed a monopoly of knowledge on the subject. [130]

Stephen's goal was reflected in the speech of Sir George Campbell, lieutenant-governor of Bengal, to the Viceroy's Legislative Council on 12 March 1872. He justified the *Indian Evidence Act* as enabling a non-specialist judge who might not be on an equal footing with a specialist advocate to say: 'I am as good a man as you: if you raise a question of evidence, there is the law by which your question can be decided'.[131] The needs of legally untrained officials and Indian barristers who had not been educated in England had much in common

with those of law students.

The *Digest was* a short compact work, 184 pages in the first edition. It was organised into articles not unlike the sections of a statute or code, interspersed, like the *Indian Evidence Act*, with illustrations, and contained only limited citation of authority. Stephen understandably said of the work: 'The labour bestowed upon it has … been in an inverse ratio to its size.' [132] In terms of longevity at least, the *Digest* is one of the most successful students' works ever published. By 1936 there had been twelve editions, and the twelfth edition was reprinted with corrections in 1946 and with further corrections in 1948.[133] The 1948 version had grown, but only to 273 pages. Its structure and style had changed very little. In 1934 there was an adaptation for use in courts martial.[134] There were reprints in the United States.[135] There were numerous editions in the United States.[136] Some were published for particular jurisdictions, such as an edition in 756 pages published from the fifth English edition (1899) in 1904 for New Jersey, Maryland and Pennsylvania by George E Beers, assisted by Arthur L Corbin. There were local editions in other parts of the common law world, such as New South Wales.[137] It had some influence on Wigmore.[138] It had a large influence on other writers in the United States.[139] There are nineteenth and early twentieth century academic textbooks that have survived longer – for example, *Anson on Contract* (dating from 1876) and *Salmond on Torts* (dating from 1907). There are also practitioners' works of greater age, for example, *Chitty on Contracts* (dating from 1826), *Clerk and Lindsell on Torts* (dating from 1889) and *Dicey on the Conflict of Laws* (dating from 1896). But there are not many in either category. Few of those works changed as little from the form adopted in their first author's lifetime as Stephen's *Digest*. And, taking into account considerations of influence, a glance, for example, at the early English editions of Sir Rupert Cross' s *Evidence* will reveal how it affected that master of 20th century evidence law .

A full account of the influence of the *Digest* would depend on the performance of tasks which it may now be impossible to perform. One would be to discover how many copies of each edition and impression were sold, where and to whom. Another would be to work out which institutions prescribed it for use by law students. It may have been prescribed at the University of Sydney Law School, for example, as late as the early 1950s. Another would be a complete survey of all evidence cases since 1876 to see how often it was cited by the bar and by the bench.

There is certainly a steady stream of citation in the High Court. In 1907 O'Connor J did so in relation to the burden of proof.[140] In 1908 Isaacs J did so in relation to presumptions.[141] In 1913 Barton ACJ did so in relation to res gestae.[142] In 1915 Isaacs J did so in relation to presumptions.[143] In 1919 Barton, Isaacs and Rich JJ did so in relation to admissions of the contents of a document.[144] In 1928 Isaacs J did so in relation to satisfaction of the standard of proof,[145] and in relation to presumptions from silence.[146] In 1929 Starke J did so in relation to the meaning of evidence.[147] In 1931 Dixon J and Evatt J did so in relation to the competence of children to take oaths.[148] In 1936 Evatt J did so in relation to presumptions of fact,[149] and in relation to similar fact evidence.[150] In 1937 Evatt J did so in relation to the presumption of death.[151] In 1989 Toohey J did so in relation to *res gestae*.[152] In 2001 McHugh J did so in relation to admissibility of evidence by the accused.[153] In 2007 four justices did so in relation to the competence of the accused on summary charges.[154]

Counsel before the High Court have often quoted Stephen's Digest on such issues as circumstantial evidence;[155] burden of proof;[156] res gestae evidence;[157] the definition of evidence;[158] similar fact evidence;[159] the admissions of co-conspirators;[160] and the standard of proof of crimes in civil proceedings.[161]

Turning to other courts in Australia, and to English and Canadian courts, one can find extensive citation of the *Digest* from soon after it was first published in 1876. The topics include: the shifting of the burden of proof;[162] formal admissions;[163] confessions;[164] facts discovered in consequence of confessions;[165] admissions;[166] reception of depositions of deceased persons;[167] declarations against pecuniary interests;[168] competence of witnesses;[169] testimonial incompetence;[170] administering oaths to children;[171] proof of motive;[172] judicial notice;[173] leading questions;[174] police informers;[175] similar fact

evidence;[176] expert evidence;[177] effect of judgments;[178] circumstantial evidence;[179] hostile witnesses;[180] power of party calling a witness to contradict that witness;[181] evidence of complaint;[182] non-existence of privilege for matrimonial communications;[183] reception of whole of admissible statement against interest;[184] evidence of witnesses in previous proceedings;[185] admissibility of parole evidence;[186] definition of 'document';[187] accreditation of witnesses after they have been discredited in cross-examination;[188] presumption of death;[189] cross-examination of witnesses on character;[190] finality of answers in cross-examination on credit;[191] evidence of reputation as going to character;[192] admissibility of evidence that witness would not believe another witness on oath;[193] power of court to prevent cross-examination as to credit where 'the truth of the matter suggested would not … affect the credibility of the witnesses to the matter to which he is required to testify';[194] admissibility of evidence on construction of documents to show 'the genesis and aim of the transaction';[195] and other questions of contractual construction.[196] Further, the *Digest* has often been cited in argument in leading evidence cases, from a time very soon after it was first published.[197]

The *Digest* has not lacked praise. In 1932 Judge Parry called it a 'great textbook'. He said: 'The big books of cases are valuable mines in which to quarry when you are in search of a jewel with which to illuminate your argument, but Stephen's book is a chaplet of pearls that should be worn unostentatiously under your gown.' [198] As late as 1968, in seeking to determine the meaning of 'character' in 1898, the House of Lords relied on the *Digest* and described it as 'a well-known textbook'.[199] In 2005 Lord MacPhail, sitting in the Outer House of the Court of Justiciary, described the *Digest* as 'influential'.[200]

These are laudatory remarks, but the stature of Stephen is greater than they might suggest. Isaacs J spoke of Stephen's restatement of a proposition of Lord Mansfield CJ's as 'clothed with the most eminent and most authoritative recognition'.[201] In 1909 Phillimore J, after quoting a passage in the *Digest* which F E Smith KC had cited, and referring to a passage in Taylor, said: 'The authority of Taylor is not so high as that which I have just cited, and before accepting [Taylor's] statement as conclusive one would prefer to look at the cases cited in support of his proposition.' [202] That is, a statement by Stephen was seen as authoritative independently of its sources; not so a statement by Taylor. In similar fashion, in 1954 Harman J was prepared to accept a statement in the *Digest* that there was no authority on a point as conclusive of the proposition that there was none.[203] These judges viewed Stephen as not simply an able writer, but as having a more fundamental significance.

What is that significance? Evatt J said that Stephen 'endeavoured to explain the rules of evidence upon a rational basis'.[204] That points to one aspect of the power Stephen displayed in the *Digest*. Another was stated by Phipson in the introduction to the first edition of his book: he said he had tried to write a work which would take a middle place between 'the admirable but extremely condensed Digest of … Stephen, and that great repository of evidentiary law, Taylor on Evidence.'[205] There is here an element of criticism, which Cross repeated in 1978. He said of Stephen's digests on evidence and criminal law that they:

> were remarkable achievements and the succinct statements of the effect of the mass of case-law which they contain give Stephen claims to be regarded as the first nineteenth-century writer on the two subjects who could plainly see the wood for the trees, yet they tend to fall between two stools. From the point of view of the practitioner the citation of authority is insufficient, and from the point of view of the student the statements of principle are too concise. [206]

There is some truth in the latter criticism. Stephen's compressed expression makes it not easy to understand his world when one first enters it. What of the former criticism?

Stephen's approach to the citation of authority stems partly from his hostility not only to the swollen bulk of the textbooks available in the 1870s, but also to what he saw as the over-reporting which had led them into that condition. On 16 April 1872, just before Stephen left India, he told the Legislative Council:

> I do not believe that one case in twenty of those which are reported [in the Indian reports] is at all worth reporting; and when we think what the High Courts are, it seems to me little less than monstrous to make every division bench into a little legislature, which is to be continually

> occupied in making binding precedents, with all of which every Court and Magistrate in the country is bound to be acquainted. Careful reports of great cases are perhaps the most instructive kind of legal literature; but I know nothing which so completely enervates the mind, and prevents it from regarding law as a whole, or as depending upon any principles at all, as the habit of continually dwelling upon and referring to minute decisions upon every petty question which occurs. [207]

He saw it as important to concentrate on basic principle as expressed in a relatively low number of leading or illustrative cases, not on a thin stream of over-complex doctrine which meanders through a mass of footnotes and constantly changes direction. The law might change as conditions changed – that is why he favoured revising codes every 10 years – but excessive citation of authority was damaging both to codes and to the common law. While Stephen loved debate, and while he was capable of changing his mind, as he did throughout his life on many issues great and small, including evidentiary issues, his was a confident, naturally decisive, even authoritarian mind. English law as treated in evidence books in the 1870s, like Indian law before 1872, seemed piecemeal, jumbled, wordy and disorganised. In it really fundamental points were scattered amongst the mundane. One aspect of Stephen's skill was to separate out the former from the latter. The impression given by both the *Indian Evidence Act* and the *Digest* is their authorship by a mind having total confidence in its own abilities, and possessing the judgment to discriminate, to discard, to modify, and to clarify.

Stephen would have disliked the modern practices pursuant to which judges entertain debates, sometimes long debates, about admissibility; pursuant to which they deliver long judgments, sometimes reserved, rather than short decisive rulings; and pursuant to which masses of authority recorded on computer are available for citation. In part these practices have arisen because jury trial has declined, because even where it has not declined it has changed, and because avenues for discretionary exclusion of evidence have greatly increased. But he would have deplored the consequential effect in terms of delay. Stephen would have appreciated the following point made by Mr Justice Wells:

> The principles and rules [of evidence] were largely fashioned, not in the refined atmosphere of appeal courts or in courts of equity, but at *nisi prius*, in the heat and conflict of forensic strife. They comprise principles together with numerous associated corollaries in the form of working rules. They provide an enormous reservoir of guidance for trial judges, who have to resolve practical problems 'on the run'. [208]

In a world where evidentiary issues arose unexpectedly and suddenly, Stephen saw that what was needed was a volume which, with effort, could be readily assimilated into the practitioner's mental equipment, and appealed to quickly to resolve disputes. The *Digest* was an epitome of the guidance to be found in the decisions of earlier times for the resolution of contemporary forensic controversies.

The utility of the model employed in the *Indian Evidence Act* and the *Digest* is confirmed by three other instances in living memory in our country. First, in South Australia, in 1963, Andrew Wells published *An Introduction to the Law of Evidence*. It was a short work intended for police officers, but it ran into several editions. It had the same characteristics as Stephen's *Digest* – it was terse, spare, elegant and trenchant.

The second instance may be found in Harold Glass – the greatest evidence lawyer ever produced by the New South Wales Bar. He favoured an enterprise like that which evolved into the *Evidence Act 1995* (Cth) because of its capacity to simplify the materials available to solve evidentiary disputes and hence to shorten the time needed for that task. It is doubtful whether he would have been happy with the swollen case law which the last 15 years have produced in relation to that legislation, just as it is doubtful whether Stephen would have been happy with the latest edition of *Sarkar on Evidence*, which expounds the *Indian Evidence Act* in 2586 pages.

Thirdly, until a couple of generations ago – ending during the professional lifetime at the bar of Mr Justice Meares's generation, from the 1930s to the 1950s – there was a tradition of the small book. Barristers would keep small books in which they would write down key propositions and the main authority for them.

They reflected a lack of concern with anything other than principle and basic authority – for non-essential authority did not much matter and, anyway, would not have been brought to court. That was only an informal and crude exemplification of the much more sophisticated techniques employed in the *Digest*.

The *Indian Evidence Act* and the *Digest* reacted strongly against the contemporary evidentiary works and towards a search for first principles. The reactions were perhaps too strong, but they were beneficial. They illustrate an inevitable swing back and forth that is likely to be eternal, reflecting a tension between the search for fundamental principle and the search for universal coverage of detail in a case-based system of justice. Because Stephen's techniques form part of that inevitable action and reaction, they are likely to retain some influence.

Will Stephen's opinions on the substantive law retain any influence? No doubt as the law becomes more and more dominated by statutes, often increasingly detailed statutes, there is less room for the particular doctrines expounded by him or any other individual. But many of them operate at a deeper level. The opinions of a thinker like Stephen on matters of fundamental principle are likely to survive, if only because it is very hard to modify them by legislation.

Endnotes

***** Lecture delivered to the NSW Bar Association on 21 June 2010. I am indebted to Kim Pham and Jane Taylor for their assistance in preparing it.

1. *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 107: on 14 March 1841 he wrote of the 'proprietary rights in the Soil' of the Australian Aboriginal people.
2. Quoted by R J White, 'Editor's Introduction' in R J White (ed), *Liberty, Equality, Fraternity* (1967, reprint of 2nd ed 1874) 4. Eton affected a contemporary, Robert Cecil, future Prime Minister, similarly. 'His pessimism about human nature, his assumptions about the cowardice of the silent majority, the cruelty of the mob and the vulnerability of the rights of the individual were instilled in him by his Eton experiences' : Andrew Roberts, *Salisbury: Victorian Titan* (1999) 11.
3. James Fitzjames Stephen, *Defence of the Rev Rowland Williams, DD* (1862).
4. *Williams v Bishop of Salisbury* (1863) 2 Moore PC (NS) 375; 15 ER 943.
5. J B Atlay, *The Victorian Chancellors* (1908) vol 2 264.
6. See R W Kostal, *A Jurisprudence of Power: Victorian Empire and the Rule of Law* (2008).
7. Leslie Stephen, *The Life of Sir James Fitzjames St ephen* (1895) 231-232. Chamberlain's praise is significant – for though both were Liberals, both broke with Gladstone over Irish Home Rule, both declined to join the Conservative Party, both were fervent Imperialists and both employed aggression and asperity as standard tools of communication, the one was an autodidact, a left wing radical, a republican, a self-made businessman, the most extreme of dissenters and a democratic demagogue, the other the product of famous institutions, a flower of upper class Evangelical culture, and a political conservative on the extreme right of the Liberal Party. Yet Chamberlain managed to peer through the fog of these distracting differences between them to detect and admire Stephen's strong points as counsel.
8. Leslie Stephen, *The Life of Sir James Fitzjames Stephen* (1895) 211.
9. See M C Sarkar, S C Sarkar and others (eds), *Sarkar's Law of Evidence*, 16th ed (2007).
10. See R G Padia (ed), *Pollock and Mulla: Indian Contract & Specific Relief Acts*, 13th ed (2006).
11. See, for example, Sir Courtenay Ilbert, 'Sir James Stephen as a Legislator' (1894) 10 LQR 222, 224; Sir Harold Nicolson, *Curzon: The Last Phase 1919-1925* (1934) 12; Sir George Rankin, *Background to Indian Law* (1946), Preface.
12. See below, text, notes 120-123.
13. James A Colaiaco, *James Fitzjames Stephen and the Crisis of Victorian Thought* (1983) 202-203.
14. John Hostettler, *The Politics of Criminal Law Reform in the 19th Century* (1992) 182-189; John Hostettler, *Politics and Law in the Life of Sir James Fitzjames Stephen* (1995) 175-197.
15. This is wrongly stated as 1874 in Leslie Stephen, *The Life of Sir James Fitzjames Stephen* (1895) 483, R J White (ed) 'Books by James Fitzjames Stephen', *Liberty, Equality, Fraternity* (reprint of 2nd ed,1874) 19 and John W Bicknell (ed), *Selected Letters of Leslie Stephen*, vol 1, 1864-1882, 118 n 3.
16. Frederic William Maitland, *The Life and Letters of Leslie Stephen* (1906) 429.
17. Leslie Stephen, *The Life of Sir James Fitzjames Stephen* (1895) 428-429.
18. Leslie Stephen, *The Life of Sir James Fitzjames Stephen* (1895) 435-436.
19. John W Bicknell (ed), *Selected Letters of Leslie Stephen*, vol 1, 1864-1882 (1996) 218.
20. Leslie Stephen, *The Life of Sir James Fitzjames Stephen* (1895) 348.
21. Quoted in Leslie Stephen, *The Life of Sir James Fitzjames Stephen* (1895) 349.
22. K J M Smith, *James Fitzjames Stephen: Portrait of a Victorian Rationalist* (1988) 246.
23. Leslie Stephen, *The Life of Sir James Fitzjames Stephen* (1895) 94.
24. R J White, 'Editor's Introduction' in R J White (ed), *Liberty, Equality, Fraternity* (1967, reprint of 2nd ed 1874) 3.
25. Leon Radzinowicz, *Sir James Fitzjames Stephen 1829-1894 and his Contribution to the Development of Criminal Law* (1957) 5.
26. T H S Escott, *Society in London* (2nd ed, 1885) 142-143.
27. 'The First Earl of Lytton' (1907) 12 *Independent Review* 332, 333.
28. K J M Smith, *James Fitzjames Stephen: Portrait of a Victorian Rationalist* (1988) 2, 254 n 17.
29. He complained that Dickens portrayed so many deaths in order to show 'his skill in arranging effective details so as to give them this horrible pungency', and that '[a] list of the killed, wounded and missing amongst Mr Dickens's novels would read like an Extraordinary Gazette. An interesting child runs as much risk there as any of the troops who stormed the Redan': 'The Relation of Novels to Life' (1855) *Cambridge Essays* 148, 174, quoted by K J M Smith, *James Fitzjames Stephen: Portrait of a Victorian Rationalist* (1988) 14.
30. Leon Radzinowicz, *Sir James Fitzjames Stephen 1829-1894 and his Contribution to the Development of Criminal Law* (1957) 10-11.
31. Leon Radzinowicz, *Sir James Fitzjames Stephen 1829-1894 and his*

Contribution to the Development of Criminal Law (1957) 12-13.

32. Leslie Stephen, *The Life of Sir James Fitzjames Stephen* (1895) 98.
33. Leslie Stephen, *The Life of Sir James Fitzjames Stephen* (1895) 232.
34. Leslie Stephen, *The Life of Sir James Fitzjames Stephen* (1895) 212.
35. John W Bicknell (ed), *Selected Letters of Leslie Stephen*, vol 1, 1864-1882 (1996) 60
36. According to Sir Harold Nicolson, Stephen said: 'There is in the Asian Continent an empire more populous, more amazing and more beneficent than that of Rome. The rulers of that great dominion are drawn from the men of our own people.' These words 'produced upon George Curzon an apocalyptic effect. "Asia", "Continent", "Empire", "amazing", "beneficent", "Rome", "rulers", "dominion", "men", "our own people", – such were the watchwords which thereafter guided his life.' 'Ever since that day' he confessed in 1896, 'the fascination and ... sacredness of India have grown upon me' (emphasis in original): Curzon, *The Last Phase 1919-1925* (1934) 12. Curzon also retained 'a vivid recollection [of] the vast head, the heavy pendulous jaw, the long and curling locks ... as he stood at the desk': G J D Coleridge, *Eton in the Seventies* (1912) 225, quoted in K J M Smith, 'Sir James Fitzjames Stephen' 52 *Oxford Dictionary of National Biography* (2004) 439, 441. See also K J M Smith, James Fitzjames Stephen: *Portrait of a Victorian Rationalist* (1988) 156-157.
37. Leslie Stephen, *The Life of Sir James Fitzjames Stephen* (1895) 378.
38. Sir Keith Thomas, 'What Are Universities For?', *Times Literary Supplement*, 7 May 2010, 15.
39. Leslie Stephen, *The Life of Sir James Fitzjames Stephen* (1895) 213-214 n 2.
40. M M Bevington, *The Saturday Review 1855-1868: Representative Educat ed Opinion in Victorian England* (1966) 373-381.
41. Leslie Stephen, *The Life of Sir James Fitzjames Stephen* (1895) 226.
42. John W Bicknell (ed), *Selected Letters of Leslie Stephen*, vol 2, 1882-1894 (1996) 434.
43. John W Bicknell (ed), *Selected Letters of Leslie Stephen*, vol 2, 1882-1894 (1996) 428.
44. Frederic William Maitland, *The Life and Letters of Leslie Stephen* (1906) 429.
45. *Essays by a Barrister* (1862) (comprising 33 articles) and the three volumes of *Horae Sabbaticae* (1892) (comprising 55 articles).
46. Stephen had been driven to journalism in part by poverty, and in the case of Salisbury, that was the sole cause. He committed the scandalous act of marrying so far out of his class as to trigger the refusal of his father, the second marquess, to support him. By the lights of that nobleman, this point of view is reasonable. The lady was Georgina Alderson, daughter of Baron Alderson, who remains to this day a highly respected judge, but 'irredeemably middleclass' and wanting in money: Andrew Roberts, *Salisbury: Victorian Titan* (1999) 30.
47. *Essays by the late Marquess of Salisbury: Biographical* (1905) and *Essays by the late Marquess of Salisbury: Foreign Politics* (1905).
48. R J White (ed), *Liberty, Equality, Fraternity* (1967, reprint of 2nd ed 1874).
49. See *Law , Liberty and Morality* (1963) 16.
50. Reprinted as 'Morals and the Criminal Law ' in Patrick Devlin, *The Enforcement of Morals* (1965) 1-25.
51. Patrick Devlin, *The Enforcement of Morals* (1965) vii.
52. 'Liberalism and the Victorian Intelligentsia' (1957) 13 *Cambridge Historical Journal* 58, 65 n 38.
53. Ernest Barker, *Political Thought in England: 1848 to 1914* (2nd ed 1947) 150.
54. H L A Hart, *Law , Liberty and Morality* (1963) 16, where he also called Stephen a master of the common law and 'the great Victorian judge and historian of the Criminal Law'.
55. Frederic William Maitland, *The Life and Letters of Leslie Stephen* (1906) 140.
56. K J M Smith, *James Fitzjames Stephen: Portrait of a Victorian Rationalist* (1988) 250-251, 317; James A Colaiaco, *James Fitzjames St ephen and the Crisis of Victorian Thought* (1983) 206-207.
57. Leslie Stephen, *The Life of Sir James Fitzjames St ephen* (1895) 441.
58. 'The Rationalist Tradition of Evidence Scholarship' in Enid Campbell and Louis Waller (eds), *Well and Truly Tried* (1982) 234.
59. Leon Radzinowicz, *Sir James Fitzjames St ephen 1829-1894 and his Contribution to the Development of Criminal Law* (1957) 37.
60. 'The Law and the Constitution' in Woinarski (ed), *Jesting Pilate and Other Papers and Addresses* (1997, reprint of 1965 edn) 38-39.
61. (1889) 23 QBD 168.
62. (1885) 16 QBD 190.
63. (1887) 16 Cox 306.
64. (1887) 16 Cox 311.
65. (1866) LR 1 Ex 265.
66. [1932] AC 562.
67. [1935] AC 462.
68. Sir Rupert Cross, 'The Making of English Criminal Law (6) Sir James Fitzjames Stephen' [1978] Criminal Law Review 652.
69. *R v Z* [2005] 2 AC 467, 491 [22].
70. The Queensland legislation was based on Sir Samuel Griffith's *Draft of a Code of Criminal Law* (1897), which set out his draft provisions in the right hand columns and their sources in the left hand columns: the 'Bill of 1880' is often referred to – that is, the Draft Code of 1879, presented to Parliament in that year, but referred to a Select Committee just before the Disraeli government fell in 1880.
71. See Barry Wright, ' Self-Governing Codifications of English Criminal Law and Empire: The Queensland and Canadian Examples' (2007) 26 *University of Queensland Law Journal* 39.
72. *A General View of the Criminal Law of England* (1863) 99; *A History of the Criminal Law of England* (1883) vol 1 80-85.
73. Sir Rupert Cross, 'The Making of English Criminal Law (6) Sir James Fitzjames Stephen' [1978] *Criminal Law Review* 652, 661.
74. 'The Characteristics of English Criminal Law', *Cambridge Essays* (1857) 16; *A General View of the Criminal Law of England* (1863) 119; K J M Smith, *James Fitzjames Stephen: Portrait of a Victorian Rationalist* (1988) 62.
75. (1884) 14 QBD 273. For a discussion of the changing position in the 1878 and 1879 Bills, see Sir Rupert Cross, 'The Making of English Criminal Law (6) Sir James Fitzjames Stephen' [1978] *Criminal Law Review* 652, 659.
76. *A History of the Criminal Law of England* (1883) vol 2 106-107.
77. Richard A Posner (ed), *The Essential Holmes* (1996) 222 (speech to Suffolk Bar Association Dinner, 5 February 1885). Similarly, Sir Courtenay Ilbert, who is unlikely to have known of Holmes' s speech four years earlier, called him 'the ablest and most consistent advocate of English codification': 'Indian Codification' (1889) 5 *Law Quarterly Review* 347, 366.
78. It is set out in Pollock's *The Law of Torts*, 13th ed (1929) 618- 686. It has the style of Stephen's Indian legislation, flowing from Macaulay's *Penal Code*, with 'Illustrations' and the occasional 'Explanation'.
79. Editor's note to Sir Courtenay Ilbert, 'The Life of Sir James Stephen' (1895) 11 *Law Quarterly Review* 383, 386.
80. G H Knoll, 'Sir James Fitzjames Stephen, Bart' (1892) 26 *American Law Review* 489, 493-494.
81. For example, *R v Fennell* (1881) 7 QBD 147 (inducements to confessions); *R v Riley* (1887) 18 QBD 481 (holding that while a prosecutrix complaining of rape cannot be cross-examined about intercourse with persons other than the accused, she was open to cross-examination about other acts of intercourse with the accused); *R v Gibson* (1887) 18 QBD 537 (Exchequer rule in criminal appeals).
82. *Lamb v Munster* (1882) 10 QBD 110, 112-114 (followed in

Bell v Klein [1954] 1 DLR 225, 227-228) (privilege against self-incrimination); *R v Downer* [1874-1880] All ER Rep Ext 1378 (proof of agency cannot be found in admission by agent); R v Gibson (1887) 18 QBD 537 (res gestae).

83. For example, *Brown v Eastern and Midlands Railway Co* (1889) 22 QBD 391, 393 (distinction between similar fact evidence and proof of public nuisance by establishing several instances of interference with a public right).
84. (1884) 14 QBD 153.
85. (1884) 14 QBD 153, 163 per Grove J.
86. It is worth bearing in mind that similar, though more modest, claims could be made for some of Stephen's other Indian legislation such as the *Indian Contract Act* and the *Criminal Procedure Code* of 1872 in which Stephen's originality played less of a role.
87. So thought Stephen's predecessor in India, Maine, who described the predicament of judges sitting without juries in India, particularly if they were administrators as well, in 'Mr Fitzjames Stephen' s Introduction to the Indian Evidence Act' (1873) 19 *Fortnightly Review* 51, 53. See also his speech of 4 December 1868 to the Legislative Council: Imperial Legislative Council (India), *Abstract of the Proceedings of the Council of the Governor-General of India, Assembled for the Purpose of Making Law s and Regulations, 1868,* vol VII (1869) 507.
88. *The British Conquest and Dominion of India* (1989) 881.
89. *British Colonial Law* (1962) 253 n 16.
90. ALRC 26 (1985), vol 1, 158 [317]. The reference appears to be to the Indian Evidence Act ss 6-9, 11 and 13-16.
91. ALRC 26 (1985), vol 1, 158 [318]. See below, text, notes 107-108.
92. Cmnd 4991 27-28 [47].
93. 12th ed, 1948, 201.
94. Cmnd 4991 85 [134].
95. Wigmore erroneously states that this reform was originally introduced by Stephen: J H Wigmore, *Evidence in Trials at Common Law*, Tillers rev, 1983, vol 1, 888 [21], n 8.
96. Thus the *Digest*, Art 140, records r 48 as stating the civil rule, and the 'Exchequer rule' as stating the criminal rule: 130.
97. (1863) 297-298. See also *A Digest of the Law of Evidence* (1876) 174-175.
98. Imperial Legislative Council (India), *Abstract of the Proceedings of the Council of the Governor-General of India, Assembled for the Purpose of Making Law s and Regulations, 1872,* vol XI (1873) 131.
99. [1929] 2 KB 1, 50-51.
100. See, for example, *Barry v Heider* (1914) 19 CLR 197, 217-218 (discussing s 115 on estoppel, as considered in *Sarat Chunder Dey v Gopal Chunder Laha* (1892) LR 19 IA 203); *Williamson v Ah On* (1926) 39 CLR 95, 113, 115 (ss 101 and 106 on the burden and standard of proof); *Ahern v The Queen* (1988) 165 CLR 87, 98-99 (s 10 – admissibility of things said, written or done by conspirators in reference to their common intention); *Wilson v Anderson* (2002) 213 CLR 401, 445 [94] n 124 (general); *Weiss v The Queen* (2005) 224 CLR 300, 310 [24] (s 167 on appeals).
101. [1967] 1 AC 760, 780, 817.
102. [2010] 2 WLR 47.
103. Peter Davison (ed), *The Complete Works of George Orwell*, vol 9, *Nineteen Eighty-Four*, (1987) 5.
104. J H Wigmore, *Evidence in Trials at Common Law*, Tillers rev, vol 1, 1983, 689-690 [12] (relevance), 888 [21], n 8 and 894-895 [21] n 12 (test for appeal in relation to evidentiary error: s 167 of the Indian Evidence Act described as 'the only form consistent with common sense and the theory of trials'); Tillers rev, vol 2, 1983 [25] (circumstantial evidence); 966-967 [27] (nature of judicial investigations: Stephen is described as one 'of the most original thinkers in the law of evidence'); 1402 [64] (virtue of common law rules restricting proof of parties' character in civil cases).
105. 'An Introduction on the Principles of Judicial Evidence' in the Indian Evidence Act (1872) 7.
106. 'Codification in India and England' (1872) 18 Fortnightly Review 644, 672.
107. 'An Introduction on the Principles of Judicial Evidence' in the *Indian Evidence Act* (1872) 18-51.
108. *A Digest of the Law of Evidence* (1876) 135-137.
109. The twelfth edition, reprinted with editions in 1948, described the publication containing the new definition as the first edition reprinted 'with many alterations 1877': *A Digest of the Law of Evidence*, 12th ed, (revd), 1948, iv.
110. *R v Kearley* [1992] 2 AC 228, 263.
111. *Pollitt v R* (1992) 174 CLR 558, 571.
112. *Harris v Minister for Public Works (New South Wales)* (1912) 14 CLR 721, 725 per Griffith CJ.
113. *Palmer v R* (1998) 193 CLR 1, 24 [55] n 54 per McHugh J.
114. *Goldsmith v Sandilands* (2002) 190 ALR 370, 371 [2] n 2 per Gleeson CJ and 377 [31] n 8 per McHugh J.
115. *HML v R* (2008) 235 CLR 334, 425 [275] per Heydon J.
116. *R v Randall* [2004] 1 WLR 56, 62 [20].
117. *Jairam v Trinidad and Tobago* [2005] UKPC 21, [11].
118. *Seaboyer v R* [1991] 2 SCR 577, 679 per L'Heureux-Dubé and Gonthier JJ. For other approval in various jurisdictions, see *Commissioners of Customs and Excise v Harz and Power* [1967] 1 AC 760, 785; *Bortolotti v Ontario (Minister for Housing)* (1977) 76 DLR (3d) 408, 416; *Jeppe v R* (1985) 61 ALR 383, 393; *Sydney Steel v Mannesmann Pipe* (1985) 69 NSR (2d) 389, [15]; *D v Hereford and Worcester CC* [1991] Fam 14, 22; *R v Raso* (1993) 68 A Crim R 495, 509; *R v Hazim* (1993) 69 A Crim R 371, 377; *AJ v Western Australia* (2007) 177 A Crim R 247, 251 [5]; *Azarian v Western Australia* (2007) 178 A Crim R 19, 29-30 [34].
119. *Goldsmith v Sandilands* (2002) 190 ALR 370, 371 [2] n 2.
120. Leslie Stephen, *The Life of Sir James Fitzjames St ephen* (1895) 377.
121. John W Bicknell (ed), *Selected Letters of Leslie Stephen*, vol 1, 1864-1882 (1996) 118 n 3.
122. Hansard HC, 5 August 1873, 1559.
123. *A Digest of the Law of Evidence* (1876) iii.
124. See *Bills – Public*, (1873) vol 2, 355, where it is stated that Bill 274 was not printed. An officer of the Parliamentary Archives has advised that no copy exists in its possession. It is quite possible that no copy exists, for Stephen was impetuous and careless with papers. Leon Radzinowicz, *Sir James Fitzjames Stephen 1829-1894 and his Contribution to the Development of Criminal Law* (1957) 51 incorrectly suggests that that bill is what he describes as 'the Code of Evidence, 69, 1872, Parl. Papers, Bills (1872) vol 1, p 685': but the bill so referred to was introduced while Stephen was still in India. Intrinsically interesting though it is, it does not appear to be traceable to Stephen. C J W Allen, *The Law of Evidence in Victorian England* (1997) 27, says that that bill was a private member's bill read for the first time on 28 February 1872, was dropped at the second reading and may have triggered Coleridge's request to Stephen to draft an evidence code bill.
125. *Terunnanse v Terunnanse* [1968] AC 1086, 1092.
126. *A Digest of the Law of Evidence* (1876) iii.
127. *A Digest of the Law of Evidence* (1876) v.
128. *A Digest of the Law of Evidence* (1876) vii-viii.
129. Leslie Stephen, *The Life of Sir James Fitzjames St ephen* (1895) 274.
130. H S Maine, 'Mr Fitzjames Stephen's Introduction to the Indian Evidence Act' (1873) 19 *Fortnightly Review* 51, 55.
131. Imperial Legislative Council (India), *Abstract of the Proceedings of the Council of the Governor-General of India, Assembled for the purpose of Making Law s and Regulations, 1872,* vol XI (1873) 141. Sir George

Campbell was one of the original judges of the Calcutta High Court.

132. *A Digest of the Law of Evidence* (1876) vii.
133. There are bibliographical problems with the *Digest*. The publishing history as recorded in the twelfth edition (revised) published in 1948, iv does not correspond either with the usage of judges and writers or with the w ay some earlier editions described themselves. Several High Court judges have said there was a fifth edition of the *Digest* in 1887 – Evatt J in *Cheers v Porter* (1931) 46 CLR 521, 538, McHugh J in *Palmer v R* (1998) 193 CLR 1, 24 [55] n 54 and Gleeson CJ in *Goldsmith v Sandilands* (2002) 190 ALR 370, 371 [2] n 2 (see also McHugh J, 377 [31] n 8). Wigmore spoke of a 'third ed 1876' – Chadbourn rev, vol 7 [1986] 245 and a '3rd ed 1877' – [1981] 210 n 20. The Joint Courts Library has a 'Second Edition' published in 1876 which seems to be what the 1948 version refers to as a reprint with slight alterations.
134. Sir Harry Lushington Stephen and Captain R Townshend-Stephens (eds), *A Digest of the Law of Evidence in Courts Martial (under the Army and Air Force Acts)* (1934).
135. For example, there was a 'second edition' in 1879 (reprinted by Garland in 1978).
136. For example, a second American edition (from the sixth English edition) by George Chase in 1898 – at 469 pages an enormous expansion – reprinted by F B Rothman 1991; a fourth American edition by William Reynolds in 1905.
137. For example, a New South Wales edition by Henry Giles Shaw, barrister and police magistrate (1909). The work is still commonly cited: eg *Maher v Bayview Golf Club*, [2004] NSWSC 275, [27]. It was cited by the NSW Court of Criminal Appeal on a point no longer part of the law in *R v Connors* (1990) 48 A Crim R 260, 267.
138. J H Wigmore, *Evidence in Trials at Common Law* , Tillers rev, vol 1, [12] 689-690 (relevance); Chadbourn rev, vol 3A, 861 [986] n 16 (doctrine of 'privilege against disgracing answers'); Chadbourn rev, vol 6, 432 [1828] n 9 (unsworn evidence of children); Chadbourn rev, vol 7, 210 [1981] n 20 and 245 [1986] (reputation of witnesses). *The History of English Criminal Law* and other writings of Stephen were also quite frequently quoted or referred to in Wigmore.
139. See, for example, the citations in David P Leonard, *The New Wigmore: A Treatise on Evidence: Evidence of Other Misconduct and Similar Events* (2009) § 4.3.1 text, nn 27-33 and 57-65.
140. *Cullen v Welsbach Light Co of Australasia Ltd* (1907) 4 CLR 990, 1013-1014.
141. *Tasmania Gold Mining Co Ltd v Cairns* (1908) 5 CLR 280, 282-283.
142. *Brown v R* (1913) 17 CLR 570, 582.
143. *South Australian Co v Richardson* (1915) 20 CLR 181, 196.
144. *Dent v Moore* (1919) 26 CLR 316, 326.
145. *Houston v Wittner's Pty Ltd* (1928) 41 CLR 107, 123.
146. *Webb v Bloch* (1928) 41 CLR 331, 367.
147. *Cheney v Spooner* (1929) 41 CLR 532, 539.
148. *Cheers v Porter* (1931) 46 CLR 521, 532, 538, 542-543.
149. *Davis v Bunn* (1936) 56 CLR 246, 270.
150. *Martin v Osborne* (1936) 55 CLR 367, 383-384, 386, 397.
151. *Axon v Axon* (1937) 59 CLR 395, 412.
152. *Harriman v R* (1989) 167 CLR 590, 606-607.
153. *Azzopardi v R* (2001) 205 CLR 50, 102 [151] (also citing Stephen's *A History of the Criminal Law of Evidence*).
154. *Cornwell v R* (2007) 231 CLR 260, 275 [39] n 33: 276-277 [41]-[42] the positions taken up by Stephen's 1878 Bill and the Commission's 1879 Bill were discussed.
155. *Mountney v Smith* (1904) 1 CLR 146, 151.
156. *Cullen v Welsbach Light Co of Australasia Ltd* (1907) 4 CLR 990, 992.
157. *Brown v R* (1913) 17 CLR 570, 571 (NSW edition).
158. *Cheney v Spooner* (1929) 41 CLR 532, 535.
159. *Martin v Osborne* (1936) 55 CLR 367, 369.
160. *Ahern v R* (1988) 165 CLR 87, 91 (7th ed, 1905).
161. *Helton v Allen* (1940) 63 CLR 691, 693-694.
162. *Reynolds v G H Austin & Sons Ltd* [1951] 2 KB 135, 145;*Taylor's Central Garages (Exeter) Ltd v Roper* (1951) 115 JP 445; *Apollo Shower Screens Pty Ltd v Building and Construction Industry Long Service Payments Corporation* (1985) 1 NSWLR 561, 565. See also *Cummings v Vancouver* [1911] 1 WWR 31, 34; *R v Kakelo* [1923] 2 KB 793, 795; *Stoney v Eastbourne Rural District Council* [1927] 1 Ch 367, 382-383; *Dixon v McAllister* [1945] NI 48, 59; *MacLeod v R* [1968] 2 CCC 365, 368; *Procter & Gamble Co v Cooper's Crane Rental Ltd* (1972) 33 DLR (3d) 148, 151.
163. *Ulrich v R* [1978] 1 WWR 422, [5].
164. *R v Sileski* (1921) 32 BR 135; *R v Markadonis* [1935] 2 DLR 105, 106; *R v Matchette* (1946) 19 MPR 132, 137; *Commissioners for Customs and Excise v Harz and Power* [1967] 1 AC 760, 783, 788-792 (CCA) and 795, 801, 808, 814 (HL); *R v Sweezey* (1974) 27 CRNS 163, [32]; *R v Hayter* [2005] 1 WLR 605, 608.
165. *R v McCafferty* (1886) 25 NBR 396, [15].
166. *R v Black* (1922) 16 Cr App R 118, 120; *Falcon v Famous Players Film Co* [1926] 2 KB 474, 481.
167. *R v Hall* [1973] QB 496, 502.
168. *Lloyd v Powell Duffryn Steam Coal Co Ltd* [1913] 2 KB 130, 137.
169. *R v Connors* (1893) 5 CCC 70, 70-71.
170. *Karpati v Spira*, unreported, Supreme Court of New South Wales, 6 June 1995.
171. *R v Bannerman* (1966) 55 WWR 257, [95].
172. *R v Barsalou* (1901) 4 CCC 347, 349; *R v Castellani* (1967) 59 WWR 385, [94]; *R v Ma* (1978) 44 CCC (2d) 511, 517.
173. *Marshall v Wettenhall Bros* [1914] VLR 266, 269; *R v Wagner* [1931] 2 WWR 650, [7]; *McQuaker v Goddard* [1940] 1 KB 687, 700; *Harrison v Flaxmill Road Foodland Pty Ltd* (1979) 22 SASR 385, 386-387; *Saul v Menon* [1980] 2 NSWLR 314, 325.
174. *Ex parte Bottomley* [1909] 2 KB 14, 21, 23; *R v Saunders* (1985) 15 A Crim R 115, 121-122.
175. *Haydon v Magistrates Court* [2001] SASC 65, [114].
176. *R v Bond* [1906] 2 KB 389, 402; *R v McLean* (1906) 11 CCC 283, 286; *Perkins v Jeffery* [1915] 2 KB 702, 708; *R v Belliveau* (1954) 36 MPR 154, 160; *R v Heidt* (1976) 14 SASR 574, 586.
177. *Preeper v R* (1888) 22 NSR 174, [11]; *Fa v Morris* (1987) 27 A Crim R 342, 352.
178. *Ord v Ord* [1923] 2 KB 432, 440; *Woodland v Woodland* [1928] P 169, 172-173; *Hollington v F Hew thorn & Co Ltd* [1943] KB 587, 594; *Hull v Hull* [1960] P 118, 120; *Field v Field* [1964] JP 336, 348; *In the Marriage of Wakely* (1979) 35 FLR 138, 148.
179. *Corke v Corke* [1958] P 93, 98.
180. *R v Smith* (1909) 2 CrAppR 86,87; *R v Pitt* [1983] QB 25, 32; *R v Prefas and Pryce* (1986) 86 Cr App R 111, 114.
181. *R v Deacon* [1947] 1 WWR 545; *R v Prefas and Pryce* (1986) 86 Cr App R 111, 114; *R v Cairns* [2003] 1 WLR 796, 803 [37]-[39]; *Re Madden* [2004] EWCA Crim 754; [2004] PNLR 37.
182. *R v Lillyman* [1896] 2 QB 167, 176; *R v Reindeau* (1900) 4 CCC 69.
183. *Shenton v Tyler* [1939] Ch 620, 640.
184. *Polak v Polak* (1962) 38 DLR (2d) 333.
185. *Town of Walkerton v Erdman* (1894) 23 SCR 352.
186. *Sigroum Office Management v Milanis* (1985) 4 CPC (2d) 243.
187. *Fox v Sleeman* (1897) 17 PR (Ont) 492, 494; *Misener v Hotel Dieu Hospital* (1983) 42 OR (2d) 694, 696; *Reichmann v Toronto Life Publishing Co* (1988) 66 OR (2d) 65.
188. *Toohey v Metropolitan Police Commissioner* [1965] AC 595, 606.
189. *Ivett v Ivett* (1930) 29 Cox CC 172, 175; *Beattie v Beattie* [1945] 1 DLR 574, 582-583; *Re Bell* [1946] OR 854, 861; *Re Jones* [1955] 5 DLR 213, 219; *Middlemiss v Middlemiss* [1955] 4 DLR 801, 811; *Re Miller* (1978) 92 DLR (3d) 255, 257.

190. *Selvey v Director of Public Prosecutions* [1970] AC 304, 326.
191. *Zwicker v Young* [1929] 1 DLR 602, 604.
192. *Donaldson v State of Western Australia* [2007] WASCA 216, [65].
193. *R v Gunewardene* [1951] 2 KB 600, 608-609; *R v Hoban* [2000] QCA 384, [26]; *R v BDX* [2009] VSCA 28, [35]-[37].
194. *Hally v Starkey; Ex parte Hally* [1962] Qd R 474, 478 per Gibbs J; *Hooper v Gorman* [1976] 2 NSWLR 431, 440.
195. This is a proposition which Judge Cardozo extracted from Art 91(5) and (6) of the first ed (Art 98(5) and (6) of the twelfth ed) in *Utica v City National Bank and Gunn* 118 NE 607, 608 (1918), quoted by Lord Wilberforce in *Prenn v Simmonds* [1971] WLR 1381, 1384. See also *Appleby v Pursell* [1973] 2 NSWLR 879, 890.
196. *Korner v Witkowitzer* [1950] 2 KB 128, 163.
197. For example, *Massey v Allen* (1879) 13 Ch D 558, 560; *R v Riley* (1887) 18 QBD 481, 482; *Ballantyne v MacKinnon* [1896] 2 QB 455, 457; *Mercer v Denne* [1905] 2 Ch 538, 549; *R v Ball* [1911] AC 47, 54; *Tucker v Oldbury Urban District Council* [1912] 2 KB 317, 318; *R v Cohen* (1914) 10 Cr App R 91, 95; *R v Baskerville* [1916] 2 KB 658, 661; *Conquer v Boot* [1928] KB 336, 337; *Re Davy* [1935] P 1, 4; *Teper v R* [1952] AC 480, 485; *Corke v Corke* [1958] P 93, 94-95; *Murdoch v Taylor* [1965] AC 574, 579; *Myers v DPP* [1965] AC 1001, 1017; *Selvey v DPP* [1970] AC 304, 315; *R v Z* [2005] 2 AC 467,470.
198. Richard Harris, *Hints on Advocacy*, 16th ed, 1932, introduction by Judge Parry, vi.
199. *Director of Public Prosecutions v Selvey* [1970] AC 304, 326.
200. *Haddow v Glasgow City Council* 2005 SLT 1219, 1223.
201. *Houston v Wittner's Pt y Ltd* (1928) 41 CLR 107, 123.
202. *Ex parte Bottomley* [1909] 2 KB 14, 21.
203. *Re Overbury (decd)* [1955] Ch 122, 126.
204. *Martin v Osborne* (1936) 55 CLR 367, 383.
205. Sidney L Phipson, *The Law of Evidence*, 1st ed (1892) v.
206. Sir Rupert Cross, 'The Making of English Criminal Law (6) Sir James Fitzjames Stephen' [1978] *Criminal Law Review* 652, 655.
207. *Abstract of the Proceedings of the Council of the Governor-General of India, Assembled for the Purpose of Making Law s and Regulations. 1872.,* vol XI, Office of the Superintendent of Government Printing, Calcutta (1873) 406-407.
208. 'A Critique of the Australian Law Reform Commission Draft Evidence Bill' (1992) 9 *Australian Bar Review* 185, 186.

A tippy path to the bar - an alternative approach

By Jason Donnelly*

> There is nothing quite so hierarchical as the law, more so than the army, even the navy. In strict order of seniority they entered. Their tipstaffs stood behind their chairs, like pathfinders who had already reached their destination, and needed to guide their elderly charges to their target…. It took some time for them to be suitably seated. Tipstaffs adjusted chairs. Flasks of water were brought and glasses filled. Morgan on the left wing was tilted slightly to the right. Anxiously his tipstaff righted his chair… They were ready. They were composed.[2]

Introduction

This paper seeks to achieve two things. First, to provide an analysis of the functions and duties of the modern tipstaff, and, secondly, to explore the question whether undertaking a position as a tipstaff to a judge is useful in preparing for a career at the bar.

Historical development of the modern tipstaff

Historically, the office of the tipstaff is thought to have been established in the 14th century. One of the earliest references dates from 1570: "The Knight Marshall with all hys tippe staues".[3] The name 'tipstaff' originated from the early law enforcement officers who would apprehend a person intended for arrest, if necessary through the use of a tipped staff or stave.[4] The staff was made of metal or wood or both, topped with a crown, which unscrewed, was removed to reveal a warrant of arrest inside the hollow staff.[5] In more modern times, however, a tipstaff does not have enforcement duties, and, in particular, the staff is now mainly used for ceremonial purposes, such as for the swearing in of a new judge of the Supreme Court. However, the staff is sometimes carried by a tipstaff into court on the request of his or her judge in normal cases heard before the court.

From about 1830 the judges of the Supreme Court of New South Wales were supplied with personal staff.[6] In 1846, Stephen CJ wrote:

> up to the year 1843, three Tipstaves, (one for each judge) at 2/10 per diem each with a fee of 2/6 on each civil trial shared between them. Their duties were, as in England and Ireland, to attend on the judge whenever required by him, and especially when he was sitting in court: - to take his books and papers to and from the court, to carry letters and messages for him; bring refreshment, fetch his cloak or a carriage; keep his books and retiring room clean, and so on. When not required for any of these purposes, the Tipstaff was usually employed in the judge's household, receiving as remuneration, either money, or board and lodging in lieu. But in 1843 the Legislative Council thought fit to abolish the salaries of these attendants.[7]

In December 1844 the Sheriff's special constable agreed to act as well in the capacity of joint tipstaff to all judges.[8] That arrangement was found to be very inconvenient, and, so, in 1846, the judges proposed that court messengers be dismissed if necessary so that a tipstaff could be appointed for each judge.[9] Stephen CJ stated: "Without the assistance of these persons, we shall scarcely be able to keep the court open".[10] The Governor decided that the judges must make the best of sharing between them one messenger and one tipstaff.[11] This system was suffered for a year with much complaint by the judges who said that they would no longer tolerate it.[12] Consequently, each judge was given the service of one clerk associate and of one tipstaff, a system which continues to this day.[13] The modern function of a tipstaff has changed in some respects.

In times gone by, until quite recently, a tipstaff was not legally trained, and therefore the nature of work a tipstaff provided to their judge was more of an administrative nature and personal assistant. Indeed, in this respect, tipstaffs, until recently, were usually returned or retired servicemen in the army, navy or from a similar military background.[14] The last 10 years in particular has seen the development of practice in which a tipstaff to a judge of the Supreme Court is legally trained, and equipped with research skills.[15] Another notable development is that, prior to the last ten or so years, a tipstaff occupied such an office permanently, and in that sense was often a tipstaff for the same judge for many years. Now, a tipstaff to a Supreme Court judge occupies the office for a year.

A tipstaff is a member of the personal staff of a judge with the function of assisting the judge and retrieving legal materials required by the judge,[16] and provides support to the judge in procedural and organisational matters in court and may provide research and administrative support outside of court.[17] Legal tipstaffs provide support to judges in the Equity and Common

Law Division and to judges in the Court of Appeal.[18] Legal tipstaffs conduct often complex legal research on behalf of judges which generally involves a detailed analysis of case law and an examination of legal developments in areas where precedents may not be well defined.[19]

III Assisting the Judge

There is no doubt that one of the most fundamental duties of a tipstaff is to assist their judge as directed.[20] Interestingly, a review of the authorities suggest that tipstaves have been utilised for quite a wide variety of functions, some of which no doubt arguably provide exceptional experience in preparation for the bar. For example, in *Australian Securities and Investments Commission (ASIC) v Rich*,[21] Austin J made clear that a tipstaff could be beneficially utilised in chambers to assist "shuffling through innumerable lever-arch folders" of transcript. In *R v Ian Ferguson*,[22] his Honour had impressed on the jury at every opportunity that they could take breaks, and should not overstrain themselves. In this context, it was observed that the 'tipstaff had been assiduous in making sure that they followed this advice'.[23] In a similar fashion, a tipstaff is readily utilised for summoning their judge back to court should they be required.[24] A tipstaff is also useful in leaving court to make copies of particular documents for the judge and the relevant parties as so requested,[25] bringing the judge relevant books,[26] attending 'a view' with their judge,[27] obtaining summaries of cases referred to by Judicial Commission statistics[28] and calculation of compound interest.[29]

In *Varga v Commonwealth Bank of Australia*,[30] Young J (as he then was) interestingly noted a significant role his tipstaff had played:

> "despite not having been given any assistance by the solicitors who appeared in the matter apart from the reference to Ryder's case, I fortunately have been able, with the assistance of my tipstaff, to make a full and hopefully thorough examination on the meaning and effect of the legislation."

In another case, Young J recorded his indebtedness to Santow J's tipstaff, who had provided him with a key reference that had not been referred to in current Australian or English textbooks.[31]

A tipstaff also has been known to discharge a number of other functions in assisting their judge. For example, a tipstaff is required to leave court at times and chambers to provide their judge upon direction with relevant material (such as a copy of the Commonwealth Law Reports or relevant Rules of the court),[32] take notes in court,[33] summon a doctor for a jury member who requires urgent medical attention,[34] provide the judge with relevant academic arguments in the area being considered[35] and authorities in preparation for hearing of a matter in court.[36]

Interestingly, although not expressly put, the following statement by Justice Allsop seems to implicitly suggest that a tipstaff provides a level of emotional or psychological support to their judge in preparation for the judgment writing exercise:

> One of the loneliest feelings in the world is finishing a long case having had the assistance of the teams and platoons from both sides for weeks, or months, then hearing the court door close behind you and realising that the thousands of pages of transcript and of exhibits are now yours, and yours alone, to understand, to distill and to deploy in a synthesised way to reach an answer. Your only friend may be the associate or tipstaff who has been with you during the case.

Function in court & promoting the administration of justice

Apart from the direct personal assistance a tipstaff provides to their judge or indeed other judges in the court room, the authorities suggest that the function of a tipstaff goes further than just assisting judges; it is extended to the proper regulation of affairs in the court room. In *R v Peter Norris Dupas (No 3)*,[37] a tipstaff was directed to hold up a coloured jacket by counsel when evidence was being considered. In *Goldberg v Walter*, a Victorian case, a tipstaff gave an outline of rights to a self-represented litigant, which sets out their rights with respect to the conduct of the case.[38] In *Terry v Johnson*,[39] the tipstaff operated equipment in the County Court.

There are a number of other functions which a tipstaff has been required to undertake.[40] These include trial counsel speaking with a tipstaff in court with the view to relaying a matter that he wished to speak about with her Honour,[41] providing copies of a pre-sentence report

to counsel in court,[42] moving technological equipment to the jury room from court,[43] receiving documents from counsel in court which were to be handed back to the judge,[44] providing a party with a copy of a decision of the judge,[45] ensuring a place in the court was always available for a particular person,[46] swearing a witness in to give evidence in court,[47] and oddly enough, waking up an applicant who had fallen asleep in the court room on several occasions.[48]

The ability of a tipstaff to experience firsthand in a practical sense the work of advocacy by barristers presenting their cases to the court, equips the tipstaff in question with the opportunity to not only draw out the strengths and weaknesses of various barristers, but to gain a fundamental appreciation of the procedural underpinnings of the common law system in Australia. Furthermore, like an advocate who communicates with the bench, a tipstaff can gain a vital understanding of what the court thinks about the submissions which are being put before the court. And, like a process of osmosis, the art of advocacy is slowly learnt in one respect by valuing the mistakes of others, remembering hopefully not to make the same errors of another.

In a number of respects, a tipstaff has quite directly promoted the administration of justice in giving evidence against those seeking to undermine such a principle. In *Registrar of the Supreme Court of South Australia v Moore-McQuillan*,[49] a tipstaff deposed in an affidavit that in the course of proceedings the respondent accused the judge of being "corrupt". In part, it was this evidence of the tipstaff along with the court reporter and associate which led the respondent accused to be held in contempt, with the comment made being viewed by the court as an insult of the worst kind designed to impair confidence in courts and judgments. Similarly, in *R v Hirini Taurima (No 2)*,[50] a tipstaff gave vital evidence that the accused struck the informant as he was seated and landed on his upper left thigh within the vicinity of the courtroom. Again, such evidence supported the contempt finding against the accused.[51] Elsewhere, Justice Allsop has also commented on the function of a tipstaff, which provides a useful summary for the aspiring tipstaff:

> "One of the privileges of being a judge is the opportunity to hire and work with a young graduate every year as an assistant – an Associate in the Federal Court and a Tipstaff in the Supreme Court. They are intimidatingly bright. All in their own way are ambitious; but they all have their own sense of idealism about the law. Almost all are wary of aspects of future professional practice. None fears hard work, all wish to do well, but all wish to have a sense of fulfilment from their life in the law. The task of the profession, including the Academy, is to see that fulfilment is achieved, not by money, but by the participation in a service to the public, by the development and maintenance of a fine legal system, helping to support a free civil society in Australia and in our wider region. Drive the idealistic young from the profession by perceived venality and exploitative drudgery and they will be replaced by others content to pay the price in order, later, to pluck the goose".[52]

Despite the foregoing, it is to be appreciated that at times a tipstaff has inadvertently caused difficulties in promoting the administration of justice. One such example of this is the case of *R v Gae*,[53] where a tipstaff incorrectly and improperly advised the jury that a majority verdict was sufficient for a finding of guilt in relation to the accused. The judge redirected the jury as to the need for a unanimous verdict within thirty minutes. On appeal against the appellant's conviction, a key issue for the court to consider was whether the circumstances of the case of the unauthorised communication by the tipstaff to the jury was a material irregularity that infected the root of proceedings. In dismissing the appeal, the court held that the error of the tipstaff was not such as to lead to a miscarriage of justice. The case is significant in that it highlights quite directly what can happen when a tipstaff does not effectively discharge their function in an appropriate manner.

In a more positive light, an affidavit of the tipstaff in the case of *Prothonotary v Wilson*[54] provided evidence that led to the defendant being convicted of two counts of contempt. In that case, a question arose as to whether the defendant's conduct interfered with the administration of justice or was calculated to do so. The defendant had thrown bags of yellow paint at the judge on handing down of judgment. The court held that the physical assault on the judge constituted serious contempt, and was conduct likely to interfere with the administration of justice and undermine the

authority of the court.[55]

V Tipstaff Relations With the Jury

In *Sarah Martin v R*,[56] the day after the jury had delivered its verdict, the judge's tipstaff found seven pages of material apparently downloaded from the Internet in the jury room. The pages revealed that they were downloaded several days before the jury retired to consider its verdict. Although there was no evidence as to the provenance of the pages, the inference can scarcely be avoided that a juror downloaded the material in the course of the trial. In this respect, the work of the judge's tipstaff in recovering the impugned material led to an appeal against conviction, although the appeal was dismissed in that the irregularities did not require that there be a new trial. The case is important in that it highlights how the work of a tipstaff can reveal unlawful conduct by jury members, which may not have otherwise been discovered.

In a similar fashion, recognising the important role of a tipstaff, Gibson DCJ in *Hunt v Radio 2SM Pty Ltd (No 4)*[57] noted,

> Supreme Court judges have a tipstaff who can assist with the jury. This is not possible here, and this means that my court officer has to look after a jury as well as be a court attendant. There are other burdens, and indeed I question whether it might not be appropriate for defamation jury trials generally to be heard in the Supreme Court, where there are better facilities.

It seems to be the practice at times for jury members to communicate with the tipstaff about matters related to the trial. That communication may be for the purposes of merely confiding in the tipstaff or so that a message may be passed onto the tipstaff's judge. For example, in *R v Stretton*,[58] a juror had indicated to the tipstaff, at an early stage in the trial, that he thought he knew one of the accused and knew one of their fathers, and that the juror felt biased already. It appeared that the stated bias related to ethnic grounds and that the remark may have been "semi-flippant". The tipstaff passed this information on to the trial judge. An analogous occurrence took place in *R v Peter Allan Sharp*,[59] where during a jury trial, a juror left the jury box and went to the jury room for no apparent reason. Subsequently, after a brief conversation with his Honour's tipstaff, the juror handed him some notes for forwarding to the judge. Further, in *R v Juric, Ruling (jurors, Less Than Twelve)*,[60] the judge was told by their tipstaff that a member of the jury had informed him immediately after court that she had met with a Crown witness in the case in 1997 in company with her now deceased brother, although she had not seen the Crown witness since.[61] The cases of *Stretton*, *Sharp* and *Juric* are important in outlining the simple but important role of a tipstaff's dealings with the jury.

Despite the foregoing, it is to be appreciated that there is authority for the proposition that a tipstaff should not have any conversation with members of the jury.[62] In the same case, similar comments were expressed by another judge in the case, Kaye J, where his Honour said:

> …it is highly inappropriate for the tipstaff or keeper to be used as a conduit between the jury and the Court. If there is a matter which has been raised in the way that occurred during this trial, the tipstaff should not indulge in an examination to find out the nature and extent of bias, intimidation or any other matter disclosed by the juror.[63]

However, there appears to be conflicting authority on this point. In *The Queen v Anthony Piggin*, Crockett J (King and Vincent JJ agreeing) held that in the course of a criminal law trial, the responsibility of the tipstaff starts and finishes with their obligation to act merely as a conduit, passing on messages from a juror to the judge, or to pass on to the judge, without comment, observations that he may have made, or draw the judges attention to any matter that he thinks the judge should be made aware of in relation to what may be happening, particularly out of court.[64] The view supported in *Piggin* does not seem to have gained the support of Justice Eames, writing extrajudicially, who suggested that members of the jury should not talk to the tipstaff about the case.[65] His Honour suggested if the jury had a question for the judge, the question should be put in writing and given to the tipstaff to give to the judge.[66]

It is suggested the better view is that expressed in *Stretton*, supported by Justice Eames, namely that it is not appropriate in any circumstances for a tipstaff

to have conversations with the jury, especially acting as a messenger between jury and judge of verbal communications.[67] This practice has the ability to cause disagreements in the nature of what was said between jury and tipstaff, and, worse still, create the possibility of a miscarriage of justice of inadvertent advice from tipstaff to jurors regarding the case.

VI Conclusion

There is no doubting the view that good practical experience as a lawyer is excellent training in preparation for being called to the bar. Exposure to various forms of legal work, such as drafting legal documents, dealing with clients, briefing counsel, and appreciating the long hours required of members of the legal profession can guide a practising lawyer in the right direction for work at the bar. However, it is suggested that work as a tipstaff in the court system is another suitable alternative path to the bar. A tipstaff has ongoing exposure to the courtroom, has the opportunity to learn from some of the most experienced and well-developed legal minds in the country, assist their judges in dealing with the countless cases that come before the court and develop contact with fellow tipstaffs who may become lifelong friends.

That the work as a tipstaff is valued as meeting prescribed practical training requirements in the law was recognised in the case of *Juratowitch v Solicitors' Admission Board; sub nom*,[68] where a tipstaff's application for exemption from prescribed practical training requirements for admission as a lawyer was recognised by the court.

In summary, a tipstaff is versed with various functions. Some administrative, others more legal in nature. It should be appreciated, however, as the broad range of roles undertaken demonstrate, the function of a tipstaff is very much at the discretion of their judge, who, like all of us, have particular characteristics which no doubt influence the work of such an office. And, although the role of the tipstaff has changed to meet the modern legal world, which includes direct legal assistance to the judge in a variety of ways, the role of tipstaff continues the more traditional function of administrative and personal assistance to their judge.

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* Jason Donnelly, BA (Macq), LLB (Hons) (UWS), GDLP (COL). Tipstaff of the Supreme Court of New South Wales, 2010.

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Sir Adrian Knox

By David Ash

> Some day someone will write the full story of Australian roguery, from the rum racketeers of the First Fleet to the beer racketeers of the Second World War, from land swindlers to mine swindlers, from William Wentworth to Claude de Bernales. The dramatis personae will be well assorted – red-coated English officers and wide-hatted Australian squatters; Tories and Socialist; knights and nobodies; politicians, policemen, aldermen; racing-men and brewers; and every State will provide a scene or two, though, unquestionably, New South Wales will steal the show.

Adrian Knox was a New South Welshman. He was neither a red-coated English officer nor a wide-hatted Australian squatter, although his birthright was upon them. He was a Tory and not a socialist. He was a knight and a politician and a racing-man. But he was no rogue; rather, he was the acme of his own perception of integrity.

Why open this fifth instalment of *Bar News*'s Sydney High Court prosopography with Cyril Pearl's paean to larrikinism, other than to note the bar's founding father gets his own guernsey?[1]

In fact, the word 'larrikin' and the child Knox each made an appearance in the 1860s, with the child – at 1863 – in by a head. Knox was the last appointment to the High Court to spend the greater part of his life in the 19th century. Knox's time was at least his own as much as the larrikin's, a fellow described by Pearl as the 'product of the acute social inequality, the class bitterness and the frustration of his times…'[2]

Knox was more than not a larrikin. He was an anti-larrikin, a counter-product of that same inequality. For him, the concept that class was anything other than an inert collation of rights and obligations, or the idea that bitterness or frustration was anything but a personal trait of the weak, these were foreign things.

None of which is to say that Knox was a foreigner in his own land. He was intimately involved with it; if we stress each of 'his', 'own' and 'land', we may add 'More so than any High Court judge before or since.'

Frigyes Karinthy

Frigyes Karinthy was a contemporary of Knox. That is the end of what they had in common. Karinthy was a poet, a satirist, a comic writer and a café society wit. He was Hungarian. While not a Jew, his second wife would die in Auschwitz. He was a way removed from Knox's world, physically, financially and spiritually.

In 1929, Karinthy wrote a short story whose title translates as 'Chains' or 'Chain-Links'. In it, he proposed the 'six-degree-of-separation' theory:[3]

> A fascinating game grew out of this discussion. One of us suggested performing the following experiment to prove that the population of the Earth is closer together now than they have ever been before. We should select any person from the 1.5 billion inhabitants of the Earth—anyone, anywhere at all. He bet us that, using no more than five individuals, one of whom is a personal acquaintance, he could contact the selected individual using nothing except the network of personal acquaintances.

Sir Harry Gibbs wrote in a foreword to Graham Fricke's excellent sketch of earlier members of the court:[4]

> The writer of the biography of a member of the High Court who has not engaged in politics has no easy task. The life of such a judge has not usually been an adventurous one, except in the field of the intellect, and a scholarly analysis of judgments on legal topics, and an examination of the development of legal principles, does not make exciting reading for the layman.

The interesting thing about Knox (who did engage in politics, unexcitedly) is that if the living of his life may have been unadventurous in the Gibbsonian sense, it was a life with a box seat position from which we may vicariously view our colony and our early state and nation. Knox by his birth and then by his ability was intimately involved in so much of Sydney's commercial and legal life that he gave up one fortune to take the post of chief justice and gave up the post of chief justice to take up another. It is these involvements, chain-links if you will, which make Knox's story far more accessible than Knox himself.

As a postscript, I accept that it would be unfair to take up Karinthy without attempting at least one 'six-degreer' between himself and Knox:

> Karinthy (1) had as translator and a person who as a child had met him Paul Tabori (2); who was a member of the

> Ghost Club Society[5] with K E Shelley QC (3); who successfully led the appeal in Chappell & Co. Ltd v Nestle Co. Ltd [1960] AC 87 before inter alia a dissenting Viscount Simonds (4); who had juniored R G Menzies (5) in one of the Privy Council forays of Mr James, well after Menzies had had his victory in the Engineers' Case, a victory built upon (6) Adrian Knox asking him why he was putting an argument he knew to nonsense.[6]

Chappell is perhaps better known to the tortured contract student for Lord Somervell's observation that '[a] peppercorn does not cease to be good consideration if it is established that the promise does not like pepper and will throw away the corn.'[7]

A recent *Herald* obituary throws up a 'five-degreer'. The obituary is for Charles Campbell (1937–2011). Knox is not mentioned, but we can infer his presence: Charles (1) married Martha (2); Martha is the daughter of Helen (3); Helen was the daughter of Colin (4); and Colin was – apart from being a descendant of the original Campbell himself by a different route – best man to Knox (5).

The obituary mentions that the original Campbell had owned Duntroon (and, for that matter, Yarralumla). In the *Women's Weekly* of 1 July 1964, Mary Coles writes on the subject of new bells for Canberra's St John the Baptist Church:

> St John's owes its start to Robert Campbell, Sydney Free-Settler merchant and original owner of 'Duntroon,' a sheep-run in the Limestone Plains – Canberry Creek district. He names the property after Duntroon Castle, the Campbell family seat in Scotland…
>
> With Campbell backing, the foundation stone was laid in 1841 and the church, with seating for a congregation of 200, was completed in 1844.
>
> … In a lighter vein there's an original pew with the inscription A KNOX LLB.
>
> It's believed to have been scratched (prophetically) in 1878 by Sir Adrian Knox, a former Chief Justice of the High Court of Australia, when he was a lad.

Sir Edward Knox

Neither entrepreneurs nor judges are known for pondering the Hamletian dilemma, so it is not surprising that Edward Knox emigrated from Elsinore (in 1839 after quarrelling with his uncle).

In 1844, he married Martha Rutledge, the sister of the well-known merchant and settler William.[8] (Martha being the great-grandmother of the aforementioned Martha).

Edward had chosen Australia to make his fortune as a pastoralist; a high degree of business acumen saw him first try his hand in a number of Sydney business enterprises, including sugar and banking.

Edward was involved with sugar from 1843; the Australasian Sugar Co, a lessee of his sugar making equipment, made sugar at the corner of Liverpool and Pitt Streets, the intersection where the Downing Centre is found. But the defining – or refining – moment would come on New Year's Day 1855, when the Colonial Sugar Refining Company commenced business with Edward retaining a third of its capital.

Chippendale and Pyrmont

When Sydneysiders think of CSR, most of us think of Pyrmont. The land where the suburb is had been bought by John Macarthur in 1799 for a gallon of rum; when he took a group for a picnic in 1806, one of the women in the party said that it reminded her of Germany's Bad Pyrmont. Young barristers know that Bad Pyrmont was once home to Nobel laureate Max Born. Old barristers know better the songs of his granddaughter Olivia Newton-John.

Before Pyrmont, CSR had Chippendale, where Knox Street still comes out onto City Road opposite Victoria Park, between the Landsdowne Hotel and the Golden Fang Chinese Restaurant. The land was owned by Robert Cooper, who had his Brisbane Distillery there.

Cooper had been a convict, and if too early and occasionally too rich to be a larrikin, he was certainly a prototypical 'colourful Sydney identity'. Pearl's rogue W C Wentworth – wearing it seems a solicitor's hat and not a wig – once wrote to Cooper's solicitor on behalf of a client, regretting that 'Mr Robert Cooper who is so liberal of his Gin to others, should not have indulged Mr Alexander with a taste of it last night, instead of that taste which he gave him of a bludgeon'.[9]

Cooper was not ashamed to advertise the source of his wealth, choosing for the name of his still-extant-on-Oxford-Street residence, *Juniper Hall*. (It is tempting to wonder whether one of the Knox family houses in Darling Point, *Lansdowne*, was the reason the pub later got its name. Somehow I don't think so.)

Coopers' workers did not have had it so good. Edward Wise, on the other hand, had a social conscience. In 1859, he was attorney and not yet Supreme Court judge. After firsthand and detailed inspections, he gave evidence to a select committee 'on the condition of the working classes', after observing of part of Chippendale:[10]

> This row of houses [in Paradise (!) Row, now Smithers Street], twenty-five in number, are all weatherboard, with a roof of shingles, in an exceedingly dilapidated condition, totally unfit to be the residence of any human beings; many of these dens are so filled with vermin that the people can hardly live at all in them. The wet comes in through the roof, and runs off the street into them, the floors being lower than the street. Each dwelling contains two rooms – the one 10 feet square, the other 7 feet 6 inches by 10 feet. All the light is from two windows, about 25 inches square. The back room in which they sleep is so small, that when the bed is up scarcely room is found to turn round, and yet I found, huddled together, five of both sexes, indiscriminately. There is no drainage, and only one well to all the houses. At the back of the house, fronting the back, are the privies, five in number, three full, and four out of the five unfit for any human being to enter; three have no doors, and another has no roof, so that, if the feelings of delicacy were at all consulted, four would never be used, and the 100 inhabitants would all go to one privy. The men seemed ashamed to look at me while they told me the barbarous state in which they were compelled to live. The houses were 8s. each, reduced to 6s.

Things would not be so bad after CSR began operations. Local historian Shirley Fitzgerald observes that 'If Robert Cooper represented the first generation of colonial adventurers, [Edward Knox and his two partners] represented a second generation of more respectable investors and merchants', adding that 'All three men were free immigrants with considerable standing in the commercial world of Sydney, and considerable involvement in worthy social ventures'.[11]

True it is that Wise actually gave his evidence in 1859, after Cooper had decamped and four years after CSR had commenced operations. Against this, CSR had upon its commencement begun the demolition of most of the cottages to the west (towards the now Knox Street), erecting in their stead 'more substantial four-roomed, two storey brick houses with slate roofs', although probably selling them off rather than using them as tied housing.[12] Many years later, in 1877, Edward would make a personal gift of £1,500 to the 129 employees in the business.

None of which is to say that CSR ran a model operation. Like other capitalists before and since, it would admit its participation in a nuisance (in this case, the fouling of city water) and avoid any responsibility. CSR was fortunate in 1872, when, as one of the defendants in an prosecution relating to the same, it was able to find local residents prepared 'to vouch for the sweetness of the air in Chippendale'.[13]

Sir Edward Knox's offspring

Edward and Martha had George (1845-1888, barrister); Edward William (1847-1953, chair and managing director, CSR); Thomas Knox (1849-1919, managing director, Dalgety's Sydney branch); Clara (1851-1928); Jessie (1853-1927); Fanny (1856-1944); Katie (1859-1946); and Adrian (1863-1932).

In omitting parenthetic particulars of the women, I am not being unfair. First, this is an article about Adrian and not about them. Secondly and in any event, I will try to make good the imbalance. In the last issue of *Bar News*, legal historian Tony Cunneen wrote:[14]

> (Sir) Adrian Knox KC lamented having to serve on a particular Red Cross committee then added: 'When the war is over I hope I never have to act on a cock & hen committee again – at least until the next time.' Knox's reference was clearly to the necessity of having to work with women and he was obviously keen to avoid it if at all possible.

With four sisters separating Adrian from three high-achieving brothers, we are entitled to speculate on a link between his family life and his attitude to working with women. And we are fortunate in this respect of have a book of recollections by Helen Rutledge, the Helen who was mother-in-law of Colin Campbell, whose obituary is referred to above. We are fortunate

for three reasons.

The first is that Rutledge was no mere relation of Knox. Her father Colin was Adrian's best man, her mother Knox's niece.

The second is hinted at when Rutledge acknowledges in an afterword her daughter Martha's 'professional editorial experience and her historian's knowledge'. This is an understatement. Martha is the doyenne of Australia's *Dictionary of Biography*, with 169 entries to her name, at last count.[15] Pertinently, she and Graham Fricke are the joint authors of a biographical note on Adrian in the *Oxford History of the High Court of Australia*.

The third is that Helen provides a legal flavour to our theme of interconnectivity: Helen's daughter Martha's late husband Charles was first cousin twice removed of Lucy Stephen nee Campbell, wife of Septimus, seventh son of Stephen CJ and brother of the aforementioned Colin, Helen's father.

I digress.

Of Adrian, Helen writes:[16]

> Adrian was the one his family considered to be the most brilliant. He was the fiercest and most dogmatic of the brothers and though he did not suffer fools gladly, he was powerfully attractive. Unlike Edward, who seemed to have no pleasures except in business affairs and his home and garden, the sons had other interests. [Colin's father] Ned and Tom were keen yachtsmen and Ned enjoyed the theatre and dancing (he said the latter came naturally to him and he always danced on his toes, not his heels as some men were seen to do). Adrian liked racehorses and racing. He was chairman of the Australian Jockey Club for years but gave up all his racing interests when he became Chief Justice of the High Court of Australia, after a brilliant career at the Bar. He also sold all his company shares. There were considerable sacrifices on his part, but like Ned, who said he never tried to make money because he thought it was wrong for a salaried man to speculate, Adrian thought it would be wrong to hold industrial shares in his new position. He, also, had a high sense of duty and of what was fitting. He was much younger than the others and much spoiled by his sisters, who doted on him. He never had the rugged upbringing that fell to the lot of Ned and Tom nor did he possess tolerance as an employer of men that Ned learnt in the Sugar Company, and Tom had as a manager, general manager and inspector of Dalgety and Company.

Of the Knox women, Helen writes:[17]

> Grandfather [Edward William, Edward's son] was known as Uncle Ned, and Granny as Aunt Edith by those who had the right; because there were no sons of [their] marriage she was never called 'Old Mrs Knox'. When her sister-in-law, Mrs George Knox died in England [in 1937], Edith had her cards changed from Mrs Edward W. Knox to Mrs Knox, much to her satisfaction. Before this, there was Mrs Ned, Mrs Tom and Adrian's wife, soon to be Lady Knox [sic; Knox's CMG had been upgraded to a KCMG in 1921]. There was something very distinctive about being 'Mrs Knox' and being acknowledged head of the family, but it was pleasing custom in those days to be called Mrs Tom, Mrs Dick and Mrs Harry. It was unthinkable to speak of these married ladies by their Christian names if one belonged to a younger generation or were only an acquaintance.

Five years after Knox's cock & hen committee complaint, Frigyes Karinthy completed the second of his two sequels to *Gulliver's Travels*. Gulliver finds himself in Capillaria, a land beneath the sea where men – or 'bullpops' – are enjoyed as fine dining by women, who rule as gods. Knox might have enjoyed Karinthy's introductory remark:[18]

> Men and women – how can they ever understand each other? Both want something so utterly different – the men: women; and the women: men.

Knox would resign as chairman of the AJC immediately upon his elevation, whereupon the AJC instituted a classic race, the Adrian Knox Stakes. This is a race for three-year-old fillies, and is perhaps a vindication of sorts. What would Knox have said had he lived to see the list of acceptors for the 1939 race, which the *Herald* of 10 January reported as including Some Vixen, Feminist, Early Bird, Lady Curia, Talkalot and Radio Queen.

It is not enough to explain Knox by his connections with his family; it is necessary to consider closely his family's – and his own – connections with commerce. Older barristers will recall that the NAB branch at the corner of Elizabeth and King Streets was once CBC. In the latter's centenary history is written: [19]

> At the annual meeting of the bank in July, 1933, Mr James Ashton, the chairman of the bank, in making reference to the death of [Adrian's brother] Mr E W Knox, stated "The recent deeply deplored death of Mr E W Knox, a foremost

> figure of Australia's commercial life, removes another link with the past. Mr Knox's father, Sir Edward Knox, became a director of the bank-then a co-partnery-in the year 1845-88 years ago. In 1847 he became managing director, and when the bank was incorporated the following year with a capital of £72,000 he was appointed manager. He vacated this post in 1851 to become a director, which position he held until 1856, when he was appointed auditor. [Meanwhile in the second full year of CSR operations!] In 1862 he again became a director, and remained on the board until 1878. Thereafter he was a director at intervals until his death in 1901.
>
> Continuity of service was broken during the earlier years of his connection with the bank by an arrangement for periodic retirement of members of the board. During his absences from the board from 1878 onward, Sir Edward Knox's place was filled for the most part by his son, the late Mr E W Knox, who, joining the board in that year, finally ceased to be a member in 1909. Mr T F Knox, another son of Sir Edward Knox, was a member of the board from 1915 until his death in 1919, and the third generation is represented by Mr E R Knox, who is present as a director.

Sir Edward Knox, like William Lever, was a paternalist. But there was a difference. Lever was a liberal but a peculiarly meddlesome one, building his paradise of Port Sunlight upon the intrusive rules of an autocrat. Knox was a Tory and an extremely rich one, but I rather think he thought himself a privileged person who was required to discharge his own obligations and not permitted to impose his own mores. In this, he was Adrian's father.

Knox's Australian education

In 1827, Barnett Levey commenced building *Waverley House* at Bondi Junction, named by him in honour of Sir Walter Scott.[20] It is gone now, and all that remains is Barnett Levey Place, at the corner of Bondi Road, Waverley Street and Council Street, Bondi Junction. The closest street is in fact none of these, but the deadend Dalley Street. I do not know whether this is the Dalley whose statue looks from Hyde Park at his three homes, the Supreme Court, the Legislative Assembly and St Mary's Cathedral, or his equally colourful son John Bede Dalley, or some other Dalley. Be that as it may, this site of *Waverley House* would become Knox's first place of education.

Founded in 1866 by Miss Amelia Hall, in 1828 a teacher would write:[21]

> It was my privilege to be on the teaching staff of 'Waverley House' fifty four years ago (1874) [when Knox was a student]…. Waverley House was the principal preparatory school in the colony at that time. We had boys from all parts of Australia and Fiji.

The boys wore Eton uniforms and silk hats, and students included (Sir) Philip Street and members of Sir Alfred Stephen's family. Hall led the boys to water and let them drink, as her commemoration is two granite horse troughs at the entry to Waverley Cemetery on the corner of St Thomas and Trafalgar Streets. A feature is a lower drinking trough at pavement level, it being suggested that this was for dogs.[22] I suspect that this is correct. If you stand at the corner and look at the gates of the cemetery (which opened for business in 1877), the most notable thing is a high-placed sign barring dogs. This must have been to prevent unhygienic outcomes in otherwise solemn moments. Anyway, I wonder how many of Hall's students are buried there?

Hall's death in 1891 was the catalyst for the Kilburn Sisters taking over a lease for the purpose of enlarging their day and boarding school for girls and infant dayboys and of incorporating an orphanage.[23] I suspect George Rich's sister – Kilburn Sister Freda – may have taught here while she was not assisting the homeless.

After *Waverley House* and until Knox was about 14 years of age, he attended H E Southey's school in the Southern Tablelands. The nephew of the poet laureate, Southey rented *Throsby Park* at Moss Vale and opened with eleven boys in the early 1870s, purchasing *Oaklands* in Mittagong in 1875.[24]

The poet laureate had named his school magazine *The Flagellant* and compounded his problems by using an early number to apply the title to Westminster School's headmaster:[25]

> Vincent was moved to uncontrolled wrath and an action for libel against the publisher. Southey at once admitted himself the author of the paper and was promptly expelled.

The author of the school's history notes that a lack of humour was one of Vincent's two faults.[26] What Vincent

would have made of his student's own nephew's hack at headmastership, we cannot say. However, the *Australian Sports History Bulletin* has given us an insight with a short note on John Walter Fletcher, the English FA's first secretary and a man advanced as the 'Father of Australian Soccer':[27]

> Fletcher's movements from 1870-1874 remain obscure but during 1875 he accepted a position as Assistant Master at H E Southey's country school, Oaklands. Initially located at Moss Vale, New South Wales (NSW), the school was moved to Mittagong before Fletcher arrived in the last months of 1875. Employment and a touch of adventure lured Fletcher to Oaklands but the man Southey himself was an attraction. Also an Oxford man, even if he was secretly sent down for persistent gambling, Southey was the nephew of the prominent poet Robert Southey.
>
> If Fletcher believed Oaklands was going to be another Cheltenham, he received a rude shock upon arrival. Southey's school was a small, rough and tumble establishment where bullying among the boys was reminiscent of English schools in the 1820s. Set in the bush with 640 acres of scrub attached, the school had a better than average standard of teaching but Southey's methods, much liked by the Murrumbidgee squatters who sent their sons to Oaklands, were alien to the likes of Fletcher. His stay was accordingly short.
>
> While there, Fletcher did become a pioneer of lawn tennis in Australia. He seems also to have been the 'reformer' who introduced history and geography to the school. His charges included Gilbert Murray, then a ten year old but later an eminent classics scholar. Murray's memoirs help explain why Fletcher's stay at Oaklands was so brief:
>
> > When my mother and sister came up once to see me they were horrified at our dishevelled and ruffianly appearance, but took comfort from the thought that we were as healthy as we were untidy.[28]
>
> A final reason for Fletcher's quick departure conceivably lay in his staunch Anglicanism and disagreement with Southey, who had a commitment to Catholic religious instruction.

Murray's brother, later Sir Hubert, administrator of Papua, was named John Henry Plunkett, for his father's friend, attorney and ultimately successful prosecutor in the Myall Creek massacre.

Knox would become and remain a keen sportsman. I Zingari (from the Italian for 'the gypsies') Australia is amongst the oldest cricket clubs in Australia. There is a photo of a youthful Knox in the I Zingari Australia First XI for the 1899/90 season. An uncaptioned copy can be seen on the club's website.[29] Knox is the boatered beau in the top left corner.

Knox did not have to go far for a game. He generally lived in Woollahra, although he may at this time have been spending bachelor years in the Dower House, now part of Ascham School (for girls!) in Edgecliff. By that season, the club had ironed out accommodation difficulties: [30]

> It is generally not known that there existed considerable opposition to our old club obtaining the lease of Rushcutter Bay oval when first built- and further to prevent football being played on the new turf in its first winter, we cricket club members introduced baseball but, as there was no competition, the game did not prosper. We then formed the Roslyn Gardens Harrier Club as our winter sport and held a Sports meeting on the oval.

A digression – Darling Point realty

I think we'll just do this one by numbers and see where we go. By 1864, Adrian's father Edward felt secure enough to buy land from Thomas Whistler Smith:[31]

> After his father's death in 1842, Thomas Whistler Smith took over the successful family importing business and built a house for his mother known as Dower House in the grounds of Glenrock. In 1847 he married Sarah Maria Street… Smith also directed several companies including the Commercial Banking Co. of Sydney, and was a member of the New South Wales Legislative Assembly from 1857–1859.

From the Edward Knox side of things, there is the mere commonality of bank and politics. On the family front, John Street had married Maria Wood nee Rendell. A daughter was Sarah Maria: see above. Meanwhile, a son was John Rendell Street, a son of whom was Philip Whistler Street. Had I had either time or politeness, I would have contacted one or other of the extant dynasts for confirmation; for now, I have to hypothesise: I haven't found a Whistler in Philip's ancestry; I suspect the early death of TW Smith (in 1859) was remembered by his widow's brother and his wife when giving Philip a middle name (in 1863). *Bar News* editor, stand by for clarificatory letters.

I add only that there is no dispute that Philip Street's

mother was Susanna Caroline Lawson, a granddaughter of William, explorer colleague of Blaxland and rogue barrister Wentworth. Keep the link in mind for the hereunder.

A digression – The Royal Society

The poet's nephew made a go of being a headmaster. On page 9 of the *Herald* of 11 January 1879, the school's scholarship advertisement is larger than the adjoining ones for The King's School and Newington College.[32] Meanwhile, he was elected to the Royal Society of NSW on 7 June 1876. Given the school's sporting outlook it is happy to note that a person elected with him was a John Eales.[33] At the same meeting, Henry Chamberlain Russell (later a president and one of Australia's foremost men of science) read a paper entitled 'Notes on some remarkable errors shown by Thermometers'.[34]

Knox's elder brother George joined the society in 1874; his father Edward in 1875; and his elder brother Edward junior in 1877. On 4 October 1876, the society resolved to send a deputation to wait upon the government to urge it 'to introduce during the next Session an efficient General Public Health Act…'

The deputation included a Knox; George Wigram Allen; George Dibbs; John Fairfax; and A B Weigall. A number of other prominent names appeared. As the abstract of a recent paper by Dr Peter Tyler to the society entitled 'Science for Gentlemen - The Royal Society of New South Wales in the Nineteenth Century' says:[35]

> Members of the Royal Society were part of the colonial conservative establishment. Women were excluded, while rigorous admission procedures ensured that "working men" did not become members. Nevertheless, the Royal Society recognised the need to educate or inform the broader public about the achievements of science, and organised regular gatherings for that purpose. It would be easy to characterise the members as typical class-conscious paternalists of the Victorian era, but there were always a few dissenters who did not fit that model.
>
> In the twentieth century more inclusive attitudes emerged gradually, reflecting the changes in the wider community. Today it is difficult to discern any remnants of the earlier caste system. A question we might ponder is - has the influence and public profile of the Royal Society diminished at the same time?

Doctor Tyler points out that the society's origins go back to 1821 when The Philosophical Society of Australasia was established under patronage of the governor, Sir Thomas Brisbane, who was its first president. Himself an eminent astronomer, the origin of his name will interest barristers of our northern sister; one or more members sat on the Scottish woolsack, hence it is said the name Brisbane, or 'bruised bone'.

And what of Mr Fletcher?

With Fletcher's sporting firsts, readers will not be surprised that his son played club cricket with Victor Trumper while his wife Ann(e?) embroidered the velvet bag in which Ivo Bligh carried back the Ashes urn in 1883.[36]

Fletcher began a school in Woollahra – Knox's home suburb for much of his life – and had his own brush with the law thereby. As recorded by the Herald on 19 September 1883:

> In this case WH Chard sued JW Fletcher for 20 12s for alleged breach of contract. Mr F Barton, instructed by Messs Spain and Sly, appeared for the plaintiff; and Mr O'Connor, instructed by Messrs Want, Johnson and Scarvell, for defendant. It appeared that the defendant was headmaster of Coreen College, Woollahra. Plaintiff's case was that it was agreed between him and defendant that in consideration that he paid defendant one quarter's fees in advance defendant would board, teach and instruct a son of plaintiff at his college during the whole of the said quarter. He paid defendant the said fees, and everything happened necessary for entitling him to have the agreement performed; yet defendant did not board, instruct and teach the plaintiff's said son during the whole of the said quarter. Although he received plaintiff's son at his said college at the beginning of the said quarter, he refused and neglected to board, instruct and teach plaintiff's son during the whole of the said quarter, whereby plaintiff lost the said quarter's fees, and the board and instruction that otherwise would have been given to his son. The amount sued for consisted of the fees which plaintiff had paid to defendant. The defence was that the son of plaintiff was suffering from ringworm, and that he was sent home as a precaution against the other scholars suffering contagion from the said disease, but that defendant was prepared, upon the boy being cured, to receive him back again in the college. Having heard the evidence the Judge stated that the case was a rather unusual one. It appeared to him, however, that defendant had acted judiciously, as there was no doubt that he had to

> perform a duty to his other pupils as well as to plaintiff's son. His verdict would be for defendant, with costs for witnesses and increased fees for counsel.

Such were the early days of a future master in lunacy and a future High Court judge.

An English education

From Mittagong, young Knox was sent to Harrow. Why, I do not know. The brothers (or at least Edward Junior and George) went to Sydney Grammar, and if Edward senior and his wife knew that Adrian was headed for the High Court, he would have felt at home there. Gavan Duffy CJ said from the bench upon Knox's death:[37]

> Educated at an English school and an English University, and bred in a society which does not encourage the display of exuberant emotion, Sir Adrian did not wear his heart upon his sleeve; but he had a kind and generous heart, and his friendships once formed were warm and lasting.

And the Harrovian that Knox must have made? Perhaps a Shavian Colonel Pickering over Withnail's Uncle Monty. He would stay in England from aged 14 for a decade, later moving to Trinity College Cambridge, where his elder by two years was A N Whitehead, Bertrand Russell's partner on *Principia Mathematica*, and his junior by three, George Lord Carnarvon, known to generations of schoolboys as the man who funded the discovery of – and soon suffered mysterious death by – Tut'ankhamun's tomb. Knox was admitted to the Inner Temple in May 1883, took his prayed-for LLB in 1885, and was called in May 1886. However, he cannot have practised there, as he was admitted to the colonial bar on 26 July and commenced reading with George at Lyndon Chambers.

Brother George

George Knox had a large equity practice, but he died two years later, in 1888. Born in 1845, he was almost two decades his reader's senior, although this did not stop the precocious Adrian succeeding to much of his practice, and to much of his contact with the leading solicitors of the day.

Adrian would still have been in Mittagong when the *Herald*'s law reports for Wednesday, 18 February 1874 recorded:

> Central Criminal Court. Tuesday. Before his Honor Sir James Martin, Chief Justice.
>
> The Attorney-General (Mr Innes) prosecuted for the Crown.
>
> FORGERY AND UTTERING.
>
> Frederick Poole, otherwise Frank Percy, was indicted for that he, at Sydney, on the 12th of January last, did feloniously forge a certain warrant and order for the payment of £4 sterling, with intent to defraud. There was a second count for feloniously uttering.
>
> The prisoner pleaded guilty to the second count, and was remanded for sentence.
>
> CHILD MURDER.
>
> Frances Alderson was placed in the dock to stand her trial for that she, at Liverpool, on the 4th of January last, did murder a male child, by name unknown to the Attorney-General.
>
> The prisoner, who had pleaded not guilty on the day previous, was defendant by Mr P A Cooper.
>
> The case for the Crown was supported by the evidence of the apprehending constable, Robert Jones; Elizabeth Anderson, a midwife; and Dr Strong, a duly qualified medical practitioner.
>
> The medical testimony went to show that there were grounds for the presumption that the child whose body was found had been "fully born alive", but he could not swear that such was the case, or that what he saw was inconsistent with the theory that death might have taken place before birth.
>
> The first count was withdrawn on the part of the Crown, and the counsel for the prisoner addressed the jury in defence of the prisoner on the minor charge.
>
> The jury returned a verdict of "Not guilty of murder, but guilty of concealment of birth".
>
> The sentence of the Court was that the prisoner be imprisoned in Darlinghurst gaol for twelve calendar months.
>
> RAPE.
>
> Michael Desmond was placed in the dock to stand his trial for that he, on the 25th day of December last, did commit a rape on a female child named Ellen Anne Williams, aged 11 years.
>
> The prisoner was defended by Mr George Knox, instructed

by Mr J Carroll.

The testimony for the Crown consisted of the evidence of the apprehending senior constable James Potter, of that of the child herself (prisoner's step-daughter), her young brother, and Dr Egan.

The counsel for the prisoner (Mr G Knox) contended for the possibility of the two children being quite mistaken in their identification of their stepfather as the perpetrator of this gross outrage.

The Attorney-General replied, pointing out that no reasonable ground had been shown against the most implicit acceptance of the testimony of the child and her brother.

The jury retired to deliberate; and, on their reappearance in Court, after a short interval, returned a verdict of "Guilty".

The prisoner, on being asked what he had to say – by way of showing that sentence of death should not now be passed upon him – declared that the testimony of the constable, on some trivial circumstances connected with the apprehensions on his charge, was not to be relied upon. He complained also that the girl's "bad conduct" had not been spoken of in the evidence given in the case – that she had often been brought home drunk, and was frequently out late. This charge brought against him was due to nothing but the vengeance of his wife, a woman older than himself, who was very jealous of him, and with whom he lived on bad terms. As to this charge of rape he was innocent of it altogether. It was a mere plot against him by the Williamses, who had put up the two children to swear against him. The girl was out that very night till half-past 10 o'clock.

His Honor said that the prisoner had been tried for the capital crime of rape, and had been found guilty by the jury who had heard and considered the evidence. His defence had been very ably conducted by the learned counsel assigned, and everything had been said in his behalf that could be said. All that the prisoner now said, or might hereafter say, would of course be considered by the Governor and the Executive Counsel, but what weight would be attached to such statements, under the circumstances, it was not for him (the Judge) to say. It was his painful duty to pass upon the prisoner the sentence of death awarded by the law to those who were guilty of rape – and offence hateful in every case, but under the peculiar circumstances of this case calling for special reprobation, committed on his step-daughter – a child of eleven years, and of remarkable intelligence. For himself he must say that he could see no grounds for any possible mitigation of sentence, for the circumstances disclosed seemed to be of particular atrocity. but that would rest with the Executive. The Chief Justice then passed sentence of death on the prisoner in the usual form.

The prisoner heard the sentence (apparently) unmoved, and was removed from the dock.

ATTEMPT AT SUICIDE.

Mary Dogherty, a woman advanced in years, was charged with having, at Sydney, on the 6th February instant, feloniously attempted to kill herself by taking poison.

The prisoner, who pleaded not guilty, was undefended.

The facts of the case were simple. The prisoner took some powder mixed with water in the presence of her son giving him to understand that she was taking poison. The son went for the police, and senior constable Stephen Foley soon arrived; and, by his presence of mind, in giving the woman a dose of salt and tepid water, probably saved her life. The murderous / mysterious [?] nature of the powder taken by the prisoner, and the effect it took upon her, was shown by the evidence of the house surgeon at the Infirmary.

The jury, however, took a merciful view of the case, and without leaving the box returned a verdict of not guilty. The prisoner was discharged.

ATTEMPT AT SELF-MURDER

Robert Payton was charged with having, at Sydney, on the 25th of January last past, feloniously attempted to kill himself.

This case was very similar to the preceding. The accused had, it appeared, taken poison, but fatal consequences had been averted.

Verdict: Not guilty.

The prisoner was discharged.

George's family

George's son would become a noted diplomat. I wonder how much of uncle Adrian found its way into his temperament:[38]

> [Sir Geoffrey] Knox was a man of strong views and a pronounced realist. Pugnacious in character, he was no compromiser and, fully conscious of his abilities, took few pains to endear himself to his superiors. For his friends he had a warm smile and an infectious laugh, and he enjoyed happy relations with his foreign diplomatic colleagues. He

> was fond of the good things in life and had the means to ensure their enjoyment. As a result he was sometimes, and generally unjustly, accused of neglecting the less agreeable tasks performed by diplomats.

He was no buffoon, working hard under Eden's patronage and irritating the right people to irritate. The *Herald* reported from Berlin on 29 April 1937:

> Sir Geoffrey Knox, the Australian, who was formerly Commissioner for the Saar, and is now British Minister at Budapest, has been attacked in the "National Zeitung" (Essen), which is regarded as the organ of the Minister for Air (General Goering).
>
> Sir Geoffrey Knox is accused of trying to undermine German influence in central Europe, at the orders of the British Foreign Minister (Mr Eden). "He wishes to make up on the Danube for the defeat on the Saar," it says. "He aims at undermining Hungary's friendship with Italy and Germany, and at bringing her under the influence of Paris and London."

Law reporting

By the mid-1870s, publication of the *Supreme Court Reports* was becoming haphazard. Into the gap rode George Knox. JM Bennett and Naida Haxton report:[39]

> Reports were also written up for 1877 by George Knox but, like 14 SCR, were not published for many years, and then by Maxwell. Known as Knox's Reports, there were to have been annual volumes of them, but only the first was published…
>
> In 1879 a 'New Series' of the *Supreme Court Reports* was undertaken by Foster and Fairfax 'Printers and Publishers, 13 Bridge Street'. Volume 1 covered 1878 and was edited by Knox and Frederick Harvie Linklater… The series survived only to Vol 2.

George retired hurt after the failure of these ventures, but Adrian would be more inspired than deterred. He began reporting equity, divorce and lunacy cases for volume 8 of the *New South Wales Law Reports*, covering the year 1887. He stopped at volume 10.

In the last case, Knox himself appeared in strong company. In a stoush over the liquidation of a couple of companies, the bar from the big end of town appeared in force: C J Manning, Walker, Wise and Rich for the punter; Lingen and Davies for the liquidators of company A and the directors of company B; A H Simpson, Lingen and Knox for the liquidators of company B; Barton QC and Bevan for one named defendant; and Salomons QC leading A H Simpson for a bank.[40]

The case was an offshoot of Davy's case, an important bankruptcy judgment much later overruled by the High Court in 1908, a youthful Isaacs J dissenting.[41] (The High Court case is notable for comments about judicial interpretation of a statute repealed and re-enacted in identical terms.) Also of interest are the parties to the litigation. Barton QC and Bevan were appearing for one Lawrence Hargrave [the first name spelt with a 'u' in the report]. If there is a barrister in the metropolis who still has a pre-polymer $20 note, that person will know of whom I speak. The minutes of The Engineering Association of New South Wales record in December 1887, during the runup to the litigation, 'Mr Lawrence Hargrave exhibited diagrams of his flying machine'.

Other early matters involved Knox appearing for Dalgety & Co[42] (his brother's company) and in a dispute among relatives and creditors of a late AMP policyholder (Adrian later being a director of AMP). [43]

Knox had rooms in Northfield Chambers:[44]

> The first substantial move by barristers into Phillip Street initiated by the construction of Denman was shortly followed by occupancy of Northfield and Lyndon Chambers. In its thirty years of use, the former at 157, later re-numbered 163, Phillip Street never held more than a dozen members of the Bar while the latter at 161, later 165, Phillip Street had thirteen barristers in 1890 but was closed in the first decade of the twentieth century.

Marriage

Helen Rutledge recalls:

> My parents' courtship began, I believe, when [father] Colin [Stephen] was best man to Adrian Knox and [Adrian's sister and Colin's future wife] Dorothy was bridesmaid to his bride, Florence Lawson, at their wedding at Bong Bong Church in 1897. Though Adrian was nine years older than Colin, they were lifelong friends.

Colin and Dorothy married two years later. Colin was the father not only of Helen but of Sir Alastair, Sir Warwick Fairfax's solicitor. Sir Warwick's daughter was Caroline. Caroline married Edward Philip Simpson, a partner in Minter Simpson, now Minter Ellison. Colin's

firm is now known as Mallesons. The Simpsons built their house in Fairfax Road, Bellevue Hill, on what was the tennis court of Sir Alastair. Just down from *Rona*, Adrian's brother's house.

I digress.

And I interpolate again. This very moment, a minute or two after I had written the previous two paragraphs, *The New Lawyer* email newsletter has popped up on my screen. The main story? 'Law firm Minter Ellison has hired a Mallesons Stephen Jaques finance expert to its ranks, and appointed him partner.' I hope they provide a tennis racquet, for old times' sake.

I digress.

The New South Wales bench and bar has a special place for the Stephen family. While some of the children and grandchildren have kept barristers in Vegemite, it should not be forgotten that Alfred, Colin's father and longserving chief justice, was only the second of four generations to serve on the NSW Supreme Court: John (1825); Sir Alfred (1839); Sir Henry (1887); and Milner (1929). If barristers have ever wondered what judges do while they are boring them, Stephen has told us. On circuit in Bathurst in 1859 and during a long reply in a squatting action, the chief penned a poem on his fecundity, 'Twice nine, or Judicial impartiality exemplified':[45]

> Of children this Knight had no less than eighteen-
> Twice nine little heads, with a marriage between.
> He had nine when a barrister, nine when a judge,
> And of "sex"-thus to Nature he owed not a grudge-
> Nine precisely were girls, the other half boys,
> An equal division 'twixt quiet and noise;
> While, if by marriage the number be reckoned,
> There were nine of the first and nine of the second.
> Nine in Tasmania, nine New South Wales,
> Then, to show with what justice he still held the scales,
> Since nine it was clear he could not divide,
> (A third sex as yet having never been tried),
> Five sons and four daughters in Hobart were born,
> And four sons, five daughters might Sydney adorn.
> Twin daughters, twin sons, complete the strange story
> Of this patron of "Wigs", though constant old Tory.

Parliament

> Standing on a platform of free trade and non-payment of members, Knox was elected to the Legislative Assembly for Woollahra in 1894. He was 'an excellent speaker 'precise, easy, deliberate' and supported (Sir) George Reid, favouring direct taxation, civil service reform and federation.

A good conservative's platform. Meanwhile, in 1895, William Francis Schey introduced the self-explanatory Legal Profession Amalgamation Bill. Schey was a Protectionist and member for Darlington, which may or may not have gone as far towards the city as Knox Street. He was a unionist much interested in conditions of labour:[46]

> Scheyville National Park was part of Pitt Town Common set aside for the new neighbouring town in 1804. Although used for grazing and farming, Scheyville remains one of the largest surviving remnants of the Cumberland Plain bushland which once covered the Sydney Basin.
>
> In 1893, with the Australian colonies suffering the first 'Great Depression', a co-operative farm for unemployed workers was established on 2,500 acres of the Common. This socialist experiment failed by 1896, and the NSW Government established a Casual Labour Farm to train unemployed city workers as farm labourers.
>
> Around this time the farm gained the Scheyville name (pronounced 'sky ville'), after William Schey, NSW Director of Labour and Industry. [In fact, Schey's appointment as Director of Labour was in 1905.[47]]

And Knox's reaction to the bill?[48]

> Mr Schey [introducing the second reading]: I do not think any valid arguments can be advanced against it. There is no ground for opposition to such a step except pure toryism and conservatism, which has its last stronghold in many places in New South Wales. It is time that we placed ourselves in line with the other colonies, and made so desirable an advance.
>
> Question proposed.
>
> Mr Knox [following immediately after]: I do not intend to offer any opposition to this bill. I do not think it will make a great deal of difference whether we have the two branches of the profession or not. I do not know much of the other branch of the profession with which I am connected, that is to say, I have never been in a solicitor's office, but I know enough of it to be able to say that in a very few cases, and those very unimportant cases, can one man do the work of the two branches. In the first place, a solicitor has to have means at his disposal to collect and sift evidence and to get through the preliminaries of the case which counsel can never have at his disposal unless

> he happens to be as this bill would make him, a member of a large firm of solicitors. The effect of the bill would probably be to lead to the amalgamation of a certain number of gentlemen now practising at the bar with solicitors by going into partnership with them. But if the hon. Member thinks that this bill is going to reduce the cost of litigation I think he is a little too sanguine.
>
> Mr. Schey: I have no doubt the profession will do all they can to prevent its being effective!
>
> Mr. Knox: It ia not a question of the bill being effective. The bill does not attempt to do anything to lessen the cost of litigation. All that it provides is that from and after the passing of this bill every person who is a barrister shall be a solicitor and every solicitor shall be a barrister. If a man acts in both capacities he can charge for both branches of work. Qua solicitor he will go to the taxing master and get his costs taxed. Qua barrister he will get a certain amount allowed in the taxation for his fees member makes a mistake in saying that a solicitor is merely paid by quantity. Any one who has anything to do with the taxing of costs will know that one of the large items in a great many bills of costs is instructions for brief. That is certainly proportioned by the taxing master not only according to the size of the case, but according to the difficulty of the case. There a solicitor is paid according to quality, and not quantity. I see no objection to a bill of this kind. I do not mind it personally, and I dare say most members of the profession take the same view; but I have not ascertained whether they do or not. I did not come to the House to-day prepared to make a speech on this subject; but, as far as I am concerned, I shall offer no opposition to the bill. I can only tell the hon. Member that he is somewhat sanguine in his expectations if he thinks that this bill will altogether get rid of those little matters in connection with litigation which give the comic papers so much food for reflection. In Victoria, where they have this amalgamation, and where, I presume, they carry on under an act somewhat similar to this bill, I know there are a great many men at the bar who still stick to the practice of the profession as barristers, and who do not do solicitors' work.

The bill passed without division. In the Legislative Council, it failed miserably. Attorney Want, who made sure to say that he did not oppose amalgamation 'in an honest way', heaped scorn upon the drafting: 'Of all the wretched abortions of a bill which was ever produced this bill is about the worst'.[49]

It seems impossible to suppose that Knox – whose father sat in the upper chamber until the previous year – knew other than that the bill would be rejected there. If that is correct, then he must have seen no good reason not to take the position he did, a decision without real consequence. If advocacy for the bill, the effort is tepid. If advocacy against the bill, it is excellent.

In the course of debate on the Totaliser Bill, Knox admitted:

> No one is readier than I am to admit the over-racing around Sydney at the present time is very great; but, if we come to investigate it, we will find that the over-racing is due, not to the clubs under the auspices of the Australian Jockey Club – that is to say, horse-racing clubs- but is due to pony clubs, and, more especially, to those wretched, miserable, round and round the frying-pan clubs-Rosebery Park and Brighton, and these other places. [50]
>
> … I do not think gambling is immoral. I gamble myself, and I am not ashamed to own it. I think the man who gambles on the Stock Exchange is as much a gambler who goes to Randwick and puts his "fiver" on a horse, if he can afford it.[51]

Readers of Pearl's book will know that the man busily taunting Knox over these pages was W P Crick:[52]

> … a Sydney police-court lawyer with many clients, few scruples, and boundless impudence… [He was] hard-drinking, cynical, and accomplished. Crick was a man of great ability in politics as well as law… "His arrest by the Sergeant-at-Arms was at one time an ordinary event of the session," said Melbourne Table Talk in 1892. During one debate, he offered to take on any three members of the Opposition who were willing to come outside.
>
> Early in his public life, he distinguished himself at a debating society by throwing a glass of water into the face of the chairman, Judge Windeyer, with whom he was in disagreement…
>
> He looked like a prizefighter, dressed like a tramp, talked like a bullocky, and to complete the pattern of popular virtues, owned champion horses which he backed heavily and recklessly.

A pony club man, methinks.

And so to the tote

> Knox later enjoyed golf, sailing, and fishing on the south coast. He handled a motor car 'in expert fashion', but his great interest was the turf in all its forms.

The Australian Race Committee met on 5 January

1842 for the purpose of transforming the body into a permanent institution to be known as the Australian Jockey Club.[53] Although '[l]awyers and manufactures [with Knox the crossbred exemplar] were not yet prominently involved', two members of the Lawson family were, including the veteran explorer himself.[54] And it was W C Wentworth's land at Homebush where many of the early races were run.[55]

In Painter & Waterhouse's history of the club, there is reproduced a page of '[a] count of votes in the ballot for the committee in the early twentieth century'. The handwritten computations allow us to infer that eleven were standing, with ten getting the 203 proxies and nine getting 270 votes or more, with Knox first at 283. One of Knox's colleagues came in at 271; this was 'Hall, Walter R.'[56] It is not surprising that he was an original member of the Walter and Eliza Hall Trust.

On 1 December 1944, the *Herald* reported that Dovey KC (father-in-law and grandfather of well-known Sydney barristers) had resigned his seat on the committee of the STC to contest a vacancy on the committee of the AJC:

> In his law-student days at Sydney University, Mr Dovey was persuaded to finance two of his companions whose visits to the early days of the ACJ spring meeting in 1912 had mulcted them of their cash…
>
> He came to know the sport more when, after his return from World War I, he was made associate to Sir Adrian Knox, who was chairman of the Australian Jockey Club until his appointment as chief justice.
>
> Association with such an outstanding racing legislator had a natural sequel in Mr Dovey's interest in the administrative side of the turf…

Just how much earlier than 1944 did the Great War become known as World War I? Anyway, Painter and Waterhouse conclude their chapter on racing people by saying:[57]

> There is a gulf that has traditionally separated AJC administrators, especially those on the committee, from those who belong to the other side of racing – the bookies, jockeys and trainers. The gap is epitomised in the lives of Adrian Knox… and TJ Smith, the son of a teamster-timbercutter, who was educated in the school of hard knocks as a rabbit-trapper, strapper and jockey, for whom racing was a necessity, the only yellow-brick road leading to wealth and social acceptance.

That must be correct, although it is somewhat piquant to reflect that the very greatness of Knox's achievements paved the way for an (unintended) democratisation of the turf.

There is one curious postscript to Knox's role in the turf, and that is his determination to keep the tax man at bay. Exhibit One is young Knox the legislator. In the course of debate in the House, he said: [58]

> It is not a tax or impost, because nobody need apply for a license for the totalisator unless he likes. It is not a tax imposed on anybody.

Exhibit Two is old Knox the magistrate. When the tax man served a notice on Automatic Totalisators Ltd a notice suggesting that it held winning dividends on trust for the punters, and that it held tax thereon on the basis that dividends were a cash prize in a (taxable) lottery, Knox led his brothers to remind the tax man that:[59]

> In [betting] the investor exercises his own volition with respect to the horse which he desires to back, and eliminates all chances except those inseparable from the event of the race and the amount of the dividend.

This is Knox the Tory in full flight. His sentiment is exactly the same as that expressed on the floor of the House decades before, when he said that this type of gambling was indistinguishable from investing in the stockmarket: see above. I confess a little discomfort when I see that a party to the proceedings was his successor as chairman of the AJC Committee, Colin Campbell Stephen, but am prepared to give both the benefit of the doubt on the question of recusal; Stephen was a plaintiff *ex officio* and all classes at the races no doubt thought them both acting *pro publico bono.*

The AMP

And who was the poor soul who failed to impress the AJC proxyholders, getting three only and a final vote of 80? It was Richard Teece.

The Australian Mutual Provided Society was established in 1849 under the Act of Council 7 Vic No 10. According to an advertisement in the *Herald* of 1 January 1849, its patron was the governor and its vice patrons included

the chief justice, two puisne judges, the attorney and the solicitor general.[60] Others were the colonial secretary, Edward Deas Thompson (founding father of the AJC) and pastoralist Thomas Icely, an AJC steward.[61]

Deas Thompson is a common surname. We can be sure it was not his daughter Eglantine who had married the brother of Lucy Stephen nee Campbell. Icely is a common surname. We can be sure it was not his daughter Caroline who had married Lawson's son and whose own daughter would be mother to Philip Whistler Street.

In the preface to his 1999 history, Geoffrey Blainey observes:[62]

> It was probably the first institution in Australia to work in effect as a federation – the system later adopted in 1901 for the new Commonwealth of Australia. By coincidence, when the Commonwealth of Australia was set up, the prime minister and every member of the first cabinet was a policyholder in the AMP Society.

Knox senior never sat on the principal board, although George did, in 1887-1888. Unlike George's practice, Adrian did not – officially or otherwise – inherit George's seat. The first mention by Blainey of the younger brother is of his legal nous (something, in relation to AMP policies, we have already seen). The setting is the AMP on the one hand wanting to tap the lucrative 'industrial policy' business but on the other hand wanting to avoid a power shift to 'a new and poorer class of policyholder':[63]

> Late in 1903 the board of the Society hurried towards a decision which it had long avoided Two leading Sydney lawyers, Adrian Knox and J.H. Want [aborting Attorney on the amalgamation bill, above], were consulted about the vital question of whether, under by-law 45 of the Society's constitution, industrial policyholders would be allowed to vote. Their reply was firm: any members insured for £100 or more – a sum higher than usually permitted in industrial policies – could vote in person or by proxy at the annual election of directors. The holders of smaller policies could only vote if they attended an annual meeting or special meeting of members in Sydney, and their vote was counted only when a question was put by the chairman to a show of hands.

Knox was only raised to the board at a later time; from 1909 to 1919 and from 1930 to 1932, in other words,

Richard Teece KC

the rest of his life bar judicial appointment.

And Teece? He was what we would now call the CEO, from 1890 to 1917. Blainey observes: [64]

> An original and original thinker, Teece axed his way through the barricades set up by conventional ideas. He antagonised most of the friendly societies of New South Wales when in 1883 he told a royal commission that they were not solvent. He took pleasure in writing long articles on the economic obstacles of the day.

One of Teece's children became (upon marriage to a son of an AMP director) Laura Littlejohn, a feminist of world standing. Another, Richard Clive Teece, was the foundation president of the New South Wales Bar Association, reigning from 1936 to 1944. Active in the Anglican church, his great legacy is the *Red Book* case. Judging from Blainey's description of Teece *pere*, he and Knox may have been chalk and cheese (hence the AJC vote). That did not prevent Teece son reading with Knox, or writing to the *Herald* on 7 December 1946:

> "Case For Labour's New Appointments," by Mr J P Ormonde, contains some serious inaccuracies which

> require correction. He speaks of "a long line of political appointments to the Bench by non-Labour Governments." and gives as instances thereof Justices Higgins and Powers.
>
> Of these justices, Mr Justice Higgins was appointed by a Liberal government, but inasmuch as, though never a Labor member, he had been attorney-general in the Labor government of which Mr J C Watson was prime minister, his appointment could hardly be regarded as the reward of services to the Liberal Party.
>
> Mr Justice Powers was not, as Mr Ormonde says, a non-Labor politician. He was a civil servant. At the time of his appointment he was crown solicitor for the Commonwealth, and prior to that he had been crown solicitor for Queensland. And he was appointed, not by a non Labor government, but by the government of which Mr Andrew Fisher was prime minister. His appointment aroused great public indignation, which found expression in the *Herald* of the day. A leading article strongly condemned the appointment on the ground of his lack of the professional qualifications for the position. And his subsequent record on the bench proved the *Herald*'s criticism to be only too well founded.
>
> Then Mr Ormonde says of Sir Adrian Knox that, although 'not a member of any political party he could have been considered as being very much in politics.' Why? I was closely associated with Sir Adrian Knox for many years prior to his elevation to the bench, and I know that that statement is untrue.
>
> He was appointed solely on his professional qualifications. At the time of his appointment he was *facile princeps* amongst the counsel then practising before the High Court. He was, at any rate, such in the opinion of Sir Samuel Griffith, whom he succeeded, as Sir Samuel himself told me.

Teece means 'easily first' or, more colloquially, the obvious leader. Shooters at the bar will know that the English firm W W Greener first introduced the Facile Princeps (or Treble Wedge-Fast Hammerless Gun) in 1876. A confluence of Icelys, Deas Thompsons and all the rest had already taken up the expression:[65]

> Icely's conformity in the council involved him in the one case of notoriety in his career. He voted against the motion for a select committee to investigate Earl Grey's strictures on John Dunmore Lang's immigration scheme. In 1851 Lang publicly accused Icely of sycophancy and more directly of having defrauded Joseph Underwood over the sale of the Midas in 1824. Lang, who admitted that the charge was inspired by Icely's attitude, apologized but was given a gaol sentence for criminal libel. While in prison he investigated a story that Icely had hired someone in 1824 to fire a shot into Underwood's house 'to shut his mouth about the Midas'. Brent Rodd, who had fired the shot unwittingly, denied that Icely had had anything to do with the affair. The court proceedings did not harm Lang's electoral popularity but they vindicated Icely's reputation for honest, though perhaps hard, dealing. His fellow-landowner, Edward Hamilton, told (Sir) Edward Deas Thomson that he 'always considered [Icely] as the best gentleman of the old settlers—facile princeps', and he was glad that, as a result of the libel case, his 'estimation of him as a friend, and a good citizen, is in the highest sense not misplaced'. Icely was appointed to the Legislative Council once more in June 1864 and retained his seat until his death.

Meanwhile, Teece and Adrian's brother EW (Rutledge's grandfather) were:[66]

> … the only men on the Senate without university degrees, [and they] carried a motion that Greek should be taught by a professor rather than a lecturer. He felt sure they were right about this, 'though a knowledge of Greek literature is not one of my achievements'.

Having attempted to excuse Adrian's attitude to women by his age, I feel obliged to report the more worldly Ned was no better. Rutledge continues:

> Few would have thought [her grandfather] right in his opposition to co-education: A grievous blunder, made before my election, and there is no evidence that female influence softened the manners of the undergraduates. On a certain notable occasion, the commemoration after Windeyer's death, there was a studied rudeness to the Chancellor in which women were as prominent as the men.

Which, *pace* EW and the late Chancellor Windeyer, says something for equality in learning.

High Court advocate

Knox appeared in 138 High Court cases, fourth after Starke (211), Dixon (175) and Barwick (173). But Knox had the shortest period, and we have already seen what one chief justice thought of him. Consider now Gavan Duffy CJ, in his short eulogy already cited:

> His career at the Bar was brilliant and successful, and he became easily first in the Courts in which he practised.

Bearing in mind (1) that Knox had appeared before

him, he being appointed in 1913; and (2) that he was sitting on a bench with Starke and Dixon, Gavan Duffy would not have used facile princeps – albeit translated – in reference to the High Court itself without reflection.

Knox's longest appearance was in the *Coal Vend* case. Notoriously, the proceedings before Isaac J take up 280 pages of the official reports,[67] and the successful appeal 38 pages.[68] Knox appeared for one of two groups of miners at trial, but led for both groups on the appeal. The group that took him on for the appeal consisted of the firm J&A Brown and the person John Brown. (Knox did not appear for the respondents in the Crown's unsuccessful appeal to the Privy Council. Mitchell KC who had led for the shipowners and himself a notable High Court advocate, led Atkin KC of the English Bar.)

The Great War

> To some Knox appeared 'brusque in manner': Sir Ronald Munro Ferguson recorded that he was an 'ill-tempered person … a worthy man, but sees the disagreeable side of things first'.

The correctness of the observation is not to the point; others disagreed. More important is that Munro Ferguson had a peculiar opportunity to observe Knox. Munro Ferguson's wife had been a member of the British Red Cross Society in Fyfe, Scotland, and sought and received permission from England to form an Australian branch. Permission was received and the deed was done on 13 August 1914. (The Australia Red Cross dates from 1916.)

Knox was apparently a foundation member of the NSW division. At any event and at the height of his profession achievements, he went to war. The official historian records:[69]

> It was decided that the Australian Branch of Red Cross should have its own representatives in Egypt. Mr Norman Brookes and Mr Adrian Knox were appointed the first two commissioners. Norman Brookes, one of Australia's most renowned tennis players, had won Wimbledon in 1914. When he tried to enlist he was turned down because of a duodenal ulcer. Nevertheless, he was determined to play a part in the war effort and accepted this Red Cross role. At the time he said, "If I can play tennis, I am fit to take part". In Egypt the commissioners had their headquarters at Shepheards Hotel, Cairo, where they took two rooms for six pounds a month. Their area of responsibility was the Canal, Cairo and the island of Lemnos. As well as providing comforts to the patients they provided free barbers' shops at all Australian hospitals and convalescent depots in Egypt. The commissioners were able to purchase a seagoing motorboat for 750 pounds from the BCRS so they could service Lemnos adequately. At this time they completed arrangements to take over the hospital activities of the Australian Comforts Fund enabling the ACF to concentrate on working for the well soldier and avoiding duplication of effort.

An observer recalled in 1950 what must was surely a contribution of Knox:[70]

> An important development was the establishment in Cairo of an enquiry bureau for the purpose of obtaining all possible information as to the sick, the wounded and the missing, and to ascertain details of the death and burial of those who were killed or had died of wounds. This bureau worked in co-operation with bureaus in Australia, set up and conducted in all capital cities by members of the legal profession.

Brookes was no doubt frustrated and saddened by the death in France in 1915 of his erstwhile playing partner, New Zealander and barrister Tony Wilding. Knox's biographer continues:

> Knox showed great organizing ability and worked 'amid many difficulties and not a few risks' (when he took stores to Gallipoli) to allocate comforts for the wounded, stores and medical supplies. Returning to Sydney early in 1916, Knox was an official visitor to internment camps and served on a Commonwealth advisory committee on legal questions arising out of war problems. He was appointed C.M.G. in 1918. On 10 December he made a celebrated appearance at the bar of the Legislative Assembly to defend the members of the Public Service Board against charges arising out of the report of a royal commission.

The advocate as CJ

> On 18 October 1919 Knox succeeded Sir Samuel Griffith as chief justice of the High Court and was sworn in on 21 October. He immediately resigned as chairman of the A.J.C. …, and sold all his shares, including his inheritance in C.S.R., lest he should be involved in a conflict of interest.

A chief justice is *primus inter pares*, first among an equality of colleagues. A chief can have two functions, one as intellectual leader and one as the court's advocate. The first is of course desirable but not necessary for an

effective court. The second is indivisibly part of a chief's role. Whether advocates make for intellectuals is moot, but do we glean anything from the experiences of the three advocates who were appointed chief without having held judicial office?

Latham, I think, was a better advocate for the court when he was attorney; his fault – and his fate, given Dixon and Evatt at his flanks – was that he wanted to be an intellectual leader at a time when the need for an advocate may have been at its greatest.

Barwick's main legacy as an advocate for the court is impressive; Gar's Mahal rises over the shores of Lake Burley Griffin. And Barwick the intellectual leader? Leaving to one side both the enormous social and political changes during his long tenure and the fact that generational change and premature deaths led to at least three 'Barwick Courts', I think the better question for current purposes is whether Barwick cared. While Barwick's background was vastly different from Knox's, like Knox he had been facile princeps; did it matter that he now was merely primus inter partes? A question for another time, no doubt.

Whatever Knox's own view of his judicial ability, it is clear that he continued as an advocate. The most well known example was his refusal to buckle to government pressure for justices to conduct royal commissions.

Such requests were not uncommon. Griffith, despite a robust reluctance, had regarded the war as justification for himself sitting on one and Rich sitting on another (the latter perhaps as a break upon the death of his son in France).

Knox showed his colours immediately upon his appointment, with a rebuff to Prime Minister Hughes the day after his appointment. Further requests came in 1921, 1923 and 1928. The last, in which Knox expressly invoked the Irvine Memorandum, interests for three reasons. First, the request came from Attorney Latham, who would one day be chief himself. Secondly, the facts which wrought the request typify a political squabble which the third branch must avoid like the plague.

In 1928, the press published allegations by the Labor member for West Sydney, William Henry Lambert, that he had been offered £8,000 to vacate in favour of E G Theodore. There were difficulties, not least of which was Lambert's denial of the same allegation when made by another newspaper in 1925. Could it be – shock horror – that Lambert was peeved at losing the 1928 preselection?

Whatever Knox's own view of his judicial ability, it is clear that he continued as an advocate. The most well known example was his refusal to buckle to government pressure for justices to conduct royal commissions.

Bruce announced that the allegations struck at the honour and dignity of the parliament – the clearest sign that they did not – and eventually, after Knox flicked the pass, the two-week and forty-witness farce commenced. Sometime Clerk of the House Frank Green observed (in a readable memoir available in the NSW Bar Library) that '[w]hen the report [by Commissioner Edward Scholes NSWDCJ] was table in the House discussion was confined to a complaint by Mr Theodore that the enquiry had cost him £800 in legal expenses.'[71]

As for Theodore, a leading candidate for the best Labor PM we never had, he became partners with a man called Frank Packer in a company called Australian Consolidated Press. He recouped his expenses. And as for the dignity of the House, Green summed it up:[72]

> To speak of a member selling his seat sounds sinister, but it differs very little from the practice of a member, on the promise of an official government appointment, resigning in order to make way for somebody else; for example, the case of Sir Granville Ryrie resigning his seat of Warringah to become High Commissioner for Australia in London to create a vacancy allowing Archdale Parkhill to enter the House. [Parkhill laid the groundwork for a non-Labor alliance, but like Theodore was unpopular with much of his own party. As his biographer puts it,[73] after 1935, Menzies probably had his measure.]

And as for Knox? The press applauded his approach. Oriel, the Argus's political commentator, lauded him

in song:[74]

> Dear Mr Bruce, it is no use
> To seek of me this favour;
> For what you ask appears a task,
> Of very doubtful savour.
>
> I tell you, Stan, as man to man,
> In language far from kidding,
> It would be rash were I to dash
> Away to do your bidding.
>
> I'd live in courts, I'd wade through torts
> In oceans, for to please you,
> And burn the oil in midnight toil
> To aid what whim would seize you.
>
> But when you bid me raise the lid
> Of some soiled linen basket,
> And plunge its duds into the suds-
> O Stan, how can you ask it?
>
> I am a judge, and cannot budge,
> Though hopes I may be squashing,
> It is not meet; I must repeat,
> I WILL NOT DO THE WASHING.

Another contribution by Knox to the efficient running of the court was advice to Attorney Latham in 1927 about proposed amendments to the Judiciary Act, questioning the wisdom of a single judge hearing constitutional cases at first instance.[75]

Joint judgments

Knox tended to favour joint judgments. Whether the tendency sprung from a tenet of jurisprudence or of management, it is generally regarded as a positive in his legacy. I set out Fricke's statistical summary, which also provides something of a counterpoint to the troubled court of a decade or so later:[76]

> An examination of the reports during the Knox regime… shows that his approach was conducive to simplicity, though at time it produced merely simplistic solutions. One striking feature is the volume of reported cases. He is recorded as giving judgment in just under 500 cases – an average of more than one per week if one excludes vacations. The constitutional cases represent slightly less than 10 per cent of the total.
>
> Of the total of private and public law cases, the Chief Justice dissented in slightly more than six per cent of the cases. So he was in the majority in almost 94 per cent of the cases. Furthermore, he participated in an astonishing 260 joint judgments in which he was a member of the majority – approximately 53 per cent of the total of the private and public law cases heard by the full bench.
>
> Knox was frequently partnered by Gavan Dufy in these majority joint judgments (180 cases or almost 37 per cent of the total number of such cases). The next in line was Starke, with whom he wrote a joint majority judgment in approximately 30 per cent of the cases which he heard. He participated in a joint majority judgment with both Gavan Duffy and Starke in approximately 23 per cent of the cases.
>
> Sir Adrian was joined by Rich in a joint majority judgment in slightly less than 20 per cent of the cases, by each of Powers and Isaacs in approximately 5 per cent of the cases, and by that staunch individualist, Higgins, on two occasions. During the short period in which his tenure coincided with that of Dixon, they participated in joint judgments in approximately a third of their cases.
>
> As Sir Zelman Cowen has observed, in the course of the decade Knox tended increasingly to align himself with Gavan Duffy in cases involving the industrial arbitration power. This placed him more and more in opposition to Isaacs' centralism.

The Privy Council

Knox was appointed to the Privy Council on 2 March 1920. In 1924 he visited England to sit on the Judicial Committee of the Privy Council. The issue was the Irish boundary question. In 1921, the British and Irish delegations had executed what would become a treaty, but had left the question of the borders of the Irish Free State and Northern Ireland open.

In 1924, a number of specific questions arose about the composition of a commission provided for in the treaty. The treaty had provided for three appointments, one by the new dominion, one by the royal rump, and a chair by the British Government. In March, the dominion (which had made its nomination) pushed for completion of personnel. In May, Northern Ireland refused to name its member.

By section 4 of the *Judicial Committee Act 1833*, the Judicial Committee of the Privy Council was empowered to hear a referral and to advise accordingly. In other words, while anything from the council was and is, strictly, an advice, section 4 empowered the Judicial

Committee to act on a clearly executive basis, as an advisor and not as a court.

The trouble with this – and I suspect a foreseen trouble – was that the dominion had always objected (just as the nascent Commonwealth of Australia had objected) to the imposition by a now-foreign Britain on its domestic courts, of rights of appeal to the Privy Council.

The upshot was a committee to investigate the proper quorum of a commission, in circumstances where the committee arose from party A pressing for the commission and party B refusing to join it, a committee which party B recognised and which party A disclaimed 'being in any way committed to the acceptance of opinions' falling from the aforesaid committee. The outcome was equally extraordinary. The commission eventually met, to find that neither Britain nor Northern Ireland wished to made any submission, with a further hearing set for counsel on behalf of the dominion to be heard. Another chapter in the tragic story of England's first colony.[77]

The retirement

Sir Adrian resigned as chief justice on 30 March 1930.

In 1929, the NSW colliery owners, instead of applying to the Arbitration Court for a new award, closed their mines and locked out elven thousand miners. This was a flouting of the Industrial Peace Act. In August, EG Theodore (now deputy leader of the ALP) moved a motion:

> That, by its withdrawal of the lock-out prosecution against the wealthy colliery proprietor, John Brown, after its vigorous prosecution of trade unionists, the Government has shown that in the administration of the law it unjustly discriminates between the rich and the poor, and that as a consequence the Government has forfeited the confidence of this House.

The government survived by four votes, one Billy Hughes and three other government supporters voting for the motion. The rot set in, the government went to the people in October 1929, Bruce lost his seat, and the ALP took 46 of the 75 seats:[78]

> No ministry had ever assumed control of the Government under less auspicious circumstances. Not only did it face national bankruptcy, but for eight months a disastrous dispute had been proceeding between the colliery owners and the coal-miners of the northern coal-fields of New South Wales, bringing great economic loss and causing much suffering to the miners and their dependants.

Brown died in March 1930, the lockout still in force. On 23 March 1930, Knox wrote:

> My dear Isaacs,
>
> As I told you in my note I am off to Canberra tomorrow, Monday, morning early, and I think I ought to let you know the reason for my visit there… my real purpose in going is to tender my resignation as Chief Justice. The fact is that my old friend John Brown has made me one of his residuary legatees, and this involves my taking a direct interest in the business of J. & A. Brown – a position quite incompatible with that of Chief Justice… I am very grateful for the loyal support you have always given me, and hope to see you to thank you personally on my return…

On Saturday 5 April 1930, page 19 of the *Sydney Morning Herald* reported

> MR. JOHN BROWN.
>
> Details of Will.
>
> Sir Adrian Knox and Mr. Armstrong.
>
> PRINCIPAL BENEFICIARIES.
>
> NEWCASTLE, Thursday.
>
> A copy of the will of the late Mr John Brown, made available to the "Sydney Morning Herald" last night, shows that the former Chief Justice of the Commonwealth (Sir Adrian Knox) and the present general manager of Messrs. J and A. Brown (Mr Thomas Armstrong) are the principal beneficiaries.
>
> They are to share equally as tenants or owners in common after the payment in Mr. Brown's estate of legacies amounting to £15,250 cash and the transfer of certain properties. In addition, Sir Adrian Knox receives a cash legacy of £ 10,000, Mr. Brown's Darbalara Estate, with all fittings and all bloodstock owned by Mr Brown, and Mr Armstrong receives a cash legacy of £10,000 and Mr. Brown's home and freehold property in Wolfe-street, Newcastle.
>
> The will further directs that Mr. Armstrong should be paid a salary of £10,000 a year as executor, and expressly desires that he should continue as manager of the firm at a salary of £4000 a year.

The will, which is a document of only two pages, drawn up as recently as December l8 last, and witnessed by the secretary of the A.J.C. (Mr Cropper) and by Ellen Brown, further provides for the appointment of Mr Armstrong and of Mr W T. Morris, of the firm of Priestly and Morris, executors and trustees. It bestows respective annuities of £250 and £208 on Miss Clara Burns, one of Mr Brown's servants for almost 20 years, and on Sarah Ann Wilson, Mr Brown's house- keeper in recent years, and gives the follow- ing legacies:-£250 to Peter Poole, Jun., £ 1000 to Mrs. Margaret Poole, of Armidale, daughter of Sir Adrian Knox; £1000 to Lang Dunn, Mr Brown's chauffeur; £1000 to Miss Elizabeth Knox, daughter of Sir Adrian Knox; £2000 to Mr A B Shand, K.C.: £1000 to Mr. W J. Cleaves, of the firm of Sparke and Helmore, solicitors to Mr Brown; £1000 to Mr. Joseph Hambley, who had served the Brown family tor more than 30 years; £500 to the trustees of St. Andrew's Presbyterian Church, Newcastle, with which the Brown family has long been identified; £7500 lo Mr. Leslie Bower, stud groom and manager of the Darbalara Stud.

…

"MISLEADING STATEMENTS."

A statement accompanying the will, and signed by Mr. Armstrong, says:

"Under normal conditions, the contents of the will of the late Mr. John Brown would have been made public when probate was applied for, but on account of most inaccurate and misleading statements that have appeared recently In some of the daily papers, I feel that as the sole executor of the late Mr. John Brown at present residing in Australia, It is my duty to release the full text of the will of the late managing partner of the firm of J. and A. Brown, so as to avoid further misleading statements.

"Quite a number of the general public have been under the impression that the late Mr. John Brown was sole owner of the firm of J. and A. Brown, but the facts are that the firm, for many years past, consisted of the three brothers, Messrs. John, William, and Stephen Brown, as equal partners in the business, but by agreement, Mr. John Brown was constituted sole managing partner during his lifetime.

"The position now is that Mr. Stephen Brown is the sole survivor of that partnership business, which, on account of the do cease of his two brothers, will be carried on under the old firm's name, but the personnel of the firm will be that Mr. Stephen Brown will be senior partner, and associated with him his sister, Mrs. M. S. Nairn, Sir Adrian Knox, and Mr. Thomas Armstrong, beneficiaries under the will of Mr. John Brown. The latter gentleman will also be general manager of the business."

The miners would not be kind. On 10 April 1930, ALP member JC Eldridge attacked Knox on the floor of the House. To Latham's interjection of 'Shame!' Eldridge said:

> The shame is that such a man dramatically resigned his high post to become a beneficiary to the tune of a million pounds under the will of one of the chief coal magnates, whose law-breaking tactics plunged thousands of men, women and children into a long period of distress, poverty, destitution, and suffering…

Fricke observes in a footnote to an succinct and balanced assessment of the resignation:[79]

> A perusal of a number of volumes of the Commonwealth Law Reports preceeding Knox's retirement suggests that Knox did not in fact sit on any of the cases in which John Brown's interests were involved, despite the suggestion to the contrary in J Robertson, JH Scullin (1974) at 224. The footnote references to the Sydney Morning Herald and the Maitland Mercury do not bear out Robertson's assertion. Knox seems to have been careful to avoid sitting in such cases as Caledonian Collieries Ltd v Australian Coal and Shale Employees' Federation (No 1) (1930) 42 CLR 527.

Adrian's family

> Clean-shaven, Knox had a long, straight nose, brown eyes, and a firm mouth and chin. Although his practice was lucrative, unlike his brothers Edward and Tom he never built a large house, living after his marriage at eight different addresses at Woollahra and Potts Point; nor did he speculate in real estate, but he did give his wife beautiful jewellery. He liked entertaining and frequenting the Union Club (which he had joined in 1886) and, from 1915, the Melbourne Club; he was an excellent bridge player. 'As fierce as his brothers were mild', he was held in affection by his family: his sister-in-law always had a whisky and soda waiting for him when he came to afternoon tea. He loved Australian and Sydney silky terriers and would often return from Melbourne with a pup in his pocket. In his later years he spent much time in his garden and would not permit anyone else to prune his roses.

There is little in the books about Florence, Adrian's wife. The descriptor in the index of Rutledge's memoir is 'Knox, Mrs Adrian, ('Lady'), 'Aunt Flo'.[80] The only mention apart from those already referred to is the fact that 'Flo Knox and her children' were in England

in 1914, probably at the same time as the Ned Knoxes, with his daughter and Adrian's niece beginning her account 40 years later with '1914, the last year of the Old World. Nothing has ever been the same since.'[81] After the Second World War, the Herald records the death of 'Dame Florence Knox', but this appears to have been an imagined courtesy from a democratically educated sub-editor.

There was a son, 'Knox, Colonel Adrian Edward, "Bob"', whose only appearance in the memoir is as a lad, at the wedding of his cousin Clara Mackay:[82]

> The Adrian Knox children were in attendance, Margaret looked uncommonly well, almost pretty, Elizabeth a perfect duck with gloves of which she was tremendously proud. Bob had white knickers, and copied Captain Wilson and did not kneel down…

The wedding has something for royalwatchers: the bridegroom Grenville Miller upon his retirement from the Royal Navy would decide to knock back the job of being Queen Mary's treasurer, presumably aware of her notorious 'bowerbird ways'.[83]

Bob would have been 17 at the outbreak of the Great War, although I have found no record that he enlisted then or later. Which may explain his keenness to enlist in July 1939, prior to the outbreak of hostilities. After enlisting at Port Kembla, he finished his tour in December 1944, as Lieutenant-Colonel commanding the Kembla Fortress. Bob died in 1962.

In 1934 Adrian's younger daughter (Mary) Elizabeth became the second wife of Lewis Joseph Hugh Clifford, who succeeded to the title of 12th Baron Clifford of Chudleigh upon the death of his brother, in 1962.[84] The curious will know that the 1st Baron was a barrister; the prurient that he committed suicide by hanging himself from his bed tester by his scarf; and the neologist that his 'C' formed part of King Charles II's Cabal.

Meanwhile, Adrian's elder daughter Margaret made a Sydney alliance.

Readers who frequent Bondi Beach will know that three main streets coming down to Campbell Parade are Hall, O'Brien and Curlewis. It is too much to hope that the Campbell was the Campbell whom we have met. Nor is this is not the place to repeat the tale of Edward Smith '*Monitor*' Hall, a founder of what would become the Benevolent Society; first cashier of the Bank of New South Wales; first assaultee at St James in Phillip Street; journalist; and autolitigant extraordinaire. In his Sydney Peace Prize acceptance speech, John Pilger said:[85]

> After all, Australia has had some of the most outspoken and courageous newspapers in the world. Their editors were agents of people, not power. The Sydney Monitor under Edward Smith Hall exposed the dictatorial rule of Governor Darling and helped bring freedom of speech to the colony.

For now, it is enough to focus on Hall's failure as a property developer. In 1851, he qua trustee for his daughter Georgiana Elizabeth purchased Bondi estate for £200. By 1852, Francis O'Brien was advertising for sale subdivisions of the estate.[86] O'Brien had been co-editor with Hall of the *Monitor* and was married to Georgiana. (His marriage to another of Hall's daughters Sophia Statham had been cut short by her death.)

O'Brien Torrensed the land in 1868. In 1873, with the family running out of money, he mortgaged some 51 acres to Frederick Charles Curlewis. This did not stop him from becoming bankrupt in 1877.

Lucius Ormond O'Brien was born of the second marriage, in 1844. About a quarter century later (well prior to 1873!), Lucius married Matilda Emma Curlewis, the sister of Frederick Charles.[87]

And here we have the opportunity to show that Mr Hall for the city wordsmiths could do just as well as Mr Campbell for the pastoralists. In 1815, Hall had parented a daughter Matilda Martha Binnie, whose union would produce Frederick Charles and Matilda Emma. And so it was on 15 October 1868 at the *Homestead*, the family compound near the end of Sir Thomas Mitchell Road and with a beach frontage, a double wedding took place among four of Hall's grandchildren. Lucius married Matilda, his first cousin. And Frederick Charles, Matilda's brother, married Lucius's sister Georginia Sophia Ormond.

Lucius was called to the bar in 1867.[88] As was a son of Frederick Charles: Herbert Raine Curlewis signed the roll in 1893. He would become a District Court judge, as would his son Adrian. As for Herbert Raine Curlewis, a

happy marriage to the author of *Seven Little Australians* did not stand in the way of his earning 'a reputation for severity, especially for his insistence that correct English should be spoken in the cases over which he presided.'[89] (Perhaps a role for Leonard Teale?) As for Adrian Curlewis, among his numerous distinctions were leadership of the lifesaving movement, survival at Changi, and clerkships to Sir William Cullen and (Sir) Philip Street.[90] Cullen, it may be noted, had read with George Knox. As for Adrian Curlewis's daughter Philippa, she married Adrian Poole, the issue of Adrian Knox's elder daughter and BCH Poole, that couple having wed on Remembrance Day 1925.[91]

So the grandson of Sydney's patrician jurist married the great-great-great-granddaughter of Sydney's greatest ratbag journo. But surely Knox felt nostalgia and not shame. You see, Barnett Levey never got to occupy *Waverley House*. He went bankrupt, and it was first occupied by Edward Smith Hall, a half-century before Adrian Knox and Philip Whistler Street attended upon Miss Amelia Hall for their declensions and conjugations. Unfortunately, I am almost certain she was no relation.

The end

Knox died of heart disease at his home at Woollahra on 27 April 1932 and was cremated after a service at All Saints. And his legacy? Is the person nominated by two judges of a court as easily the best advocate to appear before it, entitled to be considered for elevation to it? Is the person disqualified by being a scion of a billionaire family? Is the person disqualified from disqualification by selling his share of the family fortune to appear to be and be, independent of that wealth?

Dixon's tribute upon his own retirement 34 years after Knox's contains the well know barb. It is worth setting out in full:[92]

> [Sir Adrian Knox] was a conspicuous advocate, as strong an advocate and as keen-witted an advocate as you would ever wish to see; very powerful, and with a highly developed intelligence. But he was of a type that you do not often meet: a highly intellectual man without any intellectual interests. That always strikes me as a bit of a pity. He was capable of almost anything, I should have judged, yet he was not capable of taking a really serious intellectual interest. He would read biographies, he would read history, he would read this, that, and the other; but I have known him, when I got to the Bench and sat with him, refuse to have anything to do with a judgment I wrote, on the ground that it sounded too philosophical for him. I think he meant it as a compliment to me, but there was a sort of cynicism about it, and it might have been true.

Knox was someone who felt both entitled and obliged to take the leadership of what was, after all, merely the senior domestic appellate court. It amazes not at all that Griffith and Gavan Duffy enjoyed his advocacy. He found himself at first surprised and later exhausted by the increasing nationalism – and, particularly with Isaacs – the increasing pages of nationalism, that the court was generating; he did not gel with Dixon's – or the court's – desire and need to expound the law.

For Knox the patrician, the law was a tool to be applied, and not something which required an elevation to the esoteric concept of legalism, no matter how 'strict and complete' that legalism might be. Knox was not in Dixon's class, in a Dixonian sense, but Dixon was not in Knox's, in a Knoxonian sense. They were both right.

I have never heard an intermediate court being named for its leader, however illustrious. For example, I have never heard reference in NSW to 'the Jordan Court'. Had Bruce gone around Knox to invite Isaacs to head a commission into whether the Knox Court was 'the Knox Court' and had Knox given evidence, I suspect the exchange might have gone:

> Commissioner: Do you have any interest in having a Knox Court?
> Witness: No.
> Commissioner: Don't you dream of being remembered for a Knox Court?
> Witness: No.
> Commissioner: I must ask you to be more discursive.
> Witness: No.
> Commissioner: I am troubled by your lack of co-operation.
> Witness: I am co-operative.
> Commissioner: Perhaps. If you will be discursive, I promise not to reason ex tempore when sitting with you.
> Witness: I am not a Court. I am a steward of one. I should not have to explain myself to you. I digress.
> Commissioner: You may retire.
> Witness: I shall.

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Global engagement by Australian lawyers

The following address was delivered by the Hon JJ Spigelman AC at the Law Society's Opening of Law Term Dinner, on 31 January 2011.

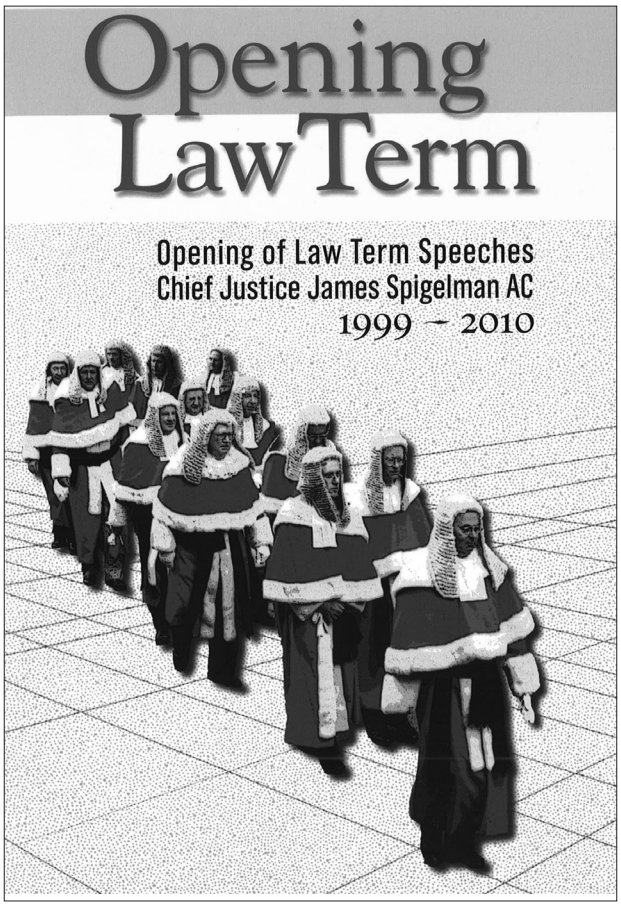
This is the thirteenth Opening of Law Address I have delivered on the first day of the new Law Term.

One of the themes of a number of these addresses has been the significance of global engagement by Australian lawyers, including judges. It is that theme which I wish to further develop on this occasion.

During the period of almost thirteen years that I have occupied the Office of Chief Justice I have had numerous occasions to witness the expansion of international contact on the part of Australian lawyers, particularly judges but also practitioners and academics. It is clear to me that the process has personally enriched the individuals who have been so involved. More significantly the process has served the broader Australian national interest including, not least, our economic interest.

Our legal system and the quality of our lawyers is one of our national strengths or, to use economist's terminology, a sphere of comparative advantage. Recognition of this strength has been affirmed to me in literally hundreds of conversations that I have had over my period of office with judges and lawyers from many different nations.

Over recent years a month has not gone by in which I was not engaged in some manner or another in this process of global engagement: arranging for judges of the Supreme Court to travel overseas; receiving judicial delegations; attending governmental launches or announcements on international matters; speaking at international legal conferences; launching books with an international focus at universities; attending the announcement of alliances or mergers between an Australian law firm and an overseas firm; engaging in discussions and decisions about the admission of overseas lawyers in Australia or of Australian lawyers in overseas jurisdictions; negotiating formal memoranda of understanding between the Supreme Court of New South Wales and two overseas courts; writing letters to attorneys-general and giving speeches to a variety of audiences, both in Australia and overseas, notably in Asia, about dispute resolution involving cross border issues, the promotion of co-operation between courts and the need to develop international arrangements



and domestic legislation to reflect the requirements of globalisation.

Tonight is the most recent of more than a dozen speeches in which I have discussed such themes. There are a number of distinct bodies of law that now must be understood in a global context. In this address I will focus on transnational commercial law. I will also focus on our relationships in the Asia/Pacific region.

We have the good fortune to live in the most economically dynamic region in the contemporary world. What used to be referred to as 'The Tyranny of Distance' should now probably be referred to as 'The Pleasures of Proximity', although in certain respects there may be reason to categorise particular matters as 'The Perils of Proximity'. No one now doubts the fundamental significance of our engagement with our region. This is as much true of the law as it is of other sectors of our society and of our economy.

* * *

There has been a liberalisation of international trade in services, including legal services, over recent decades and a number of Australian legal institutions are playing a significant role in this respect. I refer, for example, to the International Legal Services Advisory Council (ILSAC) which, while focused on the export of Australian legal services, recognises that the process of liberalisation of trade is based on the principle of reciprocity. The benefits of global engagement must be shared or they will not materialise at all.

In Australia a number of our law firms have expanded into international legal services provision, either by means of strategic alliances with overseas firms or by establishing a presence in an overseas market to service a number of jurisdictions on a 'hub and spokes' model. Last year we witnessed two English firms setting up an Australian hub to provide services into Asia. These are welcome and important developments in the process of our global engagement.

I am well aware that many young Australian lawyers find the international dimension of legal work particularly appealing. Many work in such fields overseas, including former staff members of mine employed by global firms in London and Paris. Increasingly, by reason of the visa regimes for young Australians available under the USA Australia Free Trade Agreement, many work in New York.

In London the major law firms enjoy employing Australians for three reasons. One, they are very well trained. Two, they work very hard. And three, they go home. Not all do so. Some develop an international practice that cannot be replicated here. The Australian legal diaspora constitutes an international network from which many other Australians will benefit. However, most return home with a higher level of skill and a global orientation, which will reinforce Australia's global engagement. We are building skills of future strategic significance in this respect.

I witnessed this process at first hand last year at a conference on international investment treaty law held at the University of Sydney Law School. The conference attracted the major academics and practitioners from many nations who work in this specialised area of international arbitration. As one person observed in my presence: 'Everyone who matters is here'. He wasn't referring to me. It was noticeable that young Australian lawyers have important jobs in key international institutions in this field.

The Australian legal diaspora constitutes an international network from which many other Australians will benefit.

Of particular significance from a long term strategic point of view has been the involvement of Australian lawyers in creating regional institutions which bring together lawyers from throughout Asia. I refer, for example, to LawAsia, which is now well established as a focus for interaction amongst lawyers throughout Asia and which has an Australian-based secretariat. As an Australian initiative many years ago, a Judicial Committee was formed under the banner of LawAsia. It has now become the forum where all the chief justices of Asia and the Pacific meet, again organised from Australia.

Another example is the development of the Asia Pacific Judicial Reform Network, which has emerged as an important forum for exchange of views amongst judges of the region. Again its secretariat is in Australia.

Similarly, it was the Australian Centre for International Commercial Arbitration (ACICA) which instigated a regional grouping of all arbitration centres in the region as the Asia-Pacific Regional Arbitration Group (APRAG).

Three years ago I reported in this address on the NSW Supreme Court's initiation of the first Judicial Seminar on Commercial Litigation which we organised together with the High Court in Hong Kong. The first seminar was held in Sydney the second in Hong Kong and in March this year the third seminar will be held in Sydney, again with high-level judicial representation from the major commercial nations of Asia.

These forums for mutually beneficial exchanges of legal expertise thicken Australia's relations in the region and do so, not in a manner involving an arrogant assertion

of superiority on our part, which has so often marred our exchanges with our neighbours in the past, but in a collaborative manner, with full recognition that the traditions, practices and interests of other nations are not only entitled to respect, but have much to teach us and about which, in the national interest as much as in private interests, we need to be much better informed.

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International trade in legal services is not a one-way street. Such services will be provided by lawyers in our regional neighbours to Australian clients. In this respect, solicitors who are members of this society may not all welcome the process of liberalisation of the market in legal services. You will, however, need to adapt to that development. Our legal system produces lawyers of high quality. There is, however, another relevant factor in commercial decision-making.

One of the themes that I have mentioned in many of these Opening of Law Term addresses has been the need to control the cost of provision of legal services. I have indicated, probably more frequently than many of you wanted to hear, that the legal profession in Australia is in danger of killing the goose. I warned personal injury lawyers about this before the Civil Liability Acts and the abolition of the Workers Compensation Court. I have warned commercial lawyers more than once.

There is no area of commercial life that has not been subject to significant change with a view to minimising the cost of inputs. The law will not be insulated from such changes. Those responsible for purchasing legal services in commercial corporations are subject to pressure to reduce costs, in the same way as those responsible for any other cost centre.

The outsourcing of legal services through the use of electronic communications is now well established. One source I have consulted lists dozens of websites offering various forms of legal services by electronic means. Many of them are in India, a low cost jurisdiction – with hourly billing rates about one tenth of those in the USA – and with a high level of legal expertise and high level English language capacity.

United States law firms now advertise their capacity to reduce costs by the use of Indian based outsourcing centres. Some US attorneys have said that the reduced costs arising from outsourcing have meant that they can defend unmeritorious claims on their merits, rather than surrender to what is, in substance, commercial blackmail. I appreciate that their cost structure is higher than ours. It does not appear to me, although I accept that I am not totally in touch with this matter, that Australian law firms make as much use of this form of outsourcing as American lawyers have come to do in

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recent years. The commercial pressures to follow the Americans in this respect will increase.

I repeat what I said a few years ago when I was informed that for any significant commercial dispute the flagfall for the discovery process was something of the order of $2 million. That level of expenditure is not sustainable. Outsourcing through the use of Indian based support services – such as digital dictation transcription and document management for discovery and due diligence – is an available way of containing such costs.

However, overseas legal services are not limited to administrative matters of this kind. Amongst the web based legal service providers, one of the most successful has been the Indian based firm Pangea3, which offers online legal services by US and UK lawyers, as well as Indian lawyers, extending beyond legal processes to research, advice and drafting. Late last year Pangea3 was taken over by Thomson Reuters, one of the world's major financial and legal information providers.

A clear indication of the future in this respect occurred about a year ago when Rio Tinto moved a major part of its contract writing and review team from London to New Delhi, by engaging an outsourcing company. This is high-end legal work, not merely legal process outsourcing.

Whilst such high level legal services have been particularly effective in truly international contexts, such as intellectual property work, they are not now limited to such matters. They will extend to advice on drafting of commercial contracts, even for medium size businesses. Indian lawyers will come to constitute on line competition for all commercial lawyers, not just for the major law firms. Just as outsourcing has changed many other spheres of commerce, legal outsourcing will change the way law is practiced.

* * *

The shift in the global balance of economic power from Europe to Asia, opens opportunities for lawyers throughout the region. In some respects we will be competitors – for example, Sydney, Hong Kong and Singapore in commercial arbitration. However, we also have common interests. It is difficult for a large federation to match the focus and speed of decision-making of a city state. However, we can do so and we must try.

It is appropriate to acknowledge important policy developments with respect to global engagement. Of particular significance last year was the establishment of a more effective foundation for international commercial arbitration in Australia. The widespread adoption of the interlocked provisions of the UNCITRAL Model Law, the New York Convention on Recognition of Arbitral Awards and the Washington Convention on Investment Disputes is a coherent and successful international regime.

After a process in which Commonwealth Attorney-General Robert McClelland, and New South Wales Attorney General John Hatzistergos, were co-operatively involved, important steps were taken to extend Australian involvement in this regime by updating the Commonwealth's International Arbitration Act, adopting the UNCITRAL Model Law as the law for domestic commercial arbitration law in substitution for the out-of-date uniform Commercial Arbitration Acts and the establishment of the Australian International Disputes Centre.

There are formidable difficulties in ensuring that Australia becomes the seat of arbitrations in the Asian region, but at least now we have a fighting chance to maximise our participation in this respect. Australian based practitioners are active participants in this global system. This is significant, even if our local hotels and restaurants are not amongst the commercial

beneficiaries of such involvement.

* * *

Over the years I have given a number of addresses on cross border legal dispute resolution, encompassing various aspects of international commercial litigation such as cross border insolvency, choice of court agreements, international commercial arbitration, freezing orders, comparative civil procedure, venue disputation and forum shopping, assistance with evidence and service and the enforcement of judgments. In each of these contexts there are international treaties or model laws, most of which we have adopted, but many of which our neighbours have not adopted. I have written to Attorneys on these matters advocating various strategies in this respect.

The development of an international reputation that Australian lawyers, including practitioners, judges and academics, are actively engaged with transnational commercial law, and bring to it a cosmopolitan, not a parochial, perspective, is a worthwhile objective. It can only be attained if we adopt a broad based, integrated approach across a wide range of legal and legal institutional issues.

It is now fifteen years since the Australian Law Reform Commission produced its Report No 80 on the subject of Legal Risk in International Transactions. That report identified a large number of distinct aspects of our substantive law and procedure which warranted further investigation with a view to enhancing Australia's involvement in international legal transactions. Few of them have been acted upon. Some have only been acted upon recently. More significantly, since that report, there has been no attempt, at any level, to approach these matters in a coherent and integrated manner, with the exception of the issues which fall within the remit of ILSAC.

A worthwhile comparison is with the work of the Australian Financial Centre Forum, chaired by Mark Johnson, which made a series of recommendations last year in a report entitled *Australia as a Financial Centre: Building on our Strengths*. That report indicated the interrelationship of a multitude of disparate issues which must be acted upon if the government decides to develop a financial centre in this nation. The process of internationalisation, analysed from a financial perspective in that report, finds ready parallels in the legal system.

Indeed, there is a close connection between a financial centre and the provision of legal services to financial institutions. For example, one of the matters raised in the Johnson Report was the recognition of the significance of Islamic finance as a source of international capital. The focus of attention in the report is on the taxation treatment of such products. However, there are important legal issues that arise, and changes that are required, if Islamic finance was to emerge as a source of international capital for Australia. The Johnson Report can serve as a model for a similar analysis of global engagement by Australian lawyers in transnational commercial law.

* * *

On a number of occasions, I have advocated the inclusion of commercial dispute resolution issues into negotiations for bilateral free trade agreements. When making this suggestion, I was not concerned with reducing barriers to trade in legal services – important as that issue is. My focus was on broader issues affecting all forms of cross border trade and investment. There are additional and unique risks of, and burdens on, international trade commerce and investment, which do not operate, or operate to a lesser degree, on intra-national trade, commerce and investment.

Such additional transaction costs impede mutually beneficial exchange. Business lawyers have been

described as 'transaction cost engineers' who add value to commercial relationships by facilitating the resolution of the disputes that inevitably arise in commercial relationships. Other than by means of support for the international commercial arbitration regime, Australian lawyers and policy makers have not, in my opinion, been sufficiently engaged in these respects. There are many matters to which the international arbitration regime does not and cannot apply.

As is the case with all bilateral free trade agreements, such agreements on legal issues are a second best to multilateral or regional arrangements. However, where multilateral arrangements have been attempted over long periods of time, but failed – as in the recognition and enforcement of judgments – bilateral or regional arrangements are the only practical route.

Progress on multilateral discussions – such as updating the processes of communication under the Hague Conventions – is highly desirable and is under consideration. Agreements with regional institutions – such as the European Commission, which is under negotiation or ASEAN, where our free trade agreement was concluded without legal content – can overcome the complexities and inefficiencies of dealing with multiple nations.

There are a range of matters where Australia has adopted a cosmopolitan, rather than a parochial, approach, either at common law or by enacting multilateral treaties or model laws, several of which have not been adopted by many nations in Asia. On the basis of the widely accepted principle of reciprocity, such matters could be incorporated in bilateral agreements.

I refer to matters such as:

- Service of legal process;
- Collection of evidence;
- Recognition of and assistance for insolvency regimes including preservation of assets, automatic freezing provisions and recognition of rules for unwinding antecedent transactions;
- Implementation of the Convention on Contracts for the International Sale of Goods;
- Protecting the integrity of legal proceedings by freezing and search orders;
- Proof of foreign law by reference to the foreign court.

The most detailed Australian bilateral arrangement on such matters, and of course the most practically significant relationship, is with New Zealand, reflected in the Treaty on Court Proceedings and Regulatory Enforcement. In terms of comparability of our systems and the sense of mutual trust and understanding, no two nations have as much in common as Australia and New Zealand. The list of matters upon which arrangements have successfully been made between us, could very well serve as a checklist for the purpose of promoting other bilateral arrangements, although by reason of differences in culture and legal systems, such agreement is unlikely to be as comprehensive as that between Australia and New Zealand.

attention must also be given to legislation, such as the Trade Practices Act and the Insurance Contracts Act, which stand in the way of any international commercial agreement adopting Australian law as the applicable law or choosing an Australian court as the court to resolve disputes.

It appears that, historically, the Attorney General's Department has never had a seat at the table in the negotiation of bilateral free trade agreements. I think this is regrettable. However, many of these agreements are now set in stone and the negotiation process for others is too well advanced. It now seems that the only way of pursuing these issues now is in the form of bilateral arrangements limited to co-operation for legal proceedings. Australia does have two such treaties, with Thailand and Korea, but they do not cover many specific issues that require attention.

On the other hand, there are rules of Australian common law that are more parochial than those developed in other legal systems, eg, our *forum non conveniens* test. As I have said before, attention must also be given to legislation, such as the Trade Practices Act and the Insurance Contracts Act, which stand in the way of any international commercial agreement adopting Australian law as the applicable law or choosing an Australian court as the court to resolve disputes.

If we are to develop a reputation for global engagement, we need to play a proactive role in international issues. In my opinion, high priority should be given to international co-operation to prevent commercial misconduct, especially international commercial fraud. The ease with which funds and documents can be hidden from national enforcement agencies and courts constitutes a major challenge for all commercial nations.

Decades of negotiation for a treaty on enforcement of civil judgments resulted in only limited agreement for enforcement of choice of court agreements. This has the same core justification as the New York Convention on Enforcement of Arbitral Awards and it is worth pursuing in bilateral agreements, even before it comes to be adopted as a multilateral treaty.

Support for domestic legislation on commercial misconduct, particularly fraud, can be pursued on a bilateral or regional basis. Co-operation between police and regulatory agencies has developed. The OECD Financial Action Taskforce system for control of money laundering has been widely adopted, particularly because of terrorist financing. Much has to be done, however, in support of enforcement by proceedings in court. In this respect, I do not exclude co-operation on criminal as well as civil proceedings, although I recognise that special considerations arise in criminal prosecutions.

A range of desirable reforms can be identified: mutual enforcement of proceeds of crime and assets preservation laws, including judicial co-operation in asset tracing, freezing, search and seizure laws; the collection and admissibility of evidence, including data collected under anti-money laundering laws; the development of extra-territorial arrest warrants and international surveillance orders; international enforcement of confiscation orders.

Australian lawyers can also play a proactive role in the development of the principles of international commercial contract law, including recognition of the international character of the *lex mercatoria*. This could extend to consideration of co-operative regional arrangements in maritime law, as proposed by Justice Allsop.

Progress on many of these matters will require some degree of harmonisation of domestic legislation by negotiation or implementation of a treaty or model law. That this is possible has already been manifest in a number of contexts, such as cross border insolvency or international sale of goods and, historically, in maritime law.

There are numerous bilateral, regional and multilateral contexts in which Australian lawyers – academics, practitioners, public servants and judges – have been involved on issues of this character. This involvement has, however, been issue specific, without recognition of a broader context. The principal object that I seek to achieve by this address, is to create an awareness of the interconnectedness of our involvement in the full range of matters that impinge on transnational commercial law. Only by active involvement on a broad front can we change the global reputation of the Australian legal system and of Australian lawyers.

The development of an international reputation in these respects is of particular significance for resolving third party disputes. There is an understandable suspicion in transnational commercial dispute resolution that a party may receive a home town advantage. As the profession in London has found for over a century, both in its Commercial Court and in commercial arbitration, parties who have nothing to do with England will agree to be subject to English law and to submit their disputes to an English court or arbitral body. The reputation for quality and impartiality of Australian lawyers and judges is already high in our region. Our reputation for engagement is what needs work.

The various matters I have discussed may appear

disparate and unconnected. Indeed, there are many other such issues which I have not mentioned. All should be understood as having a synergistic relationship. Progress in one context will establish personal connections and expand cross-cultural understanding which become applicable in other contexts. Significantly, such involvement in any context will help alter the reputation of Australian lawyers on the parochial/cosmopolitan spectrum. If we are to achieve the benefits of global engagement, and establish a reputation of being in the forefront of transnational commercial legal development, we have to proceed on multiple tracks, some of which will prove more successful than others.

* * *

We must proceed gradually and pragmatically in a manner well described by the person who played a key role in my personal journey of engagement with our region. In 1974 I was part of Prime Minister Whitlam's delegation to Beijing. This was towards the end of the Cultural Revolution, when the Gang of Four was still in control.

Before our arrival the Chinese premier, Zhou Enlai, warmly greeted Deng Xiaoping on the reception line at Beijing airport. In hindsight, this was a decisive turning point in Chinese, indeed world, history. Deng had not been seen in public for several years. He was to accompany the Australian delegation throughout our visit.

Deng Xiaoping said, when he started China on its remarkable journey of the last three decades, that the best way to achieve fundamental reform in a multifaceted context was by 'crossing the stream feeling for the rocks with your feet'. This is the way to negotiate the multiple rocks we will encounter as we attempt to expand Australia's global engagement in legal matters, as in other spheres. If we are to have a future as something more than a quarry, we must cross that stream, and do so by feeling each of the many rocks along the way.

Cowdery on Cowdery / DPP: the last word...well maybe

Photo: By Mark Tedeschi QC

In the 1995 edition of *Bar News* (there was only one a year in those days) a rather funereal photograph heralded an interview I conducted with myself that closely followed my appointment as director of public prosecutions for NSW in 1994. I had little idea then of how the next 16 years would pan out and no idea of where I would be in 2011.

I have made a few other contributions to New South Wales Bar publications since then, notably to the hard copy *Bar Brief*, which preceded the electronic *In Brief*. A follow-up to the 1995 'Hot Seat – Or Siberia?' *Bar News* article appeared in *Bar Brief* No. 91 of February 2002: nearly half way through my term, as it turned out: 'Who wants to be a DPP?' (It seemed that I probably did.)

With my retirement from office approaching, Bell SC decided it was time for another interview, but this time he would also contribute to the questions (interviewing oneself is a lonely business). Appointment and retirement times seem to attract this sort of interest. On appointment, people are interested in what you might bring to the job and where you see it headed – full of optimistic expectation. On retirement people seem to be interested in just how little has been achieved and what remains to be done – 'wish lists' feature prominently in the requests.

So here we go again…but I also invite readers to look at my less personal piece in the March 2011 edition of the *Judicial Officers' Bulletin* where some observations are made about some of the advances in criminal justice over my time in office and a wish list is provided of what remains to be done in that context.

Weren't you appointed for life? Why did you retire?

Good question. I was appointed for life, but a legislative anomaly in the Director of Public Prosecutions Act, from an oversight in 1991, required that I retire before I turned 65 (on 19 March 2011) or lose completely my statutory entitlement to a pension. I think I am a public-spirited person, but I didn't want to die in office if I could help it and there are other things to do. So I retired on 18 March and became a

pensioner from 19 March.

Some time before, I had formally requested that the anomaly be corrected by legislative amendment, but the attorney general in the late government (and former MLC) gave a specious reason for refusing to do so and I was stuck with it. No surprises there…

Was it important to have life tenure?

In my view, yes – but admittedly not essential. A benefit of tenure for such positions is that there can never be any suggestion or appearance of currying political favour for reappointment after a fixed term. It also gives to the officeholder confidence that, provided one does not do anything improper or silly, one may stay in office and the job will continue to be done. Of course, this imposes on the officeholder a very strong obligation to behave responsibly and effectively at all times and not to abuse the privilege that has been given.

When amendments to the DPP Act were being planned in 2007 the government initially proposed that subsequent directors be appointed for seven year terms, renewable (as crown prosecutors and public defenders are presently). Directors in other Australian jurisdictions (except Tasmania) are, in fact, appointed for various renewable terms. I argued strongly against that and in due course a compromise was reached that future appointments would be made for ten years, not renewable – and with a retirement age (it might be noted) of 72. A ten year term gives long enough for advances to be made; having it non-renewable removes any suggestion of the seeking of political patronage and gives the benefits noted above. But tenure is still better.

How has it been, to be DPP?

It was reported that in 1990 at the Press Gallery Christmas dinner Paul Keating described himself as the Placido Domingo of Australian politics, based on his assessment that Domingo's performances were 'sometimes great and sometimes not great, but always good'. I don't want to cop the flak in the present context that Keating did over that remark, but I want to raise Domingo for another purpose.

In an interview last year Domingo talked about keeping everything for the stage except happiness, which he enjoyed with his family. He talked about confining the big issues, especially suffering, to the stage. He said: 'I am a happy man, but I love to suffer on stage, it is the most beautiful thing of all!' The interviewer thought this to be a paraphrase of Aristotle's doctrine of tragic catharsis: that we are purged and exalted by watching someone else's mental distress and physical torment. On the criminal law stage in New South Wales I have been resigned to be the designated sufferer. I think it is an important part of the role (but I accept that not everyone will share that view). It means that it helps to be able to compartmentalise one's life and to have a thick skin.

I think being the DPP is the best job in criminal justice. It is true that you go to work every day knowing that just about every decision you take will make someone unhappy and that notion does not appeal to everyone; but I have had no problem with it. The important

thing is to ensure that, as far as humanly possible (and we are not perfect beings), the right decisions are made for the right reasons and that the consequences are just. So you need to know the principles to be applied and the proper limits of any discretion that may be available and you need to understand, if possible, why we humans do what we do to each other, sometimes in the most appalling fashion. It is also important to take the community along for the ride – after all, every action is done in their name and for their benefit.

I should also say that for the whole time I have had the support of an office that has included the most capable and professional criminal lawyers in the state and it has been a very great pleasure to see the willingness with which they have applied themselves to the task and have advocated and embraced improvements along the way.

Did you miss court-room advocacy?

Yes, dreadfully at first. For years jury trials had been my principal field of work and I think they are the last bastion of advocacy, which I did enjoy. (Appellate advocacy is a different beast and not as attractive to me.) When I lobbed behind the director's desk I very quickly realised that I could not continue to prosecute trials. In fact, in 1995 I did prosecute a matter in the Supreme Court (one trial more than my predecessor had done) and for two weeks I was prosecuting by day and directing by night. I had to accept that this was a recipe for a short and unhappy life and thereafter the only appearances I made were in the High Court (and, I say with all due modesty, almost invariably successfully). The difference was that I could prepare in my own time and the hearings were comparatively short.

Photo: By Mark Tedeschi QC

Should the DPP appear in high profile cases?

Subject to the limitations I have mentioned, I think it is desirable that the director should appear in the highest profile or most significant cases. That said, however, it should be noted that a very large number of cases prosecuted by the office are high profile and/or very significant and they are more than adequately dealt with by crown prosecutors. For the reasons I have discussed, it would simply not be possible for the DPP to continue to appear in even a modest number of such cases – the time required for directing, for making prosecutorial and managerial decisions behind the desk, for attending the myriad meetings, simply would not allow that.

Some high profile High Court appeals, however, should bring the director into court and I appeared in some of those – notably appeals against acquittals for murder entered by the Court of Criminal Appeal.

Do you have any views on the way in which criminal cases are dealt with?

There is a continuing push to have more (and more serious) cases dealt with in the Local Court and to expand its jurisdiction accordingly. That bench has become so much more professional than it was when I started practice (in 1971) and I think that push is a good thing. Even senior counsel and crown prosecutors are now among the appointees to the bench of the

Photo: By Mark Tedeschi QC

Local Court.

Nevertheless, in my view there remains a firm place for trial by jury of the most serious crimes and I strongly support the maintenance of that institution. The late government weakened the right to trial by jury by removing the requirement that the Crown consent to trial by judge alone and placing the decision in the hands of the judge and I opposed that move (including in evidence to a Legislative Council committee). I believe that courts faced with the imperative to become, in the word of the bean-counters, more 'efficient' (that is, faced with budget cuts), will dispense with juries too often and that rot has begun.

Juries add legitimacy and community involvement and acceptance to the process of criminal justice. They bring into the process the general values, standards and judgments of ordinary citizens which they apply, with proper guidance, in making their decisions. I think there is great value in that and I am sorry to see the dilution of that contribution. It is interesting to note that some countries that previously abolished juries (eg Japan) or had limited forms of them (eg France) are now reintroducing forms of juries or expanding their involvement. That should tell us something; although it has been fashionable in government and some media to ignore international developments.

What are your views on legal aid?

I think it needs to be understood that in the adversarial system of criminal trial the prosecution puts up a case and the defence may attack that case and mount a case of its own. The verdict depends upon not finding the truth of the matter, but upon deciding whether or not, in the face of that attack and any opposing case, the prosecution's case has been proved beyond reasonable doubt.

In Europe, where there are predominantly inquisitorial systems, they talk about 'equality of arms' on both sides of the contest and I think that, even more so in the adversarial system, for it to work at its best there must be such equality of arms. The criminal justice system is exactly that – a system. It is comprised of component parts, rather like cogs in a machine: investigators, prosecutors, defence representatives, courts and corrections. The machine works at its best when each cog is operating at its best (and, incidentally, not trying to do the work of another cog). If one cog is not working well, the whole machine risks malfunctioning.

In NSW about 80-85 per cent of indictable matters have legally aided defence representation. That is a very high proportion and it shows the necessity of having a properly funded Legal Aid Commission providing such representation. Unrepresented litigants are a heavy and costly burden on the administration of justice.

I have constantly been amazed at the illogicality of increasing funding to police at one end of the process and prisons at the other, while cutting funds to all the processes in between (prosecution, defence, courts). Criminal justice is a core function of government. Governments, whatever other priorities exist, have an obligation to

see that it is properly resourced and functioning effectively, otherwise there is the risk of people taking things into their own hands. Proper resourcing includes providing professional representation on both sides of the record in the system that government has created and maintains.

Should criminal law barristers do both prosecution and defence work?

Emphatically, yes. I commenced practice as a defender in Papua New Guinea and came back to the Sydney Bar five years later. I then appeared on both sides of the record in criminal cases, with a progressive concentration on prosecuting as the years went by. Experience on both sides enables one to better understand how a matter should proceed and the circumstances in which one's opponent is working and that can be very helpful in achieving the right outcome.

Would you do it all again?

Yes. Somebody should and I was privileged to be able to do it for 16 years. Perhaps rather perversely, I enjoyed a great deal of it (but there are some things that I will definitely not miss). Daily decision making and direction in the prosecution of serious criminal cases was enormously stimulating and satisfying.

Do you have any regrets?

Yes, of course. We all make mistakes.

I think that any mistakes I made in professional legal actions were identified and corrected before any harm was done (and I don't think there were many). I did deliver a pretty crook speech once on an important occasion early in my time in office [that invites readers to select any one – or more!] and I did once admittedly go over the top in relations with the media at a particularly fraught time. I also regret that I was perhaps too tolerant of the regime that followed the creation by then Treasurer Michael Costa of the position of executive director – I thought that it could be made to work for the benefit of the ODPP and its officers, but now I am not so sure.

But I think that, given the provocations and pressures I faced on a daily basis for over 16 years, my record is not too bad.

Do you have any advice for your successor?

This is a job that, I think, can be carried out in one of three ways, each of them legitimate. One way is for the director to go to work each day, roll the arm over, do what the job basically requires to be done, and go home in the evening to other pursuits. Another way is to do that, but also to agitate for change and improvement in the criminal justice system behind the scenes, using the avenues of political and bureaucratic power to seek to quietly achieve gains without publicity. (I believe my predecessor may have followed that course - and very effectively.)

A third way is to do the latter, but to do it with the knowledge and engagement of the community whom the director serves. I fell into that way at an early stage, when in 1995 I encountered my first 'law and order auction' election and Bob Carr (the second of five premiers I served under, with four attorneys general) was promoting mandatory sentencing and other draconian (and ill-considered) changes to criminal justice. That brought me out, if you like. It seemed to me that the community had a legitimate interest in knowing what was being done in criminal justice in their name, what changes were being agitated and why, what arguments might be made and who was doing what. There is also value in obtaining the community's informed views about all that. I headed down that road which inevitably draws media interest and political angst.

So my advice is to have a clear expectation of the way in which the job will be approached and be prepared to wear the consequences.

Is there life after the DPP?

I think so (although seeing the number of retired ODPP officers who return as prosecutors, even for acting periods, I sometimes wonder). On 1 April (a great date on which to start any new enterprise!) I became an adjunct professor at the University of Sydney and I have visiting professorial fellow appointments with the universities of NSW and of Wollongong. I have consultancy and project work with prosecutors

and prosecution agencies in developing countries through an international agency and that will involve some travel. I am involved in programs of the International Association of Prosecutors. Some arrangements may be made for limited involvement in the media and another book is possible. There are speaking and other engagements ahead. The family and whatever it is that one is supposed to do in 'retirement' will no doubt take care of any time left over. I shall maintain my practising certificate for now and I could even be an occasional barrister. I plan to keep busy and to stay engaged with criminal justice in various ways with choice and flexibility that I have not had for the last 43 years of my working life.

Paul Daley notches up a half-century

On 17 March 2011, Australia's best known barrister's clerk and one of the most popular and respected men on Phillip Street, Paul Daley, notched up 50 years of service to the Eleventh Floor, Wenthworth/Selborne.

During that time, he has clerked for some of the country's leading barristers, many of whom have gone on to hold high judicial office, including Sir William Deane, the current President of the Court of Appeal, James Allsop and Justices of Appeal Hope, Sheller, Cripps, Giles, Campbell, MacFarlan and McColl (as a member of Fifth Floor, St James Hall for which Paul has also clerked for almost 20 years).

A celebratory diner was held to mark this milestone, attended by almost all of these barristers for whom Paul has clerked over the years as well as Chief Justice Spigelman AC and Tom Bathurst QC, representing the NSW Bar.

Who's that next to Paul Daley? Clockwise from the top: Chief Justice Spigelman AC, Tom Bathurst QC, Justice Cliff Hoeben AM RFD, Alan Sullivan QC, Sir William Deane.

Left picture: Francois Kunc SC

Right picture: Paul Daley.

Left picture, L to R: Robert Weber SC, Senator the Hon Helen Coonan, Alec Leopold Sc, Leanne Norman.

Right picture, L to R: John Maconnachie QC, Justice Joseph Campbell, the Hon Simon Sheller QC.

L to R: Justice Lindsay Foster, James Stevenson SC

Sarah Pritchard, the Hon Michael McHugh AC QC

L to R: Justice Robert Macfarlan, Tony Meagher SC

The Hon Bob Hunter QC and Andrew Bell SC

L to R: Justine Beaumont, Mark Richmond SC, Margaret Allars.

The Hon Justice John Sackar

On 1 February 2011 John Sackar QC was sworn in as a justice of the Supreme Court of New South Wales.

Sackar J attended Sydney Boys High School and then Sydney University, graduating in Law in 1972. His Honour was admitted to practice as a solicitor in 1973. His Honour was articled at Hickson Lakeman & Holcombe, and then practised as a solicitor at Dawson Waldron.

His Honour was called to the bar in 1975 and appointed a Queens Counsel in 1987. Sackar J was a member of the Sixth Floor for most of his time at the bar. His Honour's practice included industrial law, defamation and a wide range of commercial matters. His Honour established an international practice in Brunei and in London, and was called to Middle Temple, with chambers in Gray's Inn Square.

The President of the Bar Association spoke on behalf of the NSW Bar, Stuart Westgarth spoke on behalf of the Solicitors of NSW, and Sackar J responded to the speeches.

The President commenced by noting

> It is always the way with judicial appointments that the bar's rumour mill reaches fever pitch when it becomes known that one is imminent. Your Honour's appointment was no exception, however when your Honour's name was mentioned in those rumours I was quite incredulous. That was not of course because I had any doubt about your capacity for the position but rather because I regarded you as the epitome of a confirmed barrister, not a confirmed old barrister, merely a confirmed barrister who would have to be carried out of his room in Selborne Chambers. The Court and the community are fortunate that I was mistaken.

The President had noted that his Honour went to Sydney University with the intention of studying medicine. His Honour said that his father

> was bitterly disappointed when I told him I was giving up medicine and taking up law. After telling me I was making a monumental blunder he said "All the lawyers I know are walking the racecourse". He added "They clearly have nothing to do". In order to test the proposition I dared him to name one. After a moment or two he said rather triumphantly, "Michael McHugh". It was at that point that I knew that I had made the right career change.

The President noted the range of clients for whom and against him Sackar J appeared:

> You eagerly appeared both for and against major corporations and financial institutions and on a regular basis advised regulators, such as the Australian Securities and Investment Commission and the Australian Competition and Consumer Commission on the more difficult cases which came across their desk.
>
> You appeared in a wide range of cases including representing Biota in a case in relation to the drug Relenza, the Commonwealth in support of the claim against it by Pan Pharmaceuticals, the mother of Michael Hutchence in defamation proceedings against the Sun Herald, the Australian Rugby Union in relation to the sacking of Lote Tuqiri and John Curtin House and Robert Hawke, the then secretary of the Australian Labor Party, in the Centenary House Inquiries. All those cases, one way or another resulted in a manner satisfactory to your clients. They exhibit the extraordinary wide range of areas which your Honour practiced, something that can only be done by a really outstanding senior counsel.

The President also noted two of his Honour's outside interests, art and agricultural pursuits. His Honour's interest in art

> extended to lining your chambers with exotica including skeletons, statues and other material of a like nature. Solicitors, I am told, had to regularly assure their clients not to be deterred, they were in fact coming to see a highly skilled barrister not a serious eccentric. I also understand that those responsible for moving your Honour from Selborne Chambers to this building almost rebelled when they saw the task which confronted them and it was only your Honour's charm and good humour which persuaded them to carry out the move.

Mr Westgarth also noted his Honour's reputation as a collector of an "*eclectic array of antiquities and artefacts*", and said:

> It is rumoured that one client, somewhat dissatisfied with your Honour's advice, told his solicitor on exiting your chambers that he did not appreciate the advice and certainly did not appreciate receiving it in an annex to the British Museum.

In referring to some of the well known cases in which his Honour had been involved, Mr Westgarth said

> I did in fact begin a survey of the case list published with your Honour's CV but fell short at the first hurdle with the 200 page Federal Court judgment in News Limited v Australian Rugby League. In that case your Honour made submissions on behalf of three hundred players and ten coaches of the rebel clubs in the super league split. Amongst other eminent counsel a certain J J Spigelman QC represented the loyal clubs who remained committed to the ARL. In explaining the lengthy judgment the Court was scrupulously fair in sharing the responsibility across all of the represented parties. The Court noted in particular the lengthy replies that had been made to detailed submissions in response to the extensive earlier written submissions by the parties.

Mr Westgarth said that his Honour was recognised as one of Australia's best cross examiners:

> your Honour's technique has been variously described as flexible, powerful, subtle and ruthless. Many have witnessed first hand your ability to weave elaborate webs into which you lure unsuspecting commercial executives who rise bemused from the witness box to find that they have revealed all. All observers agree that they would not wish to be on the receiving end".

His Honour referred to his good fortune

> … to have done one or two cases against the late Peter Hely who was then the leading commercial silk of his generation. He had such a sense of fun. We were attempting to negotiate a settlement in a largish matter. I told him I would be out for a short while and he might like to call me if he had a response to my offer. When I got back to chambers, I looked down on my cross-examination notes and realised there were a number of jottings, not mine, in the margin adjacent to some of my more brilliant thoughts, such as "hopeless question, "you'll never get him to concede this" and "rubbish and irrelevant". I have never before or since settled a case quite in that way. The troubling aspect of it all was that his comments were, upon reflection, probably accurate.

Among those his Honour acknowledged for their guidance loyalty and support during his career was Doug Staff QC

> [who] was often not well especially in the latter part of his career. That said his intellect, integrity and courage were in such abundance. On one occasion and over our daily ritual of whisky he somewhat casually presented me with my red bag, a tradition which I am sad to say has all but disappeared. I was rather overcome with the gesture until I realised that the tradition also involved having the initials of one's leader, not mine, embroidered on the side. Clearly an early form of product placement it was nonetheless an important vote of confidence which I have cherished the whole of my professional life.

Appointments to the District Court

Two members of the New South Wales Bar have been appointed to the District Court this year.

Her Honour Judge Donna Woodburne SC was sworn in on 7 February 2011.

Her Honour was admitted as a barrister in 1997, having been part of the Office of the Director of Public Prosecutions since 1988. Her Honour was appointed an acting crown prosecutor in January 1997, a crown prosecutor in July 1998 and deputy senior crown prosecutor in June 2008 before being appointed senior counsel in 2008. . Her Honour became a deputy director of public prosecutions in 2009.

***

Her Honour Elizabeth Olsson SC was sworn in on 7 March 2011.

Her Honour was admitted to the bar in 1988, and appointed senior counsel in 2003. Her Honour's varied practice had included work in commercial, equity, building and construction law. Her Honour was the Bar Association's representative on the New South Wales Government's Home Building Advisory Council. Her Honour was a part time deputy president to the Administrative Decisions Tribunal and part time member of the NSW Mental Health Review Tribunal. President Tom Bathurst QC, speaking on behalf of the New South Wales Bar, paid tribute to 'a senior counsel who is regarded with tremendous respect and genuine affection'. He said:

> ... testimony to your judicial qualities, not to mention the strength and versatility of your character, is just as often found outside the court.
>
> ...
>
> Your Honour has walked the Kokoda Trail more than once, perhaps in tribute to your father, who was a major in the Australian Army. Several times you have taken part in the Oxfam Trailwalker – a gruelling test of teamwork and endurance. This event, perhaps more than any other, has contributed to your Honour's enviable reputation for fortitude, patience and discipline. One member of your team described you as 'ferociously competent and quite unstoppable', both of which are judicial qualities. Often, your Honour carried an over-sized backpack, stocked with rations and equipment, not just for yourself, but for all the other team members as well.
>
> ...
>
> Your contribution to the bar as an institution is enormous, and has taken many and varied forms. You have served: as chair of the Equal Opportunity Committee since 2007; as a member of professional conduct committees two and three; and on the Supreme Court Commercial List Users' Group. You have given your time generously to the Bar Association's Continuing Professional Development Programme and the Bar Practice Course, by chairing many sessions, conducting advocacy workshops and presenting papers. In 2007 you stepped in to fill the casual vacancy on Bar Council when his Honour Judge Toner SC joined this honourable court.

Malcolm Duncan

I confess that the prospect of speaking about Malcolm is a daunting one.

First, there are so many facets to his life and he was known to so many people in differing circumstances that we will have a different story about Malcolm, and everyone here will have a slightly or even wildly different perception and opinion of him.

Accordingly, all I can do is speak of him, as I knew him.

Secondly, there is the public and media portrayal of him as the combative, rabblerousing, archconservative, eccentric barrister. This is exemplified by the comment of Bob Carr in parliament when he looked up and he saw Malcolm staring down at him from the public gallery.

"There he is" said Carr, "the Rumpole of the lower traffic courts".

This media and public presentation, while it has some elements of accuracy and was not discouraged by Malcolm, is at odds with the Malcolm Duncan that I and his other friends knew and which I hope to capture shortly.

Thirdly, Malcolm himself was such a formidable speaker—dare I say orator—that, if he were here, he would be doing a much better job of this than me.

However, first some disclaimers.

I have known Malcolm for an excess of 20 years so there are some things that I am not in the position to talk about; I cannot talk of his life growing up in Potts Point as the only child of Bruce and Joy Duncan. I cannot talk of his school days at the Scots College in Bellevue Hill—though you can go to his website and find a splendid photograph of him from those times looking like a slightly malevolent Bonnie Prince Charlie in full Scottish regalia. I cannot speak about his life in the Army Psychology Unit or his life as a student at Sydney University, though I do have it on good authority that he was an enthusiastic participant in the Law School review, and memorably portrayed Russ Hinze in a vicious skit. The remarkable thing about that portrayal is that even Malcolm had to be padded up to attain the corpulence of the late Mr Hinze.

However, I can speak with some authority about Malcolm as a barrister.

I instructed Malcolm in a few cases. All of them were extremely difficult. All of them had features which were common to many of Malcolm's cases. The factual issues were complex and technical. The client was always a battler, being a small business owner, a tenant or a farmer, fighting against banks or government but generally against the big end of town.

Quite often the client came from an ethnic background, did not have the advantages of extensive education and sometimes had language difficulties.

There was very little monetary reward in the case for Malcolm. In this regard I suspect that Malcolm, more than any other barrister in Sydney, acted pro bono, or on spec or on a very reduced-fee basis. Nevertheless, he cared for his clients as if they were millionaires paying full freight.

This absence of remuneration from the cases he took on usually also applied to his instructing solicitors which made the range of firms prepared to brief him somewhat limited.

Finally, as with most of Malcolm's cases, the chances of success were no good.

Malcolm had an eye for technical detail whether it was in the construction of commercial documentation, the rules of court or legislation and regulation. He also loved devising legal strategies and technical arguments.

This was just as well, as in many of his cases cunning strategies and technical arguments were the best that the client had going for him.

Malcolm also liked cross-examination and was a formidable cross-examiner. However, true to his Scottish heritage, he preferred to wield a claymore or broad-sword, rather than a stiletto.

While this robust approach gave him immense pleasure and bruised witnesses, his enthusiasm for cross-examinations sometimes had to be restrained as he had a slight tendency to go a bridge too far. With the restraining hand of a strong and determined instructing solicitor, Malcolm could be a very effective cross-examiner. Unfortunately, very few solicitors, including myself, had the strength or the stamina to stand up to him when he had the bit between the teeth.

The other thing about Malcolm as a barrister was that he was completely fearless. He was not intimidated by either the bench or his opponents. This is not to say that he did not show appropriate respect and courtesies. He was in fact, extremely polite (most of the time) as he liked the formal aspects of court—the wigs, the gowns and the procedure—the bows and flourishes both verbal and physical.

But if it was necessary to put an unattractive argument to the most ferocious and difficult Judge you can think of, Malcolm would do it.

From time to time Malcolm was also a litigant person, the most famous being his stoushes with Clover Moore over electoral advertising. The stoushes are duly reported and appear prominently on Malcolm's webpage, even though he was unsuccessful.

Curiously, one of the cases that Malcolm is most remembered for does not appear on his web page.

That case was the Kings Cross Chamber of Commerce v the Uniting Church of Australia Property Trust, the Director General of the Department of Health and the Commissioner of Police.

This is the format title for the great Injecting Room Case, in relation to premises in Darlinghurst Road, Kings Cross.

I forget Malcolm's official title in the Kings Cross Chambers of Commerce but he was effectively the guiding force, mouthpiece and personal embodiment of the organisation. Although I should add, behind him there was a very active governing body.

The Injecting Room was a classic Malcolm Duncan case.

Firstly, it involved the people of Kings Cross, and in particular a variety of small businesses along both sides of the strip in Darlinghurst Road.

Secondly, he had as his enemy, organised religion (which he was not a great fan of) in the form of the Uniting Church, and the New South Wales Government (which he was happy to torment) in the form of the Commissioner of Police and the 'Director General of Health.

The debate about whether to have an injecting room and then where it was to be situated, involved a huge public debate, some of it quite toxic and bruising. Malcolm was very active in that debate both in the press, in public meetings and on television.

Malcolm strongarmed his old university friend and colleague from Garfield, Barwick Chambers, Dr Chris Birch SC, to take on the case as counsel.

Malcolm then strongarmed me into being the solicitor for the Kings Cross Chambers of Commerce. Both of us were also strongarmed into taking the case on a very much reduced-fees basis.

Against us were formidable legal luminaries. Ian Harrison, now Justice Harrison of the Supreme Court, appeared for the Uniting Church and Stephen Gageler, now the Commonwealth Solicitor General, appeared for the Director General of Health and the Commissioner of Police.

Malcolm himself alternated between being de facto junior counsel in conferences with Chris Birch and myself, the client giving instructions and a solicitor or paralegal helping me with the paperwork. When he was not doing all of that, he was holding press conferences, issuing media releases and keeping the people of Kings Cross informed.

Notwithstanding his very active role in the matter, Malcolm was frustrated that he was not counsel appearing, or even junior counsel, sitting at the bar table.

Instead, he sat where clients sit, that is, behind me as the solicitor. However, from this position he

peppered me with endless post-it notes containing ideas, instructions, directions, questions and quite often, insults about me, Chris Birch, our opponents and occasionally, the judge.

My task was then to filter these notes and where appropriate to pass them on to Chris Birch, who then, as far as possible, did his best to ignore them. This of course, only added to Malcolm's frustration but contributed to the amusement of our opponents and perhaps provided a distraction from the case.

At the end of the first day, things were looking pretty good. Malcolm was convinced we had won. Chris and I were cautiously optimistic. However, for some reason, day two brought about a change of mood, both from the bench and in the plaintiff s camp.

Ultimately, we lost.

To this day, I still think we should not have lost. The decision to impose the injecting room on the site where it now stands, was in my view, a seriously defective piece of administrative decision-making, or perhaps non-decision making.

However, it is all in the past, and we had the opportunity to appeal but decided not to do so.

Two things were clear to me after this case.

Firstly, Malcolm passionately believed in the cause, and was able to motivate considerable numbers of other people to believe in it as well. Like the other Malcolm, or TOM as he liked to refer to Malcolm Turnbull, when motivated to act on an issue involving this community in Kings Cross, Malcolm was a force of nature.

Secondly, it was clear that Malcolm was much admired and revered by the citizens of Kings Cross. Some of them came down to watch the case, and many of them of course, stood out from the drab, fustian appearance of the lawyers normally populating the Court.

Malcolm famously stood many times for parliament and was always unsuccessful. His last attempt was as an independent candidate in Wentworth in August last year.

I think most of us were amazed at Malcolm's ability to keep standing for elections when he must have known that every time he did, lie had a difficult, if not almost impossible task.

Malcolm's long history of unsuccessful attempts to be elected to parliament and his inability to keep humour out of his campaign policies (although he was deadly serious about most of his policies) more than anything branded him in the eyes of the press as an eccentric—almost the political equivalent of a vexations litigant.

However, the press got it wrong, and those who believe the press also got it wrong.

Not so long ago I attended an exclusive dinner of sleek,, preening corporate executives and professionals. The dinner speaker and draw card was a very senior New South Wales Labour Party politician. He was quite revealing. He acknowledged that most politicians were reviled in the community, because they increasingly came from political dynasties and party machines and many were out of touch, or incompetent, or both.

However, he said that the blame for this should fait on the likes of those who were at the dinner. It was us he said, who had the educational qualifications, the business and managerial and professional skills, and above all, the money to take time away from the business of accumulating wealth to participate in the political process.

Malcolm was the embodiment of all that he was talking about—save for the fact, that he hardly had any money to fund his campaigns, which is why they were often so threadbare and relied on friends and his own feverish hard work.

Malcolm may have failed to get elected, but unlike the rest of us (although I have noticed a couple of exceptions here today) he did not fail to use his ability, skills, or passions in the democratic process in providing an alternative voice and alternative potential representation for his community.

It is the Malcolm Duncans who have kept the flame of true grass roots participatory democracy alive in Sydney and our city is diminished politically (as well as in many other things) by his death.

Away from the law and politics, and away from Community issues and the press, Malcolm was a different

character.

Not completely different mind you. He was no Jekyll and Hide and as a friend you could have spectacular arguments with him and on occasions he could be quite infuriating. However, as a friend, he was enormously good fun and the arguments were just arguments there was no rancour and they never damaged the friendship.

Malcolm was also a soft touch to anyone who needed help, whether it be to raise money for children with cancer, to help a prostitute find a way out of the cycle of abuse and dependency that most of her kind were subjected to, to help a client or to coach the local school in debating.

Sometimes his assistance to others in the Kings Cross community put him in risk of physical danger. Malcolm did not talk much about these things, but I was aware of them obliquely from snatches of conversation or comments.

Finally, his friends also knew that, the most important thing in Malcolm's life was his family; Bruce, Joy, Suzanne and Anthony. They were the rock of his life and it would not be appropriate for me to do more than just simply make that observation.

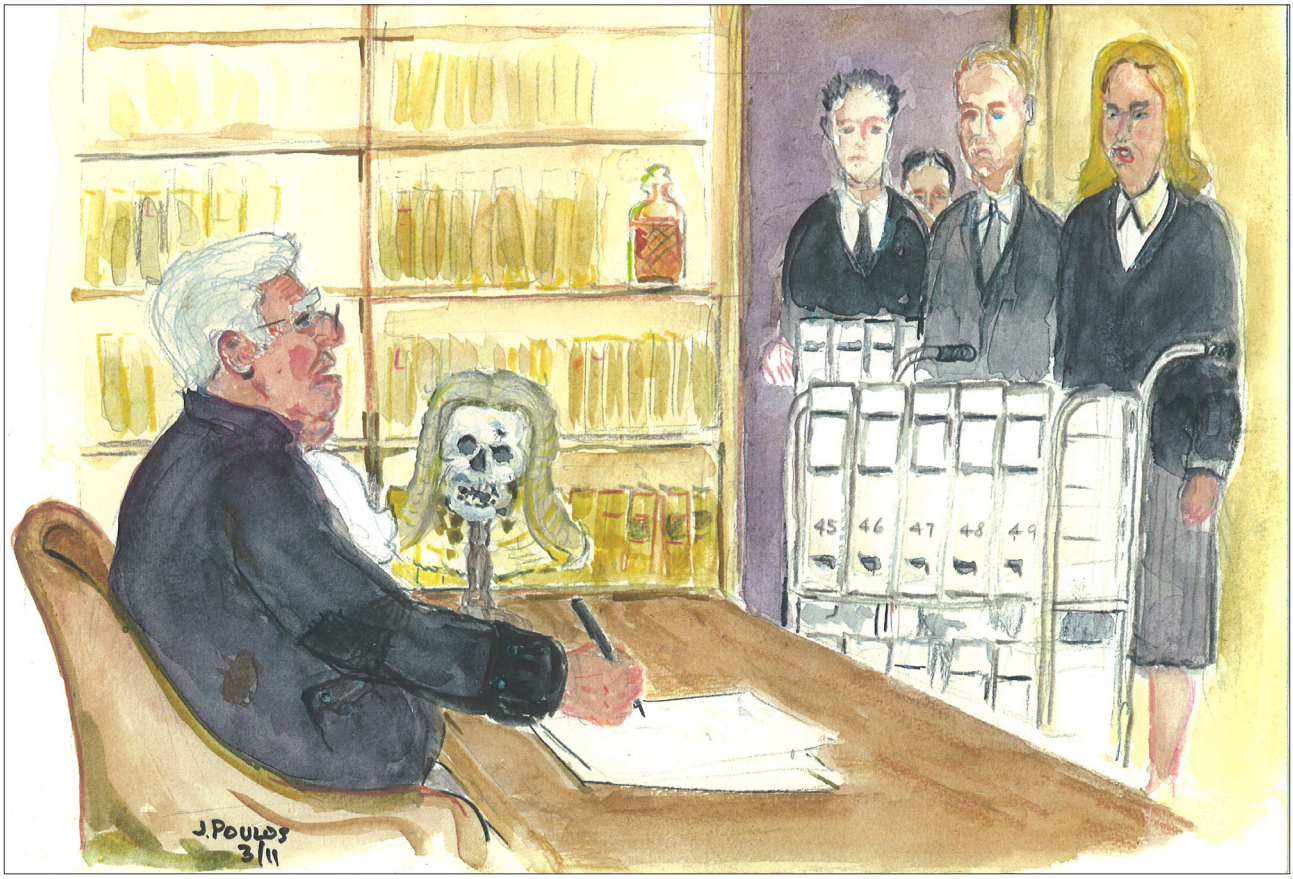
Malcolm should not have died when he did. Apart from being far too young, there is an election coming on the 26th of March and he was once again going to be a candidate.

Since Malcolm's death, letters have been published in the press and on blogs. Some are funny, some are trenchant, some are nostalgic. All of the however express sadness at the passing of someone quite unique.

Damn it Malcolm, a lot of people are going to miss you.

Bullfry and the end of 'orality'?

By Lee Aitken (illustrated by Poulos QC)



A sixty page affidavit (with supporting folders) was prepared ...

'Another thing that underpins our system of advocacy – orality – will have gone'. Doyle CJ quoted in *The Australian* on 11 February 2011.

'This looks most ominous!' Bullfry slowly refilled his Scotch, and patted the judicial skull (incautiously purchased from its wanton executrix) with an avuncular smile.

A senior, interstate, jurist was forecasting the end of 'orality' (a most unusual expression – was it 'Australian' English? – to Bullfry's fevered brain it always conjured up another image entirely). Apparently, counsel were so expensive, and given to such untrammelled oratorical extravagance, that trials were constantly going for too long – as a result, legal costs were getting (so it was claimed) entirely out of hand. Even the benighted Legal Aid Commission was threatening to establish a 'panel' to prevent an unnamed cohort of unscrupulous barristers from 'rorting' the commission by deliberately letting trials overrun – was it any wonder, when the rate for defending an armed robber, rapist, or murderer attracted the princely emolument of $200 per hour – twice that rate would not even guarantee a plumber on site, half that rate would bring someone to the door to teach a laggardly child Latin for an hour, a quarter of it would see a bathroom cleaned by a 'visitor' from some part of Latin America! If you were looking at twenty five years on top for an unexplained head in your refrigerator, was it too much to want a defender whose heart was in it? (Or would it be better to follow the US practice – have a drunken, or otherwise incompetent, and grossly unremunerated, advocate to appear at trial, and use this as the basis for endless appeals to stave off a quick dose of sodium pentobarbital?)

There was something odd about this as well in so far as it was aimed at the Bar – since most matters settled, surely the largest component of any legal costs was the amount charged by the relevant law firm *long before* the involvement of any barrister at all!

Bullfry recalled a case when he

had advised the solicitors of the recipient of a large 'uncommercial payment'. As a professional, a liquidator is even more craven than a solicitor (simply because as a professional, he is even more closely aligned with the business interests of the client – in fact, a large accounting firm now engages in 'consulting' as its most lucrative activity – auditing, and otherwise blowing the whistle, is at best a highly dangerous loss-leader). Bullfry knew from long experience that 'throwing ' an early bone to a liquidator by offering a deeply discounted payment was a good way to settle a matter – this gave the liquidator at an early stage 'fighting' funds to continue recovery actions against more difficult defendants.

Successfully to compose such a claim involved saying as little as possible on oath about the financial position of the payor company's solvency. With this in object in mind, Bullfry had prepared a masterly draft affidavit (11 paragraphs including the jurat!) to that effect after reviewing the papers for a few hours. The firm, of course, wished to deploy two or three young Associates, and a senior, to review (and charge for reviewing) all the documents. This led to the workers so deployed preparing a voluminous, and wholly counterproductive, statement. So it came to pass that Bullfry was thanked for his services, and sacked, after a day – his modest fee was paid. A sixty page affidavit (with supporting folders) was prepared – the case was settled on the door of the court, where the liquidator was paid 95 cents in the dollar of the claim, and his costs – honour was satisfied all around, and Bullfry's erstwhile solicitors could charge an appropriate fee for eight weeks of work!

Any barrister who was busy did not want a case to run on – it was all his instructing solicitor could do to keep Bullfry present in any court for the day. 'I will not wait for Mr Bullfry any longer', the chief judge would say. An urgent call would go to Level 11, and Bullfry would rush down – on one occasion he had found his solicitor conducting the case, with the client in the box! He had had, politely, to reprove the presiding jurist for this breach of protocol. (Still, Bullfry, supposed, it could be worse – of late, he had appeared before a particular jurist who insisted on reading out from his computer the orders he had made *without even calling on counsel*. That was certainly an expeditious way of proceeding but seemed to deny a number of basic precepts of natural justice (the Court of Appeal had confirmed Bullfry's own misgivings about this jurist in a couple of celebrated reviews)).

... of late, he had appeared before a particular jurist who insisted on reading out from his computer the orders he had made without even calling on counsel. That was certainly an expeditious way of proceeding ...

What was the real source of the present difficulty? Modern commercial life was more complex, legislation immense, the photocopying, and emails, of any business, enormous. But, fundamentally, the Woolf, and Jackson, and UCP 'reforms' were the main source of all the trouble. What was the purpose of the old system of special pleading? Quite simply, it was to have but one question of fact to leave to the jury – with the opportunity to review any error *nisi prius*. In equity, the purpose of the summons, in the ideal case, was to expose the claim to a demurrer! *Cadit quaestio*. The judge to whom he had been a youthful associate had told him of an exemplary case – the Dancing Man, unable to discover any proper basis for his claim in equity, had been advised simply to tell the Funnelweb that he was unsure of his equity, whereupon that kindly jurist would remedy the deficiency – boldly he sallied forth to be greeted quite simply by Mr Justice Myers: 'Yes, Mr McAlary, you have no equity – your claim is dismissed!' That didn't take two days; it took two minutes. In an older Commercial List, the plaintiff got value for money – on the first return of the summons, a damaged hand would tap a pen and say to the shorthand writer: 'Take the defence down now!' If counsel could not, ore tenus, provide a defence, judgment would be entered for the plaintiff forthwith.

Now, of course, anything could

Its rejected!!

be pleaded, and then amended. A solicitor 'advocate' would be granted any largesse, or dispensation. Frequently, the drafting of pleadings was handled 'in house' by the firm. It was impossible to strike out, or demur to anything – it was well-nigh impossible to enter summary judgment. A default judgment was liable to be set aside on any whim. If anything was arguable, anything would be argued. And who was responsible for this shambles? – why, the very jurists in the very courts who now sought to impugn the way in which 'counsel wasted time, and ran up unnecessary costs'.

Furthermore, in Bullfry's sad experience, counsel were now inevitably deployed later and later in the conduct of any litigation – to be told that a matter was unarguable by counsel too early in the piece would undermine the possibility of many lucrative and leveraged hours examining the entrails of the computers, and other systems of the opponent, on discovery.

'Orality' was essential to the system – otherwise one would be reduced to the situation which pertained in the US Supreme Court where each side had half an hour to argue and all of the 'special leave applications' (cert. denied) were decided by young law clerks from Louisiana.

Who would forget Sir Edward Mitchell's reply to a question from a now ancient High Court on when a certain part of the argument would be reached: 'Your Honours, I intend to deal with that on next Thursday'. That was perhaps taking things too far but the essence of the local system had always involved a highly skilled advocate putting a case, carefully veiled, to an astute tribunal. If a supine tribunal was now so lacking in resolve that it was unable properly to control proceedings, the fault lay entirely with its officers, not with honest toilers trying to make a quid.

Bullfry well remembered a scarifying exemplum of just this approach

from his youth. He was acting for a recalcitrant debtor before one of the most expert judicial officers (who in a previous life had been acknowledged, by general agreement, as the leading commercial silk). The relevant bankruptcy notice had long expired – Bullfry had brought along a gold cup, and a briefcase containing $80,000 in used 'bricks', to try to demonstrate the debtor's solvency. He had placed both on the bar table. This initial method of proceeding had not found favour with the jurist. At one stage in an increasingly heated case Bullfry was cross-examining the bank officer:

Jurist: 'Rejected'.

Bullfry: 'Would your Honour just hear me on the question whether ....?'

Jurist (rasping voice rising to a shout): 'It's ***rejected!!***'

They don't make them like that anymore – trials would be over in a flash if only they did.

Verbatim

Chinese numerology and masonic telephone numbers

Q. Did you know a fellow by the name of Mr [Smith] who worked at Mallesons?

COUNSEL: I object.

HIS HONOUR: What is the relevance of him knowing Mr [Smith]?

FIRST DEFENDANT: Mr [Smith] had a very interesting direct telephone number. The number, 9296 2171. When you add all those numbers, and you know how to--

HIS HONOUR: Sorry? The number 9296.

FIRST DEFENDANT: 9296 2171.

HIS HONOUR: Yes.

FIRST DEFENDANT: If you add all those numbers, and they will add up to 11: Nine and two are 11. And nine is twenty. And six is 26. And two is 28.

HIS HONOUR: What has Chinese numerology got to do with this, if that's what you are doing?

FIRST DEFENDANT: Excuse me, let me finish.

HIS HONOUR: Go on.

FIRST DEFENDANT: I can't speak Chinese and have never been a Chinese numerologist.

HIS HONOUR: All right.

FIRST DEFENDANT: Let's start again. Nine and two is 11, and nine is 20. Twenty and six makes 26. Twenty-six and two make 28. And one make 29. 37. And the next number - I will leave that be for a while.

HIS HONOUR: What is the point you're making?

FIRST DEFENDANT: You get certain numbers, telephone numbers--

HIS HONOUR: Yes.

FIRST DEFENDANT: When you add them up--

HIS HONOUR: Yes.

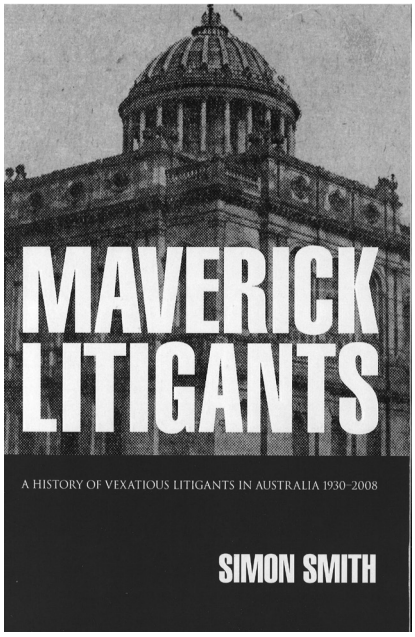
FIRST DEFENDANT: --you end up with a double digit number.

HIS HONOUR: Yes.

FIRST DEFENDANT: If you add up those two digits and they come to nine, it means that is a Masonic telephone number.

Maverick Litigants – A History of Vexatious Litigants in Australia 1930-2008

By Simon Smith | Maverick Publications | 2009[1]



Murray Gleeson has often reminded audiences that the rule of law is not the rule of lawyers. As this intriguing work reminds us, litigants are necessary for litigation and advocates are not.

The question of the vexatious litigant is a profound one. Accessibility to law is a necessary criterion of its civilising influence. The decision by a society to bar someone from accessing it is no slight question.

When a medieval society 'outlawed' someone , they were not making a fashion statement about green leotards, but a collective finding that one of its members had forfeited its aegis. As clause 39 of the Great Charter provides:

> No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.

All of which is very well, I hear you say, but have you ever been against someone who should be declared? Indeed, and that is the dilemma, the more so in a society in which the litigant in person is in greater number than before. Family law in particular has no shortage of such persons.

While the inherent power of a superior court may give sufficient power to deal with litigants whose causes tend against both due administration and due justice, the UK statutory formula – granting a discretion to superior court judges upon evidence that a person is habitually and persistently doing things they should not – found favour in Australian jurisdictions from the commencement of the twentieth century.

Simon Smith declares his hand in his opening paragraph. The book, he writes 'has been fun', before adding that an early job as a lawyer at a busy community legal centre meant that he was part of the vexatious litigant circuit:

> Well-meaning Supreme Court judges would refer persistent litigants direct to me for free grass-roots advice, presumably in the hope that I would either advise successfully against further action or take the case on and shape it for final determination. I was never successful.

As the title of the book suggests, Smith is sympathetic to the species and to the view expressed by a member of the House of Commons (J F Oswald, a silk and author on the law of contempt):

> [Oswald opposed the enactment because] it infringed the first principle of public justice, namely, that it should be free to all alike. The Queen's Courts were public Courts, and all classes of litigants were entitled to free and unimpeded access thereto. The clause might lead to abuse: the courts had already ample power to summarily and inexpensively stop any vexatious or frivolous action.

The book has two parts, the first is a social and legal study of the beast, and the second with six vignettes of persons declared. Whether each justifies the Shavian conclusion that all progress depends on the unreasonable man is moot, but I was particularly taken with the tale of Constance May Bienvenu, an animal rights activist who fell foul of an – arguably – hidebound RSPCA.

The toll vexatious litigants can take on their loved ones is not often

realized, and against the tide I was delighted to read that Bienvenu's husband, who died five years after her, established a foundation in his and his wife's name for charitable purposes, it being a condition that no donations were made to the RSPCA.

Yet it is difficult to improve on Elsa Davis. Later, she would have regular spots on the Mike Walsh and Don Lane Shows, but her beginnings as an out of control litigant began with her acquiring the status of sister-in-law to sometime chief justice and governor-general of Australia, Sir Isaac Isaacs.

Of the latter's contribution to the sorry state of affairs, one commentator would write 'It was saddening to see a man of Isaac's eminence in law and public life behaving with a venom and lack of reason that would have been deplorable even in a vexatious litigant.'

Smith's focus is Victoria, although he is generous in his assessment of New South Wales; notwithstanding its 'rich tradition of persistent litigants', it has started declarations late and has made them rarely.

Until recently. While only eleven vexatious litigants were declared under section 84 of the 1970 Supreme Court Act, six more have been made since the commencement of the *Vexatious Proceedings Act 2008*.

I am not sure whether Smith makes good his case. But the story is an important one, and one which the numbers suggest is not going away. We lawyers have a peculiar obligation to question the withdrawal of anyone's access to justice. It is a worthy paradox that those who most interfere with the administration of justice are those most in need of its application. Whether the deft finality of a declaration is appropriate is something that will always require close scrutiny.

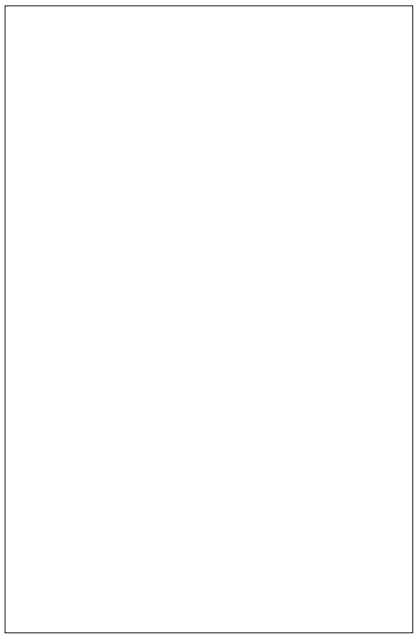
Reviewed by David Ash

Endnotes

1. The reviewer got his copy from the 'publications for sale' list of the Royal Historical Society of Victoria, www.historyvictoria.org.au/pdf/publicationslist.pdf. The book is reasonably priced. Get in while stocks last.

Remedies in Equity: The Laws of Australia

Edited by David Wright and Samantha Hepburn | Thomson Reuters | 2010



This book comprises part of the section on Equity in the legal encyclopaedia, *The Laws of Australia*. The encyclopaedia is now available on the internet; this handy book will appeal to those who still find paper easier to read and to find their way about in than screens.

The Laws of Australia provides a snapshot of the law on any given topic. In its "Quick Guide" it is said that *The Laws of Australia* uses "over 38,000 legal statements to summarise virtually all areas of law covering all Australian jurisdictions".

Remedies in Equity does not depart from this format: it is an up to date survey of each of the remedies it covers. Each paragraph (the numbering of which reflects the larger encyclopaedia) begins with a proposition of law in bold print. The proposition of law is then elaborated on in the balance of the paragraph. There are copious notes, which direct the reader to the main cases and commentary.

As its name suggests, this book deals with Equity's remedies, not its doctrines. Eight remedies, or categories of remedy, are discussed: declarations, specific performance, rescission, injunctions, compensation and damages, tracing, taking accounts and delivery up, cancellation and rectification.

The chapter on declarations considers the balancing exercise that often comes up when a party seeks declaratory relief: on the one hand the Court's power to give such relief is wide and beneficial, on the other there are many circumstances in which a declaration may be refused because it is purely hypothetical or lacks utility.

The chapter on injunctions is one of the most comprehensive, dealing with perpetual and interlocutory injunctions, and extending to asset preservation orders such as Mareva relief and Anton Piller orders. As practitioners are only too aware, issues involving this kind of remedy can arise in circumstances of great urgency and with minimal time for preparation. It is particularly useful to have a chapter dealing in a clear and concise way with these topics.

This is a practical book. It is not, and is not intended to be, an exhaustive treatment of the remedies it covers – there are other texts for this – but it is a brief and helpful statement of the relevant law with signposts for further research if needed.

Reviewed by Jeremy Stoljar SC

Fruit of the Poisonous Tree: Evidence derived from illegally or improperly obtained evidence

By Kerri Mellifont | The Federation Press | 2010

The colourful term "fruit of the poisonous tree" has been used in United States jurisprudence to describe the prohibition of the use of evidence uncovered as a result of initial unlawful police conduct since Frankfurter J coined the description in 1939 in *Nardone v United States* 308 US 338. As a description it has never gained the traction in Australia that it has in United States. Perhaps this is because roots of the doctrine in that country lie in the firm foundations of the Fourth, Fifth, Sixth and Fourteenth Amendments to the Bill of Rights annexed to the US Constitution. Those amendments provide a number of constitutional guarantees to US citizens: protection against unreasonable search and seizure; privilege against self-incrimination; the right to counsel; and extension of Federal rights protections to the States.

Australian principles governing the exclusion of illegally or improperly obtained evidence have more disparate origins in the common law in seminal decisions of the High Court such as *R v Lee* (1950) 82 CLR 133, in which the High Court articulated the discretion to exclude confessional evidence on the grounds of unfairness, and *R v Ireland* (1970) 126 CLR 321, the High Court's famous decision - subsequently confirmed by *Bunning v Cross* (1978) 141 CLR 54 - which vested Australian courts with a general discretion to exclude unlawfully or improperly obtained evidence on public policy grounds. These common law discretions have now been replaced but confirmed in a number of Australian jurisdictions including New South Wales by s 90 and s 138 of the *Uniform Evidence Law*.

The United Kingdom experience was different again, and it is the exploration and analysis of these differences, and the finding of the common philosophical threads underpinning the relevant jurisprudence in Australia, the United States and the United Kingdom, which makes this book so interesting, particularly to criminal practitioners. Thus we learn, for example, of the early robustness of the English common law, which produced dicta such as the statement of Crompton J in *R v Leatham* (1861) 8 Cox CC498: "[i]t matters not how you get it; if you steal it even, it would be admissible in evidence". Whilst such sentiments might survive on *Midsomer Murders*, the modern English constabulary no longer have such free rein, as Mellifont demonstrates in her analysis of PACE – the legislated approach to discretionary exclusions enacted in the *Police and Criminal Evidence Act 1984* (UK).

Mellifont finds four common themes underpinning the common law and legislated approaches in all three jurisdictions to discretionary exclusion of illegally or improperly obtained evidence: (a) reliability – which looks to the reliability of the evidence; (b) deterrence – which premises exclusion on discouraging future illegality or impropriety by law enforcement officers; (c) rights protection – which looks to the protection of the rights of the accused; and (d) judicial integrity – which seeks exclusion where admission would otherwise erode the integrity of the judicial system. She applies these approaches in her analysis of the various approaches in each jurisdiction to 'derivative' evidence – i.e. evidence derived from primary evidence which was in turn illegally or improperly obtained. The murder weapon found as a result of an improperly obtained confession is an example of such fruit. In so doing, Mellifont has provided Courts, practitioners and academics alike with a sophisticated and comprehensive analytical tool to use in this vital area and I commend this book to them.

Reviewed by Chris O'Donnell

Bavarian Bier Cafe in York Street

By David Jordan

> And by and by Christopher Robin came to an end of things, and he was silent, and he sat there, looking out over the world, just wishing it wouldn't stop.
>
> Winnie the Pooh
>
> *The House at Pooh Corner*

The tradition of lunch with John Coombs QC ended somewhat abruptly in 2007. In a post-Coombsie world, there are still things to which to look forward, or to look forward to, as he would have said. Mostly it revolves around going to lunch. Sometimes it involves a game of snooker, although Coombsie would have preferred the old gaming room at the Uni & Schools Club rather than the garish 1950s motifs at the merged Union Uni & Schools. Too much dark paneling. Too far from the bar. And no extended bench seating from which one could gently sledge one's far younger opponent.

But I digress.

It was time to honour the memory of the bar's last public luncher. With a napkin tucked into the limited space nature had allowed between neck and collar, and a beaming smile, John would eat for the bar. Hence, Rabbit and I set off in a quest for a meal, and something to write about. For our first venture, it had to be the Bavarian Bier Café in York St.

With far more soothing ambience than the snooker room at the Union (etc) Club, and an acceptably convenient bar, the BBCYS presents many attractions to a barrister with a couple of days to spare. Although there are a few steps to overcome to gain entrance into the main eating area, such obstacles should present no barrier to the recently released advocate, fresh from negotiating a way around the *Civil Liability Act* or some such. Indeed, on the occasion we were there most recently, Rabbit commented on how much steeper – and more dangerous – the stairs looked as we were leaving.

But leaving the stairs, and avoiding the bar, our German waitress (with a distinctly English accent) ushered us to that most underrated of eating hardware – the booth. Now, the booth is one of the most universally under-acknowledged friends of the lunching barrister. It restricts the numbers of freeloaders one can invite, it provides a sanctuary from the din of noisy stockbrokers holding their interminable farewell lunches at the longer and less classy bench tables, and it gives reasonable cover from the prying eyes of floor juniors sent to look for the MIA barrister. If only bar tables could be similarly configured to provide privacy from one's opponent, and a cone of silence from the bench.

So the eating furniture was good.

We both started with Paulaner. A good cleansing pilsner with which to start. Or to start with, as Coombsie would have said. And, as it turns out, with an excellent website (www.paulaner.com, or www.paulaner.de for the more adventurous). Not only does one have to answer the question – not asked of me for a long time – 'Are you over 16?', but answer the question correctly and one is taken into a virtual bier garten, 'Paulanergarten' with background music, and laughter. If only LexisNexis had this sort of pizzazz.

And you shouldn't worry if you get the answer to the entry question wrong – it's not like trying to enter a research database (say) using a mate's log-on at all. Just for fun I 'admitted' that I was not over 16, and was taken to a very warm and fuzzy page that said something about coming back later. Much later. But just hit the "back" button, and try again (it's not hard – 'JA, ich bin bereits 16 Jahre alt' is the 'password'). Easy. And with the wonders of mobile internet one can experience the bier garten anywhere, anytime. What better way to spend the Friday motions list in the District Court, the LEC, or any old day in Downing Centre 3.1 than heading off to the virtual bier garten (sound on mute, of course).

Back at the BBCYS, with your first beer it really is necessary to have the pretzel offered. Not only have you, of course, worked up a powerful hunger from many many seconds of adversarial high-jinks before lunch, but the pretzel offers another opportunity to engage in a foreign custom. That is, eating a pretzel. Which was quite nice. Rabbit thought it went with the Paulaner so well that he had another Paulaner.

We then looked at the menu further. Now Rabbit and I are modern chaps (yes, a quota

system will be applied on the next Coombsie event, but in the meantime I had to make do with Rabbit), and we thought that pretzel plus some form of schnitzel PLUS entrée would interfere too much with our plans for the evening. Not to mention with being able to bring a discerning eye to reviewing the lunch. So in the interests of journalistic integrity, it was mains only for us. Rabbit chose the Bavarian tasting plate. I chose the beef schnitzel, which I was told was the same size as the unavailable pork schnitzel I'd originally chosen. With fries (we asked if they were French, or American – our Pommie waiter was unable to say). Notwithstanding, we ordered them anyway. After all, if the BBCYS had gone to the extent of employing a Pom to serve us, we thought all of the Allies should get some sort of look in at the meal.

While waiting for our mains, young Rabbit thought to move the conversation onto our patron, Coombsie. Why did he write those reviews, he asked. It was a good question. I think Coombsie liked eating, I said. Yes, but why write about the meal, asked Rabbit. Because he could, I suggested. But for the Bar News, he asked further. This was a very good question, to which there were 2 complete answers. 1 – Coombsie wanted something to read about in the Bar News, even if he had to write it himself. And 2 – Philip Selth needed guidance, he thought, on where to eat. So while we were unable to state with confidence that we would be able to fulfill the first of Coombsie's objectives, we were going to be able to honour the second.

Meanwhile, Rabbit for a reason he failed to disclose at the time moved onto Franziskaner Mango (a wheat beer with mango flavour – yes) while I had moved on to Hofbräu Original. Now while we're talking websites (which I know Coombsie didn't talk about a lot), you have to go to the Franziskaner one (www.franziskaner.com). This one you have to pick a birth date that is more than 16 years ago. Which is rather more challenging to a witness than just asking if you are 16 or over. But do make sure that you have the sound down if heading into this type of research site while in the aforementioned courts – this last website has a very effective popping and pouring sound effect which is the very last thing that a busy commercial list judge might want to hear at 10.15am.

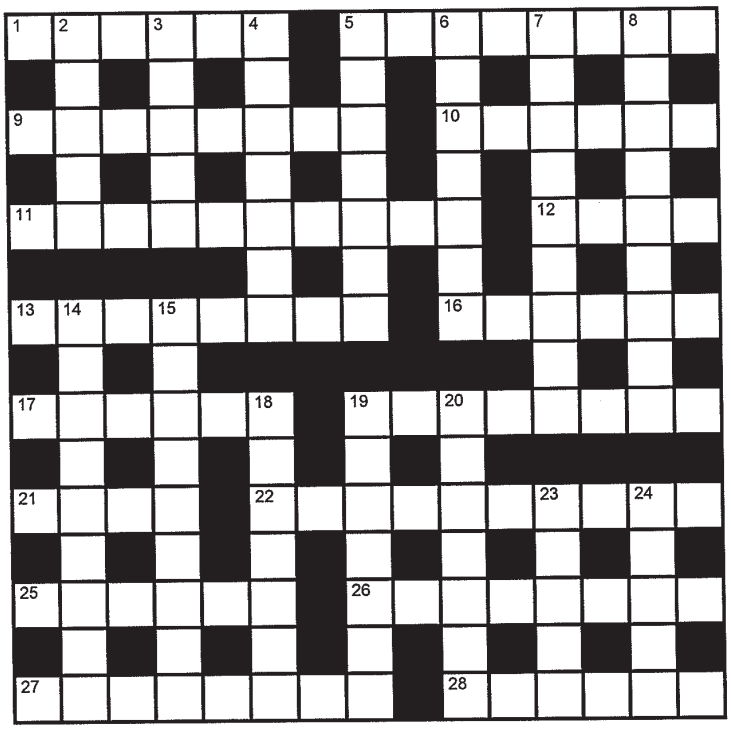
Just then the mains arrived. Actually, the word "arrived" does not really do them justice (and goodness knows we were interested in justice at this point). The beef schnitzel hung out over the sides of the plate like a midriffs used to from under bar jackets in the old Workers Comp court. Big, juicy and totally unformed. But Rabbit's meal was a triumph. Looking more like a cross-section of Bergin J's bench on directions day, the rectangular plate was stacked along its length with sausages, pork belly, schnitzel, sour kraut, and mashed potato. Continuing the unexpectedly international nature of the meal to that time, the BBCYS had managed to arrange German food with the same principles of *feng shui* with which her Honour insists her bench is arranged. In this case, both heaven and earth had been brought together by some culinary artisan to help Rabbit improve his life by receiving positive energy flow.

Which was lucky because after eating it all we were both a little weary. By this time, we had moved on to the rather excellent Hofbräu Dunkel dark beer. Caring rather less by this time as to whether Philip Selth enjoyed dark ales, Rabbit asked me whether Coombsie would have like the meal, and the place itself. This was both and easy, and a difficult, question. There were many things to like about the BBCYS. Coombsie would have rated the booth for sure (as opposed to the tall stools and tables at its O'Connell St cousin). He might have liked the meal, but would have been looking to a more robust wine with the meal. But what he would have liked was the idea of having lunch after court in an atmosphere of convivial languor. Which the meal induced, and the booth allowed.

Yes, he would have rated this place.

Crossword

By Rapunzel



Across

1 Places for wooing judges? (6)

5 Drip derived from prior DNA. (8)

9 Indian beef has French wine driving American crimebuster potty. (8)

10 Gore Vidal's apostate? (6)

11 Semiconductor orchestrates blend of transfer and resistor. (10)

12 Sounds like GG's senior law officer is in poles. (4)

13 A banker keeps this for the receipt of monies (76 CLR 1, 285). (4,4)

16 Scarcity = "Expensive time bomb". ("Dark Lord" to you, thanks!) (6)

17 Save thing prompt? (6)

19 Consenting senior law officer, about one "German German" leader. (8)

21 Military supplies Order of Australia around Military Medal. (4)

22 Babel talks collapse amid sport for towering giants. (10)

Down

2 A willow overseas that's upon the end of war (or Australia's contribution to NATO's Balkan intervention?) (5)

3 Radiation ends radioactive element. (5)

4 Small, smallish, tight? (7)

5 Top floor drops law; lawless above the top floor? (7)

6 Hurt insured replaces self-starter with jump start. (7)

7 Define time around "paperless-line". (9)

8 Jason's man drops new leader at sea. (Large ape!) (9)

14 Piano menu preparation for overheated organs. (9)

15 Record for Hades residents? Only Greco make-up. (9)

18 Refractory Boer AGM makes for trade ban. (7)

19 10 across as Agnes let loose. (7)

NSW Bar XI v Queensland Bar XI

By Lachlan Gyles SC

On 26 March 2011 the NSW Bar Cricket Team travelled to Brisbane to play its annual match against the Queensland Bar. The game was held at the Churchie School No.1 Oval, and a beautiful batting strip greeted the players on their arrival for the match.

The visitors won the toss and elected to bat. Having lost the previous two encounters, including a very tight match at Sydney University in 2010, the visitors had everything to play for.

Unfortunately the Queensland opening bowler Williams had other ideas and removed Bilinsky and Carroll in the first over of the day, leaving the visitors at 2/1. At that point, the Queenslanders were talking about where they would go for lunch after their victory.

Docker then came to the crease with a steely resolve and he and Steele managed to see off the Queensland opening bowlers, and then began to set about trying to establish a competitive total. Steele was uncharacteristically restrained although he did hit the Queensland inswinger Anderson for a magnificent 6 which cleared the fine leg boundary and clattered into one of the school buildings. He was perhaps unluckily adjudged LBW for 23 as the wily left arm orthodox Collins got one through his defences.

With the score then at 3/64, Stowe joined Docker and the scoring rate was raised after drinks with Docker by this stage seeing the ball beautifully and being particularly brutal on anything short with some fine shots off the back foot through midwicket. Stowe as well worked his way into his innings enjoying the pace of the Churchie wicket and playing some lovely drives through both on the on and off side.

Stowe was ultimately unluckily run out for a well compiled 35, but by that stage with Docker 75 not out and the score 4/135, Steele, Stowe and Docker had got the visitors back into the match.

Gyles then came to the wicket joining Docker and another 20 was added before Gyles was removed through a fine catch in the covers by Crawford off the bowling of Johnstone. Niel then joined Docker as he moved towards what we all hoped would be a well deserved century.

Unfortunately Docker's fine hand ended in the last over when he was caught on the boundary by Williams off the bowling of Taylor for 96. Having gone in with the score at 2/1 in the first over and then batting through the innings until the last over it was a great shame that Docker could not achieve that personal milestone. It was a magnificent innings nonetheless.

Botsman and Niel were then able to take the score to 197 with Nell finishing undefeated on 20. It was a competitive score but with the state of the wicket and a fast outfield the visitors were going to have to bowl well to win the match.

The old firm of Traves and Taylor came out for Queensland to take on the new ball. Botsman and Eastman bowled very well over the first 10 overs to restrict the Queensland openers to 35, which was well behind the required run rate of 5 runs per over. Given his heroics in the morning, it was perhaps not surprising that Docker when thrown the ball would make the breakthrough, he having Taylor caught behind by Stowe and the Queenslanders were 1/36 in the 12th over. Chin and Docker continued to keep the pressure on the locals with Docker picking up his second wicket shortly afterwards

having Williams caught by Steele in the covers.

Bilinsky then came into the attack and settled into a good spell, removing the dangerous Crawford and restricting the Queenslanders to 31 in his 8 overs. Traves meanwhile, as he has done for many years, continued to hit shots to all parts and when joined by Johnstone the scoring rate increased and the match was there for the taking.

In the end Traves was run out for 92, having rolled back the years in a magnificent display, particularly his driving off the front foot through extra cover. Katter then joined Johnstone and they continued to put pressure on the NSW fieldsmen and the match continued in the balance. At the start of the 39th over Queensland required 21 for victory and the match was on a knife edge.

The obvious candidate to be thrown the bowl was the Iceman Chin, following on from his last ball heroics in the corresponding game at Hunters Hill in 2008. Chin delivered the goods, going for only 2 runs in that over, Johnstone being run out through a fine throw from Botsman on the deep square leg boundary, and then Chin removing the dangerous McLeod well caught by Steele on the mid wicket fence.

Carroll was then able to hold it together in the final over with Queensland finishing 7/180. The Blues were home. All of the NSW bowlers had contributed to the victory by bowling a good line and length, however the Man of the Match honours were very much with Docker for his fine innings, backed up by a very good spell of fast medium bowling. All credit to the big fella.

The teams, and a few hangers on, were entertained after the match at the stately Ashgrove home of Tony Collins. While the bragging rights were with the visitors winning away for only the second time since 1993, the Queenslanders were already plotting revenge for the next fixture in Sydney in 2012.

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