VICTORIAN BAR NEWS

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Welcome Chief Justice Bryant to the Family Court

VICTORIAN BAR NEWS

No. 130 SPRING 2004

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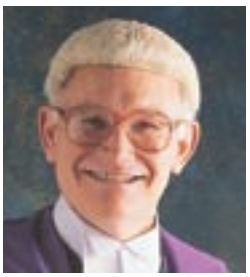

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Farewell: Master Rex Patkin

Farewell: Magistrate "Scotty" McLeod

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The View from Guantanamo Bay.

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for the year 2004/2005
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A Barrister's Lot

It's an ill wind ...

IF the mutterings and whispers in the corridors and around the lifts are any indication, the Editors' Backsheet in the Winter 2004 issue of *Bar News* has struck something of a chord, echoing general discontent with the fact that (at present) and with respect to the general availability of work, a barrister's lot is not a happy one. What then is to be done? Can anything be done? Or can nothing be done except to concur with Hanrahan* that "we'll all be rooned before the year is out"?

If the beginning of wisdom is the acquisition of knowledge (or vice versa), supported if possible by some tangible facts and figures on how the profession is doing, that might be a good start. And where better to begin the pilgrimage than a browse through the last Annual Report of the Bar for the period ending 30 June 2004, a publication not long out, a veritable chronicle of the Bar's achievements, highlights, successes, and myriad activities corresponding with the turnover of the Bar Council and Bar leadership.

Packed with interesting, curious and invaluable data as the Annual Report is, apart from telling us some basic facts and figures such as current numbers of Victorian practising counsel (1550 in total)** and that 104 persons signed the roll of counsel in the period, (putting aside the wealth of matters being considered and undertaken by the many hard-working and diligent committees) the Report does not tell us much if anything at all about how barristers are faring in the sense of running and maintaining their practices, which is after all their core business. There is, as it turns out on further enquiry, no readily available information on how barristers in Victoria are faring. No data is collected as to how many briefs are returned, what total receipts are earned by barristers, what proportion of work is directed to family law or crime or commercial, and whether any of this is changing upwards or downwards. In short and not to put too fine a point on it, the only information that is collected from barristers is not only not published or generally available but is known only to the profession's professional indemnity insurers.

Once upon a time long ago (gather round children, Uncle Mickey is going to tell us about the olden days) it was considered prudent for professionals to organize into associations and it was common practice to gather facts and figures from all the members great and small so that, armed with some tangible data, its officers could, when times were tough, approach various persons in government, industry or the (then) Prices Surveillance Tribunal to argue for a better deal for everyone. Not so as to engage in arguments about who was to get what bigger slice of the pie but how to secure a bigger pie. Lobbyists were employed, as were public relations consultants, and survey and statistics gathering firms had a field day. When particular threats emerged, for example, threats of changes in the parallel importation provisions of the *Copyright Act 1968* a book publishers' association (for example) only had to have recourse to its past annual surveys of members to get cogent and compelling information as to total gross turnovers, total turnovers of imported books in various categories (fiction, non-fiction, academic and scholarly) as compared with local publications to be able to mount an effective campaign to argue against the proposed changes and be able to extrapolate the consequences of any change on the business health of the publishing world and the sectors of the economy that had a ripple-out effect from it.

Packed with interesting, curious and invaluable data as the Annual Report is ... it does not tell us much if anything at all about how barristers are faring in the sense of running and maintaining their practices, which is after all their core business.

It seems passing strange and not a little ironic that in a year when judicial salaries and pensions should hit the front pages of the press there should still be such coyness, not to mention secrecy, within the ranks of barristers — from whom needless to say the bench has largely come — about what is earned in a global sense. From a

*from the poem

**comprising 17 female and 193 male silks; 276 female and 1064 male juniors.

mathematical point of view the equation is fairly simple: work = fees = happy barristers. The corollary of course is that lack of work = reduced fees = discontent. Why is it that there is no such information available on how we are doing if, as the mutterings and whisperings seems to suggest, we not only really need to know but need to know so that we can start to devise a strategy to do something about it?

Fortunately there is some information available on the state of barristers' practices, but it is two years old, and inevitably falls into the trap of "averaging". But it is something to hang your wig on. The Australian Bureau of Statistics published figures in June 2003 relating to the period 2001–2002 surveying inter alia national barrister practices. From this account the following picture — a thumbnail sketch, really — emerges. In the survey period there were 3670 barristers Australia wide (1202 or about a third in Victoria; but note that in the 2001–2002 Bar Annual Report, Victorian practising counsel totalled 1446, a discrepancy with the ABS figures). Of the total number of barristers 384 (10.5 per cent) were senior counsel (184 of these were in Victoria according to the Annual Report of the Bar). NSW accounted for 43.9 per cent of all barristers.

Total income earned was $1146 million; of this, senior counsel accounting for 10.5 per cent in numbers earned 24.2 per cent of the total income figure. From the gross earnings, however, expenses of $386 million were deductible, netting a pre tax profit of $759.2 million or $206,900 per barrister. Senior counsel earned on average $519,400 and junior counsel $170,400.

We must be prepared to come to a greater understanding of who we are, what we do and how we are doing. The answer, our learned friends, is blowing in the wind.

Women accounted for 14.7 per cent of barristers. By group the largest numbers at the Bar were those under 10 years' call (43.8 per cent) followed by those over 20 years' call (31 per cent) then those in the 10–19 year bracket 25.1 per cent.

Significantly, the survey includes a table about pro bono work conducted, which of necessity was an estimate. The survey found that 2878 barristers — or 78.4 per cent of the whole group — undertook pro bono work in the survey period, accounting for 614,100 hours of work .

One conclusion that may be drawn is that while we may not have much by way of current facts and figures about how we are doing, there are some positive indicators. Counsel are as a profession active and generous in undertaking pro bono work (but what this statistic also hints at in relation to the total inadequacy, indeed parsimony, of legal aid type schemes and the glaring gaps in meeting the needs of the public is another matter). So the Bar can make a collective memo to Santa Claus: warm and fuzzy feelings are well accounted for in the annual balance sheet.

But as to the state of the union? Well it's anyone's guess. There are those who will say it is no one's business but the individual's own. On the other hand, unless we are content like Don Quixote to go on tilting at windmills, or wringing our hands like Hanrahan, we must be prepared to come to a greater understanding of who we are, what we do and how we are doing. The answer, our learned friends, is blowing in the wind.

ERRATUM

In the article on the Children's Court website, page 43, foot 2nd and top of 3rd column, the correct references should have been Magistrate Ann Macdonald, not Alan McDonald.

The Editors

New Chairman Reviews Past Year

ROBIN Brett's year as Chairman saw a number of significant projects of the Bar brought to completion or near completion — the introduction of compulsory Continuing Legal Education for all who hold a practising certificate issued by the Bar, the establishment of a new process for the appointment of Senior Counsel, and the completion of renovations to, and occupancy of, three-quarters of the chambers and office space in Owen Dixon Chambers East.

The Bar has a long tradition of excellence in the quality of its professional services, sustained by informal consultation between members and, more recently, also by seminars offered by the various subject area Bar Associations. Since at least the mid-nineties, the establishment of a structured framework of Continuing Legal Education ("CLE") has been on the minds and lips of successive chairmen.

In Mark Derham's term, the Bar Council passed a formal resolution to support the introduction of a structured program of CLE. In Justice Robert Redlich's term, the CLE program was officially launched by Chief Justice Michael Black. The CLE program was then mandatory for all barristers under three years' call. In Jack Rush's term, the Bar Council resolved unanimously to commit to the principle of compulsory CLE for all practising members of the Bar, and established a committee to develop a mandatory program.

Robin Brett headed the development and implementation of the compulsory CLE program, appointing Justice Geoffrey Nettle to chair the new committee, and launching the new program, as devised and designed by the committee and adopted by the Bar Council. The compulsory CLE program began in February 2004. Since then, we have had over one hundred Bar CLE sessions. The quality has been high and the sessions well attended.

Since 2000, with the change of title from Queen's Counsel to Senior Counsel, there have been discussions between the Attorney-General and the Bar concerning future government involvement, or rather

non-involvement, in the appointment of Senior Counsel. In 2003, the Attorney-General announced that the Government would no longer be involved in the process, but agreed to make the appointments that year.

Robin Brett headed the Bar Council Sub-Committee that designed the draft protocol for appointment as Senior Counsel not involving the Government that was finally proposed to, and adopted by, the Bar Council. That protocol was then circulated to the heads of courts for review, comment and consultation.

I repeat the Bar's thanks to the Chief Justice of Victoria, the Honourable Marilyn Warren, for agreeing to make future appointments of Senior Counsel, beginning this year, and to the other heads of State and Commonwealth Courts with whom the Bar consulted.

As with the introduction of Compulsory CLE, it was Robin Brett's personal commitment and leadership that paved the way for the protocol introduced by Chief Justice Warren and that brought everything to a most successful conclusion.

Robin Brett was a Director of Barristers' Chambers Limited from 1999 until his election as Chairman of the Bar in 2003. He was Honorary Treasurer of the Bar from 1999 to 2001. He has thus been closely engaged in the entire Owen Dixon Chambers East renovation project, from the decision to renovate through the whole contracting process, through the commencement of work on the ground floor and the completion of that ground floor work in Mark Derham's term as Chairman; and through the opening of the new Essoign and completion of the first floor in Jack Rush's term.

In Robin Brett's term, the renovation of three-quarters of the Chambers and office accommodation, floors 13 to 5, was completed and people are now occupying those floors. The final remaining three floors (floors 2 to 4) are expected to be finished and occupied by Christmas.

Robin Brett has served on the Bar Council for 12 years; and was Honorary Secretary for four years before that; and Assistant Honorary Secretary for a year — a grand total of 17 years' Bar Council service. His 15 years on the Applications Review Committee (the last three as Chairman of that Committee) may be something of an active committee record.

The Bar, and his friends and colleagues on the Bar Council, have been well served by Robin Brett's energy and industry, his calm good nature, his informed and clear analysis and insights, and by his particular gift and skill in precise and elegant drafting.

RETIRING MEMBERS OF BAR COUNCIL

Tony Howard left the Bar Council after three years. His work as Chair of the Essoign Club Development Committee, the Legal Assistance Committee and the Applications Review Committee, and as a member of the Executive Committee and the Equality Before the Law Committee, has been outstanding.

The new Essoign and its efficient and friendly personal service and fine food are eloquent testimony to the work of Tony Howard and his Essoign Club Development Committee and, of course, to the efforts of Nicholas Kalogeropoulos,

our Essoign manager, and Rufus Daniel, our chef de cuisine.

Fiona McLeod was appointed silk last year, and has left the Bar Council. She has been a member of the Council for a total of nine years, and has served as Assistant Honorary Treasurer (coincidentally when first I, and then Robin Brett, was Honorary Treasurer), and as a member of the Executive Committee. She has also served, amongst other things, as Convenor of the Women Barristers' Association, as Secretary of the Bar Human Rights Committee, and, for the last six years, as a member of the Equality Before the Law Committee (including the Equality of Opportunity Working Group). On the Council, she raised appropriate issues for consideration. Her contributions, industry and her approach were highly valued.

Michael Gronow left the Bar Council having served for five years and having been a member of the Executive Committee for three of those years. He was always well informed and ready to contribute to discussion. He represented the Junior Bar with vigour, persistence and humour.

Debra Coombs left the Bar Council, having served for two years. She is a member of the Women Barristers' Association Committee, and has served as Assistant Treasurer and as Membership Secretary. She is Secretary of the Compensation Bar Association. On the Council, she was always thoroughly prepared. She believed the Council as a whole should be informed on all matters, and was not reticent in calling for reports to the full Council. Her attention to detail and her insights will be greatly missed.

RETIRING HONORARY SECRETARY

Sharon Moore retired from the position of Honorary Secretary, having served in that position for a year, and as Assistant Honorary Secretary for three years before that. The Honorary Secretary and Assistant Honorary Secretary carry a heavy work load. They attend the meetings of the Bar Council and of the Executive Committee, the Applications Review Committee and the Counsel Committee, as well as the twice-weekly morning meetings of the Chairman and Vice Chairmen with the Bar Administration.. They also interview everyone accepted into the Bar Readers' Course.

The Bar and the Bar Council were well served by the formidable teams of Richard Attiwill and Sharon Moore, and of Sharon Moore and Kate Anderson.

NEW MEMBERS OF BAR COUNCIL

I congratulate and welcome to the Bar Council Paul Lacava SC, Christopher Townshend, Kim Knights, Cahal Fairfield and Charles Shaw, all elected in September 2004.

NEW OFFICERS AND CHIEF EXECUTIVE OFFICER

I look forward to working with the new Officers of the Bar Council: Kate McMillan (Senior Vice Chairman), Michael Shand (Junior Vice Chairman), David Beach (Honorary Treasurer), Justin Hannebery (Assistant Honorary Treasurer), Kate Anderson (Honorary Secretary) and Penny Neskovcin (Assistant Honorary Secretary).

I thank David Bremner for remaining as Executive Director through to 1 October 2004, when Christine Harvey took up her position as Chief Executive Officer, and extend a warm welcome to Christine Harvey. I know her and her work well from her years as Deputy Secretary General of the Law Council of Australia, and am delighted that she is here.

PROFESSIONAL STANDARDS LEGISLATION LIABILITY CAP

In a circular dated 27 September 2004, the Bar Council sought members' views as to whether the Bar should seek to introduce a professional standards scheme under the *Victorian Professional Standards Act 2003* that would cap liability for professional negligence. The one-and-a-half page circular explains in broad outline the framework established by the *Professional Standards Act 2003*, and refers members to the updated 23 August 2004 discussion paper prepared by a subcommittee of the Bar's Professional Indemnity Insurance Committee, available from the Bar Council Office. I urge members to read that discussion paper. It is 22 pages. The discussion paper has not been posted on the Bar website because it is confidential to members of the Bar and not for public or media circulation. Bar members may obtain a copy from the Bar Council Office.

I wish to stress that, at the time of writing (11 October 2004), the issue as to whether the Victorian Bar should seek limited liability under the *Professional Standards Act 2003* has not been decided — far from it.

As noted in the discussion paper, two of the five members of the subcommittee argue that there is no public benefit in a professional standards scheme of capped liability and that, as a matter of principle, the Bar should not, under any circumstances, seek to limit the liability of barristers to their clients; two other members of the subcommittee argue that changes in the Commonwealth and State legislative scheme of tort law justify at least a careful reconsideration of the Bar's historically adamant opposition to such liability caps.

By the time this issue of *Bar News* is published, we shall have had an information session (scheduled for Wednesday 13 October), and called for written responses from members to the issues raised in the discussion paper and information session. The Bar Council hopes to receive substantial responses from a large number of members to guide its consideration of how to proceed in this matter.

PROPOSED NEW LEGAL PROFESSION ACT FOR VICTORIA

The Implementation Group established by the Attorney-General a year ago has been working with the Department of Justice in developing legislation to implement the new framework announced by the Attorney-General. Michael Crennan S.C. and former Executive Director David Bremner ably represented the Bar on that Group. A confidential draft Bill has been circulated to that Group, and there were consultative sessions with the Group in the last week in September and first week in October 2004. The Bar continues to urge that the power of the Legal Services Commissioner to delegate functions to the professional associations in relation to the issue of practising certificates and the referral of the investigation and prosecution of conduct complaints be made explicit.

ADDITIONAL $42.8 MILLION FOR COURTS

The Bar commends the Bracks Government for its recent announcement of an additional $42.8 million for the appointment of two new Supreme Court judges and two new magistrates, as well as extra staff for the Office of Public Prosecutions and improved court security and technology.

The *Courts Strategic Directions Statement* released by the heads of Victoria's Courts on 2 September 2004 is the product of a two-year review. It is a comprehensive, well-reasoned report that assesses the present situation with unflinching realism and advances sound proposals for the future.

In the comparatively short time that she has been Chief Justice, Justice Marilyn

Warren has brought fresh energy and vision to the Supreme Court. Chief Judge Michael Rozenes and Justice Stuart Morris have been doing the same in the County Court and at VCAT, and Chief Magistrate Ian Gray in the Magistrates' Court.

This is the first ever strategic plan for all Victorian courts and VCAT. Attorney-General Rob Hulls deserves great credit for his own Justice Statement, *New Directions for the Victorian Justice System 2004–2014*, released in May, and for calling for concrete proposals for the courts for the next 10 years.

Although the Courts Strategic Directions Statement is critical of confusing governance arrangements and inadequate resourcing, it is not critical of the Bracks Government. The Statement makes it clear that the present situation is the product of many decades.

The Statement shows that the Courts have in fact continued to function well despite the limits on the resources available to them. The Chief Justice acknowledged the "strong competing demands on government funding".

The Statement clearly demonstrates that much needs to be done to safeguard the independence of the Courts and provide adequate resources for the Courts to meet the demands that already exist and will increase. The government and the courts will need to continue to work together to ensure that Victoria has a justice system equal to the best in the world, and the announced $42.8 million boost is a very welcome start.

MEASURED GOVERNMENT RESPONSE TO CALLS FOR MANDATORY SENTENCING

The Premier and the Attorney-General have displayed responsibility and courage in their rejection of public criticism and calls to intervene in the *Sims* case. They rightly rejected mandatory minimum sentencing as the solution for the future.

Sims was a home invasion rape case. The accused pleaded guilty to aggravated burglary, two counts of rape and one count of indecent assault. The total effective sentence was imprisonment for two years and nine months. The accused had already been in custody for 38 days. The sentence of imprisonment was suspended for three years. This case was a springboard for attacks on courts, judges and the Director of Public Prosecutions.

The public has every right to be concerned about sentencing and to debate, question and criticise sentencing decisions. That is part of a healthy democracy. But there is a great danger when the debate proposes fundamental changes — in this case, mandatory minimum sentencing — based on one or two emotionally charged and highly publicised cases, without considering all the facts of those cases or what is already involved in the sentencing process.

What would a good sentencing system look like? In his 18 August article in the *Herald Sun*, the Attorney-General set out the fundamentals:

- a judiciary and public prosecutor who are fearless and independent;
- judicial discretion to decide cases on individual merits;
- prosecutorial and judicial decisions based on all the facts, the law and in the interests of the community; and
- a real voice for victims in the justice system.

Our system already has all these features. It is a good system. Judicial discretion is exercised in the sentencing framework established by Parliament:

- just punishment
- deterrence of the offender and others
- rehabilitation of the offender
- denunciation by the court of the type of conduct
- protection of the community.

But a good system does not make it easy to decide hard cases. Did the offence involve violence? Was the effect on the victim severe? What if it was only minor? Does the offender support a family? Is the offender likely to be a danger to the community in the future? Should the offender be given the special opportunity for reform afforded by a suspended sentence, so as to rebuild his or her life? There is never a "right" sentence. One side or the other will usually complain that the judge was too severe or too lenient.

How did this all work out in the *Sims* case? Did the victim have a real voice? She could have. The victim was asked whether she wished to make a victim impact statement, but chose not to.

There is a great danger when the debate proposes fundamental changes ... based on one or two emotionally charged and highly publicised cases, without considering all the facts of those cases or what is already involved in the sentencing process.

It is not apparent what efforts were made to obtain a victim impact statement. However, one lesson may be that more should be done to explain to victims the importance of their making such a statement.

There was no lack of appreciation of the effect on the victim. Both courts condemned the crime as "serious and invasive". Justice Eames wrote: "The experience was undoubtedly a terrifying one for the victim. With considerable fortitude, she endeavoured not to show her fear to her attacker"

Should people who commit violent offences always be imprisoned? How should sentences for violent offences compare with sentences for theft or drug offences, or momentary inattention in driving that is careless and fortuitously causes serious injury or death?

There are no "right" answers to these questions. However, some things are clear. Sentencing cannot restore victims or their loved ones to wholeness; and justice and the community are better served by rehabilitation than by punishment.

Judges do their best to apply the sound legal principles and authorities developed over many years. Far from being out of touch, they see and hear the tragic consequences that crime has on its victims.

The sentencing judge in the *Sims* case is an experienced judge, not known for lenient sentencing. Most of his life as a barrister was devoted to public prosecution of crime. The two majority judges in the Court of Appeal are life-long criminal lawyers who have, as lawyers and judges, been involved in some of the most heart-rending and difficult cases imaginable. Both have made significant contributions to issues affecting women in the criminal justice system.

Significantly, the day before they heard *Sims*, the same three Justices of Appeal heard another Director's appeal against sentence involving convictions for rape and aggravated burglary in the victim's home. Unanimously, they increased the sentence from nine years imprisonment to 11 years imprisonment, with a non parole period of nine years.

One may or may not agree with the outcome in *Sims*. The Director of Public Prosecutions did not agree with the decision. The judges disagreed among themselves. Sentencing decisions are made and reviewed by judges and magistrates who have the knowledge and experience to make them. They know all the facts — not

just a few learned through the media. They are not insensitive to the rights of victims or the views of the community. They are trained to approach a difficult task the right way, according to law. They are in a position to make informed comparisons with sentences in other cases. Over 80,000 persons are sentenced in Victorian courts every year. The number of sentences that are even controversial is infinitesimal.

A thorough review of Victoria's sentencing laws was commissioned by the Bracks Government nearly four years ago. The Review was conducted by Professor Arie Freiberg, a leading authority on sentencing law, now Dean of the Monash University Faculty of Law, now also Chairperson of the Board of the Sentencing Advisory Council. In his 230-page report, Professor Freiberg unequivocally "rejects mandatory or minimum penalties".

The Premier, in rejecting mandatory sentencing, said it had proved unsuccessful in other States. It is as well to recall how "unsuccessful" mandatory imprisonment for property offences was in the Northern Territory.

It took the suicide in detention of a 15-year-old Aboriginal boy sentenced for stealing texta colours and paint worth less than $100 to arouse public outrage. At about the same time, a 21-year-old Aboriginal man was given a mandatory one-year sentence for stealing $23 worth of cordial and biscuits.

A Commonwealth Senate Committee reported that "mandatory minimum sentencing is not appropriate in a modern democracy that values human rights". It has no place in our Victorian system.

ACTING JUDGES

Over a year ago, in September 2003, in this column, my predecessor, Robin Brett QC, affirmed the Bar's adamant opposition to the proposal by the present Attorney-General reported in the news media at that time for the appointment of Acting Judges to the Supreme Court.

The Attorney-General was then reported as advocating a system modelled on the English Recorder system, and as linking short-term Acting Judges with the appointment of more women to the Court. The Bar's position then, as now, is that the Attorney-General has an exemplary record of appointing well-qualified lawyers to judicial office. However, the introduction of a system of acting appointments to the Supreme and County Courts is offensive to the fundamental principle of judicial independence. The point was also made that the English Recorder system is not one of short-term appointments, but of permanent part-time appointments.

The July 2004 Department of Justice discussion paper on Acting Judges raised the issues of judicial independence and potential conflicts of interest and, more significantly, the perception of conflict or bias. It recognizes that the English Recorder system is one of permanent part-time judges, and that "most people appointed as Recorders continue to practise law part-time while acting as judges". The discussion paper asks questions. It does not advance satisfactory answers.

The only authority given for the assertions recorded in the discussion paper that "concerns about temporary appointments are largely unproven, and that the experience in NSW and the UK indicate[s] that the appointment of temporary judges led to the better delivery of justice by eliminating systemic inefficiencies and even abuses" is a newspaper editorial that makes that bare assertion.

In fact, a 1999 decision, *Starrs* v *Procurator Fiscal, Linlithgow* [1999] ScotHC 242 (11 Nov 1999) that a temporary judge (the particular title is "sheriff") failed to meet the requirement of trial by an "independent and impartial tribunal" led to significant revision of the English Recorder system, and the revised system is therefore of comparatively recent origin.

The Bar has made further written submissions opposing the proposal insofar as the discussion paper and various reported statements can be said to constitute a proposal. In the event that the Government decides to proceed, we ask that we and other interested parties be given a reasonable opportunity to comment on any draft Bill before it is presented in the Parliament.

HICKS TRIAL

Lex Lasry QC, the Australian independent legal observer at the preliminary hearing of the US military commission trying David Hicks, has concluded that the proceedings are "flawed" and that a fair trial is "virtually impossible".

Mr Lasry is well qualified to assess the trial process. He is a highly respected member of this Bar, and Chairman of the Victorian Criminal Bar Association. He has experience in the most serious and complex criminal trials, not only in Australia, but also in foreign and international tribunals. As a Council member of the International Criminal Bar, he is involved in the establishment of a framework for defence counsel at the International Criminal Court. He has also served Victoria as a Royal Commissioner.

The Lasry Report is thorough and compelling. It is accessible on the web, and I encourage people to read it for themselves.

This military commission framework has been universally criticised by other leading advocates and jurists. The American Bar Association has made the same criticism as the Lasry Report, that the process is neither impartial nor independent. Lord Steyn, one of England's foremost jurists, has described it as a "kangaroo court".

The Commonwealth Attorney-General, Philip Ruddock, has admitted concerns arising out of the preliminary hearing on which Mr Lasry reported, but refused to say what they are.

The Bar Council endorses the Law Council of Australia's observation that the Government's response to the Lasry Report is inadequate.

Mr Ruddock's dismissal of the Lasry Report is wholly unwarranted. It is wrong to suggest, as the Attorney has done, that the Lasry Report could have been written without leaving Australia, and equally wrong to describe it as an exercise in chauvinism.

Mr Ruddock said the Lasry Report contained nothing new. It later became known that the Pentagon Chief Prosecutor had filed a submission raising the issues of impartiality and independence in relation to the Presiding Officer, and the suggestion that both he and three other members should be removed for cause.

The Attorney-General, when informed that even the prosecution was willing to concede these concerns identified in the Lasry Report, then claimed that, if that were so, "it simply shows they're taking into account the objections raised and the system is working the way it should".

Even if the Presiding Officer and other members are replaced, that will not cure the many other fundamental flaws in the process identified by Mr Lasry. The UK government has negotiated the release of five of its nationals, and the suspension of proceedings against the two who, with David Hicks, were declared eligible for military commission trial. The Australian government has so far failed to take adequate steps to safeguard David Hicks or Mamdouh Habib.

Ross Ray QC
Chairman

Responding to the Perception that Many Sentences Are Too Low

OVER the decades, politicians and newspaper editors of all persuasions have seized on the courts, and the pain of those caught up in the legal system, as scapegoats for their particular *cause célèbre*. From family and immigration to the criminal jurisdictions, all have been in the spotlight at some stage. Recently, however, attention has returned to the most divisive, sensationalised and over-simplified subset of criminal law, sentencing, and the perception that many sentences are too low.

The resulting outcry has put mandatory sentencing and the curbing of judicial discretion back on the agenda and there are a number of ways we can respond to this. We could bury our heads in the sand, dismiss public concern as a storm in a teacup and assume that the tempest will abate. We could meet this concern with derisory retorts, complacent in our roles as "experts". Neither of these approaches contains any legitimacy, however, and, in general, I have been disappointed by the silence emanating from the Bar and wider profession in response to the recent public debate. While I have welcomed recent press releases from the Bar Council and Criminal Bar Association, I have been bewildered by the lack of outrage and clear argument radiating from the profession as a whole in the face of the more incendiary media commentary.

It is possible that many in the profession are taking the ostrich approach, assuming that the furore will die down if it is left alone. With the benefit of substantial experience of the political cycle, however, let me assure you that this issue will *never* be put to rest until we tackle it head on. It is not a "one-off", it is a battle that *must* be fought, lest we find ourselves proceeding down the road of other jurisdictions, in which mandatory sentencing has become unremarkable, where "three strikes" legislation is promoted, and where Attorneys blithely direct their DPPs in relation to which cases to prosecute or appeal.

It is incumbent upon every member of the profession with any interest or knowledge in this area to take time out of their busy schedule and defend those principles of the law that we hold most sacred. We *must* defend the independence and discretion of the judiciary, and of the DPP. We must do it vocally and, perhaps most importantly, with humility. It is no use taking the high ground and telling the general public, many of whom have suffered terribly from the commission of a crime and who are aggrieved by their experience of the criminal justice system, that "lawyers know best". Instead of allowing the debate to remain polarised, we must test our belief in each fundamental tenet we so automatically defend. For those that remain sound, we must explain clearly and vigorously why they exist for the protection of the community and should not be sacrificed, why mandatory sentencing (or whatever insidious label it wears) is a malevolence that *must* be resisted, why it is the enemy of a humane society, the device of politicians jostling for an agenda.

Where some of our assumptions are found wanting, we must have the maturity to grapple with them and identify potential improvements. This is why, on the whole, I welcome the Law Reform Commission's recommendations regarding the law and procedure relating to sexual offences, because we cannot defend the basic structures on which we have built the law of sentencing if the myriad processes involved *before* a rightful conviction is secured and an appropriate sentence imposed continue to erode public confidence in the law.

Sexual crime confronts us as a community, yet we struggle to understand its extent, its effects, or to develop an adequate response. With such a profound legacy of failure at our door, Governments and legal systems *must* acknowledge our duty to interrogate the law constantly, demanding that it treat alleged offenders fairly, *and* be compassionate to those who suffer from the offence. It is a difficult balance to strike and the Government will of course give all the recommendations the detailed consideration they deserve. I am aware of the concern of many in the profession regarding some of the recommendations but, whatever the eventual outcome, our ultimate aim must be a legal system that acknowledges the experiences of victims of sexual crime, rather than compounds their distress; one in which all participants understand the complexities and consequences of sexual crime; as well as one which remains steadfastly fair to the accused.

This is because we need a system that encourages people to come forward about sexual crime, one that recognises their

courage in doing so. It is only when more survivors come forward about sexual crime, when we shed the shackles of secrecy and shame that have so wrongly burdened those who most need support, that we will begin to combat the wrong it does *all* society. It is only when we confront sexual crime — its consequences *and* its causes — in all its ugliness, rather than sweeping it under the carpet or marginalising those who have experienced it, that we can hope to reduce the scale and frequency of its occurrence.

No doubt many of you have had, and will continue to have, a great deal to say about this potential area of reform. It is the profession's duty to speak up about *every* issue — whether you agree or disagree with a Government's proposals, whether you agree or disagree with media campaigns or with the ruses of the Opposition of the day. However, this means that it is also your duty to speak up, loudly and often, against the reactionary tide that is increasingly pushing against the walls of judicial discretion.

It is time to restate the boundaries, to make clear that the criminal law is not a market place in which an individual's rights are up for negotiation or can be bartered for political success. The current political climate is fertile ground for the decay of some of our most valued legal principles as, when communities feel anxious about security, both internal and external, knee-jerk responses become the order of the day. Judicial independence is often the first to be bowled over in the stampede to appease the polls and, increasingly, the nation's judiciary has been the target of the federal Government; the quarry of a media hungry for its daily fix of sensation and of a State Opposition scrambling for its moment in the sun. Attacks such as these do not require skill; they are not a show of strength or courage. A demonstration of real strength on the part of any Government involves the protection of individual rights and vulnerabilities, as well as the provision of a safe community. It is time for all of those with a passion for the law to make clear that judicial independence and discretion are not the unattainable privileges of high office. Rather, they are the basic safeguards of the rule of law, without which we are *all* diminished.

It is only when we confront sexual crime — its consequences and its causes — in all its ugliness, rather than sweeping it under the carpet or marginalising those who have experienced it, that we can hope to reduce the scale and frequency of its occurrence.

Rob Hulls, MP
Attorney-General

Senior Counsel and Stars of Courage

Editors

RE: "You Say 'SC", We Say 'S.C.'. Let's Get the Whole Thing Right!"

Dear Editors

THE article by Glenn McGowan "You Say 'Q.C.', I Say 'QC', You Say 'S.C.', I Say SC?". Let's Call the Whole Thing Off!"— (2004) 129 Vic B.N. 50, drawing attention to a perceived problematic use of the post-nominal "S.C." or "SC" by more recently appointed Silk was curiously interesting. Although this probably reflects more on what I consider curious it set me off in a spare moment to see whether his abrupt conclusion of urging the use of "SC" rather than "S.C." should be considered correct. I have regrettably found the conclusion, insofar as it applies to Australia, to be in error.

The writer was probably not aware that there are hundreds of barristers and solicitors in Australia who hold a Australian military decoration, the Reserve Force Decoration — gazetted as the "RFD". Indeed there are a number of barristers presently at our Bar with an RFD including this humble writer. These people and the thousands of naval and military personnel in the Australian Defence Force are also very familiar with another military honour, the Star of Courage.

The Star of Courage is an honour under the Australian Bravery Decorations and was established as part of the Australian honours system by Letters Patent issued by the Queen of Australia on 14 February 1975. The Star of Courage ("SC") is awarded for acts of conspicuous courage in circumstances of great peril. According to the Annual Report 2002–2003 of the Office of the Official Secretary to the Governor-General (available on the Governor-General's website), in the period 14 February 1975 to 30 June 2003 Stars of Courage have been conferred on 114 remarkable Australians. The Star of Courage is referred to specifically in the Annual Reports of the Governor-General and the Commonwealth Government Gazette solely by the use of the post-nominal 'SC'. In this regard McGowan was correct in stating that "Who's Who" contains an index identifying all official abbreviations and explains the difference between "SC" and "S.C." as referring to Star of Courage and Senior Counsel respectively.

As we now know, in Victoria since 2000 (and it seems until 2004) all Silks have been appointed by the Governor-in-Council on the advice of the Attorney-General by Letters Patent as "one of the Senior Counsel for the State of Victoria" with precedence next after a named individual. That is, rather than an appointment by the Governor-in-Council as "one of Her Majesty's Counsel for the State of Victoria" the appointment is as a Senior Counsel.

Since the decision by the respective State and Territory Executives to no longer issue Letters Patent appointing Silk, since the early 1990s the NSW Bar and the Queensland Bar (and now all others save South Australia) have recognised the appointment of Silk by the professional honorific of Senior Counsel and the "guild" recognised post-nominal of "S.C.". Whilst many Silks may consider that they have achieved their rosette "for acts of conspicuous courage in circumstances of great peril" it is probably not really meeting the test for the conferral of an "SC"!

Star of Courage: SC.

However, there is a tendency for editors of august journals and otherwise to feel compelled to edit from a technical typographical point of view. There is a view that the use of points (full stops) after abbreviations and/or contractions is a stylistic decision and not a textual one. From an editor's perspective a document is styled either as "pointed" or "unpointed" and (learned) editors believe that it is totally incorrect for it to contain a mixture of these two styles. Yet this is not determinative of the issue.

A problem with contracting "S.C." to "SC" is the *Defence Act 1903* (Cth). By section 80B(4) it is an offence for a person to falsely represent oneself as being a person upon whom a service decoration has been conferred. As we know the Star of Courage, SC, is a service decoration. One would hope to not have to add the complications of worrying anyone with concerns of aiding and abetting a breach of the section by wilfully (or perhaps recklessly?) contracting a reference merely for stylistic reasons.

Therefore, it is likely, or at least arguably, a breach of the Defence Act to refer to a Silk with, for example, a military service decoration as "Bloggs RFD SC" if that person was not in fact the holder of a Star of Courage. A reference to "Bloggs RFD S.C." correctly identifies the person as the holder of a military decoration and a Silk.

So it seems it is a correct practice of the Victorian Bar and for that matter all others to describe Senior Counsel, howsoever appointed, not by the use of the post-nominal "SC" but only by use of "S.C.".

Senior Counsel: S.C.

As such I would suggest that the last paragraph in McGowan's article that "it seems appropriate to recommend that the Victorian Bar commence using 'SC'" is one requiring a retraction be published R.Q. (real quick).

David H. Denton, RFD S.C.

The Editor

Sir

APROPOS Glen McGowan's article in your recent Winter issue, my understanding is that "S.C." should be punctuated in the title of Australian silk to distinguish it from the accepted abbrevation for the Star of Courage, which is awarded in Australia only for acts of conspicuous courage in circumstances of great peril (see for example http://wwww.itsanhonour.gov.au/about/medal_descriptions/bravery).

Sincerely

Robin Margo S.C.

The Old Days

Editor

Dear Sir,

AS one of the vestigial remnants of a by-gone age, might I be permitted to reminisce, not about the good old days, but factually about the old days. Nowadays when judges are almost treated as human, to the point that even the press invariably mentions their given names as well as their patronymics, it may seem like heresy to remind those who never had to endure the trial by combat of appearing before them, that some judges could guarantee to conclude chamber business (defended or undefended) by twenty-to-eleven daily. Two, whom counsel regularly dodged if possible, were Sir James Macfarlan and Russell Martin. By naming them as I have done, I have acceded to the

common trend of acknowledging that they were mortal.

Sir James was a better than average sportsman in his distant youth and never abandoned his interest in golf. Due to his ineradicable irascibility he found it hard to get anyone to play with him, and he was usually confined to his ageing former associate Wanliss as his partner. One day he impatiently watched as a foursome ahead of him dug up the divots and indulged in what Jack Dyer called "fresh air shots". He said to Wanliss, "Go down there and tell them Sir James Macfarlan wants to play through." He watched as his former associate strode off to do his bidding. He returned with the message that the foursome claimed priority and had no intention of allowing him precedence. "That's not what they said," Sir James exploded, "Tell me precisely what they said."

Wanliss replied, "The fellow in the tam o' shanter cap said, 'You can tell Sir James Macfarlan that he can kiss my arse.'" "Did he now," said Sir James. "Hold this club." He strode off to confront the foursome who were pottering about in a vain attempt to get closer to the hole. "Did you tell my associate that Sir James Mcfarlan could kiss your arse?" he demanded of the man in the tam o' shanter. "As a matter of fact, I did," he replied. "Well," Sir James shouted, "I am Sir James Mafarlan." "Really," observed tam o' shanter. "Now that I've seen you, you can't."

Russell Martin always gave the appearance of being in a bad temper barely under control. I was appearing before him seeking an injunction to restrain the then Shire of Moorabbin from introducing sewerage to the municipality. My client had the current contract to carry out collection and disposal of nightsoil. Martin was unimpressed with my pleading that in reliance on the continuity of the contract my client had invested heavily in vehicles and provision of two appropriate cans for each premises served. I pointed out that the trade-in value of a second-hand night-can would not be accepted as a deposit on a Mercedes and the used cans would cost money to get rid of. Martin tersely threw us out on the ground that the council had to safeguard the health and sanitation of the community and could not be prevented from implementing safest practice. My client leapt to his feet. "Your Honour," he exclaimed, "it might be shit to you, but it's bread and butter to me."

My client subsequently transferred his interest to the other end of the alimentary canal and opened an up-market restaurant.

With attempts to pull the administration of law into the twenty-first century, how long will it be before all judges, not those confined to federal jurisdiction, get rid of the dandruff bags on their heads. Wigs are meant to be a substitute for hair not an addition to it. Nothing looks more ridiculous than to see shoulder-length hair protruding below the wig, particularly when it may be any colour of the rainbow. To call it tradition is insupportable. Maybe enough members of the Bar still enjoy strutting about looking like left-overs from the last Gilbert Sullivan season. The only thing I am sure about is that I won't live long enough to see the wig consigned to the rubbish tin alongside the thumbscrew and the rack.

Philip Opas QC

Direct Access Briefs

THE Ethics Committee wishes to remind barristers of the Rules of Conduct relating to direct access briefs.

RULES OF CONDUCT

The Direct Access Rules are found at Part VI of the Rules of Conduct — Rules 165 to 177.

Subject to the Rules of Conduct, Rule 165 permits a barrister to accept instructions or a brief (without the intervention of a solicitor) from:

(a) a member of an approved body acting on its own or on behalf of a client;
(b) a lay client in a matter in which the client is directly concerned; or
(c) the Victoria Legal Aid in criminal matters.

The application of Rule 165 is limited by the Rules, in particular, Rule 171 which prohibits a barrister from accepting any instructions or a brief in a direct access matter (except with the written permission of the Ethics Committee):

(a) to appear in the High Court of Australia, Federal Court of Australia, Industrial Relations Court of Australia, Family Court of Australia, Supreme Court of Victoria, County Court of Victoria (except in criminal matters where the barrister is instructed by Victoria Legal Aid), or in any civil proceeding in the Magistrates' Courts of Victoria;
(b) once proceedings are instituted (if acting for a plaintiff) and served (if acting for a defendant) in any of the courts set out in sub-paragraph (a) hereof.

Rule 170 allows a barrister to appear in a direct access matter in the Magistrates' Court in a criminal proceeding.

The effect of the Direct Access Rules is to permit barristers to appear in the Magistrates' Court in a criminal proceeding and at Tribunals (including VCAT) without the intervention of a solicitor. This permission is, however, subject to Rule 168 which provides that:

A barrister:

(a) must not accept any brief or instructions in a direct access matter if he or she considers it is in the interests of the client that a solicitor be instructed.
(b) must decline to act in a direct access matter in which at any stage he or she considers it in the interests of the client that a solicitor be instructed.

Furthermore, Rules 173 to 177 place a number of procedural type restrictions on barristers when acting in a direct access matter.

PILCH

The Ethics Committee also receives requests from the Victorian Bar Legal Assistance Scheme ("PILCH") which contacts the Committee seeking dispensation for barristers from the direct access rules in regard to acting, without a solicitor, for migration and refugee matters. These applications are considered on their merits.

FEDERAL COURT AND THE FEDERAL MAGISTRATES' COURT

In addition, the Federal Court and the Federal Magistrates' Court in conjunction with the Victorian Bar also conduct *pro bono* assistance schemes. The Rules for these schemes are contained in Order 80 of the Federal Court Rules and Part 12 of the Federal Magistrates' Court Rules. The Rules of Practice of the Victorian Bar also apply to these schemes. Thus, it is the obligation of the barrister to make an assessment of what is in the interests of the client under Rule 168 as well as comply with the other Direct Access Rules. If the barrister considers that it is in the interests of the client that a solicitor be instructed in the matter, the relevant court official must be notified and the court will make the necessary appointment of a solicitor in the circumstances.

Any barrister who has a query in relation to the Direct Access Rules should contact a member of the Ethics Committee.

31 August 2004
Bulletin 3 of 2004

Family Court

Chief Justice Diana Bryant

MAY it please the Court. On behalf of the Victorian Bar I extend warmest congratulations upon Your Honour's appointment as a Judge of this Honourable Court, and as the Court's third Chief Justice.

Your Honour was sworn in by Justice Kenneth Hayne in this courtroom on Thursday 8 July. Official notification of the swearing in ceremony was simply in the Law List for that day. The profession learned of it the day before. It is eloquent testimony to the high regard for Your Honour in the profession that, on less than a day's notice, this courtroom was packed. I was overseas, and regret that I was, on that account, unable to be here myself. On the Bench with Your Honour today is Your Honour's Deputy Chief Justice, the Honourable John Faulks. On behalf of the Victorian Bar, I would like also to congratulate him, and welcome him to his new position.

The *Family Law Act 1975* swept away the fault-based grounds for divorce, and introduced the single ground of irretrievable breakdown of the marriage and 12 months separation. It also established this Court. The Constitution vests the judicial power of the Commonwealth in the High Court and "such other federal courts" as the Parliament creates. The Family Court of Australia was the first "such other federal court".

The Family Law Act has been described as one of the most innovative pieces of legislation passed by the federal parliament in 100 years. Its first Chief Judge (as the title then was), the Honourable Elizabeth Evatt, characterised the philosophy of the Court as a radical departure from that of other courts of the day: "I felt that we were reaching out to people, that we were not there to deliver black and white justice, but to understand — to try to understand — the needs and feelings of people involved in marriage breakdown, and to help them to find a way forward — to leave them with some dignity, and not see them as winners and losers."

Some 40 to 50 per cent of the parties in family law matters are unrepresented by lawyers at some stage of proceedings. Justice Faulks headed the Court's two-year initiative entitled "Self-Represented Litigants: A Challenge". His Honour has said that when he addresses people on the difficulties faced by self-represented litigants, his first thought is that he should give each member of his audience "a blindfold and a gag, and have someone talk to them in Swahili".

Writing on mediation, His Honour warned of the danger of conceptualisation masking objective analysis of Alternative Dispute Resolution as a method of resolving disputes — pointing to its vital role, but also noting the frustration of protracted mandatory ADR in delaying judicial resolution with what His Honour characterised as "the Hundred Years Jaw".

Your Honour graduated Bachelor of Laws from the University of Melbourne in 1969, served articles with Mr Gordon Duxbury of the firm of Darvall & Hambleton, and was admitted to practise on 2 March 1970.

Your Honour initially practised as a solicitor in Melbourne under the old Matrimonial Causes Act, fault-based regime, and recalls briefing and instructing Beverly Hooper and John Cantwell in divorces in the Victorian Supreme Court.

Your Honour had been born in Perth and, in 1977, moved from Melbourne back to Perth. Your Honour was admitted to practise there, and was a solicitor with the firm of Lavan & Walsh, becoming a partner in that firm in 1979. In 1985, Lavan & Walsh merged with Phillips Fox, and Your Honour was a partner in that firm.

Consistently with the practice in Western Australia, Your Honour appeared as counsel in the Family Court of Western Australia and in the Supreme Court of Western Australia. Your Honour also appeared in this Court, and regularly in appeals before the Full Court of this Court.

For some seven years, Your Honour was a member of the Barristers' Board of Western Australia — the statutory body charged with responsibility for admissions and professional discipline in that State.

Your Honour was a Commissioner of the Legal Aid Commission of Western Australia and President of the Family Law Practitioners Association of Western Australia. Your Honour was also a member of the Board of the Royal Perth Hospital, and of the Ethics Committee of that Hospital. Your Honour was a member of the Australian National Airline Commission and a Director of Australian Airlines (now Qantas).

In 1990, Your Honour returned to practise in Melbourne after some thirteen years' practise in Perth. You came to the Victorian Bar and read with Michael Watt, now Justice Watt of this Court.

Soon after your return to Melbourne, you had a case at Dandenong before His Honour Justice Wilczek. Your opponent, an experienced family law practitioner, did not know you, or of your considerable experience — only that you had very recently come to the Victorian Bar. Feeling confident, he took a hard line in negotiations. When the case was called on, Justice Wilczek's effusive greeting, and delight at Your Honour's return to Melbourne, opened your opponent's eyes, and settlement negotiations took a very different turn.

Your Honour was a founding member of Chancery Chambers in Queen Street. The Chancery Chambers stationary, designed by Your Honour, has interlocked "Cs" reminiscent of Coco Chanel. There is speculation as to what sort of

stylistic makeover might lie ahead for this Court.

Your Honour appeared as counsel in a number of notable cases before the Full Court and the High Court, including *AMS* v *AIF*. In that case, the High Court accepted Your Honour's submissions as to what the law should be in the international relocation of children, and overturned the decision of your good friend, Chief Judge Holden of the Western Australian Family Court, who is sitting with Your Honour on the Bench today.

Your Honour and Chief Judge Holden had sometimes been opposed as counsel. Mr Garry Watts, then chair of the Family Law Section of the Law Council of Australia, spoke at Your Honour's ceremonial welcome as Chief Federal Magistrate. The story he told bears repeating, namely that, on hearing the result in *AMS* v *AIF*, Chief Judge Holden remarked that it was unfair that, not ever having beaten him as opposing counsel, Your Honour beat him in the High Court when he was not there to defend himself.

Your Honour was a member of Justice Fogarty's Child Support Consultative and Evaluation Advisory Groups, and was influential in the development of that area of family law.

Your Honour took silk in 1997. Your Honour made substantial contributions to the Victorian Bar, serving on the Bar Council from 1995 to 1997, and on the Ethics Committee from 1998 to 2000. You were Vice Chair of the Victorian Family Law Bar Association, and on the Executive of the Law Council Family Law Section.

In addition to serving on the Board of Victoria Legal Aid, Your Honour did personally a considerable amount of pro bono work.

As if all this were not enough, Your Honour engaged in graduate study at Monash University, graduating Master of Laws in 1999. Your Honour has presented papers on family law, de facto relationships law and related topics at numerous conferences and seminars.

Your Honour's last case before being appointed Chief Federal Magistrate was a custody and property case in Alice Springs. The case was allocated three days but, as often happens on circuit, there were interruptions. It began on Tuesday. At the end of Thursday, there was still about a day to go, and the Judge proposed to adjourn it.

It was not public knowledge that the Attorney-General intended to announce Your Honour's appointment as Chief Federal Magistrate immediately that case ended. Your Honour asked to see the Judge in chambers, but he declined on the basis that he never saw anyone in chambers.

Your Honour's opponent and the child representative both supported Your Honour's application that the case could be concluded, and that it be heard the next day. The Judge observed that he supposed Your Honour was telling him that, whenever the matter was adjourned to, you would not be available. He sat on, and the matter was concluded.

The haste was, however, ultimately unproductive because Parliament rose, and the announcement of Your Honour's appointment had to be delayed until the following January when the Parliament resumed. This caused some awkwardness in relation to a celebration that had, unbeknownst to Your Honour, been planned for that weekend. Diplomatically, Your Honour took the opportunity to go off bird watching in the desert, and then to Thailand.

In January 2000, Your Honour was appointed Chief Federal Magistrate, the first appointment to that Court, newly created by statute.

Your Honour had been concerned that the proposed Federal Magistrates' Court could lead to unnecessary fragmentation. Your Honour established excellent relations with Chief Justices Gleeson, Black and Nicholson, and you all worked to ensure effective and smooth co-operation.

Your Honour established and led the Federal Magistrates' Court with intellect and grace, making it a truly collegiate court with good governance and accountability, and infusing it with your own work ethic.

When Your Honour's appointment as Chief Justice of this Court was announced, Professor the Honourable George Hampel, present in court today, but then in Florence, reacted to Your Honour's appointment with, "Oh no, I've melted down the ski boots of the Chief Justice".

Last skiing season, while Your Honour and your husband lunched at the Hampel-Haus on Mount Buller, Your Honour's reasonably new, and very conservative, grey ski boots were put in the Hampels' drying cupboard. One boot became so hot that it completely disintegrated. Professor Hampel did manage to find a replacement, but it meant that Your Honour skiied that afternoon with your own grey boot on the right foot and a bright, not to say lurid, pink Hampel-boot on the left.

Your Honour and Deputy Chief Justice Faulks both write doggerel verse, sometimes in parody of Gilbert and Sullivan songs. In this Court on this rainy Melbourne day, Your Honour's reflection at the ceremonial opening of this Court Complex bears repetition — and for this anecdote also I am indebted to Mr Garry Watts. There was, at the time, consideration of adding a preamble to the Constitution.

Magistrates' Court

Magistrate Brian Wright

I love a sunburnt country, a land of sweeping plains.
I'm even fond of Melbourne, where it very often rains.
I love a new court complex, where litigants may amble,
With the Constitution on the windows, but no place for a Preamble

This Court, which Your Honour now leads, is, with its full complement of judges, the largest superior court in Australia. It presently has 45 judges, six judicial registrars and over 700 staff. It has 20 registries, in all capital cities (except Perth, which has its own Family Court), and in some major regional centres. Judges, judicial registrars and registrars go on circuit to other regional centres and country towns.

For the last three years, the Court has sat on circuit on Thursday Island in the Torres Strait. In cases heard on Thursday Island, the Court has involved the Elders of the indigenous Kaurereg people in the process — in particular, receiving expert evidence in relation to traditional adoptions.

Each year, this Court touches the lives of upwards of 150,000 Australians — men, women and children.

The Bar is delighted at Your Honour's appointment, and looks forward confidently to the application of Your Honour's demonstrated skill and learning, your industry and collegiality, and your good sense and compassion, as Chief Justice of this Honourable Court.

On behalf of the Victorian Bar, I wish Your Honour long, distinguished and satisfying service as a Judge and as Chief Justice of this Honourable Court.

May it please the Court.

ON the first day of September Brian Wright was appointed a Magistrate in the State of Victoria. It is a popular appointment. His Honour comes to the Bench with a wealth of knowledge about workers' compensation, common law and personal injury matters. As one of his colleagues described him; "He is a walking Halsbury when it comes to the law of workers' compensation." He completed his articles with Slater and Gordon. His Honour came to the Bar in 1978. He read in chambers with Judge Mervyn Kim, formerly of the County Court. Thereafter he has developed an extensive common law and workers' compensation practice. His Honour has a marvellous memory and has accumulated an extensive library of unreported decisions. Brian Wright was always the first point of reference for his colleagues when they had a prickly legal issue. It is not surprising, given his wealth of knowledge, that he was one of the editors of the leading reference book *Accident Compensation Victoria.*

Brian has been an intrepid traveller during his life. His preference is to travel to exotic places where no man has been before. He has travelled in group tours and, in more recent years, taken solo voyages up the Amazon and into darkest Africa. It might be said "there is no place on this planet he has not visited". An undisclosed source reported that his holiday activities ceased approximately 18 months ago when he remarried!

The Bar warmly congratulates His Honour and wishes him a fulfilled career in the years ahead.

Supreme Court

Justice Norman O'Bryan

MAY it please the Court. I appear on behalf of the Victorian Bar to pay tribute to Your Honour's service to this Court, and to the law.

Your Honour has been a judge of this Court for more than 27 years. Although Your Honour retired from full-time service in 1992, you continued to serve as a reserve judge, since 2001 on the Court of Appeal.

Your Honour's prodigious capacity for hard work is legendary — you have been a doer and a decider. At Your Honour's welcome to the Bench in February 1977, you said, "I enjoy court work, so do not look for me in the library reading esoteric legal tomes during court hours if there is work to be done. Keep me busy with court work, and I believe I shall be most happy."

And busy is exactly what Your Honour has been. You began sitting immediately upon your swearing in, not even waiting to be welcomed to the Court. At the time of your welcome, not only had you already sat for several days, but you were in the course of delivering your first charge to a jury. Sitting before being welcomed was a break with custom and tradition in those days, although Your Honour seems to have set a precedent, because it has now become common.

Your Honour demonstrated from the outset a robust and forthright attitude to the work of a trial judge. You adopted the wisdom of Sir John Starke that a trial judge's job is to get the case decided as quickly and justly as possible, and not to get bogged down in complex issues of law or fact, however imaginative and ingenious counsel might be in creating complexity.

As you had forecast at your welcome, you were not to be found whiling away the hours in the library reading esoteric tomes. You did not write legal treatises disguised as judgments. You decided cases by the shortest and most direct route.

And the fact is that Your Honour was rarely overturned on appeal. Your Honour instinctively recognised the crucial issues. Your Honour has a great knowledge of the law and always applied it swiftly and decisively.

As we've heard, Your Honour has delivered a number of leading judgments in a diverse range of cases — the Solicitor-General referred to *Hohol* in relation to property rights in de facto relationships and *TVW Enterprises* v *Queensland Press Ltd*, a difficult case concerning the "relevant interest" provisions of the Takeovers Code. Your Honour was also the judge in the defamation case of Dr Bertram Wainer against Police Association spokesman Ted Rippon, which arose out of a television confrontation between the two.

Your Honour also said at your welcome, "I don't expect I can eliminate the backlog of cases all by myself." However, you made a pretty good fist at doing exactly that, particularly on circuit. On circuit you called on cases and decided them, one after another. You rarely granted adjournments. Put on the spot to proceed, it is remarkable how often the parties gained fresh perspectives, and found themselves able to compromise previously irreconcilable differences.

Once in Warrnambool, the settlement rate was so remarkable that virtually the whole list collapsed. Not content with having cleared the Supreme Court list, you offered to help with the County Court list. You had your associate contact Chief Judge Waldron, who was on holiday interstate. Your associate reported amazement on the other end of the line. Politely, the offer was declined.

You abhorred waste of time. One could set one's watch by your arrival onto the Bench, morning and afternoon. It's said that, on occasion in your early days on the Bench, when counsel was late, you began without them. After that, counsel were on time, or contacted your associate. They also learned not to bother asking, before 4.15 pm, whether it might be "a convenient time" to adjourn.

However, you did mellow somewhat towards the end of your time as a trial judge. It was Holy Week. You were sitting in Warrnambool, setting the usual cracking pace. Unexpectedly, you announced that the court would sit, not only on the Thursday before Easter, but also the Tuesday immediately after. This was unheard of, and counsel had planned on a longer break. Tim Tobin, then junior counsel, seemed to have received a kindly audience from you, which he put down to his advocacy, although others suggested it might have something to do with his recently having become a member of the same golf club as Your Honour. In any event, Tobin was deputed to approach Your Honour personally on behalf of all counsel.

History doesn't record Tobin's argument — whether it was founded on devotion to liturgy or the more pragmatic appeal of a number of very attractive social engagements. In any event, Your Honour relented and a long Easter break was enjoyed by all.

While social associations, such as membership of Peninsula, cut no ice with Your Honour, you were not immune from flattery. A somewhat elderly female litigant in person repeatedly addressed you as "Your Majesty". Not only did you not bother to correct her, I'm reliably informed that later, and constant, recollection of that form of address has never failed to please Your Honour.

In the Court of Appeal, Your Honour has also contributed to clearing the lists. Every second Friday, a single Judge of Appeal hears applications under section 582 of the Crimes Act for leave to appeal

against sentence. Your Honour has routinely disposed of 10 such applications in a morning. Moreover, although the Act provides for a de novo application to a panel of three, rarely was any such application made after Your Honour's decisions.

Your experience on the Bench has not been all seriousness and hard work. In one case, an attractive female witness was giving evidence of the difference between a passionate kiss and a fatherly kiss. I do not know quite how that was germane to the case. The witness offered to give a practical demonstration to Your Honour. I'm not sure which type of kiss she offered, but I do understand that it was with some regret that Your Honour declined.

The Solicitor-General has spoken of the massive *Occidental/Bank of Melbourne* case. It was known that this was to be your last trial as a full-time trial judge. When the case eventually settled, Tom Hughes QC, as the senior member of counsel present, paid tribute to Your Honour. He described Your Honour as the best trial judge then on the Court in Victoria. The late Neil McPhee QC, as the senior Victorian counsel, expressed the same sentiment, and it was an opinion that was widely shared.

As a young man, Your Honour was a competition swimmer and oarsman. We have heard that, with Sir James Gobbo, Your Honour was a member of the Xavier crew that, for once, won the Head of the River.

You are an enthusiastic golfer – a life member, and former President of the Peninsula Country Golf Club. In 1995, Your Honour established the annual golf tournament between the judges and associates of the Supreme and County Courts, The Judges' Golf Classic, held shortly before Christmas at Peninsula. You donated the trophy, which incorporates the scales of justice, and has small copper weights in the scales – which often go missing. Honours are about even between the two courts. The County Court presently has the trophy.

You and your father, between you, cover more than 55 years of the 152-year history of this Court. You were each a judge for more than 27 years. Your father joined the Court in the time of the sixth Chief Justice, Sir Frederick Mann, and served with Chief Justices Sir Edmund Herring and Sir Henry Winneke. Your Honour was appointed in the time of Sir John Young, and served with Chief Justice Phillips, and the present eleventh Chief Justice, Justice Warren.

The family connection appearing as counsel extends even further. Your father signed the Roll in 1920, and appeared before judges such as Sir Leo Cussen. Your sons Norman and Stephen are both senior counsel, and your son Michael is junior counsel. Your son-in-law, Nemeer Mukhtar, is also senior counsel.

Your father served on the Committee of Counsel (the predecessor of the Bar Council) for four years (1935–39). Your Honour served on the Bar Council for two years (1962–64).

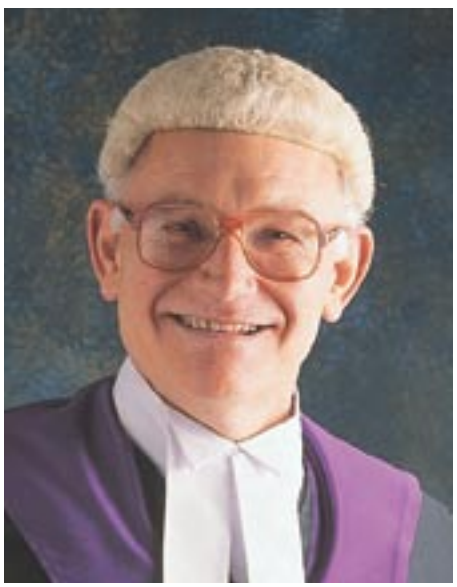
Three of your 14 grandchildren are in post secondary education. None of them is studying law, but there is still plenty of opportunity in the next generation of O'Bryans.

Your Honour is a leading member of a great legal family, and it is a matter of some regret that this is the last occasion on which Your Honour will sit in court. However, we are glad to see that Your Honour is in full of health and vigour and, on behalf of the Victorian Bar, I wish your Honour and your wife, Margaret, a long, satisfying and happy retirement.

May it please the Court.

County Court

Judge Gordon Lewis



MAY it please the Court. I appear on behalf of the Victorian Bar to farewell you from this Court and to pay tribute to Your Honour's remarkable service to the Court, the law and the community.

Your Honour's service on the Court crowns a career of service to the public, to the profession, and in the public service: 16 years as a solicitor in private practice, first in Melbourne and then in country Victoria in Hamilton; 11 years as Executive Director of the Law Institute of Victoria; a year as Victorian Commissioner for Corporate Affairs; and three years as Victorian Government Solicitor.

Your Honour's early years at the Law Institute brought particular challenges: fraud, flood and fire.

The Solicitor-General has mentioned the fraud, a massive trust account defalcation. The first hint of trouble was in early 1975, about six weeks after Your Honour's arrival at the Institute. It was the largest trust account defalcation that Australia, or the world for that matter, had then seen. The total pay-out, with costs and interest, was over $11 million. Everyone was paid in full, but it took some years of payments by instalments.

The flood was in 1976. The new Director of Consumer Affairs was in Your Honour's office to present his case for taking over the handling of all complaints against solicitors by members of the public. It had rained heavily for several days, and the Institute down-pipes had been blocked by two misdirected tennis balls. The ceiling of Your Honour's office began to sag. The water burst through, and the Director of Consumer Affairs was swept sideways out the door and into the corridor. The Institute retained control of complaints against solicitors.

A similar proposal to take over complaints against legal practitioners was made a year or so ago. Both the Institute and the Bar wished that they had Your Honour's power to call down help from the heavens in sweeping away the proposal.

In June 1978, the Institute was deliberately set on fire. Someone poured petrol around the front foyer area. The building was reduced to a cinder. Fortunately, just three weeks before the blaze, the Institute had quadrupled its insurance cover.

According to Your Honour's account, there were three main suspects: Your Honour, Justice Teague (then President of the Institute), and a solicitor recently released from a prison term for trust account defalcations who had been seen standing outside the Institute that afternoon with two four-gallon tins of petrol and a large box of barbeque matches.

Your Honour relates that the solicitor was cleared on the basis that he had an alibi. According to Your Honour, his wife said he was at home with her when the fire started, and also that he smoked heavily and needed the petrol for his cigarette lighter. In fact no-one was ever charged in relation to the fire.

Mr Dale will speak of Your Honour's remarkable and lasting contributions to the work of the Law Institute.

We have heard of Your Honour's weekly legal talk back session on ABC radio and Your Honour's weekly film review segment. Your Honour attributes your appointment as a film critic to a remark on the ABC radio legal program that the best movie you'd ever seen was the Ed Wood classic "Attack of the Killer Tomatoes", closely followed by "Godzilla meets Bambi".

Your Honour's first public appointment was as Victorian Commissioner for Corporate Affairs. Your Honour asked for renovations to your office. Public Works advised that the structure of the building was such that the requested renovations were probably not possible, and that, if they were possible, they would take 18 months.

A builder friend of Your Honour said this was nonsense — that the job was feasible and simple. Your Honour had him do the work. Public Works admonished Your Honour and said the office would have to be restored. Your Honour assumed that it would probably take them 18 months to get around to it, and left to become Victorian Government Solicitor after 12 months.

Your Honour was the first person outside the public service to be appointed Victorian Government Solicitor. Your Honour did an outstanding job, and quickly won the respect, support and loyalty of that office, including some who had been disappointed with the external appointment.

Your Honour's common-sense, problem-solving approach resulted in very practical advice to government. Beyond analysis of the relevant statutes and cases, Your Honour's predictions as to how matters would be decided by the judges likely to hear them were remarkably insightful.

On this court, Your Honour has been an outstanding judge. Your Honour has presided effectively in all areas of the Court's jurisdiction. Your Honour's humanity and warmth have been particularly appreciated in the Court's jurisdiction over adoptions.

In one civil case, Your Honour demonstrated not only your characteristic good sense, but the depth of Your Honour's sporting knowledge. A couple living on an isolated farm had been raided by the police, who found $28,000 in cash behind the bed-head. They seized it, claiming it was the proceeds of the illicit sale of imported drugs. The couple's defence was that they had won the money betting on horses. The couple had some credibility problems.

The man claimed that the woman had been the brains behind the gambling, and she eventually entered the witness box. After some initial, not terribly fruitful, questioning by counsel about her knowledge of racing, Your Honour interrupted and asked, "Who were the sire and dam of Phar Lap?" The woman immediately replied, "By Night Raid, out of Entreaty. Do you want to know the name of the sire's dam?" Your Honour ordered the police to return the money.

Your Honour's high regard for the Bar is well known. It is illustrated by a story that appears in the immensely practical "Handy Hints on Legal Practice", of which Your Honour is co-author with Emilios Kyrou (a partner at Mallesons Stephen Jaques). The story is that Senior Counsel was examining his client, the plaintiff in an injury case, a timber worker of modest education:

QC: And did this have a deleterious effect on your health?

Plaintiff: Eh?

QC: And did this have a deleterious effect on your health?

Plaintiff: (Looking towards Your Honour) What is he on about?

Your Honour: He wants to know if it made you crook.

Plaintiff: Why didn't he say so?

For many years, Your Honour has presided with particular distinction in the WorkCover jurisdiction. For the last several years, Your Honour has been the judge in charge of the Compensation list.

With characteristic modesty, Your Honour has said that all that is really needed in WorkCover is a cardboard cut-out of a judge who can take settlement consent orders. The truth is that Your Honour's many written judgments in this field have brought common-sense social and legal construction to an extraordinarily difficult piece of legislation, the *Accident Compensation Act 1985*.

County Court judgments are not normally reported, but those who practise in WorkCover take trouble to collect Your Honour's judgments. Leading judgments include *Ladhams* on section 11 and sharefarmers, *Holt* on "work capacity" and "suitable employment", *Willmott* on sections 104B and the new section 98C dealing with medical practitioner assessments, and *Finn* on section 82(2)(a) and stress cases.

Seldom have Your Honour's WorkCover judgments been appealed, and even more seldom have they been upset on appeal. This is due to their obvious good sense and the thorough exposition they contain.

Your Honour's extra-curricular activities have also been remarkable. For 10 years, Your Honour was an Independent Lecturer in Professional Conduct at the University of Melbourne Law School. Your Honour presented a paper on judicial conflict of interest at the 1994 conference of the International Bar Association, and gave presentations on Careers, Lifestyles and Legal Practice, and The Profession in the 21st Century at the 1990 ninth Commonwealth Law Conference in New Zealand.

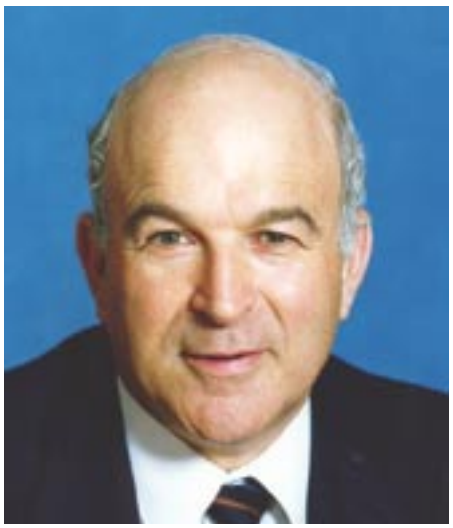
Your Honour is the Australian Cricket Board Senior Code of Behaviour Commissioner, and previously served as Commissioner for Victoria.

Your Honour has served the Victorian community as a Judge of this Court with distinction, courtesy, humanity and good humour for nearly 14 years. Whatever the outcome, counsel and parties have left Your Honour's court feeling that they have been treated with dignity and their arguments have been fairly heard and carefully considered.

On behalf of the Victorian Bar, I wish Your Honour a long, satisfying and happy retirement. May it please the Court.

County Court

Master Rex Patkin



ONE of the more egregious errors we have made over the years is to let Master Patkin's appointment as the first Master of the County Court slip by without comment and then to allow his retirement to occur almost unnoticed. This composite welcome and farewell is intended to remedy, in part, that error.

Rex Patkin, as he was and is known to all, started off as a student of aeronautical engineering. He spent five years with mathematics, physics, chemistry, aerodynamics, aircraft engines and metallurgy. In his final year he was required to study a humanities subject. He selected sociology and, as he informs us, discovered that he was more interested in people than in machines. So he decided to study law.

Having married his wife Faye in his last year of engineering, his decision to study law put certain pressure on the Patkin finances. For the first two years of his law course he taught half time at Brighton Technical School and tutored other students in maths. He graduated, as he points out, with "Brear, Carter, Coldrey, Mandie, Moloney, Sundberg, Rockman, Walsh and Willee to name a few".

After completing articles at Russell Kennedy & Cooke he went to Monash as a tutor, then described as a "teaching fellow" where, as well as taking an arts degree he completed an LLM dealing with the law of options.

He came to the Bar in 1972 commencing his reading with Searby, and completing it with Lyons when Searby took silk half way through the reading period.

He did his stint in the Magistrates' Court and then proposed to specialise in industrial property. But, although there was considerable paperwork in that area, he found that most of his appearance work was in the County Court Practice Court. We believe that in those days there were between 80 and 100 matters in the County Court Practice Court each day and that the Master arrived regularly briefed in multiple matters, "15, 20 and we are informed 31 on one day was the record before Judge Rendit on 26 October 1977".

Perhaps the highlight of the Master's career at the Bar was his acting for Frank Penhalluriack, the "rebel trader" in a multitude of cases dealing with weekend closing of hardware shops. Subsequently, after Mr Penhalluriack had been gaoled, he appeared before the Full Court on behalf of another "rebel trader". During submissions when the Master was, to use his own phrase "teaching everyone the law about shop trading", Starke J interrupted him and said: "You are here to represent your client not untangle the skein of the law". The Master replied: "With respect your Honour, by untangling the skein of the law I am acting in my client's best interests."

Rex Patkin was appointed as Master of the County Court in 1988 and occupied that position with distinction for the next 13 years. He retired without any fanfare in 2001.

During his time on the Bench he became concerned at the impracticality of some of the rules operating in the County Court and in particular with the effect of Order 14A and Rule 8.05.

He described Rule 8.05 as an "ideal but impractical solution to an interesting problem". His views on Order 14A are well known. He canvasses the problems created by the former Rule 8.05 in an article in the Autumn 1994 edition of *Bar News* at p.53 and analyses the former Order 14A in the same issue of *Bar News* at page 38.

Master Patkin has taken with him into retirement his notes and his case analyses from his time on the Bench. He took with him some "interesting cases" exceeding 600 of which he has made case notes with a view to subsequent publication. An article by Master Patkin on "The Relevance of Merits When Extending Time" appears in this issue of *Bar News* and it is hoped that we will be able to publish further similar articles in the future.

He goes into retirement with this comment: "Sometimes I feel I made a great mistake in deciding people were more interesting than machines. There is more logic in science than the law; and more predictability in machines than people."

Rex Patkin's concern has at all times been to "untangle the skein of the law". In his retirement he hopes to be involved in writing and in teaching "in a limited fashion … at universities, the Bar Readers' course and Leo Cussen Institute".

We wish him well in his retirement and in his role as an untangler of numerous skeins of the law.

Magistrates' Court

Magistrate "Scotty" McLeod

MAY it please the Court, I appear on behalf of the Victorian Bar. I appear to some extent by default because the Chairman of the Bar Council is overseas, and my learned friend and your good friend, Jack Keenan, is interstate. However, Keenan has provided me with certain information; and I am, myself, qualified to speak about you because, in 1974, I became your one and only reader.

The fact that I read with you was due to a characteristic act of kindness on your part. Arrangements I had made to read with someone else fell through at a late stage, and you took me on, even though we had met on only one occasion.

I don't recall learning a great deal from you about any technical aspects of the law. I did learn how important it was to you to act fairly and with consideration toward others. On about the first day on which I tagged along to court with you to see how it was done, your opponent turned out to be only a little more experienced than I was then. I remember how careful you were not to be overbearing, and not to expose his lack of experience to the court.

I learnt that if one is considerate like that, others are likely to reciprocate. When I tagged along with you to the Liquor Control Board, you received a note from the presiding judge to see him in his Chambers. "Scotty," he said, "you've got a problem", and he pointed out an obscure regulation that was most unhelpful to your unopposed application. The problem was insurmountable. However, at least, because you were the recipient of courtesy on that occasion, you were saved from unnecessary embarrassment.

Your practice of always dealing fairly with others has, perhaps, inclined you to be too trusting. During one of your episodes of home renovation, you found yourself being assisted by an old ex-boxer and colourful South Melbourne identity, who took it upon himself to supervise your tradesmen whilst you were at work. For a time you could not sing his praises often enough. Then, suddenly, you stopped talking about him. So, I asked what had happened to your honorary foreman. "He's disappeared," you said dolefully, "and my wife's car has disappeared with him."

During my reading period, I learnt something of the life of a bon vivant from you. Invaluable knowledge about the best brands of cigars and champagne, and of Melbourne's better eateries was mine for the asking.

Such knowledge was useful to you in your liquor licensing work. On one occasion you acted for a restaurant called "The Great Australian Bite", which was seeking a full liquor licence, rather than the then ubiquitous BYO licence. Full licences were, at that time, reserved for the most prestigious restaurants. Initially, the Board was not prepared to grant a full licence to a restaurant with a name like "The Great Australian Bite", which it considered vulgar. You were able to set the Board straight very quickly by pointing out that a diner could already avail himself of "Frenchies", before proceeding to "Fanny's" and "The Love Machine" and finally to the "Nutcracker", all of which enjoyed full licences.

Both whilst I was reading with you, and in the years that followed, you illustrated to me the need for anyone following a career in the law to be able to cope with the "slings and arrows of outrageous fortune". Briefless days, you taught me, were not to be regarded as a misfortune. Rather, they were to be seen as holidays conferred by a munificent providence. I recall that, during one lengthy period of such holidays, you were unable to pick up a suit you had had made.

The holidays must have come to an end soon after because, when I next saw you only two or three weeks later, we were in a Sydney restaurant and you shouted French champagne.

Perhaps you had enjoyed a stroke of luck like the one that befell you once on circuit in Bendigo. Two County Courts were sitting, and both were taken up by long running trials. Suddenly and unexpectedly, Court Two became free and there was great consternation amongst the local solicitors who hadn't expected they would need to have counsel present for their cases on that day. Applications for adjournments were made and refused, and you and the only other available barrister (having been warned to "stick around") found that you were each in possession of half the list for that session. That list was duly settled whilst counsel in Court One laboured grimly over their sole case.

One of Fortune's sharper arrows struck you when the WorkCare Court (of which you had become a judge) was abolished, and you found yourself back in Owen Dixon Chambers after a long absence, trying to rebuild a practice. A reader in the next room asked if she should still call you "Your Honour". "Unfortunately no," you said, "I'm just Scotty again."

You might perhaps have told her to call you "Judge Bong", a sobriquet you earned by telling long-winded WorkCare practitioners, "Bong! You've said enough. Sit down."

At the Bar, you had a wide-ranging practice. I have mentioned your liquor licensing work.

You also had a very big personal injury practice and your criminal work extended from some very high profile matters down to sad little cases, like that of a simple-minded country youth whose reason (given in a record of interview) for an unnatural act with a pig was that his mum had sold their poddy calf.

One of the high profile cases in which

you appeared was that in which (I think in the late sixties) you represented one of four policemen charged with taking bribes from abortionists. For some reason, whilst the jury was out, one of the defendants was held separately from the other three, who complained bitterly that, for want of a fourth, they couldn't have a game of cards whilst waiting for the verdict. Ever compassionate towards those in trouble, you joined them in the dungeons below the Supreme Court and they got their game of cards.

You were often briefed by the Crown as a prosecutor. One such brief took you to the town of Kerang, where you were joined by a colleague who is now a retired County Court judge. I would not have thought there was much nightlife to be had in Kerang but, but whatever there was, you and your colleague enjoyed it so fully that the local constabulary grew tired of fielding complaints about noise, and threatened to issue charges, until they realised they were dealing with the Crown prosecutor and defence counsel for a trial that was about to start.

As a magistrate, some of your decisions have resounded beyond the walls of your court. A decision regarding the actions of ticket inspectors caused some rethinking by tram operators. Your ruling in a matter relating to an estate agent foreshadowed significant changes to the legislation governing real estate auctions.

Very recently, I learnt from my morning newspaper that you had caused some amusement by producing $45 from your pocket and offering it to a litigant to go away and save court time in deciding his claim for about that amount.

I don't want to be told, "Bong! You've said enough. Sit down Roberts", so I will now thank you on behalf of the Bar, and on my own behalf, for your unfailing good humour towards practitioners. I wish you and your wife, Caroline, all the best in your retirement.

Knowing you as I do, though, I suspect you will already be searching for some new avenue for the energy which has already seen you as a trainee for the priesthood, a patrol officer in the Northern Territory (where you flew a Tiger Moth aeroplane), a barrister, a State Labor Party candidate for an (unfortunately) unwinnable seat, a hobby farmer, the author of a published book on your experiences in the Northern Territory, a judge and last, but certainly not least, as a magistrate.

Now, before I am "bonged" out, I will resume my seat. May it please the Court.

Arthur Roberts

Justice Peter Murphy

THE Honourable Peter Murphy, AM, who died on July 2004, was a man with a wide field of interests who in any endeavour in which he engaged, whether occupational or recreational, did so with enthusiasm and indomitable energy.

Born on 5 May 1923, he was educated at Xavier College where he was a champion athlete and co-dux of the School in 1940. In 1941 he enrolled at the University of Melbourne to study arts/law and became a resident of Newman College. In that year he was first in the high jump in the inter-collegiate sports.

When Peter turned 18 he joined the RAAF and his studies were interrupted. He did his initial training at Somers. After passing exams he was trained in bombing and gunnery at Sale and Nhill. Wishing to become a navigator he was sent to navigator school at Cootamundra and Camp Miles Standish out of Boston in the United States and then to the United Kingdom for training in the use of radar. Eventually, having topped his navigation course, he was posted as a navigator with the famous No. 463 Squadron of 5 Group Bomber Command. It was famous because it was an Australian operational squadron, flying Lancasters, carrying out successful night and daylight raids on the infrastructure on which the German forces depended in German occupied Europe. The danger involved in these raids is illustrated by the fact that in Group 5, which had the least casualties, at one stage only one out of every five men who commenced operations lived to tell the tale. The onerous task faced by a navigator is illustrated by one flight of 1,000 miles to Konigsburg in East Prussia which took 10 hours and 35 minutes and required topping up fuel in the wings on the runway at the last moment before take off, and another, navigating home after a dive to avoid an attack by an enemy fighter which caused the fuses in the radar equipment to blow, both of which Peter experienced. No doubt his ability to work effectively as a member of a team, which he had displayed in sport, was the hallmark of his contribution to the flight crews of which he was a member and which earned praise for their excellent discipline and adherence to the flight plan. He completed his tour of duty involving 30 operational sorties. He was promoted to Flying Officer before the last sortie which, at the end of November 1944, involved a daylight raid to Flushing where their bombs ran along the dykes in Westkappel and flooded territory behind enemy lines. Peter then served as an instructor of navigators both flying and on the ground at 11 Operational Training Unit. At this time he enrolled in a correspondence course to further his studies in law. In May 1945 he was discharged and entered Trinity College Cambridge to continue the study of Jurisprudence and Roman Law which he had been doing by correspondence. He sat and passed exams in those subjects and was given credit for them towards a Melbourne University Law Degree.

After he returned to Australia at the end of 1945 he met Marjorie Newing (Mimi) whom he married in 1950 after she had completed her PhD at Cambridge University. They were known by their friends as a devoted couple who shared many and varied interests.

Peter Murphy re-enrolled and continued his studies in 1946 at Melbourne University from which he graduated LLB in December 1947, gaining first class honours in Torts and Contract. Having played amateur football for a season as a member of the team prior to enlisting, after the war for two years he captained the University Blacks. He also captained a winning Newman College Australian Rules team. He gained a reputation as a very effective and robust centre half-back. He later captained the Old Xaverians.

He was admitted to practice as a barrister and solicitor of the Supreme Court of Victoria on 2 August 1948, and signed the Bar Roll in the following month, reading in the Chambers of Mr J.G. Norris (later to become a judge of the County Court and later the Supreme Court). From the very beginning Peter Murphy had a busy practice in common law and for several years also in workers' compensation. He took silk in October 1962 and was a successful leader.

His more prominent roles included appointment in August 1963 as Inspector under Division 4 of Part VI of the *Companies Act 1961* to investigate the affairs of Stanhill Development Finance Ltd and associated companies and he exposed the "round robin" of funds which caused the widespread financial losses flowing from the collapse of those companies. He was leading counsel for the Naval Board in the Second Voyager Royal Commission conducted by Sir Stanley Burbury and K.W. Asprey in 1967. At the Royal Commission into the collapse of the West Gate Bridge held in 1970–71 he led A. Goldberg (now Justice Goldberg) for World Services and Construction Pty Ltd, the company which had contracted to both fabricate and erect the steel spans but whose contract to erect had been terminated before the collapse.

For many years Peter Murphy served the Victorian Bar, as a member of the Victorian Bar Council from 1965 to 1972, for a time in 1971 as its Vice-Chairman and on numerous subcommittees of the Bar Council and other professional committees. From February 1964 to 1966 he was a member of the Legal Aid Committee which was a joint committee of the Law Institute and the Victorian Bar involved in the commencement of the first legal aid scheme generally available in Victoria. Other committees included Library, Lectures and Ethics and appointments included law faculties of both Melbourne and Monash Universities, the Chief Justice's Supreme Court Library Committee and a director of Barristers' Chambers Limited.

On 10 April 1973 Peter Murphy was appointed a Judge of the Supreme Court, an office which he filled with great distinction for 20 years. He was compassionate and fair but demanded of counsel thoroughness in the preparation and care in the presentation of their client's case.

On the Bench he remained a team player, always being prepared to help his brother judges especially when they were newly appointed. As well as having a high intellect Justice Murphy was practical, always having regard to the wider ramifications of his rulings. Evidence of his industry is not only to be found in his years of service but also in his many reported judgments. Whilst on the Bench he made contribution to the law by service on the Supreme Court Library Committee and Chairmanship of the Council of Law Reporting from September 1979 to April 1984.

Throughout his years on the Bench and away from the courtroom Peter Murphy maintained close contact with members of the Bar. Over those years he attended the Essoign Club for lunch more often than any other member of the Court.

Enough has been said to demonstrate that Peter Murphy was a highly respected and multi-faceted character. But he was far more than that.

He had an intensity about him which suggested that he was containing, with some difficulty, powerful inner forces. There was something almost primeval about him. The football field provided Peter with the opportunity to release some of these forces and yet remain within the law. He was a powerfully built man; fast and agile with a good leap. He had rather bony knees and elbows. He was invariably opposed to the opposition's star forward, but it was rare indeed that Peter's opponent had any significant impact on the game. Many a talented half forward was left with his reputation in tatters after an afternoon of Peter's relentless tackling and spoiling.

Peter did not give much attention to cricket. But he once hit a tremendous six at the Albert ground in a Bar XI game. The ball soared over Queens Parade and came to earth somewhere on the Albert Park Golf course. It was never recovered.

Although never putting on weight, Peter had a more than satisfactory appetite, particularly for red meat which he liked to consume almost raw. When ordering a steak in a restaurant, Peter would go to great lengths to ensure that his directions as to rarity were met. On a walking holiday in Argentina, he threatened to get the next plane home if the tour operators persisted in their practice of providing insubstantial salad lunches.

Although Peter had a marked sartorial sense, he had a strong preference for substance over style. When passing judgment on a footballer, his most severe indictment was to describe him as a "pretty player". Peter himself was, most decidedly, not a pretty player.

The intensity of Peter's application is shown by his approach to his non legal interests. He had never noticed a camellia until his friend, Bernard Shillito, pointed out an attractive specimen. Within a short time Peter was a member of the Victorian Camellia Society and had countless varieties growing at the Murphy home in Balwyn.

Other activities which involved members of the Bar were expeditions into remote parts of Australia. It all began in the winter vacation of 1968 with a trip, organised by Judge Gray (later Mr Justice Gray) to Coopers Creek in the steps of Burke and Wills for a number of members of the Bar with wives. During almost every winter vacation thereafter until 1996 Peter was enthusiastically involved in a trip to some remote part with barristers and others. The trips involved travelling in 4-wheel drives, camping by creek or mulga flat, where cocktails and talk prefaced quality campfire food. Vinous libation and song went well into the night and finally peace would descend as the revellers took themselves to their swags under the stars. Prior to such expeditions the history of explorers who had travelled the route was researched and as the party travelled, birds seen were recorded and Peter ensured that every plant and tree was identified and where possible its seeds collected. Specimens of these natives were propagated from these seeds by Mimi for planting in the garden of the Murphy farm "Melaleuca" at Merricks North. Peter's resolve to grow the native plants he had observed in the wild was demonstrated by his bringing in truck loads of sand to replicate conditions in WA. His ability to identify a specimen and recall its scientific name was awesome.

Peter's approach to these matters was as uncompromising as was his devotion to Mimi and to the Catholic Church.

Peter was himself a very keen trout fisherman, so it was not surprising that for many years during the week or so before Christmas he led a group of barristers, "The Tantangara Hunt Club and Madrigal Society", on occasions accompanied by their sons, to Lake Eucumbene to fish. Peter was the co-founder with the late Woods Lloyd QC of that legendary group. As many members of the Bar will remember, the details of the inland expeditions and of trout fishing were fully recounted over lunch at the Essoign Club.

It is hardly surprising that Peter was a devoted and loyal friend to those of whom he approved. He was a stimulating influence in any gathering and relished lively debate. Peter's gift for friendship was particularly valuable to those who sought his advice, most of whom were junior to him in the legal hierarchy.

Peter's distrust of style meant that his speech and writing were remarkably free from ornamentation. His judgments are not expressed in mellifluous prose, but nothing of substance is overlooked or skimped.

Being a human being, Peter was not perfect. He had strong likes and dislikes. When this was pointed out by someone he was not abashed, saying composedly, "You have to have your prejudices."

A truly remarkable man has passed from us, but his memory will be long treasured. He was indeed "a man for all seasons".

Peter is survived by Mimi, two daughters Sue and Deirdre, and a son Frank.

Judge Clive Harris

I find it a sad but very real privilege to be asked to make these observations of our much respected friend and former judicial colleague from the judicial perspective.

From my personal perspective, although Clive was 12 years my senior, his perpetually friendly demeanour, his sustained cheerfulness, his inclusive manner and attitude towards all about him, completely eliminated any feeling of a generational gap between him and me.

Clive's son Graeme has asked me to give a frank "behind the scenes" commentary of his father. I am sure that he would have expected, and I can assure you it is the fact, that such a review will reveal nothing about Clive that is other than complimentary.

All of Clive's judicial colleagues were of the same mind — that he was a man of high intelligence; of great tolerance; of deep understanding of the human condition; of unfailing friendliness and cheerfulness; of great compassion; of great industry. I personally found that being in his company provided a very real boost to my feeling of well-being. I experienced a very real sense of professional loss when he reached the statutory retirement age and thus could no longer serve as a Judge.

I sought to express my assessment of this marvellous man in a letter which I wrote to him shortly before his retirement. I hope that I am not perceived to be, or indeed am, breaching any confidences if I now read that letter to you.

It went as follows:

Dear Clive,

As the date of your retirement unhappily (at least for the rest of us) draws nigh, I do want both to thank you for, and congratulate you on, your long and meritorious period of judicial service, and also to wish you well for what I trust will be a long, so well deserved, retirement.

What I wish to say now, I have said already in a rather piecemeal and sometimes repetitive manner over the last nine years. However, it is more than appropriate to say it all again one more time.

I think that in one sense all that needs to be said is — "If only the rest of us were all Clive Harrises!" But some further and better particulars are justified. If I may say so with respect, in every way your performance has been the epitome of what one would wish from a Judge. At all times you have been a truly model Judge.

At the Workers' Compensation Board you were the de facto President for so many years, performing all the administrative duties (which were made more difficult by reason of the various responsible Ministers being ignorant of, and unsympathetic to, the principle of judicial independence) with neither financial nor any other overt recognition of your excellent endeavours in that regard, whilst still discharging to the full the judicial duties of a Chairman of the Board.

During the seventeen years or thereabouts that you discharged your specialist duties at the Board in such sterling manner, additionally — and quite remarkably — you kept yourself fully acquainted with the general law. Thus, when an ungrateful and unwise Government failed to appoint you as the first President of the Accident Compensation Tribunal, not only did you return to the general duties of the Court with alacrity, but thereafter for these last five years you have discharged those duties with consummate skill and apparent ease. And, of course, by reason of your conscientiousness combined with your expeditious competence, you have performed very significantly more than your fair share of the overall work of the Court.

Additional to all this, in your later years at the Board you had to endure the travail of Joan's long terminal illness and her untimely death. Despite that, throughout, you shouldered all your judicial responsibilities without any diminution of them.

The County Court of Victoria, indeed the people of Victoria, have been served in quite outstanding manner by you in your 26 years of judicial service. You have never flagged. On the eve of your seventy-second birthday you retain and demonstrate all the necessary attributes which go to make up a truly great Judge.

You have set an example to us all which, by the level of its excellence and diligence, may be just too high for others to aspire to. Certainly, I do assure you that you will be sorely missed.

So Clive, for myself and, I hope not too presumptuously, for the other Judges, I do thank you most sincerely for your long and splendid service as a Judge of this Court, and I do wish you a long and most enjoyable retirement.

With my warmest regards,

Sincerely,

Glenn Waldron.

I guess the happy postscript to Clive's years of service to the law, and particularly to the administration of justice, has been that he did have a long and satisfying retirement, albeit a lonely one without his dear wife Joan. He travelled extensively; he indulged his Francophile proclivities, remastering the French language whilst doing so; he golfed; he philosophically accepted the loss of sight in one eye due to a failed operation to remove a cataract; he enjoyed the social uplift of regular visits to the Savage Club.

And, most importantly, he retained his intellectual vigour to the end — a physiological fact, aided in no small part, if I may facetiously suggest, by his lifetime teetotal habits.

On behalf of all Judges, present and past, and, if I may, on behalf of all those many lawyers who knew him and thus respected and revered him, I do salute this marvellous man who gave us many, many years of outstanding judicial service to the people of Victoria.

Vale Clive Harris.

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Originality and Substantiality in Copyright: Recent Developments

Glen McGowan

It seems likely that the questions of originality (for the purposes of subsistence — e.g. s.32) and substantiality (for the purposes of infringement — e.g. s.14) in copyright may be taking a turn towards more limited operation.

HISTORICALLY the trend has been for the courts to push the boundaries of the operation of copyright. This has been most colourfully described by Laddie J in *Autospin*:[1]

> Furthermore many copyright cases involve defendants who have blatantly stolen the result of the plaintiff's labours. This has led Courts, sometimes with almost evangelical fervour, to apply the commandment "thou shall not steal". If that has necessitated pushing the boundaries of copyright protection further out, then that has been done. This has resulted in a body of case law on copyright which, in some of its further reaches, would come as a surprise to the draughtsmen of the legislation to which it is supposed to give affect.

This was reworked into an article in the *European Intellectual Property Reporter* (1996) 18(5), 253–260 with the evocative title "Copyright: Over-strength, Over regulated, Overrated", attributing the trend at least in part to powerful and high-profile lobby groups. It might be thought that the high watermark in this process in Australia came with the *Desktop* case[2] where the Federal Court decided that copyright not only subsisted in the white and yellow pages but was infringed by a CD-Rom which took merely the information and none of the formatting, set-out, arrangement or presentation of the copyright works. Special leave to appeal to the High Court was refused in that case on the basis of insufficient prospects of success.

It was conceded by the judgments many times in the *Desktop* case that the issue was not straightforward and was not easy of resolution e.g. in the Appeal Court per Sackville J:[3]

> As the present case demonstrates, policy tensions permeate the law of copyright, especially in the area of factual compilations ... It is this tension between incentive and dissemination ... that underlies the difficulties raised by the present case.

and later:[4]

> I do not suggest that the policy issues raised by *Feist* and indeed by the present case are easy to resolve.

What the *Desktop* case decided was that *Feist*[5] (which rejected sweat of the brow as the basis for copyright subsistence) did not apply in Australia and that instead Australia recognised and enforced copyright of purely factual compilations even in whole-of-universe compilations where the only merit was in the effort expended in compiling the data.

What has developed since the *Desktop* case is that two leading decisions have been published, one in Canada and the other in Australia.

First, in Canada, it had been suggested that the intermediate Court of Appeal decision in the *CCH* case,[6] had rejected

Glen McGowan

Feist and its Canadian adoption in the *Tele-Direct* case.[7] However, the *CCH* case went to the Canadian Supreme Court and there, by a unanimous nine-member decision[8] (on 4 March 2004), decided originality "did" require some intellectual effort. The Court recognised that although an original work under the Copyright Act is one that originates from an author and is not copied from another work, in addition an original work must be the product of an author's exercise of skill and judgment. The exercise of skill and judgment

required to produce the work must not be so trivial that it could be characterised as a purely mechanical exercise. Thus, in that case where CCH published judgments with headnotes, case summaries, topical indexes and compilations of reported decisions, the judicial decisions in and of themselves, without the headnotes, were not original works in which the publishers could claim copyright. Similarly, one might think that in the *Desktop* case, the *CCH* reasoning would result in only the formatting, presentation and appearance of the white and yellow pages to be protectable rather than the mere data itself.

The *CCH* judgment is replete with helpful reasoning on originality and what must be taken in order to infringe. For example, at paragraph 18:

> The plain meaning of the word "original" suggests at least some intellectual effort, as is necessarily involved in the exercise of skill and judgment ... "Original"'s plain meaning implies not just that something is not a copy. It includes, if not creativity per se, at least some sort of intellectual effort ... when used to mean simply that the work must originate from the author, originality is eviscerated of its core meaning. It becomes a synonym of "originated", and fails to reflect the ordinary sense of the word.

This idea of equating "originality" with "origination" was one which permeated the *Desktop* decisions and one which seems to be clearly disapproved by the Canadian Supreme Court.

Further, the Canadian Supreme Court decision does not seem to be limited to peculiar Canadian circumstances or legislation. At paragraph 19 the Court appealed to international standards:

> The idea of "intellectual creation" was implicit in the notion of literary or artistic work under the Berne Convention for the Protection of Literary and Artistic Works (1886) ... Professor Ricketson has indicated that in adopting a sweat of the brow or industriousness approach to deciding what is original, common law countries such as England have "departed from the spirit, if not the letter, of the Berne Convention" since works that have taken time, labour or money to produce but are not truly artistic or literary intellectual creations are accorded copyright protection.

The Berne standards, and indeed the TRIPs standards were said (and accepted) in the *Desktop* case to be satisfied by an industriousness approach to originality because such an approach conferred "greater" protection than Berne, TRIPs or a *Feist* type of approach. Although this is true, it still does depart from the obvious meaning intended in both Berne and TRIPs which is to limit protection to truly original works, not merely works which were not copied. In other words, although countries are obliged to provide the minimum protection in such conventions, equally, they should not significantly tip the balance of rights between authors and the public, as designed in such conventions.

What the *Desktop* case decided was that *Feist* (which rejected sweat of the brow as the basis for copyright subsistence) did not apply in Australia and that instead Australia recognised and enforced copyright of purely factual compilations even in whole-of-universe compilations where the only merit was in the effort expended in compiling the data.
What has developed since the *Desktop* case is that two leading decisions have been published, one in Canada and the other in Australia.

The *CCH* Supreme Court at paragraph 21 also dispensed with the notion that Canadian law or the *Tele-Direct* case were somehow unique and to be regarded as an exception to the applicability of the *Feist* principles. At paragraph 21 the *CCH* Supreme Court found that:

> ... those cases which had adopted the sweat of the brow approach to originality should not be interpreted as concluding that labour, in and of itself, could ground a finding of originality. As Décary J.A. explained: "if they did, I suggest that their approach was wrong and is irreconcilable with the standards of intellect and creativity that were expressly set out in NAFTA and endorsed in the 1993 amendments to the Copyright Act and that were already recognised in Anglo-Canadian law".

Then at para 22:

> As this Court recognised in *Compo Co.*, supra, at p. 367, U.S. copyright cases may not be easily transferable to Canada given the key differences in the copyright concepts in Canadian and American copyright legislation. This said, in Canada, as in the United States, copyright protection does not extend to facts or ideas but is limited to the expression of ideas. As such, O'Connor's J. [in *Fiest*] concerns about the "sweat of the brow" doctrine's improper extension of copyright over facts also resonate in Canada.

And to forcefully conclude the point, the Canadian Supreme Court made the following observations (paras [23]ff):

> When Courts adopt a standard of originality requiring only that something be more than a mere copy or that someone simply show industriousness to ground copyright in a work, they tip the scale in favour of the author's or creator's rights, at the loss of society's interest in maintaining a robust public domain that could help foster future creative innovation ... By way of contrast, when an author must exercise skill and judgment to ground originality in a work, there is a safeguard against the author being over compensated for his or her work ... [para 24] Requiring that an original work be the product of an exercise of skill and judgment is a workable yet fair standard. The "sweat of the brow" approach to originality is too low a standard. It shifts the balance of copyright protection too far in favour of the owner's rights, and fails to allow copyright to protect the public's interest in maximising the production and dissemination of intellectual works ... [para 25] ... For these reasons [the Court concludes] that an "original" work under the Copyright Act is one that originates from an author and is not copied from another work. That alone, however, is not sufficient to find that something is original. In addition, an original work must be the product of an author's exercise of skill and judgment. The exercise of skill and judgment required to produce the work must not be so trivial that it could be characterised as a purely mechanical exercise.

The mechanical exercise by Telstra of gathering the data seems to squarely fit

within this non-original category, as does the inevitable arrangement of that data.

These thoughts tend to accord with those of Dixon J in the *Victoria Park* case[9] at 511:

> But it is not information that is protected in the case of literary works but the manner in which ideas and information are expressed or used ... The work ... must originate with the author and be more than a copy of other material.

This last sentence imposes separate requirements. It is not an example of hendiadys. Sir Owen Dixon was not in the habit of engaging in hendiadys.

Then, the week following the *CCH* decision, the Australian High Court (on 11 March 2004) handed down its decision in *The Panel* case.[10] Importantly, that case considered substantiality for copyright purposes and concluded that it should not be permitted to expand beyond the interests the legislation seeks to protect. Substantiality should have practical operation (para [8]). The Court recited the well known statement made in *University of London Press* v *Universal Tutorial Press* (that what is worth copying is worth protecting) but correctly noted that later authorities substantially tempered this catch cry and referred to the Laddie J passage in *Suto Spin* above. The High Court seems to have caught the idea of copyright going too far by quoting Professor Waddams who identifies the use of terms such as "piracy", "robbery" and "theft" as a tool to stigmatise the conduct of alleged infringers of intellectual property rights, and who describes "the choice of rhetoric" as "significant, showing the pervasive power of proprietary concepts" (para [15]). Further, the High Court identified the aphorism in *University of London Press* as (according to Jacob J) an example of the dangers in departing too far from the text and structure of the legislation. His Lordship said the phrase proves too much because if taken literally it would mean that all a plaintiff ever had to do was to prove copying so that appropriate subject matter for copyright and a taking of a substantial part would all be proved in one go (see para [16]). This seems important because it recognises the separate but related (but not identical) concepts of substantiality and originality. Further, the High Court approved the comments of Sackville J in *Nationwide News* (para [17]) in characterising the *University of London Press* remarks as a "bootstraps" argument.

The High Court confirmed Latham CJ's comments in *Victoria Park* in rejecting the submission that by the expenditure of money the plaintiff had created a spectacle at its racecourse so that it had a quasi-property in the spectacle which the law would protect (see para [25]). Latham CJ had affirmed (*Victoria Park* at p.498) that:

> The law of copyright does not operate to give any person an exclusive right to state or to describe particular facts. A person cannot by first announcing that a man fell off a bus or that a particular horse won a race [*or, one might add, that a person has a particular telephone number*] prevent other people from stating those facts ... What the law of copyright protects is some originality in the "expression" of thought.
>
> [emphasis added]

Helpfully, the High Court has also confirmed some other basic tenants of copyright e.g. para [47]:

> As already emphasised in these reasons, the requirement that an infringer who takes less than the whole of the protected subject matter must take at least a substantial part thereof plays a well established and central part in copyright law. Questions of quality ... as well as quantity arise both in respect of Pt IV copyrights and those copyrights in original works to which Pt III applies.

It might be thought that in the case of a factual compilation, where the infringer has taken merely the bare unformatted data and taken none of the arrangement, presentation or appearance of the compilation, that this requirement would not be satisfied.

It therefore seems that since the High Court rejected special leave in the *Desktop* case (20 June 2003) there is reason to believe that the High Court coming to the issue today might take a different view in light of the *CCH* and *The Panel* cases.

Disappointingly, the Full Federal Court in the *Tamawood* case[11] has recently (31 March 2004) affirmed *Desktop* and the idea that originality is satisfied merely by origination, and substantial part is no different.[12] Neither the *CCH* nor *The Panel* decisions are referred to in that judgment (having been reserved on 20 November 2003 before those decisions were published).

It is to be hoped that this issue is approached afresh by all courts squarely in the near future.

Notes

1. *Autospin (Oil Seals) Ltd* v *Beehive Spinning* [1995] RPC 683 at 700.
2. *Telstra* v *Desktop Marketing* (2001) 51 IPR 257 per Finkelstein I; (2002) 119 FCR 491; 55 IPR 1, Full Federal Court.
3. at para 339 (FCR pp 573–4).
4. at para 427 (FCR p.598).
5. *Fiest Publications* v *Rural Telephone* (1991) 499 US 340, US Supreme Court, principal judgment delivered by O'Connor J.
6. *CCH Canadian Ltd* v *Law Society of Upper Canada* [2002] FCA 187 — 14 May 2002.
7. *Tele-Direct (Publications) Inc.* v *American Business Information Inc* (1997) 154 DLR 4th 328.
8. 2004 SCC 13 — 4 March 2004.
9. *Victoria Park Racing and Recreation Ground* v *Taylor* (1937) 56 CLR 479.
10. *Network Ten Pty Ltd* v *TCN Channel Nine Pty Ltd*. (2004) 59 IPR l (HCA 14, 11 March 2004).
11. *Tamawood Limited* v *Henley Arch Pty Ltd* [2004] FCAFC 78 (31 March 2004).
12. See at para 53 per Wilcox & Lindgren JJ.

Are Some Humans Less Human Than Others?

Alexandra Richards QC

MY time in Arusha, Tanzania, in March to June of last year involved working as a consultant to the Office of the Prosecutors of the International Criminal Tribunal for Rwanda where I was assigned the task of "money and weapons" as requested by the Senior Trial Attorney in the Military 1 case. The Military 1 case (presently part heard) concerns charges laid against Colonel Bagosora (director of services in the former Rwandese Ministry of Defence and effective leader and creator of the provisional government created after the assassination of President Habyrimana on 6 April 1994) and alleged leader and organiser of the genocides with the assistance of his co-accused Brigadier General Gratien Kabiligi, Colonel Anatole Nsengiyumva (who is also said to have directed the slaughter in Gisenyi) and Major Aloys Ntabakuze, commander of paratroopers. These are not the only persons accused of genocide and acts against humanity: so far the Tribunal has apprehended and detained 66 persons out of approximately 81 persons indicted to date. Since the first trials started in 1997 to date, a total of 18 people have now been convicted for their part in the 100 days of killing.

Arusha, known as the gateway to the safaris, is situated in the north of Tanzania close to its border with Rwanda. The ICTR sits in a monolithic concrete structure testimony to Tanzania's socialist era of the 1950s and 1960s. Arusha, and in particular its convention centre, is known as the Geneva of Africa — indeed the place where the Arusha Accords were signed (which I will refer to below).

This story, which has been told and will be told again and again in different ways, surrounds the events which occurred over a period of 100 days commencing on 6 April 1994 and ending in mid July 1994 in Rwanda when approximately 800,000 people were slaughtered as part of a systematic campaign of eradication of an ethnic group.

Alexandra Richards QC.

By way of pictorial detail, Rwanda is a tiny country of approximately 26,000 sq km huddled inland on the east coast of Africa and bounded by Tanzania to its south east, Burundi to the south, the Central Democratic Republic of the Congo (formerly Zaire) to the west and Uganda to its north. It is a land of hills rather than mountains, with the country lying between 1000 to 2000 m above sea level and the Rift Valley to its west occupied by Lakes Kivu and Tanganyika.

Rwanda's popular name is "the land of the 1000 hills": seen from one hill as far as the eye can see the land is taken up by hills of similar height to the east, south, north and west. The country has an average annual temperature of 18 degrees C. Its unique geographical and ecological environment has seen agriculture and the Rwandese population prosper with "African wildlife" long ago departed (but for the gorillas).

Once described as the "Garden of Eden" families comprising the basic social unit of this highly populated society prior to 1994 lived side by side in small compounds with the whole of the land described as a garden being tilled and sown. There are three ethnicities to be found in Rwanda in proportions prior to the events of the 1994 genocide as to Hutu approximately 84 per cent, Tutsi approximately 15 per cent and the Twa approximately 1 per cent.

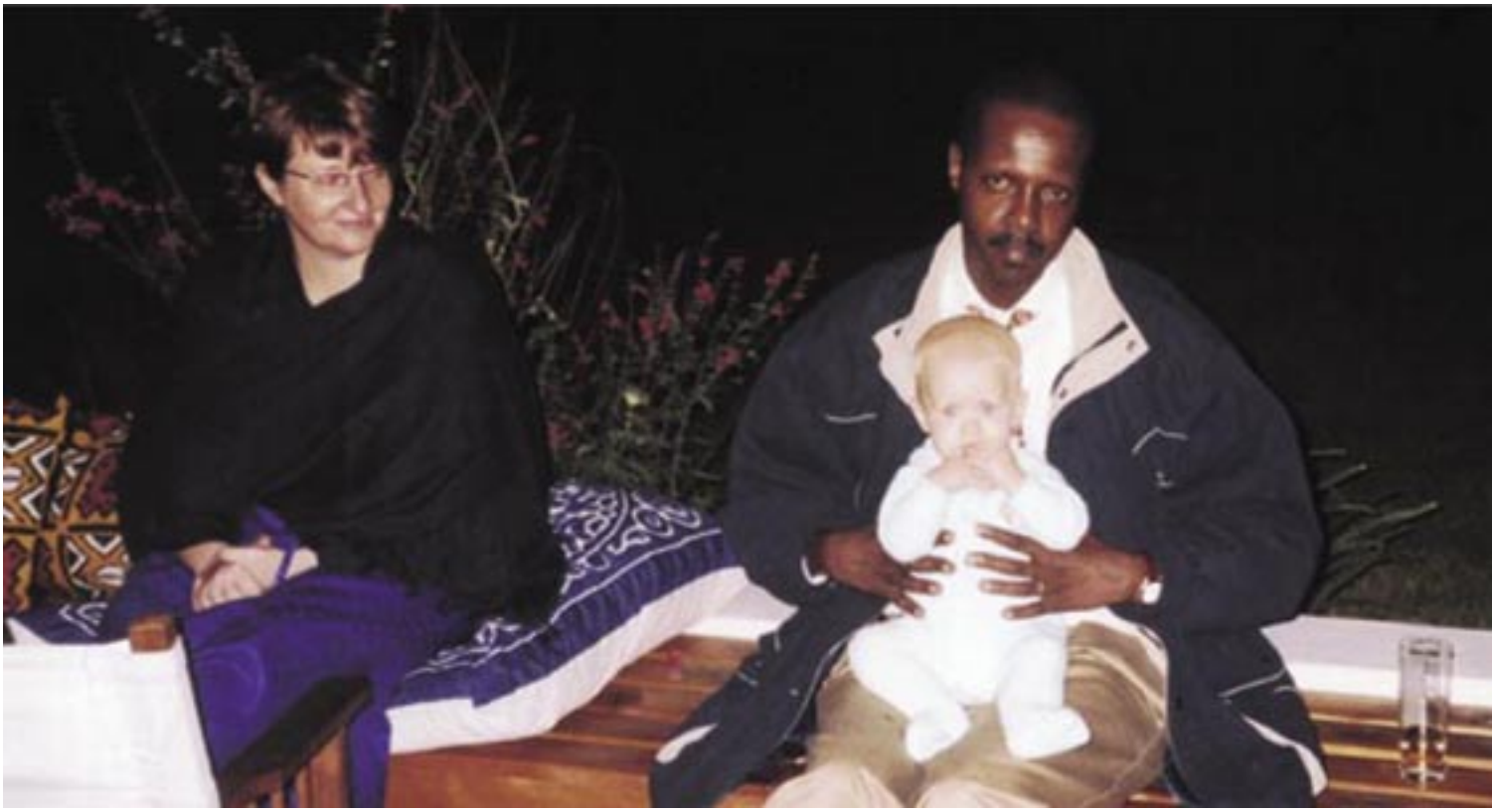
This paper is not an historical discourse of the Rwandese kingdoms of pre-colonial time, colonial occupation by the German, Belgian and French or for that matter any in depth treatment of the myriad of factors which culminated in wholesale slaughter of men, women and children with those proactive in the killings necessarily as many as those killed.

The genocide was sparked by the death of the President of Rwanda, a Hutu, Juvenal Habyarimana when his plane was hit by a missile attack over Kigali airport on 6 April 1994.

Within hours of the attack, a campaign of violence swept over the capital of Kigali and then throughout Rwanda and did not subside until three months later. The scale and speed of the slaughter was astounding.

This century has witnessed ethnic tension in Rwanda. But this was not always the case. The animosity grew between the groups over the colonial period. Indeed, the two ethnic groups had lived in harmony together for centuries, speaking the same language, inhabiting the same areas and sharing the same traditions.

When the Belgian colonists arrived in 1916 they saw the two groups as distinct ethnicities both in physical terms and intellectually and declared as superior the Tutsis over the Hutus, producing identity cards which classified people accordingly. Not surprisingly, the Tutsis were content to be so preferred and for the next 20 years they enjoyed better jobs and educational opportunities than their neighbours. They came to occupy the positions of authority whilst their neighbouring Hutus were relegated to lowly occupations and denied opportunities of advancement.



UN lawyers Andra Mobberley (NZ), Richard Haragyesi (Uganda) with baby Oliver and Drewe White (Canada).

Resentment sprung amongst the Hutus which gradually built up and culminated in a series of riots in 1959. More than 20,000 Tutsis were killed and many more fled to the adjacent countries of Burundi, Tanzania and Uganda.

In 1962, Belgium relinquished power and granted Rwanda independence but not before they, on the crest of a newfound philosophy of so-called humanitarianism renounced the separation of ethnicities and the divisions they had caused, and endeavoured to bestow upon the Hutus equality. The Hutus in any event were in a large majority and over subsequent decades the Tutsis became the scapegoats for any difficulties suffered by the young independent nation.

At the same time, Tutsi refugees in Uganda were forming the Rwandan Patriotic Front (the RPF). Their aim became one to overthrow the Hutu Government and secure their return to Rwanda.

In time, Habyarimana as the Hutu President came to exploit this threat in garnering Hutu support for his government and political party by managing to persuade many but not all moderate Hutus sympathetic to the Tutsi people. In doing so he accused the Tutsis resident within Rwanda of being accomplices with and sympathetic to the RPF collaborators.

In August 1993, under international pressure to democratise (particularly from the USA) after months of negotiation a peace accord was signed between Habyarimana and the RPF whereby the Government and army were to be divided and represented by Hutus as to 60 per cent and Tutsis as to 40 per cent.

But the Arusha Accords had only been agreed to by the Hutu government under threat of funding withdrawal. There was no genuine preparedness on the part of the Hutu Government to relinquish their power and as the appointed date drew nearer the situation became increasingly uncomfortable and exploded with the shooting down of the President's plane on 6 April 1994 killing Habyarimana and the newly appointed Burundi president who was also on board.

A part of my work involved a consideration of the particular arms available to each of the Hutu and Tutsi forces in an endeavour to establish the source.

Who was responsible for the missile which shot down the plane has remained an intriguing question. A part of my work involved a consideration of the particular arms available to each of the Hutu and Tutsi forces in an endeavour to establish the source. France also has had its own independent inquiry into the establishment of that source and although it had been widely assumed that the Tutsis were responsible there is a considerable body of thought that the inner Hutu strongholds fearing that Habyarimana had gone too far with the Arusha Accords were responsible, using the incident as evidence of treason and as an additional tool to incite the Hutu people to arms for fear of their own lives. Both the Hutu army and the RPF had missile capacity and indeed both had the use of the specific missiles used in the attack on the President's plane.

Whoever was responsible, however, the outcome was both instantaneous and catastrophic. The genocide was carried out by the Hutus largely by hand with the use of machetes, spades and clubs and largely by the militia known as the Interahamwe ("those who fight together") which comprised, in the main, young boys and men who were unemployed and pleased and

On the road to Ngorongoro Crater.

Mother and child, Stonetown.

proud to be given a uniform, a rifle, food, beer and cigarettes as their recompense. Local officials assisted in rounding up victims: Tutsi men, women and children and any moderate Hutus. All children had to be annihilated in order that the race could be expunged. They were killed in churches, stadiums and hospitals. Clergy colluded in the crimes.

An experience common to the lawyers in the OTP in and during preparation for trial is the surprise discovery of a diminution in their minds of the numbers of victims involved in the relevant massacre: first, because their previous prosecution experience in their country of residence had in the main involved one or a few victims and, secondly, because when one is referring to a particular massacre where thousands of people are killed it understandably becomes an almost impossible task to maintain a mental image of the numbers of victims involved. An arithmetical exercise, however, demonstrates the scale of the killings: to kill 800,000 people in 100 days one would need to kill approximately six persons per minute every hour of every day for 100 days to arrive at that number. Of macabre irony, this was the precise number that the Interhamwe had been instructed and trained to kill: the imperative of their training was the killing of 1000 Tutsis every 20 minutes.

Having given some background and established a scale for the killings I now wish to ponder the imponderable and the theme of this paper: are all humans human or are some more human than others? This question was posed at an address given in November 2003 to the Carnegie Council for Ethics and International Affairs by the French Canadian General Romeo Dallaire who was the commander of the United Nations Assistance Commisssion to Rwanda (UNAMIR), the UN peacekeeping force, numbering some 2500 troops present in Rwanda at the commencement of the killings. But UNAMIR's mandate rendered it and them totally and utterly powerless: they were not able to act otherwise than in self-defence.

I acknowledge my admiration for General Dallaire who had, on 11 January of 1994, sent out an urgent facsimile and alarm to the UN peacekeeping administrators in New York. General Dallaire was in receipt of information from a credible informant within the higher echelons of the Rwandese Government army alerting UNAMIR to the existence of large caches of weapons stockpiled and hidden within the cellars and basements of the buildings of Kigali, Rwanda's capital.

In a secret inspection Dallaire and Colonel Luc Marchal, the commander of the Belgian force contingent of UNAMIR, had become convinced that the type and number of stockpiles of weapons, if used in the manner informed, would ensure mass killings of Tutsi people by Hutu extremists and the occurrence of a veritable bloodbath. The Commanders were also informed as to the training and arming of a civilian army, the militia drawn from the unemployed youth.

In short, all of Dallaire's information proved to be true three months later.

On the same day as Dallaire urgently communicated to New York his information he received a response from Kofi Annan, the then head of UN peacekeeping, signed by Iqbal Riza, directing him not to raid the arms caches as planned but instead to go directly to the President and pass on the information received from the informant, despite it being the President's own inner circles who were planning the massacres. So much occurred and thereafter despite numerous requests by Dallaire for reinforcements and the power to seize weapons (let alone defend the lives of Tutsis being slaughtered after the massacres commenced) all that the UN managed to direct under the auspices of the Security Council was the withdrawal of forces and the effective abandonment and betrayal of hundreds of thousands of Tutsis and moderate Hutus.

There is little doubt (indeed no denial) that each of the member states of the Security Council had access to reliable and accurate information before the killings commenced on 6 April 1994 and certainly thereafter.

As Ambassador Heinbecker of the Canadian Department of Foreign Affairs and International Trade at the Carnegie Council stated:

> In January 1994, General Dallaire sent out the alarm with credible information of an impending catastrophe. The United Nations and the membership of the Security Council failed General Dallaire, it failed the people of Rwanda, and it failed humanity. "Never again" was what we had all said [in relation to the Jewish Holocaust]. General Dallaire told us that "never again" was happening again, and the Security Council played word games with the Genocide Treaty. It was one of the darker moments of history.

And on this subject of word games, the Convention for the Prevention and the Punishment of the Crime of Genocide which was voted into existence by the General Assembly of the United Nations in 1948 contains this definition of genocide (as amended and it stands today). Four constituent elements must be present:

- a criminal act;
- with the intention of destroying;
- an ethnic, national or religious group;
- targeted as such.

In the event of a case of genocide signatory countries to the Convention agreed to intervene. It is with some pathos that the transcripts demonstrate the considerable lengths employed to avoid the use of the singular word "genocide" by the Clinton administration of 1994 in preference for the term "acts of genocide" in relation to the catastrophies in Rwanda in order that the Convention's requirement for the US to act by intervention should not be triggered. As Samantha Power states:

> Although everybody talked about the systematic killing and extermination of the Tutsi, "G" was not bandied about in nongovernmental circles until two weeks into the genocide. Most people who noticed that extermination and cared about it were afraid that if they used the "G" word, it was like crying wolf — that somehow if it proved not to be genocide, you wouldn't get invited to the next meeting, that you would have exaggerated your claim; it's better to stick to the facts as they were understood.
>
> At the higher levels there was a reluctance to use the word for fear of triggering American obligations under the Genocide Convention, which were read, actually wrongly, to demand military intervention in the face of genocide. In fact, what the Convention demands is that the signatories undertake steps to prevent and punish.
>
> So by "undertake steps", you could have done many things. We could have denounced at a high level, threatened prosecution, frozen foreign assets, imposed an arms embargo, rallied troops from other countries, created safeguards, done radio jamming. But the fear was "use the word 'genocide' and you have to go the whole way."

I cite an example of this transcribed in PBS's "Frontline — The Triumph of Evil" and quoting Christine Shelly, State Department Spokeswoman for the US, in interview which took place on 10 June 1994:

> **Christine Shelly, State Department Spokeswoman:** [June 10, 1994] We have every reason to believe that acts of genocide have occurred.
> **Reporter:** How many acts of genocide does it take to make genocide?
> **Christine Shelly:** That's just not a question that I'm in a position to answer.
> **Reporter:** Is it true that you have specific guidance not to use the word "genocide" in isolation, but always preface it with these words "acts of"?
> **Christine Shelly:** I have guidance which-which — to which I — which I try to use as best as I can. I'm not — I have — there are formulations that we are using that we are trying to be consistent in our use of. I don't have a categorical prescription against something, but I have the definitions. I have a phraseology which has been carefully examined and arrived at to —

And why did the member states of the Security Council wish not to intervene or at least morally feel inclined to act? Once again there are myriad reasons, economic and political, which may explain the different member states' reluctance (I except, in particular, Czechoslovakia). In the US, for example, an election was imminent and the torture and mutilation of 18 US armed personnel in October of 1993 in Somalia shown publicly on CNN had produced American outcry as to why Americans were being sent to war in a country in relation to which the US had no interest. The war in Bosnia was raging at the time of the Rwandese killings. The world outlook was murky and complicated, full of self-interest, whether of a commercial or political nature or both. General Romeo Dallaire, speaking on the launch of his book *Shake Hands with the Devil: The Failure of Humanity in Rwanda*, said:

> …. instead of recommending sending troops to Rwanda, a nations' officer came to me and said they wouldn't send them because there was no strategic interest, no strategic resources. And, in fact, they said, "The only thing that's here are humans."

And as Samantha Power states:

> We had had the Sarejevo Olympics. If we had had the Olympics in Kigali at some point, that might have created a humanizing. The racism, or the "otherism", or the writing-off of provincial places that are out of our sphere of influence, is a proxy for something else, part of which is just "they're not like us". But part of it is that we've never been there; we don't have a personal connection. There's nothing that can take them out of the realm of "the other" and make them human.
>
> And the victims — Armenian Christians, Jews, Tutsi, East Timorese, Cambodians, Bosnian Muslims, potentially Chechnyans — are people of all kinds of shapes, colors, sizes, geographic zones.
>
> If you don't want to do anything, if the risks of getting involved on humanitarian grounds are so much greater than the non-costs of staying out, then you're going to be all the more prone to see difference rather than similarity.
>
> Whiteness had something to do with it, but I would argue that there are other factors, and we did characterize those people who were dying as tribes. It was a

problem from hell about which we could do nothing.

Regardless of the multiplicity of factors, acknowledging the fact of the genocide was to take some time. It took the Security Council members until April 2000 before discussions were held and gestures of regret were made. In total their contribution had been to direct that the peacekeeping security forces be withdrawn, leaving 200 army personnel in Rwanda and, of course, a total evacuation of expatriates was undertaken. The UN Secretary General, who by 1994–1995 was Kofi Annan, apologised for the UN's part of the failure but with the important but unfortunately accurate caveat that it can only be as good as its member states direct it through the Security Council to act and resource it accordingly.

So the world failed Rwanda. Boutros Boutros-Ghali had been far more reticent and unavailable in his capacity as the UN Secretary General during the Rwandese slaughters, stating: "Such situations and alarming reports from the field, though considered with the utmost seriousness by United Nations officials, are not uncommon within the context of peacekeeping operations." Boutros Boutros-Ghali's presence and visibility during the Rwandese catastrophe and in relation to that topic was one that can only be described as low level.

During my time at the Tribunal and in acquitting my task to research and consider the outcome of investigations of the money trails and arms deals pacts entered into by the former Habyarimana Hutu Government I read in particular public documents and publications which bore witness to a past policy of reluctance on the part of the Egyptian Government to supply arms to the Habyarimana Hutu Government. In approximately 1991 Rwanda's foreign minister was sent on a personal mission to Egypt for the purpose of endeavouring to reverse this policy. There he conducted personal negotiations with Boutros Boutros-Ghali (then Egypt's foreign minister) which culminated in Ghali's intervention such that the arms policy was reversed and Egypt entered into its first Rwandese arms contract worth $US6 million. A year later Boutros Boutros-Ghali was to be elected Secretary General of the UN.

But I return to General Dallaire's question as to whether there are some humans who are less human than others. General Dallaire, prior to his mission to Rwanda, was an atheist. He is famously reported as having stated on his return from Rwanda: "I know that God exists because I met the devil." I pondered this statement for some time on my return. It had not been an easy task examining the witness statements and photographs. I learned, in particular, that in addition to the obvious tools of war such as weapons and propaganda, the weapon of fear propagates loathing and a desire to kill the other person before he or she kills me. The more imaginative and extreme the forms of torture, the greater the fear campaign and the more effective it is. Popular radio played top hits inciting Hutus to kill their Tutsi neighbours. The prevailing method of killing (as the photos evidenced) was to slice first the archilles tendon so that the victim could not run away. The Nyaborongo River, a tributary of the Nile, turned red and its shores rose metres as bodies dumped within it flowed into neighbouring countries.

A few scenes remain indelibly in my mind. One account, in particular, which disturbed my somewhat feminist view of women as pacifists: it concerned a young Hutu mother whose neighbour and best friend was Tutsi: the Hutu mother with her 12-month baby straddled on her back chased her Tutsi neighbour, who similarly was carrying her 12-month baby on her back, hacking the baby and her mother to death with a machete.

I had to grapple with scenes and knowledge of evil which I had not previously considered man or woman capable of. Somehow there had to be a counterbalancing of the evil so that one's belief or conviction in the continued existence of humans and in humanity itself could be restored and maintained.

There has been a considerable tendency and body of writing which refers to the dark continent: where tribalism and pagan practices thrive, cannabalism is rife and the African native is generally primitive, dark and ignorant. This view, challenging notions of political correctness, has its appeal: how else are the atrocities that seem to abound in Africa, in particular, to be explained?

I had to grapple with scenes and knowledge of evil which I had not previously considered man or woman capable of. Somehow there had to be a counterbalancing of the evil so that one's belief or conviction in the continued existence of humans and in humanity itself could be restored and maintained.

In his book titled *The Graves are Not Yet Full*, New York reporter, Bill Berkeley analyses the West's endeavour to find cause and effect for Africa's apparent chaos and brutality. He refers to his personal experiences on the Continent and cites the massacres and killings of Rwanda, the Congo, South Africa, Liberia and the Ivory Coast amongst others. "Drawing out fundamental similarities" in these conflicts Bill Berkeley "builds an argument that blames despotic leaders for large-scale violence. Without the ruthless machinations of tyrants in pursuit of power and loot, Africa's ethnic pluralism alone would not make its societies combustible. But as despots struggle to outflank their opponents or keep their regimes afloat without Cold War patronage, they find it expedient to stoke ethnic rivalries and spawn anarchic conditions. That way, they absolve themselves. 'Tribalism' is thus no less orchestrated in Africa than in Serbia or other places where dictators have played the ethnic card."

In a similar vein an article in a June 2003 edition of the *Guardian* advanced the view that Africa, having no infrastructure, technology or manufacturing skills and with all of its mineral resources being vested in Western interests was and could only be in the business of war, there being nothing else.

In his extraordinary and formidable opus, *Africa, a Biography of the Continent*, John Reader raises the same theme but takes the debate in a different direction, having considered the issue from a paleontological, geographical and historical context. In his preface he comments:

> That people have behaved barbarically in Africa is undeniable but, as events in other parts of the world have demonstrated time and again this is not an exclusively African tendency. Indeed, civilisation — as an expression of cultured behaviour — is a very transitory feature of the human story. Civilization is not a predetermined consequence of human progress, as the Victorians believed, with the white Anglo Saxon leading the way, the rest of the world following in their wake, and the Africans straggling several centuries behind. On the contrary, civilisation is more like a protec-

tive skin of enlightened self-interest that all societies develop as they learn to regulate their interactions with the environment, and with other people to the long term benefit of all parties.

The Reader theory, although it more comfortably sits with concepts of equality, is not without difficulty, and to posit that civilisation is but a mere veneer also challenges our dearly held Western notions of civilisation.

However, John Reader in his excursis qualifies the African circumstances, stating that Africa throughout its history has been woefully misunderstood and misused by the rest of the world, citing Joseph Conrad's description of Belgian occupation in the Congo as "the vilest scramble for loot that ever disfigured the history of human conscience". Reader tracks through the history of the export of slaves over four centuries until finally when the white man decided he could no longer in conscience tolerate such trade indigenous Africans continued within their own geographical confines the European precedent which had been firmly established. Importantly, it is to be borne in mind that being a poor country the major commodity with which to bargain and prosper was labour. In payment for the slaves John Reader estimates that over four centuries the white man provided and imported into the country 20 million guns, finally culminating in a continent which was to be carved up without rational basis into a fragmented series of states agreed between white men at European conventions in Europe where no African person was present. A survey has shown that no fewer than 177 ethnic "culture areas" in Africa are divided by national boundaries, with every land boundary cutting through at least one.

In May 1995, a Catholic theologian in Rwanda, Laurien Ntezimana confessed to having been shocked by the genocide in Rwanda but not astonished:

> People live behind a mask, he said, which the winds of history occasionally blow aside. The genocide was shocking, but only those who were naïve about human nature could be astonished. He told an inquiring reporter: "I have the impression that you have not yet discovered man, either in his grandeur or in his misery; he can always surprise us."

I find the statement resounds of reconstruction after the event but I for my part can rationalise no other way with which to describe the evil and depravity of the events we continue to witness in this century.

However, I find to my misfortune that I am able to empathise more with the following statement of Retired General Romeo Dallaire who has now completed his testimony in the Military 1 case. At the Wilfrid Laurier University Lecture he delivered on 6 November 2003 he had this to say:

> I'm unable to reconcile this life with the reality of Rwanda — the fighting, the dying, the crass barbarism. Too often, I reel back and find myself despising this artificial life and wanting to go back into the horrors. My real dream is to become a pilgrim in Rwanda, just to walk the hills and valleys, to give a little hand here and a little hand there. That, I think is where I'll find solace, among all the spirits and the carcasses.

Our view of the world and human capacity is limited and naïve: not only a lack of appreciation of the depths of depravity that man, woman and child can descend to but also, to our loss, the heights that man women and child can aspire to in their compassion and courage when called upon to do so.

And it does seem that once one has learned and experienced the horrors that humans are capable of, the world we live in appears as artificial, somewhere in the middle of an extremely controlled mainstream propped up by media, insulated by Western television experiences of "life" or "reality life". On my return I experienced Australia as a sheltered workshop: not only were we privileged beyond comprehension on a scale that residents of Rwanda and its neighbouring states could only imagine and dream of after seeing Western television, but that our view of the world and human capacity is limited and naïve: not only a lack of appreciation of the depths of depravity that man, woman and child can descend to but also, to our loss, the heights that man women and child can aspire to in their compassion and courage when called upon to do so.

As General Romeo Dallaire questioned his American interviewer:

> General Dallaire: On the morning of April 7 — and remember that on April 6th the presidential plane was shot down and the killing commenced — your ambassador to the United Nations said to the Security Council: "We will not get involved in Rwanda, and we will support no one who does."
>
> Many of these nations do not put our countries at risk. I mean Canada was not at risk with Rwanda. So the real question is: is the Western world prepared to spill blood for advancing human rights in far-off lands that mean nothing, except for one small fact: they are exactly the same as us. People are not different; the circumstances are different.

Driven to Drink

A worker in receipt of weekly payments under the Accident Compensation Act due to incapacity from a work-caused injury was referred by the WorkCover agent to a rehabilitation service. As part of his rehabilitation the worker was required to demonstrate that he was able to complete a letter applying for employment. Perhaps exhibiting some frustration with his plight his offering was:

> Dear Sir or Madam,
> I wish to register my interest in any present or future positions your company may have for a wine taster.
>
> I am currently employed by XYZ Company, however, I have not actually worked there since July 2002 due to injuries sustained at work.
>
> Although I do not drink alcohol, I have been told it is good for numbing pain, and seeing as I have been in pain for a year, and on WorkCover (and in the care of a rehabilitation provider) to help me find a job, despite the fact that I am certified by my doctor as being unfit to return to work, I am considering becoming an alcoholic. I note from your ad in the yellow pages you make wine. I have bills to pay. It seems to me to be to our mutual benefit for you to employ me should you ever be in the need of someone to drink your wine for reasonable recompense.
>
> A resume and references are attached.
>
> Thank you, in anticipation of your most earnest consideration.

The rehabilitation service described the worker's offering as "a very inappropriate" letter for prospective employers!

The Relevance of Merits When Extending Time

Applications to Extend Time for Procedural Defaults in Civil Proceedings

Rex Patkin

In considering the law governing applications to extend time for procedural defaults in civil proceedings a question arises as to whether the respondent, in opposing the application, can argue that the time should not be extended as the proceeding is hopeless, futile and therefore lacks merit.

POWERFUL ARGUMENT

IT is a powerful argument that the court should not extend time to perform a step in a proceeding which is hopeless, futile or has no merits at all. In *Hughes* v *National Trustees* Mclnerney J. says:

> consideration of possible injustice to the respondent resulting from the disturbance of his seemingly vested interest in the maintenance of the judgment involves a consideration of the prospects of success of the appeal if the extension be granted. For it would be unjust to the respondent to put him to the trouble and expense of an appeal if the judgment sought to be attached is plainly right ...

Rex Patkin.

If this argument is correct then the question of merits is always relevant to an application to extend time in a proceeding. In the Queensland Civil Practice the following statement appears:

> The court will also examine the merits of the case to ascertain whether there is any useful purpose in extending time.

In *Foreman* v *Federal Commissioner of Taxation* Hunt J. says:

> The merits of the proposed appeal are of course relevant to the exercise of my discretion to grant an extension of time within which the taxpayer may file his appeal, In the sense that no extension would be granted where the proposed appeal itself would obviously be futile or is bound to fail.

EXISTING AND COMMENCING A PROCEEDING DISTINGUISHED

A problem arises with the statement of law that merits is always a relevant issue in applications to extending time when some statements of law distinguish the situation between "commencing" a proceeding and an extension of time in an "existing" proceeding. Thus it is said in an "existing" proceeding merits is not a relevant issue, or as said by Brennan and McHugh JJ. in the *Jackamarra* case:

> The merits of the appeal do not furnish the criterion for granting or refusing an extension.

EXAMPLES OF APPLICATIONS IN RELATION TO COMMENCING A PROCEEDING

What are some examples of situations involving steps in "commencing" proceedings? Practitioners will be familiar with Section 23A applications by a party who seeks to extend time to commence a proceeding pursuant to the Limitations of Actions Act. Then applications under Part IV of the Administration and Probate Act, the so called TFM application, must be made within six months of probate being granted. In this paper I am assuming there is no provision in the legislation, rules of court or order relating to merits. Then there is the commencement of an appeal. In the cases considering the law there are a number of applications in relation to commencing an appeal out of time. Acts and rules of court will generally provide a time limit for the appellant to file, and maybe also to serve, a notice of appeal by a specified period after the decision.

Then parties may also commence a proceeding within an existing proceeding out of time limited in the rules of court, for example, the counterclaim, third party notices and notices of contribution between defendants. There appears little authority upon the question of merits in such applications.

However, in the 1988 Supreme Court Practice, the white book in the United Kingdom, at page 238, it is said in relation to granting leave to issue a third party notice:

> and the court will not, in granting leave, consider the merits of the claim.

This statement of the law thus conflicts with the general proposition of law that merits is a relevant consideration in applications to extend time when commencing a proceeding. The editors state subsequently that the question of merits can be considered later at a directions hearing. At the original application to extend time the only respondents may be the plaintiff and any other defendants. At the directions hearing the third party will take part in the hearing.

APPLICATIONS TO EXTEND TIME IN EXISTING PROCEEDINGS

Then practitioners are familiar with applications in "existing" proceedings to extend times to serve pleadings, particulars, affidavits of documents and answers to interrogatories. Other examples arise where orders are made for parties to file and serve affidavits by a certain date or pay money into court and attend medical examinations.

THE JACKAMARRA CASE

In the *Jackamarra* case the plaintiff's proceeding was dismissed and a notice of appeal was filed promptly. However, there was a default by the appellant in subsequent steps, in failing to enter the appeal for hearing in time pursuant to the rules. The appellant satisfied the three factors of explaining the delay, providing an explanation and there was no prejudice to the respondent. However, the Western Australian Full Court held that the appeal lacked any real prospect of success, so the appellant's application to extend time for a step in the appeal process was refused. The High Court, by a majority of 3–2, reversed the decision. However, all judges held that merits was a relevant factor.

Since the appeal had been "commenced" the question arises whether merits could be an issue? If the law is that as the appeal had commenced merits were irrelevant, then the question of merits should have been ignored in the application to extend time in this application. Thus the simple rationale that merits is irrelevant for a step in an "existing" proceeding is called into doubt by this decision.

The decision in *Jackamarra* is not clear in relation to the role merits plays in the application to extend time. It was clear that the appeal process had convinced and the application to extend time is in relation to a step in an "existing" proceeding. I first of all propose to analyse those parts of the judgment, with selected statements, that seem to support the case that in an "existing" proceeding merits is irrelevant.

STATEMENTS OF LAW THAT MERITS IS IRRELEVANT IN AN EXISTING PROCEEDING

Kirby J refers to two cases, *Esther* and *Palata*, where the applicant for an extension of time had to establish the proceedings was "arguable", and says:

> I wold point out that *Palata Investments* was concerned with an application for an extension of time for appealing, not for extending the period within which an appeal, already lodged within time, might be entered for hearing. The distinction is important.

Brennan and McHugh JJ, on page 278, draw a distinction a number of times between proceedings commenced, as they say, "already lodged" and a proceeding yet to be commenced, or as they say extending time for appealing or lodging of an appeal. They say:

> When the application for an extension of time merely concerns the doing of an act in respect of an appeal already lodged, as the present one does, an even more liberal approach is justified. The court is dealing with a pure procedural question — should time be extended. The merits of the appeal do not furnish the criterion for granting or refusing an extension of time. The appeal is already filed in court.

Then on page 279, their Honours say, after considering *Palata*'s case where the application was to extend the time to commence the appeal:

> But once an appeal is lodged different considerations apply. An appeal, honestly lodged by a suitor within time, must be investigated and decided in the manner appointed.

Merits is a relevant factor in all applications but for existing proceedings the test is less stringent.

Then later their Honours say:

> The merits are examined at the end of the process, not during its course. It would lead to strange consequences if consideration of the merits was a prerequisite for extending the time for each and every step in the conduct of the appeal, just as it would lead to strange consequences if consideration of the merits was a factor to be determined in considering extensions of time for every step in ordinary actions.

I am of the opinion that these statements made by Kirby J and Brennan and McHugh JJ clearly refer to the distinction between extending times when commencing a proceeding and in existing proceedings. However, when the entire judgments are read the distinction is not that merits is irrelevant in existing proceedings, but that on the contrary, it is a relevant consideration; but the test is different. Thus merits is a relevant factor in all applications but for existing proceedings the test is less stringent. As Kirby J would say there is a broad evaluation, or the scope for review is necessarily more limited. Brennan and McHugh JJ would say a more liberal approach is justified.

MERITS IS ALWAYS RELEVANT

However, Brennan and McHugh JJ seem to being saying three different propositions of law:

1. Merits in an existing proceeding is not considered in an application to extend time.
2. Merits in an existing proceeding is not considered in an application to extend time but can be considered in another application by the respondent to dismiss summarily, or in a dismissal for want of prosecution or pursuant to the rules.
3. Merits in an existing proceeding can be an issue if the court is satisfied that the proceeding is so devoid of merit that it would be futile to extend the time. Their Honours say on page 279:

> But once an appeal has been lodged different considerations apply. An appeal, honestly lodged by a suitor within time, must be investigated and decided in the manner appointed. If the appeal is frivolous, it can be disposed of summarily. If there is gross delay in prosecuting the appeal, it may be dismissed for want of prosecution. If it fails to comply with a particular rule, the rules of court may entitle the respondent to

> strike it out. But the merits of the appeal are not a relevant consideration where the application concerns an extension of time for taking a step in prosecuting the appeal unless the appeal is so devoid of merit that it would be futile to extend time. The merits are examined at the end of the process, not during its course. It would lead to strange consequences if consideration of the merits was a prerequisite for extending the time for each and every step in the conduct of the appeal, just as it would lead to strange consequences if consideration of the merits was a factor to be determined in considering extensions of time for every step in ordinary actions.

What is interesting is that when Kirby J initially introduces the question of merits His Honour does not draw any distinction between commencing a proceeding and existing proceedings. His Honour says:

> The party seeking the indulgence bears the burden of persuading the decision maker to grant its request. A consideration relevant to that exercise is whether the case is arguable. If it is hopeless, unarguable or bound to fail, the request for an extension of time will be refused. However, this is basically because to grant it would be futile.

Then His Honour refers to the statement by Denning MR who said in *Mehta*'s case it involves an outline of the case, and says:

> This description accords with my own experience of Australian practice.

Then Gummow and Hayne JJ (dissenting) say there is no difference, merits are relevant whether the proceeding has commenced or not, and the decision by the Full Court was correct to reject the application to extend time as the appeal was without merit.

There is no doubt that in relation to merits a majority of the judges recognise the distinction between an "existing" case and extending steps in a "new" proceeding. However, the judges are concerned about the justice and logic of extending time in a hopeless situation. So they have their cake and eat it too. What they are saying is that for an "existing" proceeding that is obviously hopeless time should not be extended. Then how does the lawyer explain the statement of Brennan and McHugh JJ quoted above that merits should not be considered in an existing proceeding? Thus the danger of that quotation taken by itself and relied upon in a submission to the court. What must be appreciated is that there is a variety of methods to deal with the hopeless case. This was mentioned by Brennan and McHugh JJ.

THE PROBLEM OF THE HOPELESS CASE

It is a simple matter of justice and logic that the time to perform a step should not be extended if a "contemplated" proceeding is hopeless or futile. Thus where the appellant is late in a procedural step commencing the appeal, for example filing the notice of appeal, the respondent's lawyers seize the opportunity, and require the appellant to establish that the appeal is arguable. The judges state the obvious, it is wrong for an appellant to obtain an extension of time where the appeal is hopeless; it is unjust to a defendant to have to defend a hopeless case. As regards administrative efficiency it is a waste of court resources to enable a hopeless case to proceed to a hearing and decision. This principle is just and logical. However, the problem is that the same argument applies to an "existing" proceeding.

It is a simple matter of justice and logic that the time to perform a step should not be extended if a "contemplated" proceeding is hopeless or futile.

MERITS AND THE APPEAL PROCESS

Thus a problem arises as a matter of logic in the law. The logic of the hopeless case very quickly breaks down if a party in "commenced" proceedings need have no concern of merits when making an application to extend the time. Thus a right to appeal can proceed to a hearing no matter how hopeless the appeal appears to be. The question that arises is whether the only solution is for the respondent to have the appeal heard as soon as possible. In some situations security for costs may be obtained.

THE PROBLEM OF THE HOPELESS PROCEEDING

It must be appreciated the problem of the hopeless proceeding is dealt with in a variety of ways in the rules of court and the court's inherent jurisdiction. The plaintiff can proceed pursuant to rule 22 by way of summary judgment where the plaintiff believes there is no arguable defence. Then a defendant may bring an application for summary judgment pursuant to rule 23.03. If a pleading does not disclose a cause of action or a defence, a pleading summons may issue pursuant to rule 23. Likewise rule 23 can be invoked as the power to strike out a pleading which is scandalous, frivolous, vexatious or an abuse of process.

DO THE RULES OF COURT DEAL WITH THE APPEAL PROCESS?

A question does arise as to whether these rules, or some of them, apply to the appeal process. Is the appeal a "proceeding" to which the summary judgment rules apply? Is rule 23.03 available to the respondent? Can the respondent to an appeal argue it is a defendant within rule 23.03 and as the appeal is hopeless the respondent has a good defence on the merits? Is the notice of appeal to be characterised as a "proceeding" within rule 23.01? It is an abuse of process for the court to permit an appeal which is futile. But is it an abuse of process within rule 23.01(1) (C)? These issues are considered in another paper.

If there are doubts about the power of the court to consider the merits of an appeal prior to the hearing, that is determine the matter summarily, then the rules may have to be amended to make this power clear. Of course if the matter is clear that the court has power pursuant to its inherent jurisdiction then the rules can be said to be irrelevant.15 In *Jackamarra*'s case Brennan and McHugh JJ state that if the appeal is frivolous it can be disposed of summarily.

THE MERITS CRITERION HAS ITS DIFFICULTIES

One of the real difficulties arising in this area of the law is how the practitioners and the court consider the issue of merits in the application. There is a variety of problems in terminating a proceeding on the grounds that it lacks merits. The common criterion is whether the proceeding is "arguable". To determine if the appeal is arguable gives rise to a variety of problems. The question of whether the appeal is arguable is no easy matter. It has been said the court should not spend time determining if a matter is arguable. It is said that the court should be able to quickly determine if a matter gives rise to an arguable case. To what degree must the appeal be arguable? Often a consideration

of this issue results in the court virtually hearing the appeal.

A reading of the *Hughes* case illustrates the difficulty of determining if the application is arguable. The judgment of Mclnerney J devotes about seven pages to analysing the judgment to reach a conclusion that there are arguable grounds of appeal. His Honour says:

> ... the judgment may be attended with sufficient doubt to make it proper to give the appellant at least the opportunity of presenting argument to an appellant tribunal.

DIFFICULTIES OF TWO TESTS FOR MERITS

There are enough difficulties in determining whether a proceeding or a defence has merit, that is, is it arguable, without introducing a "lesser" and "more stringent" test for merits. If the stringent test for merits is that the proceeding is "arguable" and such test is an "outline" or "broad"; then how is a "more liberal approach" to be characterised or analysed? The scope for review is already limited without attempting to frame a test in the terms of Kirby J when His Honour says the scope for review of merits is more limited in existing proceedings.

These issues become significant in *Jackamarra*. However, this paper is solely concerned with the question of whether merits is an issue in applications for an extension of time where there are purely procedural defaults. The law regarding how the court's determine if the proceeding has sufficient merit is considered in another paper.

The same problem arises in determining if there is an arguable defence in summary judgment applications and setting aside a default judgment. There is a variety of problems for the court to determine if a proceeding gives rise to an arguable case. The case may be arguable but weak. When is a case arguable but so weak that it is hopeless? Sometimes a seemingly hopeless case becomes successful at trial, Then again the court should be slow to deny a party their day in court. These issues are considered in papers on summary judgment and setting aside default judgments.

THE QUESTION OF MERITS IN VARIOUS APPLICATIONS

This paper is primarily concerned with the question of the relevance of merits in a general proceeding before the court. Although I have mentioned applications to extend time under section 23A of the Limitations of Action Act and Part IV applications under the Administration and Probate Act such applications will develop their own principles which need not be the same as for general applications for proceedings before the court.

Thus the question of merits in a section 23A application raises an interesting issue. The earlier legislation required that an applicant must prove that there is evidence on which the claimed cause of action can be established at the trial. This was deleted in the current legislation and in *Taylor*'s case King J says that merits is now not a prerequisite for the court to extend time, but then His Honour says its absence is still a matter to be considered.

Then there are a number of TFM cases which consider the question of merits when there is an application to extend the time to bring an application pursuant to section 99 of the Administration and Probate Act. It would seem that merits is a relevant consideration and this conclusion follows as the application is in relation to commencing a proceeding.

MERITS HAS TWO ASPECTS

In this paper I have been considering the lack of merit in a proceeding and its relevance to an application to extend time. There is also the question of the relevance of a strong case before the court when there is an application to extend time. The question arises whether an applicant who has a strong case can rely upon this factor where there is no excuse or adequate explanation for the default? Then the prejudice alleged by a respondent may not be significant. To what extent is a strong case a relevant factor?

MERITS AND THE JUSTIFICATION TO EXTEND TIME

In considering the question of the basis for the court to extend time a primary consideration is the explanation for the default. The explanation for the default is one issue and the merits of the case is another issue. A question arises as to the relevance of each of these issues in the exercise by the court of a discretion to extend time. There are some statements of the law that the strong merits is not a reason to excuse the default. Thus it is said the issues are therefore discrete and separate.

Consider a case where the explanation does not excuse the default. Can a party rely upon a strong case as the basis for the court to extend the time? For example, the plaintiff is suing an executor for repayment of a loan of $100,000 to the deceased. The executor defendant has no defence accept for relying upon an argument that the plaintiff has to prove his case. Assume the plaintiff has no problem in establishing the debt and that it is still owing and seeks to extend time for a procedural default. Assume the reasons for default are minimal, for example the plaintiff's lawyer forgot about the time limit. There is no prejudice to the respondent. It would be absurd for the court not to extend time where the plaintiff has a strong case but cannot establish that the default is excusable. Thus the merits relating to the strength of the case are relevant to the question of justice between the parties. If this is correct, then it is illogical if the lack of merit is irrelevant to extending time in an "existing" proceeding.

MERITS SHOULD ALWAYS A RELEVANT FACTOR

I am of the opinion merits, whether weak or strong, should always be a relevant factor where there is an application to extend time for a procedural default. Justice is the final determining factor of whether or not to extend time. There is a gross injustice to a plaintiff who has a strong case if the case does not proceed due to a procedural default by a plaintiff. Then there is a gross injustice to a defendant if a futile case proceeds to trial. It does not matter if the application is made when commencing a proceeding or in an existing proceeding. The real problem with this law is how the court determines the degree of merits in the case. It is the administration of the law that is the difficult issue. In relation to a plaintiff seeking an extension of time the answer is for the court to ask three questions:

1. Are the facts relied upon plausible? If so, assume they are true.
2. Then ask whether there is an arguable cause of action.
3. If so, does the defence, on the basis the plaintiff's facts are true, render the plaintiff's case futile? If not, there is an arguable case.

The defence may make the case weak or unlikely to succeed. That is irrelevant to the question whether there is an arguable case.

In relation to an appeal, consider the grounds of appeal and ask if they are arguable. The fact it is postulated that the appeal will fail or is unlikely to succeed is irrelevant to whether it is arguable. That conclusion may permit the court to require the appellant to give security, but not refuse an application for an extension of time for a procedural default.

PILCH: Access to Justice and the Rule of Law

PILCH (Public Interest Law Clearing House) 10th Anniversary Dinner, Parliament House, Melbourne, 9 September 2004.

Keynote Speech by The Honourable Sir Anthony Mason AC KBE.

The Honourable Sir Anthony Mason AC KBE.

INTRODUCTION

IT is a great pleasure to be with you all in Melbourne tonight to celebrate PILCH's tenth birthday. My pleasure is all the greater because, metaphorically speaking, I launched PILCH way back in September 1994. I have a keen recollection, not only of the launch and of the dinner afterwards, but also of the high hopes and expectations and of the enthusiasm of all those connected with PILCH in its early days, an enthusiasm justified by PILCH's splendid achievements over the past 10 years.

IN THE BEGINNING

The impetus to establish PILCH sprang out of the public concern voiced about access to justice and the perceived shortcomings of the legal system in the early 1990s. This public concern led to inquiries and a host of reforms to the legal and court system, a new emphasis on alternative dispute resolution, including dispute resolution by lower level bodies and groups outside the orthodox court system.

The impetus to establish PILCH sprang out of the public concern voiced about access to justice and the perceived shortcomings of the legal system in the early 1990s.

But these reforms did not assist those who were unable to access the legal and court systems because they could not afford the costs of legal advice and litigation. A first class court system and a first class legal profession are of no avail to a person who cannot afford to access them. PILCH was a response to this problem, a problem which has become more acute as government sponsored legal aid is not as readily available as it was.

As the full name "Public Interest Law Clearing House" implies, the organisation's primary function is to improve access to justice by providing an avenue for *pro bono* work by members of the legal profession interested in dedicating themselves to standards of professional excellence and to the service of the public without fee or at a reduced fee. In this respect, PILCH acts as a facilitator for *pro bono* legal assistance between the community and the private legal profession. The organisation's second function is to take up public interest cases as a means of protecting and promoting the interests of particular sections of the community or classes of persons.

The idea of lawyers in private practice participating in public interest work was a novel idea in Victoria. Public interest work in this country had been confined to lawyers working in legal aid services and community legal centres, though PILCH's NSW counterpart (PIAC) had been formed some years earlier.

In the space of 10 years that picture has changed dramatically. PILCH can take a lot of credit for this change. There is now a wider recognition in the practising profession, especially in Victoria, of an obligation to undertake *pro bono* work. Over 400 members of the Victorian Bar and over 500 firms and individual solicitors have registered their willingness to

act on a *pro bono* basis and many have done so. The State Attorney-General, but not his federal counterpart, has made it a condition of panel membership for obtaining government legal work that they meet *pro bono* targets. Some concern has been expressed that doing *pro bono* work against the Federal Government or its agencies might prejudice a firm's prospect of securing public sector work. Whether there is any basis for this concern I do not know.

The *Tampa* challenge was unsuccessful in that it did not result in orders bringing the 433 asylum seekers to the Australian mainland. But the challenge raised for determination legal issues of fundamental importance.

Pro bono work is generally understood to cover three situations, namely where a lawyer:

(a) without fee, works for a client where
    1. the client has insufficient financial resources to otherwise access the courts and the legal system; or
    2. the client's case raises a wider issue of public interest; or
(b) is involved in free community legal education and/or law reform; or
(c) does work without charge for charitable and community organisations.

PILCH's activities cover these three situations.

PILCH'S PRESENT ACTIVITIES

PILCH administers the *pro bono* schemes of the Victorian Bar and the Law Institute as well as its own scheme and the Homeless Persons' Legal Clinic which provides free legal assistance, casework, advocacy, policy advice and law reform proposals on behalf of homeless persons. The lawyers who provide these and other services recognise that *pro bono* work is a responsibility that has its roots in our common humanity and the professional ideal of service to the community.

Although public interest litigation forms only a relatively small proportion of PILCH's overall activities, PILCH's participation in, and support of, public interest litigation, has attracted much attention. Public interest litigation, particularly when it is seen as a "test case", is often controversial and political. Sometimes it is sensational or treated as such by the media. Included in the well-known public interest cases in which PILCH has participated were the challenge to the installation of gaming machines in shopping centres in 1995, cases concerning the "Stolen Generation" and other indigenous issues, the challenge to the mass DNA sampling of prison inmates, organising representation of asylum seekers, and the historic *Tampa* case. The publicity given to PILCH's participation in these high profile cases has tended to obscure the importance of the less spectacular work to which PILCH devotes most of its energies.

Although the Attorney has discussed the *Tampa* case, its importance justifies some repetition. PILCH initially sought to contact the asylum seekers detained incommunicado on the *Tampa*. When PILCH was unsuccessful in this endeav-

PILCH Volunteers.

PILCH President Ian Walker.

Tony Wilson.

Attorney-General The Hon. Rob Hulls.

our, it assembled a legal team, comprising a Melbourne commercial law firm and senior and junior counsel, to act on a *pro bono* basis on behalf of Liberty Victoria which was the applicant for relief in the nature of habeas corpus and mandamus.

The *Tampa* challenge was unsuccessful in that it did not result in orders bringing the 433 asylum seekers to the Australian mainland. But the challenge raised for determination legal issues of fundamental importance. They were resolved by a slender majority of 2–1 (Black CJ dissenting) in the Full Court of the Federal Court. The Full Court overruled the judgment of North J at first instance in favour of the asylum seekers. Not only were the issues of fundamental domestic legal importance, they were also of international maritime importance and attracted the attention of the world. The proceedings, through the publicity which they attracted, alerted the community to the importance of the legal issues at stake and of the circumstances in which asylum seekers were prevented from landing in Australian territory and detained on the *Tampa*.

Placing impediments in the way of communication with lawyers so as to hinder access to the courts was at odds with the rule of law.

Justice Robert French, one of the majority in the Full Court of the Federal Court, commended the work of the lawyers who represented the asylum seekers. He said:

> The counsel and solicitors acting in the interests of the rescuees in this case have evidently done so *pro bono*. They have acted according to the highest ideals of the law. They have sought to give voices to those who are perforce voiceless and, on their behalf, to hold the Executive accountable for the lawfulness of its actions. In doing so, even if ultimately unsuccessful in the litigation, they have served the rule of law and so the whole community.

Special leave to appeal was refused by the High Court because subsequent events made unnecessary a decision on the issues dealt with by the Federal Court.

Tampa was in the line of well-known *pro bono* cases in which lawyers, notably Victorian lawyers, have given their services for worthy causes without fee or for reduced fee. These cases included *Chu Keng Lim, Croome* v *Tasmania*, *Mabo, Toonen, Levy* v *Victoria*, *Cubillo* v *Commonwealth* and the *IVF* case.

THE RULE OF LAW, ACCESS TO JUSTICE AND DEMOCRATIC RIGHTS

An important object of PILCH public interest litigation is to maintain the rule of law by assisting in the provision of access to justice for the vindication of individual rights. In Australia, we take the rule of law for granted. We know that it differentiates our society from totalitarian and other regimes which are founded on oppression and terror. Yet we are slow to perceive the ways in which the rule of law is at risk of compromise or erosion when we take strong action to pursue other legitimate or important goals.

The *Tampa* case provided a striking illustration of how the rule of law is dependent upon access to justice. The government had taken steps to ensure that the people on board the *Tampa* were not able to contact lawyers. This action had the potential to prevent the claims of the asylum seekers being ventilated in the courts. Lack of access to communications was a barrier to the giving of legal advice and to the giving of instructions for the taking of legal proceedings. Placing impediments in the way of communication with lawyers so as to hinder access to the courts was at odds with the rule of law.

The justification for taking this step was the assertion of control over our borders, a goal to which all major political parties in Australia subscribe. Yet why did assertion of control over our borders require or justify placing obstacles in the way of a challenge by the asylum seekers to the legality of their detention in the courts? True it is that the refugees were not Australian citizens, they were aliens. But the rule of law exists to protect or benefit everyone and most certainly all those who have standing to sue in the courts. And the irony of the *Tampa* controversy is that a substantial proportion of the *Tampa* asylum seekers were found to be genuine asylum seekers.

At the time of the *Tampa*, there was considerable concern in sections of the community at the prospect of a substantial migration of "boat people" to Australia. This concern and the reasons on which it was based was unquestionably a matter of importance. Was this concern enough to justify the steps which were taken to place obstacles in the way of giving or securing legal advice which might lead to a legal challenge? To those who value the rule of law and the availability of access to the courts, the answer must be no. In the past we have been respected as a nation dedicated to the rule of law and our support of humanitarian causes. Moreover, as a nation, we should be mindful of our history. With the exception of our indigenous people, we are a nation of immigrants. We

are either immigrants or the descendants of immigrants. And our future will be tied to immigration, just as much as our past has been. As it happened, the initiative taken by Liberty Victoria, PILCH and the *pro bono* lawyers circumvented the impediments to communication between the asylum seekers and the lawyers.

Our determination to protect ourselves against the threat of terrorism presents another challenge to our dedication to the rule of law and that traditional common law fundamental value, the liberty of the individual. Two Australians are being brought to trial after well over two years of detention, mostly in Guantanamo Bay. For all, or almost all that time, they were held without any specific charges being formulated or laid against them. Leaving aside fundamental questions relating to (1) the fairness of the forthcoming trials (a matter pinpointed in the last week by the Federal Government as one of concern): (2) the jurisdiction of the United States military tribunal (it is certainly not an orthodox court); and (3) the lawfulness of the interrogations to which the defendants were subjected — questions on which I make no comment — their detention for so long without the presentation of specific charges and without recourse to the courts was corrosive of the due process which we have associated for so long with the rule of law.

Our determination to protect ourselves against the threat of terrorism presents another challenge to our dedication to the rule of law and that traditional common law fundamental value, the liberty of the individual.

In his F.A. Mann Lecture, "Guantanamo Bay: The Legal Black Hole", Lord Steyn, the well-known English Law Lord, after strongly criticising the treatment of the suspects held in Guantanamo Bay, quoted a telling and perceptive statement made by President Aharon Barak of the Supreme Court of Israel. President Barak made this statement in a case in which his Court held that violent interrogation of a suspected terrorist was not lawful even if it might save human life. This is what he said:

> We are aware that this decision does not make it easier to deal with the reality. This is the fate of democracy, as not all means are acceptable to it, and not all methods employed by its enemies are open to it. Sometimes, a democracy must fight with one hand tied behind its back. Nonetheless, it has the upper hand. Preserving the rule of law and recognition of individual liberties constitute an important component of its understanding of security. At the end of the day, they strengthen its spirit and strength and allow it to overcome its difficulties.

The UN Secretary-General, Mr Kofi Annan, spoke to the same effect when he said:

> If we compromise on human rights in seeking to fight terrorism, we hand terrorists a victory they cannot achieve on their own.

Access to food and wine seen as consistent with access to justice.

My reference to the issues arising from the way in which the suspects held at Guantanamo Bay have been dealt with is not designed to suggest that PILCH should concern itself with these problems. Far from it. My purpose is simply to make the point that protection of our own interests, whether it be our security or control of our borders from unwanted migrants, presents a risk of compromising our own adherence to the rule of law, due process and fundamental rights and to commend PILCH and the legal profession for supporting cases where the rule of law and fundamental rights appear to be at risk.

THE IMPORTANCE OF PUBLIC INTEREST LITIGATION

The *Tampa* case is a classic illustration of the focus which legal proceedings, quite apart from proceedings for judicial review which are directed at the decision-making processes of our institutions, can give to

major community issues, whether they be political, social or economic. Legal proceedings can bring to light facts and evidence not otherwise available, even under Freedom of Information legislation. They can reveal the motivation as well as the reasons given for government and agency decisions. They contribute to greater openness in government and enable us,

My reference to the issues arising from the way in which the suspects held at Guantanamo Bay have been dealt with is not designed to suggest that PILCH should concern itself with these problems. Far from it.

Julian Birnside QC and former Premier Jeff Kennett listen in the wings to Sir Anthony Mason speaking.

the people, to assess and evaluate how our servant, the government, is discharging the mandate which, it is suggested, we have given it. So it is with public interest proceedings. They can enhance the democratic process by making government accountable and by enabling us to scrutinise government actions and its decision-making processes. Proceedings of this kind also demonstrate the essential and influential part that lawyers can play in subjecting government action to searching scrutiny and in vindicating individual rights.

So the *Tampa* case is an instance of what an organisation like PILCH and *pro bono* lawyers can do for the public interest in assisting those in need of legal services and, incidentally, in advancing the rule of law, liberty of the individual and due process.

THE LAW AND SOCIAL CHANGE

The expression "public interest litigation" is not capable of precise definition and I shall not detain you with an attempt to define the indefinable. It is used, I think, by some, including PILCH, to denote litigation which serves a non-private purpose, at least in the context of what I shall call a test case, for want of a better word.

In this context, there is discussion of law and social change, a discussion which has its origins in the United States. We need to remember that, with some exceptions, law reacts to rather than creates social change, though law, in the form of a judicial decision, can, very occasionally, contribute to a climate in which political movement for social change is more likely to gain support. Just how far PILCH should adopt policies which favour social change is obviously a complex question. Ultimately, any decision must hinge on whether the change is desirable and how it is to be achieved. In deciding questions of this kind, PILCH must take some account of its support base because it relies on the contribution of the legal profession.

PILCH must also bear in mind that the American experience, valuable though it is, is not always a reliable guide for us to follow. For one thing, the absence of a general Bill of Rights in Australia (except for the ACT) means that the relationship between the courts and the other arms of government in Australia differs from the corresponding relationship in the United States and elsewhere. The courts here have a more limited role. It would be a mistake to think that all that the courts do in the United States can be replicated by Australian courts. In situations where legal proceedings might lead to social change in America, it may well be advisable to think of a political rather than a legal initiative here.

As Australia is one of the few countries in the Western world without a general Bill of Rights, it is not to be expected that international human rights jurisprudence will be as influential here as it is elsewhere. This jurisprudence has developed around constitutional and statutory guarantees as well as international conventions. We lack the general constitutional and statutory foundations which support or contribute to the development of human rights jurisprudence elsewhere, though in specific statutory and non-statutory situations, there will be a basis for looking to international and overseas jurisprudence. As always in the law as it is applied by the courts, one needs to focus on what is case specific rather than on abstract generalities.

What I have just said is intended to sound a note of caution rather than a note of discouragement. The common law has evolved over many centuries. The process of evolution inevitably continues.

I conclude by congratulating PILCH on celebrating its 10th birthday in style and urging the legal profession to maintain its dedication to *pro bono* work.

Launch of Pizer's Annotated VCAT Act

On 20 July 2004 Maddocks proudly hosted the launch of the second edition of Pizer's "must have" *Annotated VCAT Act Second Edition*.

Judy Benson

AROUND 5pm on Tuesday 20 July 2004 the reception area of Maddocks was receiving an unusually large number of arrivals. On any other day one could have been forgiven for thinking that these power-dressed professionals might have been a crowd of potential class-action litigants descending en masse for a briefing (though on what possible rarified claim the mind rather boggles).

Over 100 enthusiastic well-wishers, including Deputy President Sandra Davis from the VCAT, members of local councils and statutory bodies, government departments, solicitors and barristers, were flocking in for the launch of the second edition of *Pizer's Annotated VCAT Act*, and exhibiting all the readiness at this particular hour to partake of the consequential liberal hospitality that generally accompanies such occasions. And in keeping with the entrepreneurial spirit of the publication of this edition — in which the author turned publisher as well — the event was much more than a book launch; it was also a custom-made seminar earning the bar attendees CLE points. It had after all been three years since the first edition; there had been much water under the VCAT bridge; and so there was something of an air of expectancy at this gathering. Much was promised and actually delivered.

But first to the formalities. In launching the book Justice Stuart Morris, President of VCAT, was effusive in his praise and

Pizer's Annotated VCAT Act (2nd edn)

By Jason Pizer
Publisher: JNL Nominees Pty Ltd, 2004

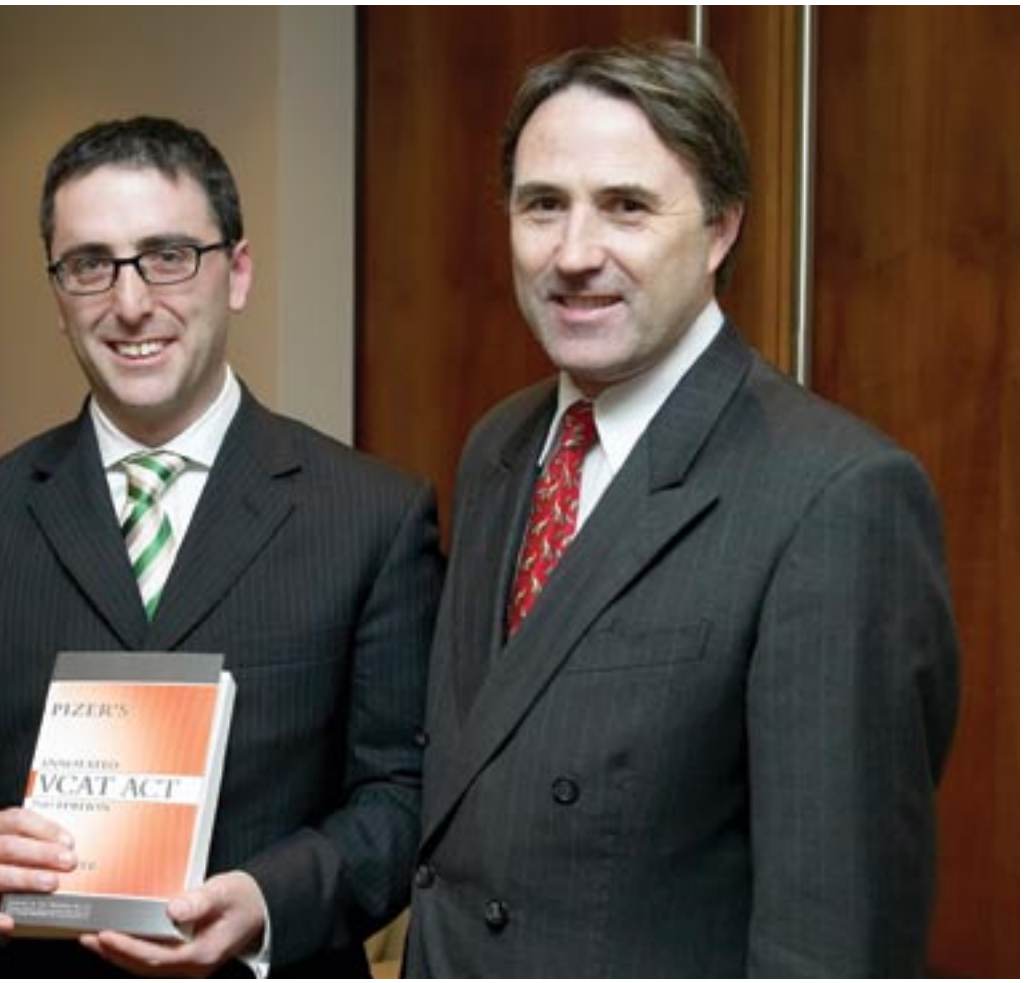
FOR a time, I was habitually opposed to a practitioner at VCAT who seemed to have all the answers. No matter what procedural question turned up, he always had a decision on point at his fingertips. What was his secret, I wondered? What was his magic bullet? More importantly, where could I get access to the vast reservoir of information that he obviously had? It was only later that I discovered that he had the first edition of *Pizer's Annotated VCAT Act* in his library.

Jason Pizer, a member of our Bar, has now published a second edition of his book. It is self-published, so if you wish to purchase it, you can only do so from the Law Institute Bookshop, the VCAT Registry, or from Pizer's secretary. Although claiming to be an annotated commentary on the *Victorian Civil and Administrative Act 1998*, the work is much more than that. It is more like a comprehensive handbook to the operation of the Victorian Civil and Administrative Tribunal.

The book is laid out in chapter format. Chapter 1 provides an overview of the Act and the Tribunal; Chapter 2 contains the VCAT Act itself; Chapter 3 the Regulations as to fees; and Chapter 4 the VCAT Rules. There are tables of cases and of statutes, and an index, all of which makes the book easy to navigate. The text is laid out in a clear fashion. One of the common problems of an annotated work — lack of cohesiveness — is minimised by extensive cross-referencing within the text itself.

Those practitioners who are unfamiliar with VCAT will invariably benefit from reading the overview in Chapter 1 prior to their first appearance before the Tribunal. Those who are more familiar with the Tribunal will no doubt dip straight into Chapter 2, which contains the VCAT Act and the annotations, and therefore the heart of the work.

The greatest strength of this work



Mark Hayes, partner Maddocks; Jason Pizer, author and publisher; and Justice Morris, VCAT President; launching the publication.

endorsement of the text. In a generous, warm and no doubt much appreciated practical gesture, he indicated that the VCAT would be placing a substantial order for the text for its own purposes. So the second edition was well and truly launched and the print run (one suspects) off to a sizeable depletion in stocks. No wonder the author/publisher was smiling broadly at this point. Justice Morris emphasized that this was a resource not only for those who practice and appear in the jurisdiction, but also an invaluable reference for those members on the other side of the Bar table over the Bench. Clearly one gained the impression that Jason's Herculean enterprise was beatifically regarded from above.

In responding to the VCAT President's effervescent launch, Jason Pizer, a member of the Victorian Bar, paid tribute to those who had supported him throughout the period of his foray into the world of publishing with all the rewards and challenges — not to mention insights — that experience had brought.

Following the launch itself, the seminar part of the program commenced. Justice Morris spoke on recent developments in the VCAT jurisdiction, including the role of natural justice, the rules of evidence, the striking out procedure, and the power to grant injunctions and deal with contempt. Jason Pizer then spoke in more detail on the application of the rules of natural justice in the VCAT context, focusing on four particular aspects: the relationship between VCAT's obligation to afford natural justice and some of the provisions in the VCAT Act that allow the VCAT to adopt a more flexible and informal approach to procedural and evidential matters; how the hearing rule is applied; how the bias rule is applied; and what steps may be taken if the VCAT threatens to breach or has breached one of the rules of natural justice.

In a generous, warm and no doubt much appreciated practical gesture, VCAT President Justice Morris indicated that the VCAT would be placing a substantial order for the text for its own purposes.

[These two papers delivered by Justice Morris and Jason Pizer have subsequently been published in the *Australian Journal of Administrative Law* Volume 11 Number 4 at pages 173 and 161 respectively.]

Finally, Terry Montebello — a partner of the host firm Maddocks — delivered a detailed excursus on the question of the awarding of costs in the VCAT planning list.

Last but not least followed the generous hospitality of Maddocks, which was both liberal and elegant. Old enough to remember the ghastliness of publishing launches in the 70s when the best that could be devised was cask wine, cubes of cheddar cheese and jatz biscuits, I can only say this was launch fare made in heaven, and not a cube of cheddar to be seen.

The book costs $110 and can be obtained from the VCAT Registry or the Law Institute Bookshop. A review by Daniel Aghion appears on this page.

is the detail and high quality of the annotations. The author has crammed references to a surprisingly large number of cases into the text, but has done so in a manner that keeps the commentary concise and easy to read, while maintaining a robust analysis of the "rationes" arising from the cases.

Future editions could be assisted by the inclusion of the VCAT Practice Notes. Apart from that, it is an excellent work that fills a niche. No practitioner who appears regularly at VCAT should be without it.

Daniel Aghion

New Bar Scheme for Magistrates' Court Mediations

A co-operative pilot project has been commenced with the States Magistrates' Court to provide affordable and professional mediation services for its litigants in its current and proposed civil jurisdiction.

ON 28 April 2004, the Victorian Attorney-General Rob Hulls, Chief Magistrate Ian Gray and the Chairman of the Victorian Bar's Dispute Resolution Committee Mr Bill Martin QC formally announced the commencement of a pilot program for mediation at the Magistrates' Court complex in Melbourne to apply statewide .

The Attorney-General said the pilot program would assist in "reducing the demand on judicial time by offering litigants an opportunity to take part in a simple, informal, low-cost and accessible dispute resolution process conducted by trained mediators".

The pilot project is currently only accessible in cases at the $30,000 to $40,000 range — which is the present upper limit of its civil jurisdiction. As anticipated, a draft bill is currently before Parliament to increase the Magistrates' Court civil jurisdiction to $100,000 and give power to their Honours to order compulsory mediation. The pilot is a precursor to the increase in the powers of the Court.

There are now approximately 150 members of counsel who have joined the panel. To be on the panel counsel must have been "accredited" as mediators by the Bar Council. (The Law Institute has also created their own scheme which will run in parallel with the Bar scheme.) Counsel participating have also agreed to a fixed fee and will provide at least five hours mediation work as mediators and also conduct a preliminary conference prior to the mediation taking place. Litigants accessing this scheme will be supplied with mediators on a rotational basis from the panel, (similar to present internal referral practice in VCAT and the Federal Court/Federal Magistrates' Court jurisdictions) to be administered by Bar Council administration.[1] The Bar has also agreed to significantly reducing the fees for use of the Bar Mediation Centre, where at least two mediations under the scheme are conducted at the Centre on the same day. Pursuant to the scheme all mediations must be held in approved facilities, and not simply in an individual counsel's room. Panelists have also as part of ongoing CLE, recently attended an informative seminar outlining their responsibilities to the Court, litigants and the Bar as part of this scheme.

Chief Magistrate Ian Gray, Attorney-General Rob Hulls and barristers.

Bill Martin QC, Chief Magistrate Ian Gray and Attorney-General Rob Hulls.

1. The Law Institute scheme mediator fees will be at commercial market rates and charged at an hourly rate with no cap on the amount charged to the litigants.

Attorney-General Rob Hulls, Ross Maxted, Bill Martin QC and Chief Magistrate Ian Gray.

The lead-up to the launch involved many hours of liaising and meetings with members of the Court, the Bar and the Law Institute; and as a result the two branches of the profession have come together and created a mutually parallel scheme.

The Bar has also agreed to significantly reducing the fees for use of the Bar Mediation Centre, where at least two mediations under the scheme are conducted at the Centre on the same day.

Hopefully at the end of the pilot, the need for fine tuning will be minimal and it will become a permanent feature of the Court and the service offered by the Bar, reducing not only the cost of litigation in the Magistrates' Court but the stress involved in lengthy court hearings.

This scheme would not have been possible without the enthusiasm and unequivocal support of both the Chief Magistrate and Deputy Chief Magistrate Peter Lauritsen and their Court staff, to whom we are extremely grateful, and the Dispute Resolution Committee members, especially Ross Maxted.

Deadly Sins

THE Seven Deadly Sins are not as much spoken of now as previously. In the middle ages, they were popular personified for morality plays. Christopher Marlowe, for example, has them as characters in *Doctor Faustus*. They are, by name:

Vainglory (or Pride);
Covetousness;
Lust (understood as inordinate or illicit sexual desire);
Envy;
Gluttony (including drunkenness);
Anger; and
Sloth.

These same characters are cast in Peter Cook and Dudley Moore's modern remake of the Faust story, "Bedazzled".

We do not hear of *vainglory* these days. The latest quotation in the OED2 entry for *vainglory* is dated 1882. It is a near-synonym for *pride* in its bad sense. Obviously, *pride* is the noun cognate with the adjective *proud*; *vanity* is the noun cognate with *vain*. *Proud* and *vain* are two oddly ambiguous words. Their primary meanings are similar, their etymological origins are almost exactly opposite and each has at least two senses — one unfavourable and the other neutral or favourable.

The favourable sense of *proud* is "affording high satisfaction or gratification; (of things): stately, majestic, magnificent, grand..." This sense is captured in comments such as "I am proud to be an Australian"; "The ruins do shew that it hath been a verie statelie and proud fabrick".

In its unfavourable sense, *proud* is defined in OED2 as "Having or cherishing a high or lofty opinion of oneself; valuing oneself highly on account of one's position, rank, attainments, possessions, etc.; ... also arrogant, haughty".

Proud comes from Old Norse, originally meaning brave, gallant, magnificent, stately. This is consistent with the favourable sense in which it is still used. It came into Old English in the 11th century, brought by Norman invaders. Since the Norman invaders were unwelcome, their pride was offensive to the vanquished: the *prud barun* or *prode chevalier* was an outrageous affront to the Anglo-Saxon peasant, subjugated to their will — this at least is the speculation in OED2 to explain the early and rapid emergence of the unfavourable sense. No mistaking the sense in Hamlet's famous soliloquy:

> ... For who would bear the whips and scorns of time,
> Th' oppressor's wrong, the proud man's contumely,
> The pangs of despis'd love, the law's delay,
> The insolence of office, and the spurns
> That patient merit of th' unworthy takes,
> ...

Proud has two further related meanings — Large; projecting in any direction. So, a construction in which something projects beyond the prevailing level *stands proud*. This is quite neutral. Also *sensually excited*; "*swelling*", *lascivious* in reference to female animals. This is now obsolete.

Vain comes from Latin *vanus* — empty, void, idle. This same word is the root of *evanesce* (to fade out of sight, "melt into thin air", disappear) and *wane* (an obsolete adjective meaning lacking, absent, deficient. Incidentally, the verb to *wane* is unrelated, although its sense is similar. It comes from Old English *wanian* — to lessen).

The original meaning in English of *vain* was "Devoid of sense or wisdom; foolish, silly, thoughtless; of an idle or futile nature or disposition", then by the late 17th century the current meaning emerged: "Given to or indulging in personal vanity; having an excessively high opinion of one's own appearance, attainments, qualities, possessions, etc.; delighting in, or desirous of attracting, the admiration of others; conceited". Its secondary meaning is *pointless* — "a vain endeavour" etc. This is obviously close to the original meaning, but it carries no moral sting.

Pride bears the meanings of its related adjective, but it also signifies a social group of lions. This sense has been recognised since the *Book of St Albans* (1486).

Covetousness is a word not often heard these days. It is familiar from the

sixth commandment "Thou shalt not covet thy neighbour's house, thou shalt not covet thy neighbour's wife, nor his manservant, nor his maidservant, nor his ox, nor his ass, nor any thing that [is] thy neighbour's." Covetousness means strong or inordinate desire. OED2 notes it as obsolete — the word, perhaps, but not the sentiment.

By contrast, *lust* is alive and well. It is a word which has sunk gradually. In the 9th century, it meant pleasure or delight; from the 11th century it began to gather overtones of sexual appetite; by the 17th century it signified "lawless and passionate desire".

Envy comes from the Latin *invidia*, from which we get *invidious* — tending or fitted to excite odium, unpopularity, or ill feeling; offensively discriminating. It means "the feeling of mortification and ill-will occasioned by the contemplation of superior advantages possessed by another". Ambrose Bierce defined it as "Emulation adapted to the meanest capacity". He also defined *congratulation* as "the civility of envy".

Gluttony, like the other deadly sins, is still familiar to us as an idea, although the word is not often heard. It is "the vice of excessive eating". It comes from Latin, and is first cousin to the Latin *glutire* — to gulp down. Bierce says that a glutton is "a person who escapes the evils of moderation by committing dyspepsia". Evelyn Waugh picked it up in passing when he defined *hypocrisy* as follows: "Hypocrisy is the most difficult and nerve-racking vice that any man can pursue; it needs an unceasing vigilance and a rare detachment of spirit. It cannot, like adultery or gluttony, be practised at spare moments; it is a whole-time job." This casual pairing of adultery and gluttony seems natural but it is a curious thing that adultery is not listed as one of the deadly sins.

Anger is another deadly sin which has grown and prospered in generation upon generation. OED2 defines it as "That which pains or afflicts, or the passive feeling which it produces; trouble, affliction, vexation, sorrow." Its meaning has been stable and unchanged since it was first recorded in the 13th century. It comes from Old Norse. Johnson quotes Locke: "Anger is uneasiness or discomposure of the mind, upon the receipt of any injury, with a present purpose of revenge." The added element of a desire for revenge seems not to accord with other etymologies, but is consistent with ordinary experience. Ambrose Bierce does not provide a definition of anger, but he does define *wrath*:

> WRATH, n. anger of a superior quality and degree, appropriate to exalted characters and momentous occasions; as, "the wrath of God," "the day of wrath," etc.

Sloth is a familiar phenomenon, but the word is not frequently heard. This might be due in part to ambivalence about its pronunciation: does it rhyme with *both* or *moth*? OED2 rhymes it with only one, namely *both*. (I would never have imagined that sentence possible.) Built on the Middle English word *slaw* — *slow*, it means "physical or mental inactivity; disinclination to action, exertion, or labour; sluggishness, idleness, indolence, laziness". Appropriately, its meaning has not bothered to change at all since the 12th century.

Sloth is also an animal, an "edentate arboreal mammal of a sluggish nature". Two genera are known: the bradypus, or three-toed sloth, and the choloepus or two-toed sloth. Flanders and Swan wrote a wonderful song in the 1950s about the bradypus which begins:

> A Bradypus or sloth am I,
> I live among the trees;
> Suspended gently from my toes
> I live a life of ease ...

and includes the lament:

> I could climb the very highest Himalayas
> Be among the greatest ever tennis players
> Learn to cook, catch a crook, win a war then write a book about it;
> I could paint a Mona Lisa, I could be another Caesar, compose an oratorio that was sublime,
> The door's not shut on my genius but
> I just ... don't have.... the time.

The Seven Deadly Sins make a strange list to modern eyes. They are more encouraged than avoided; they do not include some of the more serious misdeeds such as murder, adultery and theft although they may be precursors to those vices. The cosmetics industry is built on vanity; the fast food industry is built on gluttony; the advertising industry harnesses covetousness and lust; politics provokes anger and sport often gives it the name of action; television induces sloth.

The list needs updating.

Julian Burnside

Wine Report in Association with the Essoign

By Andrew Bristow

Pondalowie the Gladstone 2001

THE 2001 the Gladstone (84 per cent Shiraz, 16 per cent Cabernet) from Pondalowie Vineyards is made by husband and wife team Dominique and Krystina Morris at their winery at Bridgwater on Loddon in Central Victoria. They use both traditional and modern techniques in specially designed fermentation tanks.

The wine has a bouquet of intensely fruity plum and pepper aromas from the Shiraz and blackberries from the Cabernet.

The wine is a deep ruby colour.

The wine is long on the palate, with other flavours such as mint, nutmeg and cigar box spices. It has fine-grained tannins and a softness that makes it a good wine to drink now and over the next three to five years. It is available from The Essoign Club at $24.50 a bottle ($20.00 takeaway).

I would rate this wine as a late-starting academic barrister: complex now and will take some time to reach maturity.

All Honours

Richard A. Lawson

THEIR Worships have gone and the ranks of their Honours have increased correspondingly.

The official explanation for this change was that it will make things simpler for the consumers. These consumers, presumably, will be unrepresented criminal defendants with County Court priors who subsequently appear at a Magistrates' mention court. Now the phrase "yes, Your Honour" is all they need know — wherever they are. One thing less to remember.

It may be that those who have offered this explanation believe it to be true. But I confess to having my doubts — if only because making things simpler for the consumers is usually the last thing officialdom does. One need only consider Tax Pack, the computation of BCL rents, the daily fluctuation in petrol prices or the AFL Finals system — to realize that this is so.

I admit I reacted a little niggardly to the new form of address but I am not sure why. It is not as if I think of it as an unwelcomed increase in formality because I am a bit of a fan of formality — both generally and in court. When you address your client as "Mr Smith" it may be that he will say "please call me John". But if you initially call him "John", he will not readily say "please call me Mr Smith" even if that is how he would prefer to be addressed. Any request for greater formality usually takes the form of a demand: "Mr Smith to you".

Richard A. Lawson — if in doubt, it is better to over-dress.

The worship/honour change will take some getting used to. One will hear "if Your Worship, I'm sorry, if Your Honour pleases" for a little while. Akin to reminding oneself what year it is in the early days of January. The change will also mark the demise of "don't worship me, honour me" hitherto employed by certain members of the County Court Bench to correct nervous counsel appearing in criminal appeals.

Mistakes in forms of address can occur unexpectedly and can even be turned to advantage. I was once at a call-over in an applications court then normally constituted by the County Court Master. But the Master was indisposed and had been replaced by a Judge at the last minute. The first barrister to speak addressed his Honour three times as "Master" — all in less than 30 seconds. Then the call-over continued with every subsequent barrister calling His Honour "Your Honour".

I wondered how our offender would recover. To make matters worse he had one of those awkward unopposed applications. He began: "Your Honour, forgive me, forgive me, forgive me". His Honour tried not to smile. And very soon His Honour said: "I will make the orders you seek. What are your costs?" Altogether brilliant, I thought.

To add to court formality may be desirable from time to time or, should one say, one needs to be careful not to erode court formality. This applies to dress as much as to forms of address. If every change were a relaxation of previous practice or standards where would one ultimately end up? Going to court in one's paint-splattered track-suit and thongs to address a judicial officer as "Liz" or "Steve"?

This is not altogether alarmist. If one appears for a respondent ratepayer before a municipal "committee" one may frequently find the atmosphere far too casual or relaxed. Of course, it is only superficially casual or relaxing for the ratepayer-clients who are very distressed to be there at all. It is upsetting enough for them to hear that the "committee" is ordering their pet dog to be shot. But it is all the more upsetting when the death sentence is announced by "Liz" or "Steve". True, they can always appeal but appeals cost money.

Men have difficulty even recognising what purports to be female dressing up or female dressing down. Apparently there are contrary trends. They tend to dress up for the VRC Spring Carnival. Elsewhere, they usually dress down.

One doubts that lawyers will ever be required to robe in the Magistrates' Court, but who knows. Yet the periodical push to abandon robes in the higher courts may well continue.

Generally speaking, I was taught that, if in doubt, it is better to over-dress. If you feel you must, you can remove your coat and tie when you arrive at your destination. Indeed, I am reliably informed that there are certain nightclubs in Melbourne that have a "no suit" dress code. Take your ecstasy but remove that tie. Hitherto, somewhat surprisingly, this has not resulted to my knowledge in any application to the VCAT Anti-discrimination List.

As for women and the matter of dress formality, one hesitates to say anything at all. Men have difficulty even recognizing what purports to be female dressing up or female dressing down. Apparently there are contrary trends. They tend to dress up for the VRC Spring Carnival. Elsewhere, they usually dress down.

The View from Guantanamo Bay

Lex Lasry QC

Part of the military area to the bay.

A week or so before the opening day of the case of the *United States* v. *David Matthew Hicks* I imagined a few lighter moments for myself on the way to Guantanamo Bay, Cuba. It seemed logical that Havana, Cuba, would be one of my stops with some time to hear and learn a few of those complex Cuban rhythms; enjoy a quality cigar or two and experience a culture somewhat different from the grey atmosphere of Melbourne's legal precinct.

But it can't be done. You may not fly to Havana from the US and if you go there via Canada, as would be required, you certainly cannot then fly from Havana to the US military station at Guantanamo Bay. So we did it the American way: Washington DC; Norfolk Virginia (where you are either in the military or unemployed); Jacksonville and on to Guantanamo.

The American lease at Guantanamo Bay, Cuba, is essentially a Naval Station which, as it happens, is also the convenient place to keep "detainees/enemy combatants" like David Hicks and Mamdouh Habib if their access to the US civilian justice system is to be avoided. Leased by the US as a coaling station since 1903, Guantanamo Bay itself is a sparkling blue stretch of water with somewhat barren shores and an American military town of about 6,000 occupants and 600 or so of the detained "killers" as President Bush described them. Most of the population is military personnel with some civilian workers from the Caribbean. Fenced off from the rest of Cuba, I am told the line is mined on both sides of the fence. The last US military death in "Gitmo" (as they call it) was in the early 1990s from an exploding land mine. Fidel Castro wants the area back but the US is not keen. Gitmo has a new use since 11 September 2001 and the detention or interrogation camps have become the main purpose for its existence in this violent 21st century.

Indeed, Fidel has wanted this area back at least since the 1950s and it is said that he has not cashed a lease payment cheque since 1957 although that tactic does not seem to be having the effect he hoped for.

If you are looking out over the water, the view is pretty appealing. If you are looking at the camps that include Delta and Echo (Hicks is in Echo) the view is somewhat more depressing. For the average US soldier whose job it is to guard the camps, most of the American comforts are laid on. Everything can be deep fried. There is AFN TV — Armed Forces Network TV — from which personnel are regularly reminded what a good job they are doing and what a great country America is. Naturally Fox and CNN are there too. CNN is perceived as very left wing and some times referred to as the "Communist News Network". And to service almost every other need there is a very large supermarket and, inevitably, a McDonalds.

The edge of the bay is punctuated with various forms of accommodation, military equipment, its own electricity generating plant (which regularly breaks down) and a de-salination plant. The water is close to undrinkable. And if that was not enough, there is an open air theatre (regularly screening "A Few Good Men") and a swimming pool. Apparently the scuba diving is exceptional but it is not my thing.

A striking feature of our visit, at least for me, was the almost overwhelming hospitality shown to us by the Lieutenant-Colonel from the Air Force and the Major from the Army who looked after us. I started to think that there might actually be a few supporters for the Democratic Party down there from the way they talked, although I think it was for show. The more Stephen Kenny went on US television and criticised the place, the military commissions and the US government, the friendlier and more helpful our escorts became. It was quite disarming.

Leaving Guantanamo Bay looking towards the military camp.

And then there is Dan Mori. He has been here — we have met him in

Melbourne. This man is an emotional and physical dynamo. He is always moving. He talks with his whole body and his enthusiasm for the defence of the Hicks case is at such a high level that some people wonder how he can survive in the US Marine Corps. He will survive.

High on the hill above Guantanamo Bay under a huge American flag is the military commission building. Anyone who gets sensitive to the idea of firearms near a court room should never go near this place. My report to the Law Council of Australia carries the detail of what happened on 25 August 2004. Interestingly, perhaps incongruously, the motto for the "Joint Task Force Guantanamo" which appears over the doorway of the military commission is "Honor Bound to Defend Freedom". David Hicks has been incarcerated for nearly three years without trial.

So far there is a hero in all this. It is not the lawyers or the observers — it's Terry Hicks. He has changed attitudes in Australia by his determination to support his son and by his raw courage in track-

ing down information in Pakistan and Afghanistan. Terry Hicks is a knockabout Australian who loves footy and loves his son. His sustained straightforward campaign against the injustice being done to his son is inspiring.

In the meantime, the nearest I came to those Cuban rhythms was the music from Cuban radio just across the land-mined fence — I couldn't speak the language but I enjoyed the music.

And let's not get too smug about the US. Camps Delta and Echo remind me of home — where we keep the refugees.

Verbatim

Military Exhibits

County Court

3 August 2004
Coram: Judge G.D. Lewis
Woodall v *Gary K. Blackman Pty Ltd and Victorian WorkCover Authority*
T. Tobin S.C. and A. Keogh for Plaintiff
M. Titshall QC and Britbat for Defendants

Tobin tenders document on behalf of plaintiff.
His Honour: That will be exhibit D.
Associate (with military background)**:** "DELTA".
Later Tobin tenders further document.
His Honour: That will be exhibit E.
Voice from associates desk: "ECHO".
His Honour: One can only await with some tripidation, exhibition F.
Titshall: I can allay Your Honour's fears, I expect it will be an invitation to dance.

Legal Anatomy

County Court

1 September 2004
Coram: Judge Higgins
Spomenka Salamandic v *Ready Workforce and Heinz Pty Ltd*
J. Kennan S.C. with P. Jewell for the Plaintiff.
D. Curtain QC with A. Middleton for the third named Defendant
C. Winneke for the second named Defendant.

Next line?
"Acupuncture AP"
Sorry, acupuncture?
AP stands for acupuncture.
Yes?
L14, large intestine 4.
What does that mean?
Acupuncture point, special acupuncture point.
Where did you give it to her?
Pardon?
Where was the acupuncture point?
Where?
Yes?
Large intestine 4.
Where abouts is that?
It is between the thumb and the second metacarpal joint.
Now read the entry on 2 March.
Second of March, yes.
What does it say?
Both hands, forearm stiffness all the time. Pins and needles to the elbow for three months.
So she told you on 2 March that she had reported it as a work-related incident on 15 February?
Correct.
What does it say after that?
Says "Work doctor applied ice for 10 minutes" and I gave her haemorrhoid cream to rub on it.

Order to 'get a life'

In the United States District Court for the Western District of Texas, Austin Division

Klein-Becker LLC and Basic Research LLC v *William Stanley and Bodyworx.com Inc.*
Case No. A-03-CA-871-SS

ORDER
Be it remembered on the 21st day of July 2004 and the Court took time to make its daily review of the above captioned case, and thereafter, enters the following: When the undersigned accepted the appointment from the President of the United States of the position now held, he was ready to face the daily practice of law in federal courts with presumably competent lawyers. No one warned the undersigned that in many instances his responsibility would be the same as a person who supervised kindergarten. Frankly, the undersigned would guess the lawyers in this case did not attend kindergarten as they never learned how to get along well with others. Notwithstanding the history of filings and antagonistic motions full of personal insults and requiring multiple discovery hearings, earning the disgust of this Court, the lawyers continue ad infinitum. On July 20, 2004, the Court's schedule was interrupted by an emergency motion so the parties' deposition, which began on July 20, would and could proceed until 6:30 in the evening. No intelligent discussion of the issue was accomplished prior to the filing and service of the motion, even though the lawyers were in the same room. Over a telephone conference, the lawyers, of course, had inconsistent statements as to the support of their positions. On July

20, 2004, the Court entered an order allowing the plaintiffs/counter-defendants until July 23, 2004, (two days from today) to answer a counterclaim. Yet, on July 21, 2004, Bodyworx.com, Inc.'s lawyers filed a motion for reconsideration of that Court order arguing the pleadings should have been filed by July 19, 2004.

The Court simply wants to scream to these lawyers, "Get a life" or "Do you have any other cases?" or "When is the last time you registered for anger management classes?"

Neither the world's problems nor this case will be determined by an answer to a counterclaim which is four days late, even with the approval of the presiding judge.

If the lawyers in this case do not change, immediately, their manner of practice and start conducting themselves as competent to practice in the federal court, the Court will contemplate and may enter an order requiring the parties to obtain new counsel.

In the event it is not clear from the above discussion, the Motion for Reconsideration is DENIED.

SIGNED this the 21st day of July 2004.

UNITED STATES DISTRICT JUDGE

Transferrable Skills

The following passage appears in the decision of Gleeson CJ in *Green* v *Green* (1989) 17 NSWLR 343 at 345–6 (a case involving a constructive trust):

The late Robert Green (deceased) was born in 1932 and died in 1981. He was survived by one lawful wife, two de facto wives and seven children. The deceased appears to have maintained simultaneous domestic establishments with all three women and their respective children. In terms of division of his time he appears to have given preference to Margaret Green, but it seems that he spent two nights a week, regularly, with the respondent and, at least according to her evidence, gave what she regarded as a plausible explanation of his absences. Presumably, over a number of years, he managed to achieve the same result with the other women. This is consistent with his apparent success as a used car salesman.

Expert Evidence

County Court of Victoria

4 June 2004
Coram: Judge Gebhardt
Crump v *Baulderstone Hornibrook*

Jordan S.C. cross-examining medical witness:
Where's the left sacroiliac joint?
It's that dimple on your bum, sir, right there.
So about the belt line, is it?
It's below the belt line, it's where that dimple appears, if you look in the mirror.
I'm not looking at my dimple at the moment. I don't think anyone else wants to either. I was really trying to get something for the transcript, doctor.
His Honour: We've got it all right? … 10 centimetres below and lateral to the bottom of the lumbar spine.

The High Court on Defence Openings in Criminal Proceedings

High Court of Australia

22 April 2004
Coram: Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ
Rich and Silberman v *Australian Securities and Investments Commission*
Walker S.C. with Williams S.C. and Goodman for the Appellants
MacFarlan QC with Wigney and Beaumont for the Respondent

Callinan J: Mr Walker, some modern criminal proceedings now make provision for all sorts of participation by the accused.
Mr Walker: There is a fairly long-established statutory requirement in relation to alibi notices, which is a species of the genus, I suppose, criminal pleading.
Gleeson CJ: Somebody got the idea in New South Wales a few years ago of giving defence counsel of criminal trials an opportunity to open to the jury, an opportunity that was very rarely taken advantage of.
Mr Walker: Yes.
Hayne J: They are now obliged to in Victoria and they are now obliged to state their defence at the start of the trial and that has …
Gleeson CJ: You cannot say, "I was rather hoping that the principal Crown witness would get sick".
Hayne J: No, at least not overtly.
Callinan J: If ever there is a misnomer it is to call what happens in New South Wales in a criminal case an opening.
Gleeson CJ: That is a very bitter comment.

Have I Learned Anything?

AFTER more than 50 years as a servant of the law I have played many parts. I have been an advocate, an in-house corporate lawyer, a senior consultant and I have adjudicated in about 4000 appeals in planning and administrative tribunals. I have had many skilled barristers appearing before me.

I made my way through the ranks by appearing as a junior to some of the leading seniors in Australia My practice had been general, including eight appeals to the Privy Council and regular appearances in the High Court. When I took silk, I had as my juniors members of the Bar who went on to become judges in superior courts. In addition, for 11 years I was Judge Advocate General of the Royal Australian Air Force.

The first thing always to remember — never become emotionally involved with the client. What happens to him or her is not happening to you. Coming from me that no doubt rings falsely because in the case of Ronald Ryan (the last man in Australia to hang) I broke that rule. I did become emotionally involved and I died a little with him. The reason is that I will remain convinced until my last breath that he was innocent of the murder for which he undeservedly paid the penalty. I keep torturing myself, even this long after the event, by wondering how I let him down. His hanging certainly changed my life but thankfully, with the abolition of capital punishment, counsel will never again have to confront a client in the condemned cell.

Never start off by accepting the case you are given as gospel. Clients have a convenient memory sometimes and often draw to your attention only those matters which favour their case, ignoring facts adverse to it. After all, if your opposing counsel's brief contained the identical facts to yours, the only sure test would be an argument on the legal position resulting from undisputed facts.

Don't be like a racehorse racing in blinkers so that you do not see another horse in the field. The best evidence is contemporary written material. Therefore before trial your instructing solicitor should obtain discovery of the documents the other side intends to rely on. You should never be taken by surprise at trial by the written document that torpedoes your case.

Memory of conversations is notoriously faulty. Where actual words used assume importance it is surprising what variations of recollection occur between decent, honest witnesses really trying to repeat what they heard, or thought they heard.

Witnesses often vary significantly in their recollection of events that take place in a fraction of a second, such as a shooting or a car accident. The Ryan trial was typical, where 13 eye witnesses differed widely on the relative positions of Ryan and the victim at the time of the shooting. No two of them precisely agree and not one of them was accurate in placing the otherwise verified position where the victim was when shot.

Look for the evidence which cannot lie, photographs, videos, tape recordings and documents (unless shown to have been corruptly and falsely prepared to mislead).

Often when cross-examining, you have never seen the witness before he or she enters the witness box. You have very little time to decide on the best way to break down evidence which is damaging your case. Is the witness an impressive, obviously truthful person? If that is the case don't try to bully the witness. That will only strengthen the testimony. Treat such a witness politely and don't accuse him or her of lying. That way you may be able to obtain concessions from the witness which possibly leaves your case viable.

There are occasions when it is necessary to attack the witness. In such a case make sure that you have factual material on which to base your attack, such as record of convictions, contradictory documents, etc. Often a judge may ask counsel whether he or she has instructions to launch a character attack and whether it is necessary for the case. Gratuitous attacks which are bound to attract publicity should not be embarked on unless necessary and relevant to the case. Counsel enjoys a privilege to attack the character of a witness. It should not be abused.

Never talk down to a jury. A juror might never have been in a court before and, like going to church, expects to hear language somewhat different from the common discourse at a football match. Don't deliberately drop g's and h's.

I have used many apt quotations from the Bible (King James' version) and Shakespeare. I believe juries like hearing appropriate references of that sort. Usually the poets succinctly and memorably express something better than the language you would ordinarily use. Those who have watched the TV series of Rumpole of the Bailey will have noted how well the fictional character drew on Wordsworth.

You have to have a bad case to loose it, no matter how much of a mess you make of it. The judge rarely allows you to lose the case that should be won. In the same way, no matter how brilliantly you handle the case, which on the facts is a no-hoper, the judge won't let you win it. The margin for skill, in my estimation, is only about 5 per cent. There is a big difference between doing a job well and badly, but it often does not affect the result.

Most cases are won or lost on facts. Get your facts right. The law should conform to the merits based on facts. Focusing on law reports, citing what some long dead English judge said a century ago in an entirely different case, cannot divert attention from the relevant facts of a case. Concentrate on the facts. If they are in your favour, you should win.

My school days have concentrated my preference for Shakespeare. He has a quotation for any given occasion if only you can find it. When you look in the mirror in the morning you should be able to bear the sight. If you conduct yourself in accordance with the ethical standards of a proud profession, you will be respected and gain much personal satisfaction. As William S. said:

> To thine own self be true,
> And it must follow as the night the day,
> Thou canst not then be false to any man.

Philip Opas

Technical Vocabulary and the Criminal Advocate

With the arrival of enhanced rights of audience for solicitors, more practitioners may be tempted to dip their toes into the swirling waters of advocacy. For those who are inclined towards criminal practice it will be necessary to grasp the full range of technical vocabulary which is the "toolbag" of those appearing in the criminal courts.

IN order to assist, the authors have provided below a glossary of some of the better known words and phrases used on a daily basis in the magistrates' courts.

Each is accompanied by a translation which, we hope, will help to divine the inner meaning of what are, essentially, terms of art. Indeed, in taking his or her first faltering steps the unfamiliar advocate could do worse than to mix and match a selection of the following, thus acquiring a ready made, all purpose, bail application or speech in mitigation.

Similarly, the glossary may provide an insight into well used expressions from the Bench which do not always possess their obvious meaning. Quite the contrary, certain legal expressions have the very opposite intent to that which is apparent to the lay observer. To give but one example, "My friend" generally means, "My opponent if not "my sworn enemy", and is frequently an expression of distaste when used by the Bar of solicitors who have the temerity to appear before the same tribunal as their "learned friends".

B. Wynn-McKenzie M, Children's Court of Victoria.

NEW LAW JOURNAL

The prosecution request six weeks for service of committal papers.

The prosecution need six months for service of committal papers.

Police enquiries are continuing.

There isn't a lot of evidence against this defendant.

The prosecution would like an opportunity to review the matter fully.

We have lost the file.

This is a complicated matter.

I haven't yet read the papers.

The new charges should be in your register.

I have just seen several pigs fly past the court

Are you instructed to apply for bail?

The Bail Act does not apply in my court.

I am instructed to make an application for bail.

Before you look at me like that I know this is utterly hopeless.

What I say about the matter is this ...

I am a member of the Bar and congenitally incapable of blowing my nose without a prologue.

My client tells me ...

I suggest you treat the following information with great caution ...

I am instructed that ...

I am paid to believe the following …

The defendant has substantial community ties.

He is on bail already to two local courts.

... and is well known in the area.

... and generally appears here twice a week.

The victim is not known to the defendant.

My client attacks people indiscriminately.

All of the property has been recovered.

It was found in his pocket.

This theft was completely out of character.

Normally he just stabs people.

There is no history of failing to appear.

No one has ever been foolish enough to give him bail.

The defendant has a job to start on Monday.

My client has not done a day's work in his life.

... painting and decorating.

But would very much like bail.

... with his uncle.

No one in their right mind would employ him.

His girlfriend is pregnant.

Not only is he dishonest but also stupid.

Both of my client's girlfriends are pregnant.

I am also very stupid to think that this is twice as good.

My client was fully co-operative with the police.

He was caught red-handed.

He pleaded guilty at the first opportunity.

The evidence was utterly overwhelming.

He made full and frank admissions.

His Brief didn't get there in time.

He is a man without a blemish on his character.

He has never been caught before.

As the learned prosecutor rightly points out …

I was counting on him not reading the files.

Unfortunately, the surety cannot be here today.

No one in their right mind would stand surety for this man.

May the surety be taken at a police station?

Is there any way we can slip this one past you?

If you are against me on that ...

I can see your eyes are glazed ...

In my respectful submission ...

Listen, you clot!

His family have always stood by him ...

Various relatives have been co-defendants in the past.

... and are likely to continue to do so.

And may yet be charged!

Unless there is any further matter upon which I can assist?

For the life of me I can't think of anything to say.

I am intrigued by your submissions.

May I see your practising certificate?

I hear what you say ...

Come off it, Mate!

Well, there it is.

I disagree with you violently.

I have not yet made up my mind.

My mind is frozen hard as permafrost.

My preliminary view is ...

My views is engraved in graphite.

I will hear what you have to say.

Justice must be apparent if not real.

Thank you, unless you have anything else to add ...?

Please shut up and sit down.

Thank you, Miss Smith, you have been a great assistance to the court.

Is entry to the Bar now conducted on a random basis?

I hesitate to interrupt ...

How I love the sound of my voice and have no hesitation in offering you the opportunity to enjoy it.

I needn't trouble you ...

After hearing that pile of codswallop.

I have listened carefully to what your advocate has said ...

My eyes have been closed but I do have a vague recollection of someone speaking.

... and indeed nothing more could have been said to advance your cause ...

He went on a bit, but we both know you're going inside, Sunshine.

With the greatest respect ...

I spit on your argument.

So be it ...

I have nothing but utter contempt for your ruling.

Extracted from the *New Law Journal* courtesy of the publishers, LexisNexis UK, by His Worship B. Wynn-McKenzie, Magistrate, Children's Court of Victoria.

Conference Update

24 October 2004: Auckland New Zealand. International Bar Association Conference 2004. Website www.ibanet.org/auckland.

28–30 October 2004: Canberra. The Criminal Lawyers Association of Australia and New Zealand. 9th International Criminal Law Congress. www.icms.com.au/crimlaw.

3 November 2004: Sydney. Asian Arbitration Conference 2004. Contact Mary Mamootil. Tel: (02) 9024 5273. Email: mm@mandmevents.com.

13 November 2004: Melbourne. Masterclass on Equal Opportunity: in Law, Medicine and the Professions. Contact Eugenia Mitrakas (A.G.A.P.I. Limited — The Greek Conference). Tel: 03 9690 2033. Fax: 03 9696 2937. Email: eugenia@greekconferences.com.au.

18 November 2004: Brisbane. Legal Aid Congress 2004. Tel: (07) 3878 9242, Email: congress@legalaid.qld.au.

19 November 2004: Melbourne. The Third Annual Australasian Jury Conference. Contact Jury Research Conference c/- School of Law, Division of Business, Law and Information Sciences, University of Canberra, ACT, 2601.

20 March 2005: Cape Town, South Africa. Fourth World Congress on Family Law and Children's Rights. Contact Gayle Fowler, Tel: (02) 9999 6577, Fax: (02) 9999 5733, Email: lawright@capcon.com.au.

21 March 2005: Broadbeach, Queensland. Law Asia Down Under 2005, 19th Biennial Law Asia Conference, 34th Australian Legal Convention. Contact Mrs Robin Kulmar. Tel: (07) 3222 5888, Fax: (07) 3222 5850, Email: robin.kulmar@lawasia.asn.au.

29 May 2005: Mykonos. Tenth Greek/Australian International Legal and Medical Conference. Contact Jenny Crofts. Tel: 9429 2140. Fax: 9421 1682. Email: jennycrofts@ozemail.com.au.

2–8 July 2005: Bali. Tenth Biennial Conference of the Criminal Lawyers' Association of the Northern Territory. Contact Lyn Wild. Tel: (08) 8981 1875. Fax: (08) 8941 1639. Email: info@thebestevents.com.au.

3–9 July 2005: Amalfi Coast. Europe Asia Medico-Legal Conference. Contact Rosanna Farfaglia, Tel: (07) 3236 2601. Fax: (07) 3210 1555. Email: conference@qldbar.asn.au.

15–21 September 2005: Rome. Pan Europe Asia Medico-Legal Conference. Tel: (07) 3236 2601, Fax: (07) 3210 1555, Email: conference@qldbar.asn.au.

25–30 September 2005: Agios Yiannis Mykonos, Greece. Contact Eugenia Mitrakas (A.G.A.P.I. Limited — The Greek Conference). Tel: 03 9690 2033. Fax: 03 9696 2937. Email: eugenia@greekconferences.com.au.

The Way We Were: An Old Lag's Tale

Record of Interview between Raymond Ernest Lamb and Constable Daryl Hadley at the Altona North Police Station at 2.20 a.m. on Friday 19 December 1968. Also present is Constable Foster and Senior Constable Conroy. Record of Interview commenced at 2.20 a.m. Hadley typing and asking questions then typing down answers in reply.

Q. *What is your full name and address?*
A. Raymond Ernest Lamb.
Q. *What is your age and date of birth?*
A. 27 and my date of birth is 17 December 1953.
Q. *What is your occupation?*
A. I'm an unemployed …
Q. *How do you feel?*
A. Pretty smooth.
Q. *Are you ill or injured in any way?*
A. No way.
Q. *I am going to ask you some questions in relation to your being found in a stolen motor vehicle earlier tonight, but before I do I must advise you that you're not required to answer any of my questions, do you understand this?*
A. Yeah. Everything that you have seen I've done. I got caught, the job's sweet.
Q. *Is there anything that you can tell me about this stolen car?*
A. I arrived at the Seaview Pub at about 9 pm until about 9.45 and I then left. I walked across the road to the wog in a taxi and jumped in … and I said: "Listen wog. Take me here wog, and you just go where I tell you to go. Go to 327 Ballarat Road, Braybrook, the postcode is 3019 and my phone number 312 1991, when I hit as far as Valley Street I just talked to the wog. We were at the lights at Kingsway and Queens Road and I was waving my arms about to scare him and … then the chook flew the chicken coop.
Q. *Did you hit him at all?*
A. Look at me. These are only old war wounds.
Q. *Did you hang your coat in the taxi's rear vision mirror?*
A. Yes, that's when the wog got heavy, and that's when he shit himself and flew the coop.
Q. *What do you mean by "flew the coop"?*
A. Ah he shit himself and fucked off.
Q. *When the wog flew the coop what did you do?*
A. All right, free car, let's make the most of it, let's go to fuckin' Colac or Geelong, let's run the car in and we run it, run it out, get a new fuck.

I am going to ask you some questions in relation to your being found in a stolen motor vehicle earlier tonight, but before I do I must advise you that you're not required to answer any of my questions, do you understand this?

Q. *Did you in fact steal this car?*
A. Fucking oath, fuckin' spot on son, then just sparked my way through a couple of pallet boards.
Q. *Do you know that it's wrong to steal other peoples cars?*
A. Yeah fuckin' oath you only steal from wogs, not from aussies, fuckin' wogs. Pour petrol over them and set fire to them.
Q. *Did you in fact assault the wog?*
A. … the wog scratched the side of my face, the fuckin' cat went out the window and I'm a midnight cowboy.
Q. *You are going to be charged with the offence of theft of a motorcar, assault, you are not obliged to say anything unless you want to do so, do you have anything to say in answer to the charges? You are not obliged to say anything in answer to the charge unless you wish to do so but whatever you do may well be taken down in writing and used in evidence, do you understand?*
A. No worries. I understand everything you say, it's true and correct and I'm backing you up all the way.
Q. *Do you wish to make a written statement?*
A. No, fuck that, I'm in the Indian tent.
Q. *Will you read this record of interview over out aloud?*
A. Yes, no fuckin' worries. No I don't want to read the fucking thing. I'll sign the fuckin' thing. Hang on, I want to read the fuckin' thing.
The defendant then read over the record of interview aloud, agreed that it was true and correct, page two still in typewriter.
Q. *Is this a true and correct account of our interview here tonight?*
A. Fuckin' oath it is. I don't lie to my friends.
Q. *Will you sign this as a true and correct account of our conversation here tonight?*
A. Fuckin' oath I do. I sign it all the way.
Q. *What was your address again?*
A. 327 Ballarat Road, Braybrook, post code 3019 and phone number 312 1991. The job's sweet then. Throw in a bit of sugar and its sweeter.
Q. *Is there anything that you wish to add?*
A. Yes, that everything's true blue and that we all stick together.
Q. *Is there anything that you wish to have altered or changed in any way.*
A. No. It's all true.
Interview concluded by me at 3.04 a.m.

Retail Leases Volumes 1 and 2

By Clyde Croft
Published by Leo Cussen Institute 2004
Volume 1, pp. i–xx, 1–544, Comments on forms of standard lease 547–626, Table of VCAT Retail Tenancies Decisions 629–650, Appendices 653–808, Indexes 811–857;
Volume 2, pp. i–xvii, 1–372, LIV Standard Lease 375–418, 421–422, Appendices 425–675, Indexes 679–722

DR Croft has updated *Retail Tenancies* in a fourth edition renamed *Retail Leases*. The renaming reflects the recent enactment of the *Retail Leases Act 2003*.

The fact that this work is the fourth edition since 1992 is a recognition of the ongoing and changing legislative framework, the steady flow of judicial and VCAT decisions in the area and the importance of this area of law to commercial practitioners.

This work is structured in two volumes, with the first volume containing commentary, legislation and forms relevant to the *Retail Tenancies Act 1986*, the *Retail Tenancies Reform Act 1998* and associated legislation. Volume 2 covers the new *Retail Leases Act 2003* and associated legislation, including the *Fair Trading Act 1999* as amended by the *Fair Trading (Amendment) Act 2003* (particularly relating to the unconscionable conduct provisions and their application by virtue of s.76 of the *Retail Leases Act 2003* to retail premises leases that were entered into or renewed before I May 2003) and the *Small Business Commissioner Act 2003*.

The *Retail Leases Act 2003* and associated legislation commenced on 1 May 2003 and applies to retail premises leases entered into after 1 May 2003 (whether by way of new lease or renewal), nevertheless the Retail Leases Act although being generally prospective in operation has retrospective operation in relation to renewals of pre-existing leases.

Accordingly, although the volumes may be purchased separately or as a set, it is clear that for the foreseeable future practitioners in this area will need to have a knowledge of all relevant retail tenancy legislation.

Much of the Volume 1 material is relevant to Volume 2 and the similar structure of both volumes provides ease of reference between the two volumes. It is proposed that electronic updates will be provided through the Leo Cussen Institute website as well as supplements or new additions on a regular basis.

This work contains comprehensive commentary and usefully incorporates a large number of appendices which set out standard forms of leases and other documents such as disclosure statements, VCAT retail tenancy list application forms, explanatory memoranda and the text of legislation.

Retail Leases confirms the author's reputation as a leading expert in this area, and the work will be an indispensable resource to those whose professional expertise involves them in retail leases as well as to landlords and tenants whose relationship is governed by the legislative regime.

Retail Leases is a practical resource containing in a single format the vast majority of source and ancillary material, together with expert and authorative commentary. This excellent work is commended to all those involved in or interested in retail leases.

P.W. Lithgow

Handy Hints on Legal Practice (3rd edn)

By Lewis, Kyrou and Dinelli
Law Book Company 2004
Pp.1–504, paperback
RRP $90

THE origins of the third edition, namely as a guide to assist young practitioners, is evident in Chapters 1 and 2, dealing with the practitioner–client relationship and the first interview with the client.

In keeping with its original purpose, the advice or "hints" contained in the book are set out with clarity, precision and a degree of dogmatism. Unfortunately for the critical reviewer, the simple statements of the law, covering matters such as the taking of and adherence to instructions, the conflict between duties to the client and duties to the court and the need for independence from the client, contain very little with which one can quarrel.

I was particularly impressed with the chapter on Legal Professional Privilege, a subject which does not lend itself easily to condensation in precise and dogmatic form. However, that is precisely what the authors have achieved.

This book is a wonderful short tour of the elementary issues which all of us face in our daily lives. Some of us will know more about the relationship with the client than others. Some of us will have a better idea of the difference between indemnity costs and party–party costs than others. Some of us will understand the solicitor's lien better than others. Few of us, however, will know the answer to the dilemma of the Queensland cane cutter posed in Chapter 22.

The cane cutter in a divorce action fighting over custody, tells his solicitor that he is going to come down from Queensland to straighten out his wife and "kill that bastard who is advising her". Is this a matter that one passes on to the other side in order to save the life of the solicitor on the other side, and to enable the husband to be cross-examined by the other side as to his violence and threats and unsuitability to have custody of his children? This is one area where the book does not give an answer with the same degree of dogmatism. Not surprising really.

Chapter 26, dealing with precautions against negligence, should be read by all practitioners, solicitors and barristers.

There are a number of profound, yet obvious hints such as "learn the facts as soon as possible. If your client's instructions reveal the existence of witnesses, obtain a signed statement from them as soon as possible …". Or "when taking over any matter from another practitioner, it is very important to satisfy yourself immediately that all items requiring attention have been completed. In particular, be wary when taking over a matter shortly before the statute of limitations period is due to expire … Unfortunately, previous omissions by other practitioners or your client may become your own omissions, simply because you failed to review the file and make the necessary enquiries from your client or other parties".

By contrast with Chapter 26, Chapter 34 dealing with court etiquette should be well known to all experienced practitioners who have spent any significant time in court. The advice, however, is invaluable to younger inexperienced practitioners.

This reviewer found one statement that seemed to depart from "reality". It dealt with the proposition that one should not give advice until satisfied that the advice was correct. Dealing with the pressure placed on lawyers in commercial practice to implement transactions within

"unrealistic" time lines and the fact that there is a conflict between meeting the deadline and ensuring that the client's interests are protected, the authors say:

> The solution is simple. Never give advice with which you are not entirely satisfied even if it means that your client is disappointed that the advice cannot be given within a particular time-frame. If your client imposes unrealistic deadlines which prevent you from carrying out your professional duties, then it is better not to act for that client. To proceed with the matter, even with written disclaimers which point out that you have not had enough time to advise on all relevant matters, is simply too risky.

This seems to ignore the fact that for an employee or even a partner in a large firm to send away — to another large firm — a large and continuing client may well affect his continuing status as an employee or partner in that firm.

In the context of litigation, such a "hint" ignores the fact that when a client arrives in one's office or a brief arrives in one's chambers five minutes before the midnight bell of the relevant limitation period, decisions have to be made often without the benefit of certainty as to what is the relevant law or even as to what are the relevant facts.

The fact that it has been necessary to attack such a relatively minor matter or defect in the book illustrates just how good the book is.

There is one other statement that raises nostalgia rather than credence. In Chapter 23 the authors say:

> It has often been said that membership of a profession is different from membership of a trade. One of the hallmarks of a profession is a tradition of devoted and disinterested service quite apart from financial reward. Another is a tradition of co-operation between members of a profession.

While the last sentence of that quotation clearly still represents the truth, one has to doubt the extent to which "devoted and disinterested service" are provided by the profession as a whole today totally distanced from financial reward. The introduction of time costing and the "bottom line" have done much to distort the earlier picture.

G.N.

Double Entendres

Those who jump off a bridge in Paris are in Seine.
A backward poet writes inverse.
A man's home is his castle, in a manor of speaking.
Dijon vu — the same mustard as before.
Practice safe eating — always use condiments.
Shotgun wedding: A case of wife or death.
A man needs a mistress just to break the monogamy.
A hangover is the wrath of grapes.
Dancing cheek-to-cheek is really a form of floor play.
Does the name Pavlov ring a bell?
Condoms should be used on every conceivable occasion.
Reading while sunbathing makes you well red.
Acupuncture is a jab well done.
When two egotists meet, it's an I for an I.
A bicycle can't stand on its own because it is two tired.
What's the definition of a will? (It's a dead giveaway.)
Time flies like an arrow. Fruit flies like a banana.
Santa's helpers are subordinate clauses.
In democracy your vote counts. In feudalism your count votes.
She was engaged to a boyfriend with a wooden leg but broke it off.
A chicken crossing the road is poultry in motion.
If you don't pay your exorcist, you get repossessed.
When a clock is hungry, it goes back four seconds.
The man who fell into an upholstery machine is fully recovered.
You feel stuck with your debt if you can't budge it.
Local Area Network in Australia: the LAN down under.
He often broke into song because he couldn't find the key.
Every calendar's days are numbered.
A lot of money is tainted — It taint yours and it taint mine.
A plateau is a high form of flattery.
A boiled egg in the morning is hard to beat.
He had a photographic memory that was never developed.
A midget fortune-teller who escapes from prison is a small medium at large.
Those who get too big for their britches will be exposed in the end.
Once you've seen one shopping centre, you've seen a mall.
Bakers trade bread recipes on a knead-to-know basis.

Mediation — a Meditation

POST two CLE seminars on Mediation August 2004 (Coram Bob Miller, Tony Nolan and John Bolton who presented two joint sessions — well attended — with the speaker interrupted by the others (and others)).

There were three musketeers at the Bar
They're mediators they've told us so far.
The one on the right
Pulls the punches
No fight.
The left man just queries and spars.

Keep your client well versed all the time.
Keep your kisses well hidden in lime.
Make your mediator of choice
Allow you to voice
As to throw one's opponent in brine.

Sir Laurence then appeared on the screen.
A dispute sharp on facts was then seen.
Emotions were bubbling
Amidst finances troubling.
Comments came thick and fast like a stream.

Note the difference in style of them all.
One hits whilst the others play ball.
We will all take note
Not to grab by the throat
Any one of the three in the hall.

"Fred of Canterbury". 25 August 2004