Victorian Bar News

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Page

AGENDA:

BAR COUNCIL REPORT

Since the last publication of the Bar News, the Victorian Bar Council has met on nine occasions. The following decisions of interest were made by the Council during that period:

1. **Gift to Law Institute Library**
   Following the recent fire, the Bar has purchased a set of Authorised Reports for the Library of the Law Institute.
2. **Clerking**
   Investigations are currently being made into the possibility of appointing a further clerk.
3. **Recommendation as to Fees**
   The Bar Council has resolved to withdraw the existing recommendations as to fees and make no further recommendations in this field. It will therefore be up to individual members of Counsel to arrange for their respective fees in the relevant areas consistently with Counsel's Rules. The Council has, however, established a Committee headed by Waldron Q.C. to examine the present fee charging and collecting practices of the Bar. The Committee is also asked to report whether such practices should in any respects be modified or altered. So far as Magistrates' Courts fees are concerned, the Bar Council resolved to submit to the Attorney-General that the scale of fees for briefs and conferences should be as follows:

Scale: $1,000 – 2,000 –	Brief	$130
	Conference	15
$2,000 – 3,000 –	Brief	$150
	Conference	20

4. **Two Thirds Rule**
   A circular has been distributed to members regarding the resolution of the Council that where two Counsel are briefed the junior should charge a proper fee in all the circumstances of the case. A proper fee may be more or less than two-thirds of the fee of the senior.
5. **Qualifications for applicants**
   The Bar Standards of Practice Committee has been asked to consider and report upon the question whether applicants should be required to complete a prescribed examination before commencing reading.
6. **Barristers Disciplinary Tribunal Bill**
   It is hoped that this Bill will come before Parliament in the present session.
7. **Court Lists**
   The executive committee is to make arrangements for the display of daily court lists in all buildings occupied by barristers other than Owen Dixon Chambers.
8. **Independent accommodation**
   Following an inspection, approval was given to a member of Counsel to rent chambers in that part of Equity Chambers which is not controlled by Barristers' Chambers Ltd.
9. **Reciprocity with Queensland Bar**
   After some discussions between the Chairman and representatives of the Queensland Bar regarding reciprocity of admission, it appears that the Queensland Bar will not agree to receiprocity under present circumstances.
10. **The Common Room**
    Artist George Luke has presented to the Bar a sepia sketch following his recent successful exhibition in the Common Room.
11. **Visiting American Lawyers**
    Visiting American and Canadian Lawyers en route to the International Bar Association Conference in Sydney were entertained to drinks on Friday 8th September and Monday 18th September.
12. **Law Institute**
    Monthly meetings of the joint standing committee of the Bar and the Institute have been resumed.
13. **Ethical Rules**
    The Bar Council has invited Sir Gregory Gowans to compile a booklet of ethical rulings and Sir Gregory has accepted that invitation.
14. **Annual General Meeting**
    The Annual General Meeting of the Bar will be held on Monday 25th September at 5 p.m. in the Common Room.

BAR COUNCIL CANDIDATES

The following have offered themselves for election to the Bar Council.

A. Counsel of not less than 12 years' standing (11 to be elected)

H.C. Berkeley Q.C.
Frank Costigan Q.C.
G.R.D. Waldron Q.C.
J.H. Hedigan Q.C.
J.E. Barnard Q.C.
P.A. Liddell Q.C.
B.J. Shaw Q.C.
R.C. Tadgell Q.C.
J.G. Phillips Q.C.
J.L. Sher Q.C.
G. Hampel Q.C.
F. Walsh Q.C.
N.H.M. Forsyth Q.C.
J.G. Larkins

B. Counsel of not less than 6 nor more than 15 years' standing (4 to be elected)

I.C.F. Spry
P.D. Cummins
E.W. Gillard
H.R. Hanson
L.R. Opas
A. Chernov
P. Mandie
W.B. Zichy-Woinarski
B.G. Walmsley
B.M. Hooper

C. Counsel of not more than 6 years' standing (3 to be elected)

M. Rozenes
R.C. Webster
P.J. Kennon
J.W. Burns
A.J. Myers
A.J. Howard
P.W. McCabe
J.W.K. Burnside

BAR NEWS — REPORT OF ETHICS COMMITTEE

Since the last publication of the Bar News the Ethics Committee has met on four occasions. Most of the matters that were considered by it related to rulings that were sought by members of this Bar as to the proper mode of behaviour in given circumstances. One such ruling, which is of general interest, was in the following terms:

1. That the primary obligation of counsel was to accept a brief marked at a fee proper for counsel practising in the particular jurisdiction.
2. That where counsel was instructed by a solicitor who was also the lay client he was entitled to insist upon the appointment of an independent instructing solicitor before accepting the brief.
3. That if counsel's past experience of a particular client was such as to give him good reason to believe and he did believe that his performance in the conduct of the case would be adversely affected thereby, he could decline the brief.

The Committee also considered four complaints made by lay clients against members of this Bar. It has finalized its investigations in relation to two complaints and found that neither complaint was justified. As to the third complaint the Committee is still in the process of making investigations. In relation to the fourth complaint it has been decided to hold a summary hearing and this will take place in early September.

The Committee also has received complaints from two solicitors against two members of the Bar. The Committee has undertaken the investigation of these complaints and is currently awaiting further information from the respective solicitors.

The Committee also had to consider a complaint made by one member of the Bar about the behaviour of another member of Counsel. In relation to that complaint, the Committee has decided to conduct a summary hearing and this will take place in early September.

A. Chernov
Secretary

TRIBUTE: W.O. HARRIS J.

For the last thirty years of his life we knew W.O. Harris as a master, a colleague, a leader, a Chairman and a Judge. I write, therefore, of that side of the man known to the Victorian Bar. It would not be true to say that Bill Harris was a quiet man. He had an impish sense of humour and his bubbling laughter was easily evoked by the more piquant gossip that ever floats around barristers' chambers. But there was in the man a great inner calm. Those who knew him well did not associate his characteristic little gesticulations with any disturbance of what we knew to be a calm and analytic mind.

My first memory of him was of the day that he almost moved by admission to practice. After I sauntered up to the First Court ten minutes after Sir Edmund Herring and his brethren had left the Bench there was no recrimination, no inquiry, no panic, merely a willingness and an ability to put things right.

In conferences it was those same well-remembered qualities which, hour after hour, allowed him to wait whilst an inarticulate and meandering client gradually built together a narrative from which patiently, and bit by bit, he could piece together a coherent and convincing account of past events. I remember him sitting quietly long after the patience of any other barrister would have been exhausted, waiting with a certain bird-like attention for the crumb of relevant fact to appear. Those conferences so far removed in manner from those in more hurried and, perhaps, more robust chambers, were an example to his readers not only of pains-taking devotion to the interests of his client, but also of an innate kindness which patiently and, in the end, effectively allowed the client to find his own way.

He was a kind man and towards his former readers he was even a sentimental colleague and mentor. In many ways large and small he took an interest in and tried to further their professional advancement. One former reader, less optimistic than his master, had his Silk announced without having been to Mr. Ravensdale for his gown and Windsor coat. It was unthinkable to Bill that one of his former pupils should appear in Court in such circumstances apparently still a junior. It was not without some misgivings in the ensuing weeks that a bulky and very new Silk conducted his practice constricted in robes made for a taller and much slighter man.

Bill's Chairmanship of the Bar was, as he told me, one of the happiest times of his life. His gregarious and warm personality was well suited to the duties of that office and neither before nor after that time have we enjoyed such good relations with the other side of the profession.

In the Tribute paid to him by the Supreme Court after his death, many things were said of him as a man and a judge which need not be repeated in what is a personal note. I last saw him a short time before his death. His inner calm was still there. He did not fear death, and he was still ever-loving of life and the things of life. We shall miss him very much.

H.B.

WELCOME: BEACH J.

The appintment of Barry Watson Beach Q.C. to the Supreme Court of Victoria will be welcomed by all those who respect integrity, admire courage, and value principleand truth above narrow self interest.

Already assured of a place in legal history as Chairman of the Board of Inquiry into Allegations against the Victoria Police Force, this new position will extend the areas of law to which he can bring his considerable talents. Barry Beach comes to the Bench not as an unknown quantity but as a man who has proved his capacity to grapple with complex legal and human problems.

In the wake of the Report which bears his name, with the support of his family (his wife Del, and children David, Jonathon and Sally), his true friends and his own resilience, he weathered a storm which would have destroyed a lesser man.

The fact that from time to time the Bar can produce from its ranks men of such independent thought and action is the major justification for its existence.

His Honour was educated at Geelong College and from his youth has had an allegiance to the Geelong Football Club which could only be described as masochistic — a trait also evident in a devotion to golf, rowing, and (perhaps to a lesser extent) swimming. He served articles with the firm of Wighton & McDonald of Geelong, was admitted to practice in March, 1953 and, in the same month, signed the Bar Roll and commenced reading with the late Lionel Revelman. His Honour's career at the Bar was a distinguished one involving many jurisdictions varying across the legal spectrum from the Westgate Bridge, Winton Air Disaster and Atlas Dredge Inquiries to narcotics prosecutions and murder defences.

In October, 1968 His Honour was appointed Queen's Counsel. His Honour was always available to assist and advise fellow Barristers (and particularly junior counsel) their legal problems.

His readers were Dove, Dee, Ashley, Darvall, D. Ross and McGrath.

The Bar's loss of a leader is the State's gain in the administration of justice.

J.C.

WELCOME: GOBBO J.

Of Judges: learning is expected; eminence, if not already achieved, comes with the judicial office; courtesy is hoped for; but humility is a surprise. Uriah Heep debased the word, and certainly the practice of the profession of barrister does not encourage it — rather the reverse. It is a rare man who comes to the Bar with a sense that his gifts of intellect do not entitle him to lord it over his fellows, and a rarer one who carries that sensibility to the Bench.

There is no doubting Mr. Justice Gobbo's learning and eminence. A silk since 1971, he was educated at Xavier and then Melbourne University where he took a B.A. with honours. At Xavier he rowed in the only winning Head of the River eight since the time whereof the memory of man runneth not to the contrary. Mr. Justice O'Bryan was in the same crew, so they will be a formidable combination on the Full Court. He was a Rhodes Scholar and President of the Oxford University Boat Club of which University he is also an M.A. He is a Knight of Magistral Grace Sovereign Military Order of Malta, and Commendatore al Ordine di Merito of the Republic of Italy. The former order, sometimes known as that of the Knights of St. John has a history going back to the Crusades. The latter is a high distinction awarded by the Presidentof the Italian Republic. A glance at the Australian Who's Who will indicate the long list of other things he has done and bodies of which he is a member. One wonders how he had time to beget the 2 s and 3 d there noted. He read with the late W.O. Harris and his own readers were Martin, Henshall, Walker, Bailey (now in the diplomatic corps), Byrne, Stanley, Heerey, Dunn, Buchanan, Harper (whom he inherited when the late Peter Brusey took silk) and R.J. Evans.

Those who appear before him will fast discover, if they do not already know, the quickness of his mind and the subtlety of his analysis. Barristers of more recent call accustomed perhaps to think of him as a Local Government silk, will discover his knowledge of other areas, including crime, civil juries, equity and commercial causes; acquired during earlier years in practice.

His courtesy will both make his Court a civilised forum for adversaries and conduce to the better administration of Justice as it does wherever it is observed.

His respect for other human beings, his humility, is attested to by the obvious affection in which he is held by the local Italian community. The writer in the course of trying to understand the intricacies of his Italian decorations, rang the Italian Consulate on the day His Honour's appointment was announced. (Incidentally, how did Butterworths manage to find out soon enough to get it into the new *Cross*?) A lady at the Consulate who sounded much more youthful than her later comments indicated, said how delighted she was at the news and that she must hurry to tell the Consul who would share her enthusiasm. She added (as if it was yesterday) "We were all so thrilled when he was made a Rhodes Scholar" and "oh he *was* such a darling

little boy!" The darling little boy from the northern Italian family has now added to his list of achievements by becoming a Judge of the Supreme Court of Victoria at the age of 47. Few men can have so richly fulfilled the hopes of their parents.

We can expect that His Honour will not retire behind some judicial screen and be lost to mortal contact. He will be what our grandfathers called an ornament to the Bench. But he will retain his human touch.

There are a few words of advice for a new judge scattered through Act 2 scene ii of the Merchant of Venice:

> "take heed honest Gobbo"
> "truth will come to light, murder cannot be hid long; a man's son may, but at the length truth will out".
> "Take leave of thy old master, and enquire my lodging out. Give him a livery . . .".

FOR THE NOTER UP

Federal Court of Australia

C.A. Sweeney J.
(date of first appointment should read "1963").

Supreme Court Judges

King J: delete and insert after Kaye J. as follows —

King J:	59	13.2.1919	1977	1991

Delete:

Harris J: deceased.

Add:

Beach J.	47	16.2.1931	1978	2002
Gobbo J	47	23.3.1931	1978	2002

Masters of the Supreme Court

Age for retirement — 72 years.
Correction :
Delete "Jacob" and substitute "Jacobs" as Senior Master.

MISLEADING CASE NOTE No. 3

Grendel Pty. Ltd. v Adam and Others

Prof. Druce for the Plaintiff.
Fitzroy Q.C. and Ring for the Defendants.
Slough J. read the following judgment:—

The Plaintiff is the owner of certain letters patent in respect of "a method of using the legal system". The Defendants are some 500 persons who describe themselves as "barristers" and say that they belong to an unincorporated association which they call the Victorian Bar. The Plaintiff alleges that the Defendants have infringed its patent by using its method, and seeks injunctions and counterclaimed for revocation of the patent, on the grounds that it is not novel, that it is obvious, and that it is against public policy. They have also denied that their acts constitute infringement.

The Plaintiff's method is simple and has many advantages. It consists of calling witnesses in a court and having them tell the truth in their evidence. That they do tell the truth is ensured by the threats, of immediate physical violence to ensue should they not, which threats are administered after the oath. I am satisfied, having heard the evidence and seen the demeanour of some of the Plaintiff's employees for this purpose, that this method works far better than the administration of the oath simpliciter. Indeed, it gives a fresh and real meaning to the term "subpoena". The encouragements used to make witnesses tell the truth in court have always been based upon threats, and those threats today are those of the perjury trial, and divine retribution for breaking the oath. Since perjury trials are so rare as to be almost extinct, devine retribution is the only threat left. However, what was sufficient to terrify the faithful peasant of 400 years ago is not sufficient to terrify the faithless barbarians of today. If we are to continue to use our legal system, something more than an oath is needed, and in my view the Plaintiff has supplied it.

The Plaintiff was granted its patent some 3 years ago, and alleges that since that time the Defendants have consistently infringed it. The Defendants have admitted that they have called witnesses in court during the last 3 years, and asked them questions, and been given answers which are at least sometimes true. They say that the patent should not be revoked, or that at least they have not infringed it by their acts. I will consider first the potential grounds of revocation, and the first of those is lack of novelty.

Mr. Fitzroy submitted that it is not novel for a party to call a witness in court and have him tell the truth. He submitted indeed that it is a well known method of winning cases, but I cannot accept that submission. I have been on this Bench for a long time, and in my view, to be sure that a witness is always telling the truth is a novelty. For too long have my brother Judges and I been forced to sit here and listen with suitable gravity to stories which we would dismiss as fantastic if we heard them elsewhere. Constrained though we may still be by the rules of evidence, it is time for us to cry "Enough". Evidence was given by some of the Defendants of what they described as a known method of obtaining truth from witnesses, which they called cross-examination. It seems to be an apt name. I will refrain from deciding into which of the following two categories those Defendants fall, but from their answers given in cross-examination I have formed the view that the main purpose of cross-examination is to confuse honest witnesses, and to reinforce the evidence of liars. On the ground of novelty therefore the Defendants cannot succeed.

On the issue of obviousness, I consider the Defendants' submissions to border on impertinence. To say that the Plaintiff's method is obvious is to say that for centuries, the members of this and other Benches have been too simple-minded to think of it, or too weak-willed to use it. On either view the Defendants cannot succeed on that ground.

It was argued that the validity of this patent would be against public policy. Mr. Fitzroy submitted that it would place the manipulation of the court system in the hands of those select few able to obtain a licence from the Plaintiff. In my opinion that would cause little change from the present position. The patent must therefore be valid.

The Defendants have denied that their acts have infringed the Plaintiff's patent, although they have made the admissions to which I have already referred. In my view the Defendants are saying "We have pretended that our witnesses tell the truth while it has been to our advantage to do so, but now that it is to our advantage to reveal that they do not, we so reveal"; and I find it unconvincing. Either they have made witnesses tell the truth in court or they have not. If they have, they must have used the Plaintiff's method, because the methods they have admitted using do not have that effect. I dismiss as a recent invention the Defendants' story that they have not, because they have consistently purported over a period of years to the contrary. Accordingly, I find that the Defendants have infringed the Plaintiff's patent.

It was submitted finally by Mr. Fitzroy that the injunctions, being an equitable remedy, should not be granted. He called evidence, which was not disputed, that the Plaintiff is a company controlled by the Law Institute of Victoria, and submitted that the injunctions would give a monopoly over the court system to that body and its members. I reject that submission for two reasons. First, if the self-appointed guardian of justice fails to guard and indeed perpetuates a system which supresses it, this court will not strive to maintain that guardian's monopoly. Second, the evidence in support of the submission, though uncontested, was not given by use of the Plaintiff's method. I cannot tell, therefore, whether it is true or not, and I must reject it.

I will grant the injunctions sought against each Defendant, and the accounts of profits. I will also grant a certificate of validity, and say in passing that there appear to be excellent reasons for renewing this patent indefinitely when the time for expiry arrives.

GUNST

PENALTIES FOR TRAFFIC OFFENCES

The following article and table appeared in "The Times" of 1st August 1978. The Australian Stipendiary Magistrates Association formed on 3rd June this year might give early consideration to a similar promulgation:

"The Magistrates Association, which represents most of the 23,000 JPs in Enland and Wales has issued new guidance tables on sentences to be imposed for road traffic offences.

The suggestions follow the coming into force of the Criminal Law Act, 1977, which increased substantially the maximum fines applicable to a wide range of offences, some of them to £1,000, and take into account inflation since 1975, when the last table of penalties was issued.

The association makes clear that the suggested penalties (see accompanying table) should not be regarded as a tariff, and indeed says that treating them as a tariff would be a misuse. They were merely "starting points for discussion by courts in their assessment of penalties".

The suggested penalties are designed to apply to average offences committed by first offenders of average means, the association says in its accompanying comments. There might be good reasons for local variations, such as the differences in levels of pay between one area and another.

The factors to be taken into consideration when deciding whether to increase or decrease the suggested penalties include: the gravity of the particular offence, its prevalence, the offender's record, his or her means, the number of convictions arising from the same incident, and the different impact of disqualification from driving.

Referring to the fact that many of the suggested penalties are much lower than the maximum provided by law, the association points to the great danger that higher maxima might bring normal fines for traffic offences "out of proportion to other offences", such as assaults or thefts from shops". Benches should be careful to prevent unjustified anomalies.

Experience had proved that drink-and-drive offences accounted for many accidents, injuries and deaths, The Magistrates' Association says, and the Court of Appeal had consistently upheld higher penalties for offenders with high blood/alcohol content. "Fines, and especially periods of disqualification, should reflect this", it adds."

Offence	Max penalty	Suggested penalty
Failing to stop after accident	£100 E	£50 E and consider disqualification
Failing to report	£100 E	£25 E
Drunken driving or driving with excess alcohol	£1,000 D and/or 6 months prison*	£100 D 12 months but (re blood) E dis 18 months over 150mg E dis 2 yrs over 200mg E dis 3 yrs over 250mg
Refusing urine or blood specimen (driving)	£1,000 D and/or 6 months prison*	£100 D 18 months E
In charge drunk or with excess alcohol or refusing urine or blood specimen	£500 E and/or 3 months prison	£75 E and consider disqualification
Faulty brakes	£100 E; goods vehicle £400 E	Driver £25 E Goods vehicle owner £50 E
Driving while disqualified by court order	£1,000 and/or 6 months prison	£120 or detention centre or imprisonment; E and consider disqualification for longer than existing disqualification
Reckless driving	£1,000 E and/or 6 months prison	£120 E and 6 months disqualification
Careless or inconsiderate	£500 E	£60 E but consider degree of carlessness
No crash helmet	£50	£10
No insurance or permitting	£200 E	£60 E and if deliberate disqualify
Unsupervised learner driver in car	£100 E	£25 E
Motor cyclist with unqual passenger	£100 E	£15 E and consider disqualification
No L plates	£100 E	£15 E
No driving licence	£100. In some cases E	£40 E if endorsable; otherwise £5
No excise licence	£50 or 5 times annual duty	Actual duty lost plus fine of approx twice that

D : must disqualify at least 12 months (unless special reasons) and endorse

E : must endorse (unless special reasons), may disqualify and may order driving test

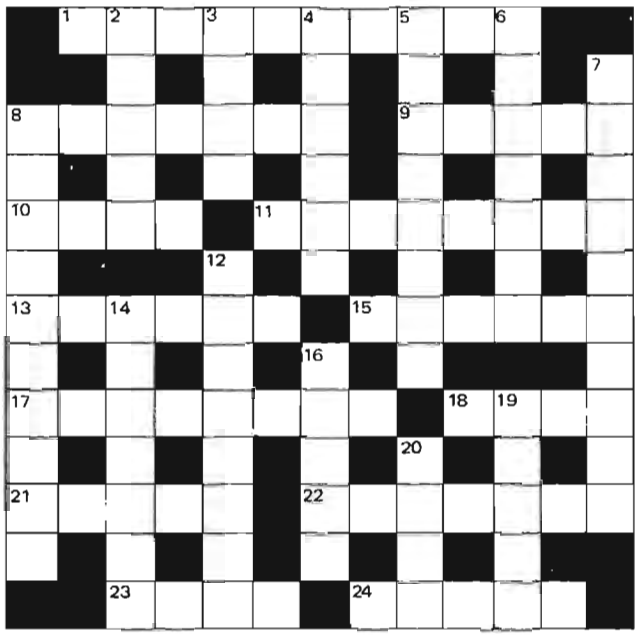
E shown in suggested penalty indicates endorsement only (disqualification and/or driving test being added only if justified).

* Disqualification at least 3 years if previous conviction in past 10 years

Offence	Max penalty	Suggested penalty	
		Lit Road	Unlit
Driving without lights	£100	£10	£20
Driving without matched headlights on unlit road	£100	—	£15
Parking during darkness on wrong side	£100	£8	£15
Dangerous parking position	£100 E	£25 E	
On zigzags by pedestrian crossing	£100 E	£20 E	
Obstruction	£100	£10	
Not supplying statement of ownership	£200	£20	
Exceeding speed limit	£100 E	£1.50 per mph over any limit. E (More for heavy vehicles. Consider disqual, particularly if 30mph over limit)	
Taking vehicle without consent	£1,000 E and/or 6 months prison	£100 E and 12 months disqual or consider detention centre or prison	
Carried in taken vehicle	£1,000 E and/or 6 months prison	£75 E and 6 months disqual	
No test certificate	£100	£8—more if over 3 months overdue	
Failing to comply with trafic lights	£100 E	£25 E and consider disqual	
Faulty tyres	£100 E: goods vehicles £400 E	Driver £25 E. Goods vehicle owner £50 E each tyre	
MOTORWAY OFFENCES			
Driving in reverse	£500 E	Main motorway, £75 E and 3 months disqual. Sliproad, £40 E	
Driving in wrong direction	£500 E	Main motorway. £100 E and 3 months disqual. Sliproad £50 E	
U-turn	£500 E	£100 E and 3 months disqual	
Over 70mph on motorway	£500 E	£1 50 per mph over 70. E (More for heavy vehicles, consider disqual, partic if 30mph over limit)	

CAPTAIN'S CRYPTIC

No. 25



ACROSS:

1. Underwear on the wharf perhaps (4,6)
8. Said no and fused again (7)
9. Shylock's servant J. (5)
10. Sounds extremely like a change (4)
11. Bearing including womannered (8)
13. Clubs and kitchens remind of old Gauls (6)
15. Or not as much as one who lets (6)
17. Mal's a nit and a charming thing (8)
18. Body of Kaffir warriors (4)
21. Otherwise consumed to declaim (5)
22. No cream becomes a love affair (7)
23. Noel (4)
24. Barry Act. No. 7642 J. (5)

DOWN:

2. First part of binding contract (5)
3. Osculate, oh please remember this (4)
4. Of rays (6)
5. Farouhk was a cricketer, not a craftsman (8)
6. So Burns procures perjury (7)
7. Mark of the edge (10)
8. Rescind the divine call again (10)
12. Name the letters incorrectly (8)
14. Croon by a lull (7)
16. Upside down flower of Melbourne (5)
19. Ech! A crazy craftsman (5)
20. Sitting duck for Peter Pan (4)

MOUTHPIECE

He tilted back his chair hoping to give the impression that he knew all about it. A comfortable feeling welled up inside him. Vaguely familiar, like adulation, or was it Armagnac?

"What do you say?" said Whitewig breaking in, "you're the expert on this".

The Waistcoat pretended not to hear. In social conversation, who wants to hear from an expert? They're thrust upon us daily, and on oath, from all sides in court. And what is an expert anyway? Only someone who is away from home. He became aware that they were actually waiting for him to speak. Even the childers in denim had ceased their chicle chewing.

"Should the Bar Council still recommend proper fees?" Whitewig pressed.

"It's all a question of power" He paused to let this observation sink in. As the only person at the table who subscribed to the CCH, he could hardly be found wanting. "And since the *Humes Case* no one is quite sure of the ambit of the power".

"That only applies to corporations doesn't it?" cooed Flossie, trying hard not to offend.

The Waistcoat shot her another glance, and decided to swerve.

"But that's not the issue m'dear. We all have a lesson to learn from our industrial brethren. There's no point in laying down the law if you can't enforce it. Take the Biggs girl".

"Yes" murmurred Whitewig obediently and rose as if to leave.

"The elders of the Bar Council have been recommending fees for years. Have you ever heard of anyone being prosecuted for non-compliance? It's all a question of recognising the limits of your power".

"Do you mean the market forces really fix fees?" Flossies eyes opened wide.

"No, you won't get your answer there" he responded with an avuncular touch on her elbow.

"Where, then?"

"The clerks".

BYRNE & ROSS D.D.

MAJORITY VERDICTS IN CRIMINAL TRIALS

The Bar's Law Reform Committee recently considered the desirability of majority verdicts in criminal trials. The Attorney-General has asked the Bar for its views. He pointed out that majority verdicts are taken in South Australia, Tasmania and also in England.

The Committee observed:—

"1. It has been a fundamental principle of the English system of criminal law that a jury decision should be unanimous. This has been considered as a fundamental requirement particularly having regard to the adversary nature of the British system of criminal law in which the prosecution undertakes the proof of guilt of an individual beyond reasonable doubt.

2. The concept of unanimity is consistent with the requirement that proof be beyond reasonable doubt. It would be difficult to say that such a standard has been reached if any number of the 12 judges of facts were not prepared to find an accused guilty.

3. Unanimity has always been rightly regarded as a factor in engendering public confidence in the administration of criminal law. A dissenting minority on juries would be likely to attempt to justify its position and attempt to throw doubt on the verdict of the majority. This would undermine the fact of and the appearance of absolute fairness and certainty of verdicts against individuals charged with criminal offences. (For example, in a case such as the *Ratten case* it is easy to envisage a strong dissenting minority effectively undermining the confidence in the verdict of the court).

4. Unanimity is a strong safeguard of the freedom of an individual vis-a-vis, the State. Such a freedom requires all the protection which could possibly be made available particularly having regard to the strong encroachment by the authorities upon the liberties of the individual. Such protection is to a great extent afforded by the requirement of a decision unanimous of 12 members of the community.
5. There is an arithmetical argument used by Forsyth in his "History of Trial by Jury" 10 A.L.J. 69, based on the theory of probabilities. Given 12 jurors and each of them being right 3 times out of 4, the probability of a unanimous verdict being right is 167,776,220 to 1. However, on the same assumption the probability of a majority of 8 to 4 jurors being right is only 256 to 1 and the probability of a majority of 7 to 5 being right is only 17 to 1.
6. With the requirement of a unanimous verdict the quality and intensity of deliberation is likely to be greater than in a situation where a mere vote would produce the necessary majority leaving the dissenting views unconsidered.
7. Having regard to the existence of this well tested fundamental concept it is submitted that the onus of showing that a change for the better by the introduction of majority verdicts is likely to occur is on those advocating such a change.
8. The change to majority verdicts in other States and in England came about for varying reasons, the main ones of which appear to have been:—
   (a) that some individuals on juries perversely refuse to convict no matter what the evidence may be;
   (b) that bribery and intimidation of jurors is made difficult if not impossible;
   (c) that proof beyond reasonable doubt does not necessarily require a unanimous view of 12 individuals and can be achieved on the basis that a considered opinion of 10 is more correct than for example a considered opinion of 2;
   (d) that the incidence of "hung" juries which is costly and inconvenient will be avoided.
9. It is the view of this committee that in Victoria there is no evidence to support any of the four abovementioned suggestions:
   (a) Although on occasions there may have been jurors who have perversely refused to act in accordance with their oath, there is no evidence that this is responsible for a significant number of "hung" juries nor is there any evidence that majority verdicts will necessarily obviate this problem to the extent to which it is thought to exist.
   (b) That although there might have been isolated instances of attempts to intimidate jurors, there is no evidence that this has in any way affected the proper administration of criminal justice in Victoria. To the extent to which this is thought possible, particularly in important trials, measures are available to ensure that it does not occur.
   (c) It is not possible to have the same confidence particularly in an adverse verdict against an individual where a number of jurors are not prepared to convict. As indicated above, such a system is likely to produce dissent and public discussion and undermine public confidence in the certainty of criminal law.
   (d) The available statistics in Victoria provided at the instigation of the Attorney-General for the period 1970-1977 are referred to in an article by Messrs. Willis and Sallman on "Criminal Statistics in the Victorian Higher Courts", 51 (11) *Law Institute Journal* 498. These indicate the following rate of disagreements in the County Court where most criminal trials are heard:

1970	8.5%
1971	4.4%
1972	5.5%
1973	4.8%
1974	5.6%
1975	7.2%
1976	6.2%

There is no basis for supposing that any significant proportion of even those percentages are due either to perverse approaches by individual jurors or the intimidation of jurors. It is in fact impossible to say that any significant proportion of these disagreements are due to anything but the difference of views amongst 12 dilligent and honest jurors.

10. It must of course be conceded that on isolated occasions the requirements of unanimity may produce a disagreement which would not have otherwise occurred had there been majority verdicts. It is however, for those who support majority verdicts, to show that such an occurrence would justify a change so funamental and so necessary for the protection of the individual in our system of criminal justice.

11. Insofar as any argument is based on the fact that some States and England have adopted majority verdicts, it is necessary to point out that other States have not, nor has New Zealand, Canada and most of the States of the United States of America. The Continental systems, most of which allow majority verdicts are of course, systems not based on the adversary approach but rather the inquisitorial approach to criminal justice.

Having regard to the considerations set out it is the view of this committee that a case for change to majority verdicts has not been made out either in principle or as a matter of expediency and that therefore, majority verdicts should not be introduced in Victoria."

LAW REFORM FOR MISREPRESENTATION

In his recent report (No. 7) the Law Reform Commissioner has tackled the thorny problem of non fraudulent or innocent misrepresentation.

The difficulties facing a dissatisfied purchaser who has entered into a contract on the faith of a representation which is neither fraudulent nor incorporated into the contract have long bedevilled practitioners and judges. Often rescission is not appropriate, as where the falsity is not discovered for some time. In a sale of goods situation it is just not available: *Watt v Westhoven* (1933) VLR 458. In such cases, where an award of damages would appear the sensible means of adjusting the rights of parties, the Courts have striven to do justice by a generous finding of fraud, by the often unreal expedient of collateral warranty or, more recently, by a finding of negligent misrepresentation.

The Law Reform Commissioner has sought to overcome these problems by recommending that legislation be enacted —

(a) that a representee be entitled to rescind notwithstanding that fraud is not shown and notwithstanding that the representation has become a term in the contract or that the contract has been performed.

(b) that the decision in *Watt v Westhoven* be reversed so that in the sale of goods the purchaser has the right to rescind for misrepresentation.

(c) that the representee have a right in damages notwithstanding that fraud is not shown unless the representor can show lack of civil fraud.

(d) that the Court may order damages in lieu of rescission where appropriate.

(e) that conduct which is misleading or deceptive be proscribed and that the Courts have wide powers to award compensation to persons suffering loss by such conduct. Compare Trade Practices Act Part V.

(f) that section 16 (3) of the Goods Act be amended so that a buyer has a right to examine defective goods before he loses the right to reject them.

The recommendations of this Report will, if accepted by the Government, effect a radical and much needed reform in this area of law. A copy of the Report is available in the library for those interested.

UNFAIR DISMISSAL IN U.K.

From time to time a client consults Counsel regarding his rights following dismissal from his employment. Usually he feels unfairly treated. Often he has received the appropriate notice required by the contractual or statutory rules that govern his employment. In such cases Counsel, constrained to advise that no relief is available, might well look a little wistfully at the thriving unfair dismissal jurisdiction which was developed in the United Kingdom.

The Sunday Telegraph for 20 August 1978 reports that in the past six years, a new legal industry has sprung up. Some practitioners derived the whole of their income from practice before Industrial Tribunals. After some preliminary screening by Tribunal Staff, there is a preliminary hearing akin to a committal in a Magistrate's Court. The Government's Advisory Conciliation and Arbitration Service seeks at that stage to resolve the complaints by conciliation. It succeeds with about a third of them. The remaining cases proceed to a full hearing before a Tribunal.

There are some 80 separate Tribunals in England and Scotland. Each consists of a Chairman who must be a lawyer (usually a barrister) of not less than seven years experience and two lay members. Each is selected from panels nominated respectively by the Confederation of British Industry and the Trades Union Congress. There are 80 full time chairmen each paid a salary of £13,154 a year plus expenses. The 126 part-timers each receive £49 a day plus expenses, while the lay members each get £22 a day (plus expenses).

Although the Tribunal does not award costs, about one third of the complainant employees and about half of the defendant employers have legal representation.

The average amount of compensation awarded is currently about £408. Less than 2% of the Tribunal's award exceed £3,000. Not surprisingly the insurance industry has fastened on to this new £5m a year business. An apparently typical premium charged by a Lloyds backed syndicate is £5 per employee per annum.

An appeal is available from the Tribunal to the Employment Appeals Tribunals, but only on points of law. Between 1975 and 1977 the All England Law Reports contain reports of eleven decisions of that Tribunal, and of one decision each by a judge of the King's Bench Division, the Court of Appeal and the House of Lords. That tally is limited to unfair dismissal cases and takes no account of the plethora of decisions in the related areas of redundancy, and equality of treatment of men and women under the *European Communities Act* 1972, the *Equal Pay Act* 1970 and the *Sex Discrimination Act* 1975.

For consistitutional reasons, Federal jurisdiction over dismissals in Australia is limited to cases where the employee has been dismissed for reasons associated with membership of, or participation in an official capacity in a union. By a recent 1977 amendment, that jurisdiction has been extended to cover the situation where the employee is allegedly dismissed for refusal to join in industrial action, or with the intent to coerce him to join in industrial action or become a member of a particular union.

Similar provisions in the New South Wales Industrial Arbitration Act likewise empower an employee who claims to have been dismissed for one of the stated reasons to seek reinstatement. The onus of proving that the dismissal was not actuated by one of the prohibited reasons is cast on the employer by both the Federal and New South Wales legislation. The only similar protection conferred by the Victorian *Labour and Industry Act* is continued to employees dismissed for reasons associated with memberships of a wages board or giving information to a labour and industry inspector.

D.M. RYAN

TIDBITS

Congratulations:

Gilbert: upon his appointment as Member of the Victorian Taxation Board of Review.

Todd: member of the Taxation Board of Review upon his appointment as Full Time Senior Non-Residential Member of the Administrative Appeals Tribunal.

Gaffy: appointed Crown Counsel of the new State of the Northern Territory.

G.A.N. Brown: elected Mayor of the City of Hawthorn.

Forensic Medicine

It has been suggested that a serious of lectures on Forensic Medicine would be advantageous to barristers and solicitors, with inputs from the Faculty of Medicine. To this end, an informal gathering is being planning in the Department of Social and Preventive Medicine at the Alfred Hospital on October 5 at 5.00 p.m.

People wishing to participate in this planning session should contact the Centre for Continuing Education, Monash University, on 541-0188, extension 3717 (Mrs. Hunt) or for after hours messages, 541-3718.

MOVEMENT AT THE BAR

Members who have signed the Roll (since June 1978)

J.A. O'Brien
B.R. Wright
G.I.K. Bromley
C.T. Corns
F.S. Zydower
M.C. Mangan (Miss)
C.T. Chettle
S. Daley
F.T. Brennan
J.H.L. Forrest
N. Crafti
P.H. Barton
D.G. Brookes
J.B. Lord
H.B. Carter (Miss)
J.L. Parrish
G.L. Smolenski
P.H. Kearney
M.R.B. Watt
T.J. Rosen
M.F. McNamara
M. Fitzsimmons

Members who have transferred to the Non-Practising List

R. Schilling
Bruce Coles.

Members who have had their Names Removed at their own Request

R.S. Hayes

Deaths

W.O. Harris J. — 17th August.
L. Dethridge C.M.G. (formerly Chairman of Court Judges) — 8th September.

SOLUTION TO CAPTAIN'S CRYPTIC No. 25

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