rian Bar News

SPRING EDITION 1981

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BAR COUNCIL REPORT

1. READERS

In 1982 there will only be two intakes of readers. These will be in March and September. Rather than signing the Roll at the commencement of reading, readers will be invited, to sign the Roll at the end of the Readers' course provided that they have satisfactorily completed the course. Black Q.C. will be in charge of the September 1981 Readers' Course.

2. MICROFICHE READER

Barristers Chambers Ltd. has purchased a Microfiche Reader. This will be available for the use of all members of the Bar.

3. CLERKING

(a) An ad hoc committee was set up to consider clerking generally. This committee met on several occasions. Following a report of the Chairman of that committee on the 23rd July, the Bar Council resolved that eight of the readers from the June intake be allocated by ballot to List R, while the remainder were to be allocated to other Lists.

(b) On the 23rd July the Bar Council resolved that the policy of the Bar Clerking Committee, should adopt the following policy in considering transfers: no transfer be allowed to a more senior List than a List from which the transfer has taken place, save in exceptional circumstances.

4. FEES

(a) Consideration is presently being given to an increase in the Supreme Court Scale in civil proceedings.

(b) Following discussion in the Bar Council and reference to the Bar Fees Committee negotiations are about to commence between the Law Institute of Victoria and that committee in relation to the recovery of outstanding fees owed to Counsel.

5. SOCIAL

On the 19th of August the Bar held a reception for the metropolitan Stipendiary Magistrates at the Essoign Club. A similar function for the County Court Judges is to be held on the 29th of September.

6. ACCOMMODATION

On the 3rd of September the Bar Council resolved that during the current shortage of accommodation, Barristers Chambers Ltd. may permit junior Counsel to share chambers with other junior Counsel.

7. DEBENTURE

An application from a member of Counsel who did not keep chambers in Melbourne to be exempted from the payment of a $2,000 debenture was refused by the Bar Council.

BAR COUNCIL ELECTIONS

The following candidates have presented themselves for election to the Bar Council of Victoria.

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

G.R.D. WALDRON Q.C.	ODC. 1213
J. J. HEDIGAN Q.C.	O.D.C. 1203
J. E. BARNARD Q.C.	O.D.C. 1207
P.A. LIDDELL Q.C.	O.D.C. 215
B. J. SHAW Q.C.	O.D.C. 1205
J. H. PHILLIPS Q.C.	O.D.C. 133
G. HAMPEL Q.C.	O.D.C. 103
F. WALSH Q.C.	O.D.C. 904
P. D. CUMMINS Q.C.	T.C. 31
M. J. L. DOWLING Q.C.	O.D.C. 1001
A. B. NICHOLSON Q.C.	O.D.C. 901
E. W. GILLARD Q.C.	O.D.C. 1208
A. CHERNOV Q.C.	O.D.C. 1204
D. H. McLENNAN	O.D.C. 723
L. R. OPAS (Miss)	O.D.C. 425

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

H. R. HANSEN	O.D.C. 613
W. B. ZICHY-WOINARSKI	O.D.C. 221
J. D. McARDLE	O.D.C. 401
B. A. MURPHY	O.D.C. 806
P. J. KENNON	O.D.C. 1215
L. LIEDER (Miss)	
T. A. HINCHLIFFE	F.C.
M. A. ADAMS	F.C.

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

J. L. BANNISTER	F.C.
D. G. GARNET-THOMAS	F.C.
C. GUNST	F.C.
R. LEWITAN (Miss)	O.D.C. 1106
M. B. KELLAM	F.C.
P. A. TRIBE	F.C.
K. M. LIVERSIDGE	Eq.
G. C. ANDREWS	Eq.
L. M. DESSAU (Miss)	L.C.
R. WEINBERG (Mrs.)	F. C.
B. S. T. VAUGHAN	O.D.C. 705
P. G. PRIEST	T.C. 3
J. C. MILLER (Mrs.)	O.D.C. 723
F. P. FOSTER (Miss)	O.D.C. 102

THE ESSOIGN CLUB LIMITED

The Club was incorporated on the 11th March, 1981. Bar Council records indicate that the formation of such a Club was contemplated prior to the erection of Owen Dixon Chambers in 1961. It was then envisaged as a part of the general facilities in the new building. Subsequently there were various sub-committees, steering committees and indeed a referendum culminating in the Bar Council in 1979 requesting the Catering and Functions Committee to form the Club. At the General Meeting of the Bar on 2nd March, 1981 the Bar gave its support to the establishment of the Club and urged all of its Members to join the Club.

The Memorandum and Articles of the Club were originally subscribed to by 51 Barristers and, as at the 1st day of September, 1981, there were 414 Members and 35 Applicants for Membership. One of the pleasing aspects of the Membership is the strong support that the Club has received from the Bench. The Club has also received great help and generous assistance from Barristers Chambers Limited.

The objects of and the activities undertaken by the Club establish it as an alter ego of the Bar. The Club has provided, through arrangements with the Caterer, luncheon facilities of a very high standard, and various Members of the Club have conducted functions at the Club premises of general interest to Members of the Bar. Perhaps the most successful activity to this date conducted by the Club was the Magistrates' Reception held on the 19th September, 1981. This was attended by 33 of the Metropolitan Magistrates and 130 Barristers, the majority of whom were junior Members of the Bar. The Committee of the Club have now decided to hold a similar function for the County Court Bench later this month.

As Members will be aware, the Club is applying for a Club Licence, O'Callaghan and Bourke are to appear before the Liquor Control Commission on behalf of the Club on the 16th September, 1981. Plans for the proposed alterations to the 13th Floor are exhibited on that floor and further details are available upon request.

It is hoped that all Members of the Bar will become Members of the Club and that activities organized by the Club will therefore be activities of all Members of the Bar.

McInerney

STILL MORE ON ACCOMMODATION

ABC Project

The events leading to the Debenture referendum have been rehearsed in **Bar News** Winter Edition. Of a total of 800 or so eligible voters, 210 were in favour of the Debenture and 157 were against. All, including the half of the Bar who did not bother to vote, have now been required to contribute $2000 towards the purchase of the ABC site.

The Bar has now retained the McLachlan Group, management consultants to:

- report on and make recommendations concerning the comparative feasibility of constructing accommodation on the ABC site as against that of obtaining leasehold accommodation in a building such as that being constructed at the corner of Queen and Little Bourke Streets.

- make recommendations as to the appropriate form and size of the building to be constructed on the ABC site.

- prepare a critical comparison of the various proposals for the construction of the new building that have been submitted by Lend Lease, Silvertons, Leith and Bartlett, Hookers and others.

- prepare a financial analysis for the proposed project including the various financing options which may be available.

The fee for this work has been agreed at $38,500 plus certain out of pocket expenses.

MEANTIME

The ABC project is estimated to take between three and five years to complete. In the meantime the Bar continues to grow at a rate of about 50 per annum. Assuming the continuance of existing tenancies, there is now a shortfall of 29 rooms. Furthermore, not all of the existing tenancies are secure – as the following summary illustrates –

Premises	Barristers Accommodated	Lease Conditions
Owen Dixon Chambers	313	Owned
Latham Chambers	84	Leased until 1990 3 year rent reviews
Four Courts Chambers	110	Leased until 1984 with 3 x 1 year options
Hume House	28	Leased until September 1983
Tait Chambers	36	Tenancy, 6 months notice by either party
Hooker Building	11	As for Tait
Equity Chambers	41	Tenancy, 3 months by either party
	623	
Present Shortfall	29	
Present needs –	652	

For some time, the Bar has left the task of obtaining leasehold accommodation in the hands of Barristers Chambers Ltd. The Company has for many months been negotiating for a lease over part of Nubrick House at the corner of Little Lonsdale and William Streets. It is understood that these premises would provide some 30 chambers. It was hoped that senior members would go to these chambers so as to provide a healthy mix. Generally speaking, this hope was not fulfilled.

Goldsborough Mort revived

In July it came to the attention of the Company that the Goldsborough Mort (Woolstore Chambers or Centre 1) Building was available for lease or purchase. The Company thereupon terminated negotiations with Nubrick, and on 23rd July, sought the authority of the Bar Council to negotiate with a view to lease or purchase the Goldsborough Mort Building.

It is not clear why the Company was so confident of obtaining this approval that it cut off the Nubrick negotiations. It will be recalled that in June 1978 the Bar Council reported to the Bar that it was not economic to purchase Woolstore Chambers, and at a price very much less than than presently asked.

It is not clear why the Company has failed to secure Nubrick House, or any other accommodation for that matter, when there was an existing shortage of rooms.

At its meeting on 30th July the Bar Council (by the narrowest margin) refused to give to the Company the authority to negotiate for the Woolstore Chambers. There was now no prospect of meeting the existing shortfall. The Company then passed back to the Bar Council the responsibility for meeting this problem.

So, the Bar Council appointed a Committee to investigate accommodation. It appointed Nathan Q.C. as Chairman of this Committee. He is in all respects competent for the task, but he has one great disability. He was available for only a few weeks, because of a commitment to go overseas early in September.

The Company continued to press the case for the Goldsborough Mort Building. Its urgings were referred to the new Accommodation Committee. The McLachlan Group was asked to advise as to the suitability of this Building for Bar purposes.

Notwithstanding the resolution of 30th July, the Bar Council on 21st August resolved that the McLachlan Group be engaged to investigate the suitability of the Goldsborough Mort Building and the financial feasibility of leasing it, with or without an option to purchase.

On 27th August the Consultants presented an oral report which is believed to have been adverse to the Building.

Subsequently, the Consultants presented to the Bar Council a written report comparing the building with the Flotta Lauro Building, next to Latham Chambers, and with Latham Chambers. This report highlights the obvious shortcomings of the Building. It was designed and built as a warehouse last century. It will not easily adapt to modern office requirements. There are difficulties with setting our chambers, with natural lighting and with fire control. Existing air conditioning is poor. But it has an undeniable charm. It is relatively cheap. It is readily available.

At its meeting on 3rd September, the Bar Council has now authorised the Company to negotiate with a view to leasing the Goldsborough Mort Building.

Conclusions

If the Goldsborough Mort Building is leased despite its physical disadvantages, this will in all probability be because of its present availability. It is altogether surprising that the Bar should find itself so constrained.

After a few days of investigation, the Consultant predicted future average net increase of 50 new members per annum. This comes as no surprise. As early as 1975, the then Accommodation Committee projected a Bar of 800 in 1984. The McLachlan estimate confirms this. Moreover, with a nine month reading period, those concerned with accommodation have at least that period of notice of the likely demand. It is then a mystery that the securing of temporary accommodation in Nubrick, or elsewhere, was not completed six months ago. Why should the present 29 young barristers who have completed their reading period be required to shoulder, in addition to all their other burdens (including the Debenture) that of homelessness?

Nor will the problem go away. Another 25 readers will complete their reading in December. A further 17 in March 1982. If the Goldsborough Mort Building with all its shortcomings is taken, rooms will be available in February. If the Bar resolves to look elsewhere they (and the present 29) will be obliged to overhold in their Master's Chambers until the middle of 1982. And where does this put the March intake?

Byrne & Ross DD.

AMERICAN ADVOCATES ON DISPLAY

Neither the chilly July winds which blow from the north-west, nor the fogs drifting in from the Pacific could detract from the warmth of the hospitality or from the enthusiasm of the 1500 delegates who assembled in San Francisco late last month for mid-Summer Convention of the Association of Trial Lawyers of America. This Association (ordinarily known by its initials ATLA) founded in 1946, now boasts more than 40,000 members from the 50 states of the U.S.A., from Canada and from Puerto Rico. For the most part, its members are trial lawyers who specialise in acting as plaintiffs' counsel in common law actions or as accused's counsel in criminal trials. ATLA enjoys the sub-title "Lawyers on the Side of People" and sees itself as a guardian of the American Common law system as it has developed during the last three centuries from English common law. ATLA strongly supports the rentention of juries for both criminal and civil trials, as an active participation by the general public in the administration of the law.

The first two days of the Convention (25th-26th July) were fully occupied with the Melvin M. Belli Seminar chaired (or "moderated") by the famous Belli himself. The Seminar began each morning at 8.30 a.m. and, apart from a brief luncheon break, continued on both days until well after 7 p.m. Australian newspapers tend to convey the impression of Belli as predominantly the powerful and flamboyant advocate. His office in Montgomery Street, where from the street passers-by can often glimpse the master at work at his desk "in the shop window", heightens that impression. But the Belli Seminar demonstrated another aspect of this remarkable trial lawyer – an encyclopaedic knowledge of American case law, a knowledge which on its own would fully justify his nickname "the King of Torts".

The format of the Belli Seminar differed significantly from the usual Australian Seminar. Each day it involved some 40 speakers, each of whom spoke for approximately ten minutes on a chosen topic. The

speakers were nearly all prominent trial lawyers, and the majority of the topics had considerable relevance to the Australian legal context. Topics included Nursing Home Litigation, Use of Stunt Drivers to Prove Proximate Cause, Dental and Medical Malpractice Cases, Arguing Soft-Tissue Damages, How to Present and Argue Punitive Damages, Cross Examination of Defendant's Experts, Proving Future Damages Without an Economist, Recovering for subsequent Injuries caused by Pre-Existing Injuries, and Protecting the Record for Appeal.

The program began with discussion on "The Coming of Age of the 'Day in the Life' film" by Monty Preiser, a leading trial lawyer and member of the famous West Virginian firm. This interesting development in the presentation of evidence is now extensively used where a plaintiff has suffered major disabilities such as quadraplegia. Prior to trial, a film or videotape is made of a usual day in the life of the plaintiff demonstrating the various problems which confront him as he is dressed, fed, conveyed by car to various locations, receives routine medical and para-medical treatment for his condition, and showing the other difficulties of his daily routine. Subject only to the requirement that any inadmissible material must be carefully excluded from the film, a number of American State Courts have now accepted such films as admissible evidence.

Peter Perlman, a trial lawyer from Kentucky, contributed useful discussion on "Development of Damages in Opening Address". He attacked the traditional American law school theory that Opening Address should be primarily used to develop liability and Final Address to develop damages, a view now discarded by many of the best American trial lawyers. Perlman said he had sometimes found it a useful technique before opening causation or liability, to develop damages fully, thereby arousing curiosity in the minds of the Jury as to how the damage was caused, before dealing at all with that subject.

Donna Winston, a trial lawyer and former nurse from Knoxville, Tennessee, contributed some helpful comments in a paper "Discovering Information Available to Nurses", in which she pointed out that trial lawyers seldom made adequate use of medical records. To take one example, frequent notations in the hospital records of the administration of injections such as morphine, will provide strong corroboration that the Plaintiff was in fact in severe pain at the relevant time. Belli himself believes in calling a suitable uniformed nurse from the hospital to read the records aloud to the jury.

Many other useful commentaries filled the two days of the Belli Seminar, such as "How to present a Wrongful Dismissal Case" (present it like a running down case with damages tied to shattered dreams) and "How to Open a Medical Malpractice Action". (It is okay to call a medical practitioner a butcher provided you have the evidence to prove it, but it is far more effective simply to say that the Defendant "buchered the Plaintiff". This conveys the message without actually making the express allegation.)

The general quality of the Belli Seminar is well indicated by the attendance. It was held in the large St. Francis Ballroom with seating for more than a thousand. On the first morning, no seats were available for the late-comers and, at all stages, some hundreds were in attendance. The Seminar was a triumph for Belli himself, who as moderator exercised fine control at all times and made numerous useful personal contributions. His ability to chair the meeting continuously for more than five hours at a time drew forth the comment from one speaker that despite the fact that Belli was in his early seventies, he still had "the vigour of a man in his thirties and the kidneys of a man of twenty". Quipped Belli from the chair, "But you can't see what I'm doing under the table".

During the remaining five days, the Convention divided into a number of Seminars on such diverse topics as Criminal Law, Commercial Litigation, Labor Law, Tort Law, Family Law, Product Liability Actions, Military Law, Railroad law, Admiralty Law and Workers Compensation. Other major features included a complete Mock Trial of an accused charged with harbouring a fugitive from justice, and the Trial of a Product Liability Action, complete with highly qualified expert witnesses. In conclusion, the Court in each case reviewed the methods employed by the participants in meeting the problems presented during the case. Product liability was also the subject matter of other seminars. This has obviously now become a frequent cause of action in the United States.

One excellent morning seminar "Trying the Criminal Case" had five of America's leading criminal lawyers presenting particular aspects of the criminal trial. This seminar began with an overview by Richard "Racehorse" Haynes from Houston, Texas. Haynes suggested that, when first meeting the accused, the trial lawyer should draw up two lists – one containing the things he likes about his client and the other, the things he doesn't like about him. Those matters should be borne in mind throughout the trial. You must get your Jury thinking favourably about the Accused, not about such irrelevancies as the high rate of crime. Haynes also conveyed the very practical advice that, at one's first interview with an Accused, one shouldn't ask him for his version of the facts at all – you ask him what it is he believes the Crown will allege against him.

"Racehorse" presents himself as a humble home-spun Texas boy but, as he talked, the shrewdness of the good criminal advocate kept showing through. In his early days a survey had indicated that large fat cigars were associated in the minds of the American public with shysters and crooks, whilst pipes were associated with plain, but honest, manliness. In those Courts where smoking by Counsel was permitted, before the case began Racehorse invariably presented his opponents with the biggest and fattest cigars he could find. When thereafter the cigars would be lit up before the Jury out would come Racehorse's "simple ole pipe".

F. Lee Bailey (author of "The Defence never Rests" and senior Counsel at the Medina Trial) contributed a helpful paper on "Attacking Eye Witness Identification". He pointed out that, if the client is innocent then an alibi ought to be available. As an Accused once expressed it so neatly when trying to explain to the police his unlawful presence on premises – "Everyone has got to be somewhere". Bailey asserted that in most identification cases there was seldom long and reflective opportunity to review the Accused and most witnesses are apt to fix on one particular feature of the offender only, such as the lobe of his ear or the shape of his mouth. Frequently in a hold-up, witnesses do not look beyond the barrel of the gun and are unable to describe the colour of the eyes of the offender. In most cases, it is important to stress to the jury the trauma at the relevant time. The question "Have you ever seen someone in the street and when you got up close to him found he wasn't the person you thought he was?" will ordinarily produce an answer providing at least some useful material for final address.

Stan Preiser of West Virginia, widely regarded as an outstanding cross-examiner, provided some very useful insight into cross-examination techniques. Preiser does not believe in the old rule "Never ask a question unless you know the answer". He believes the rule should rightly be expressed "Never ask a question unless you know how to handle the answer". Henry Rothblatt of Miami (but born in the Bronx) contributed a provocative paper on the Opening Address for the Defence. He considers Counsel for the Accused should not talk too much in opening his case. He should concentrate on that part of the Accused's evidence which cannot be refuted. Where the defence is psychiatric, it must be made clear to the Jury that you have a viable defence and you must then also ensure that the psychiatric evidence is clearly understood. Rothblatt asserts that even where defence is psychiatric, it is still important to make the Jury like your client, and it is therefore very important, or far as is possible, to humanise even the mentally disturbed Accused.

In the final paper of the Criminal Law Seminar, Federal Government Washington lawyer Donald Santarelli spoke on "The New Criminal and the New Prosecutor". Santarelli drew attention to the fact that there was an enormous amount of criminal law talent around the President, people whose basic interest had been prosecutive and that crime was now considered to be at least the number two enemy of the American people. Santarelli expressed the view that recent U.S. procedural developments in the Criminal Law field had tended to prevent conviction, and that it was now likely there would be procedural changes to reverse this situation. The Federal Government would give high priority to an attack on violent crime and drug-dealing, and the computer would be used to identify the main targets – those people who already had long criminal records. Their trials would be given high priority and, it was hoped, lengthy sentences would then keep those people off the streets longer.

Space does not permit any adequate coverage of other valuable Seminars. But not only did these Seminars cover much current American law and procedure but also devoted considerable attention to developing other aspects of the advocate's training such as, for example, the art of Jury persuasion. Amongst many persuasive orators none was more eloquent than John A. Burgess of San Francisco. "Law School" said Burgess "was traditionally a place where synthetic pearls are cast before genuine swine, but to be a great persuader you must understand life. You get this not from law school but from the back blocks". Burgess also pointed out that in presenting his case the good trial lawyer is the director and producer of a magnificent production, but he is *not* the star. "To the jury it must be made clear who is the star he said "who is to be punished and who is to be compensated.

The ATLA Convention was replete with numerous social functions, including a San Francisco Theme Party held at the Art Institute, where one had a choice of Chinese, Japanese, Indian and other national meals. There was also an Annual Membership Luncheon at which ATLA made its annual presentation to outstanding judges. One such award went to His Honour Judge Watt of Bute, Montana, went to His Honour Judge Watt of Butte, Calif., who when he was appointed a Judge in 1975, faced heard. By the development of innovative techniques in his Court, Judge Watt entirely eliminated any backlog. Now in addition to serving a full time Judge, he spends time visiting neighbouring Counties to explain his techniques. In accepting his presentation Judge Watt commented "These days we hear a lot about taking back-logs out of the legal system, but all that does is to move the problem sideways. Where do you expect to get justice? Do you achieve this by moving problems out of the justice system? All you do thereby is to get inferior justice. This is a problem for the legal profession and the judges, but it can be improved without the cost of a cent. If we can't solve it, people hereafter will say of us that we didn't do what we could have done".

Those members of the Victorian Bar who have a taste for overseas conferences, should note that the annual ATLA Conventions are very much conferences designed primarily for barristers. A number of ATLA members expressed the hope that an ATLA Chapter could be formed in Australia as in Canada. Whether or not that be practical, we cannot fail to benefit from closer links between the Victorian Bar and ATLA. To those who are wary of such a connection, it should be pointed out that many Canadian lawyers felt the greatest benefit gained by them from their association with ATLA was an added ability to resist growing incursions into Canadian common law rights. In some Canadian states, for example, an arbitrary limit has now been imposed on the maximum figure which can be awarded for pain and suffering and loss of enjoyment of life. ATLA assists in the fight to remove such arbitrary limitations.

In particular, of course, in all common law countries, we now face constant pressure for the abolition of juries. Intelligent interchange on such problems cannot fail to be of benefit. Part of the rationale of the jury system was extremely well explained by Judge Watt recently when, in thanking in a Californian jury after they had delivered their verdict, he used these words "We thank you not for the decision itself, but for having made the decision. These matters are not be determined by one man alone. This decision was not made by a government official, but by the people. You are making democracy work. Thank-you for participating in that process".

Perhaps above all, many Australian lawyers (especially those who practise in criminal law) instinctively feel what Richard Haynes expressed forcefully at the Convention when he said "Today we are only a stone's throw from the Police State. It is the lawyers of the country that keep the government of the country a government of law and not of men". It must be very much a matter of common cause with our American and Canadian cousins that the rule of law, and not of men, is maintained. ATLA proclaims that, in the maintenance of the rule of law, a powerful and genuinely independent bar always has a major role to play, a role often more important even than that of the judiciary itself.

(The next annual Convention of ATLA will be held at Kansas City on 23rd July 1982, but a mid-winter conference is to be held in London on the 16th January 1982.)

C. Francis

Mouthpiece

"I said to the man I now know to be the first-named defendant,
'What is your full name?'
He replied, 'Hartog Carel Berkeley'.

I said, 'What is your position with the Bar Council and the other defendants?'
He said, 'Primus inter pares.'
I said, 'What does that mean?'
He said, 'I am the chairman of the Bar Council and I am authorised by it to make admissions on its behalf.'
I said, 'The action brought by the A.B.C. against you and the other defendants alleges procrastination, gross negligence and breach of statutory duty. What do you have to say about that?'

The defendant hung his head then he said, 'It's all perfectly true. We were drunk with power at the time. But not so drunk as to be incapable of forming the requisite intent. Men are animals. Please don't tell our wives about it.'

I said, 'You are already in custody on a charge of being accessory before the fact to supplying misleading information on a debenture issue. I must warn you that you do not have to say anything, but anything you do say will be taken down and may be given in evidence. Do you understand that?'

He said, 'Yes I do. You've tricked me. I wouldn't have said anything if I'd known. I've only ever done Commercial Causes. But its too late anyway. You've got me cold."

I recalled being in court when that evidence was given. Soon afterwards, the sorry case closed. I will never forget his face as they led him away. Years later, he would still talk about it.

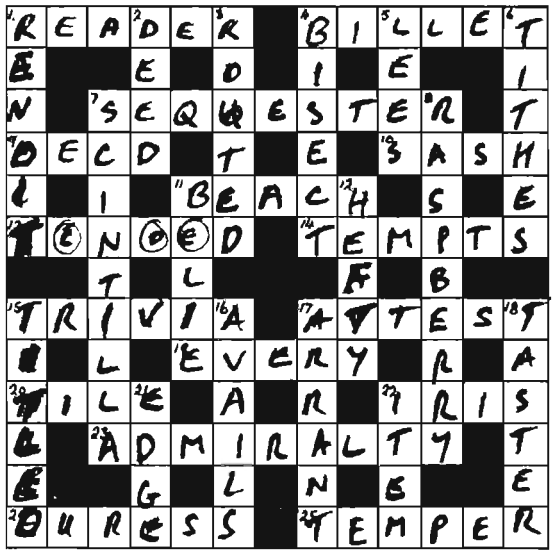
"The Supreme Court took over and developed the A.B.C. site in a way which made the Wentworth look like an old tin shed. Creditors foreclosed on Owen Dixon Chambers. Until we found something else, the judges let us use the old Supreme Court Building. Gosh, was there a scramble to get a good berth. Lloyd and Forsyth tossed to see which would have the whole library as chambers. Poor Lloyd lost and had to settle for the Banco, but in a way I think he seemed well suited by it. When the silks and the clerks were accommodated there was nothing left, so the rest went off to rent the Railways lost property office.

It was about that time that someone suggested that the Bar Council should be replaced by an administrator."

Byrne & Ross DD.

Victorian Bar News

CAPTAIN'S CRYPTIC No. 37



Across

1. Pupil in chambers (6)
4. Order requiring soldier to be boarded (6)
7. Seize temporary possession of debtor's estate (9)
9. Contracted dead (4)
10. Ornamental scarf (4)
11. Appointed to Supreme Court July 18, 1978 (5)
13. Was directed and took care of (6)
14. Entices to sin (6)
15. Trifles (6)
17. Swear (6)
19. Each and all (5)
20 A single debauch on this (4)
22. Goddess of eye colour (4)
23. Trial and decision of maritime questions (9)
24. A ratio in *R. v. Darrington & McGauley* (1980) V.R. 353 (6)
25. Disposition of mind (6)

Down

1. Appointed to County Court 1977 (6)
2. Written instrument signed and sealed (4)
3. What unlawful assembly of three or more people did (6)
4. Divide into two parts (6)
5. Dregs (4)
6. Taxes of one tenth (6)
7. Spark e.g. not a — of evidence (9)
8. Fruity sound of disapproval (9)
11. Fail to justify (5)
12. Bulky and weighty (5)
15. Of the nobility of posession of property (6)
16. Helps (6)
17. Downright (6)
18. One who tries wine food etc. (6)
21. Border (4)
22. Unit of entry (4)

LETTERS TO THE EDITORS

Dear Sirs,

I was a member of the sub-committee appointed by the Criminal Bar Association to look into the proposal floated by the Victorian Attorney-General Mr. Storey in relation to optional juries in criminal trials. The other members of the committee were Vincent Q.C. and Ross, Crown Prosecutor.

We investigated the problem and we unanimously decided against any change in the present system.

The Criminal Bar Association adopted our report and forwarded it to the Victorian Bar Council.

I was therefore most surprised to read in the press recently that the Attorney-General said that the legal profession was divided over the issue of optional juries and he was still considering implementing a proposal for optional juries.

As I am not aware that the Law Institute has given any indication of support for optional juries I am concerned to know how it can be thought that the legal profession is divided over the question. There is certainly no division at the Bar over the question and I am not aware of any division amongst Solicitors. Is it possible that if solicitors and barristers generally take one view and the Attorney-General takes another view that he then concludes that "the profession is divided".

Yours faithfully
James H. Kennan

22nd June, 1981

Dear Sirs,

I read with interest and enjoyment and entertainment, the article 'Bar Robes' by Sartor in the Winter Edition 1981 of the **Bar News.** *My enjoyment was however, reduced when I reached the final column of the article to read that Betty King "is the only one to wear bands as far as we can tell. The others (referring to women barristers) who are required to robe seem to don a black shapeless smock with a dash of white lacework round the neck".*

As you know, I practised full time at the Bar for three years prior to taking this appointment, and always wore a Bar shirt, wing collar and bands when appearing robed, as I frequently did. I do in fact recall being opposed to David Ross before Mr. Justice Marks.

Linda Dessau has to my knowledge always worn bands and so has Lindis Krejus, and there may well be other women barristers who deserve a mention.

I do feel that your description of women barristers is sexist and inaccurate and I hope you will amend this in your next edition. Unfortunately as far as I could tell, the rest of the article was completely accurate and I therefore feel it has left a mistaken impression of the dress of women barristers.

Yours sincerely,

Joan Dwyer,
Chairman,
Equal Opportunity Board.

Dear Sirs,

I write to express some mild protest concerning the reference to me as "Francis Aloysius" in **Victorian Bar News** *– Winter Edition 1981 on Page 5.*

The expression "Aloysius" has a leaning to the Jesuitical (to the influence of which I have not been submitted). My second christian name is "Patrick" which combines some of the noble ancestry of Erin's Green Isle with the sound C.B.C. background to which you have already made reference. The confusion has been caused by someone who calls himself "Berk" or "Bark" who had the temerity to stand before the assembled throng at you-know-where and describe me as "Francis Aloysius".

Basic to my mild protest is the fact that I am now being referred to as "Sweet F.A.". Croc informed me, and I agree with him, that the adjective "sweet" is inappropriate.

I enjoyed the meal notwithstanding my aforesaid ancestry and, unless told to go elsewhere next year, I propose to take you all back there again and all the Micks can get lost.

Regards

"Mine Host"

• • •

JABOT WINNING

Further to the article in Bar News Winter 1981, it is noteworthy that the jabot has established a stranglehold on lawyers in Tasmania.

Green, C. J. has indicated that both bench and bar may at their option wear the jabot. In fact all the judges do wear it except for one judge shortly due to retire.

• • •

"Plus ca change, plus c'est la même chose"

In "Bar and Buskin – Being memories of life, law and the theatre" by E. F. Spence K.C., published in London in 1930, one finds the following observations:

> "Unfortunately, too, there are some solicitors who look out for a promising beginner, and send him a great deal of work, mostly small work, but keep putting off payment and making false promises, until the victim refuses to take any more papers from them without a cheque, when they drop him and go elsewhere."
>
> "Oh, the waiting and hoping in the case of the man with no private income."
>
> "The position of the barrister and his clerk is strange. An immense gamble for both . . . on and after fifty guineas the percentage is two and a half."
>
> "In my view the salary of the County Court Judges before the war was insufficient, having regard to the nature of their work, which very often is, in a sense, more important than that of the Judges of the High Court. For the sum at stake in a County Court action is generally far larger in relation to the fortunes of the litigants than is the case in the High Court, and the right of appeal is severely limited."

• • •

NEW LAY OBSERVER

Mr. Frank Eyre has been appointed as Lay observer – Barrister's Disciplinary Tribunal and the Solicitor's Disciplinary Tribunal.

Mr. Eyre replaces Brigadier John Purcell who retired due to ill-health.

Mr. Eyre is the former General Manager for Australia & the Pacific of the Oxford University Press. He has written several books and was a member of the Commonwealth Literary Fund Advisory Board. Mr. Eyre was also Chairman of the Victorian Government Plain English Committee.

A PERMANENT COURT OF APPEAL FOR VICTORIA

I propose the legislative creation in Victoria of a permanent appellate court to be known as the Court of Appeal. The new court should be vested with all of the appellate jurisdiction, civil and criminal, presently exercised by the Supreme Court. It should also be given such additional appellate jurisdiction (additional to that which the Supreme Court presently exercises) as is necessary to equip it for its role as the supreme arbiter of the law in this State. It follows, of course, that the Supreme Court should cease to exercise any appellate jurisdiction or functions.

I propose that the bench of the new court should consist of six judges – Judges of Appeal. It should be able to sit, and only able to sit, with a bench of three or a bench of five. A bench of five would be regarded as a Full Bench and would sit in cases of special importance. The new court should also be able to sit simultaneously in two divisions, but each division would have to be a bench of three. I do not advocate any formal division of the new court according to whether civil or criminal jurisdiction is being exercised. In an appellate court with such a small bench it would be inappropriate to have any such division. All members would be expected to be expert in the full range of appellate work in both jurisdictions and in all areas within both jurisdictions. This is not to say that the special skills of this or that member could not be recognized to some degree in the allocation of work. Although the new court should have to sit in a bench of three, a bench of five, or two benches of three, the composition of any particular bench should not necessarily remain fixed except for the duration of the hearing of a particular appeal. I am not suggesting that the composition of the bench would always change from case to case, but merely that it may do so. This would allow greater flexibility and would promote the more efficient disposal of appeals providing, of course, that there was only one division sitting at that particular time. I also propose that a single Judge of Appeal should be able to exercise a practice court type of jurisdiction with respect to appellate matters. If the new court is to be separate from the Supreme Court, as I think it should, it should control all practice court matters relating to its own jurisdiction. It should also have its own appropriate administrative and other officers.

I have proposed a bench of six, rather than one of greater numerical strength, in the interests of economy. In the event that such a strength proves inadequate, the position can be reviewed. But a proposal intended to be taken seriously, and that is certainly my intent, has to have regard to practical and economic considerations. In my submission, it would not be an extravagance for Victoria to have a court of six, devoted exclusively to appellate work, bearing in mind the present numerical strength of the Supreme and County Courts and the large volume of appellate work created by the operation of those two courts.

Although urging that the new could be separate from the Supreme Court I do make two suggestions which may be said to be in contradiction of that goal. First, I suggest that the Chief Justice of the Supreme Court should also be appointed the President of the new court. In that second role he would have added duties including the allocation of work to the Judges of Appeal. The Chief Justice should be able, if he wishes to do so, to delegate those duties, or part of them, to the senior of the Judges of Appeal. Further, in the absence of the Chief Justice, the senior of the Judges of Appeal should act as President and perform all of such duties. Secondly, I suggest that Judges of Appeal also be appointed Judges of the Supreme Court, if they do not already hold that appointment. They would then be clothed with all of the statutory and other powers of Judges of the Supreme Court. They would also, at the direction of the Chief Justice and President, be able to sit as judges at first instance. I would not however envisage this happening except in very rare cases. In the event that Judges of Appeal commonly sat at first instance, the principal reason underlying my proposal for a new court would be defeated.

The Judges of Appeal should be paid salaries substantially in excess of those paid to Judges of the Supreme Court. Insofar as matters of precedence and status are of importance these days, and they

are still of importance to many, Judges of Appeal should rank before and above Judges of the Supreme Court. Depending on the colour of the government of the day, a Judge of Appeal should, on appointment, be offered a knighthood, if he does not already possess one. The Chief Justice should be paid an additional salary as President of the Court of Appeal.

The Judges of Appeal should be appointed from the Bar, including the present members of the Supreme Court bench. I would imagine that most of the appointees would come, I think most should come, from the Supreme Court bench. Any consequent depletion of the numerical strength of the Supreme Court should, of course, be made good. I would not wish to exclude the County Court as a valuable source of appointees – the promotion of selected members of that Court to the Supreme Court is now well accepted and has been an unqualified success. But the route from the County Court to the Court of Appeal should, I suggest, be via the Supreme Court.

There is not space to write in detail with respect to the powers of the new court. It should be clothed with the widest possible powers to determine appeals and to itself impose the appropriate result without ordering a new trial. I appreciate that this may be a sensitive and difficult area with respect to the determination of guilt in criminal appeals. However, resort to the new trial procedure should be cut to a minimum.

It there a need for this new Court of Appeal in Victoria? I suggest there is. But I want to make it quite clear that nothing I say is intended to convey disrespect to the Supreme Court or to any of its members. My criticism of the present system is a criticism of the system, not of the Judges of the Supreme Court or any of them.

The present system is that the composition of the Full Court varies from month to month. The Chief Justice is, it is true, an exception to this. It is also true that the senior puisne Judge and some of the other more senior judges are more frequently to be found in the Full Court than their brethren. But basically our Full Court is composed of trial judges who are for the time being appellate judges. They can in truth be called part-time appellate judges. They have the invidious task of hearing appeals from the County Court. When they return to their ordinary work as judges at first instance they know that there is a prospect that their own rulings, charges and judgment will be brought into question before another Full Court of their brothers.

But that last point, (sitting in judgment on their brothers), and what is implied in it, is perhaps of minor importance. The important point is that the Full Court is staffed by part-time appellate judges. Appellate judicial work is quite different from trial work and other work at first instance. It requires a different approach and different skills. It is best conducted by specialists if the court is to be an effective means of discovering and correcting error. Members of a permanent appellate court would be more likely to be familiar with previous decisions of the court and trends in previous decisions. They would be less likely to decide appeals on grounds inconsistent with those upon which earlier appeals had been decided. Where questions of uniformity and parity are important, for example, the review of awards of damages and the quantum of sentences, they would be more likely to produce results and to state principles which would be understandable and acceptable. But most important of all they would be better able, by their approach, to create a true appellate court. Such a court would be a court concerned with the law and error in the judicial process. It would not encourage, nor would it tolerate, specious arguments with no merit, footling points of no substance, nor attempts to re-litigate (for example, by re-stating a plea) or have a new hearing on the appeal. In the result the disposition of appeals would be speedier and more efficient. More importantly, however, the results would be of a higher standard, and the court could command greater respect from Victorian judges and practitioners and throughout the Commonwealth and the other common law jurisdictions. It is true, of course, that the Court of Appeal could never become "the supreme arbiter of the law in this State", a phrase which I used earlier. But its decision would, I suggest, be likely to achieve a much higher degree of respect in the High Court than is presently accorded to decisions of the Full Court.

There is not the space to discuss the experience in other common law jurisdictions. And all that I have said has, no doubt, been said before, although not perhaps with Victoria in mind. See for example lthe editorial note advocating a permanent court of appeal in N.S.W., written as long ago as 1937—11 A.L.J. 39. See also the address of Sir Raymond Evershed, M.R., "The History of the Court of Appeal", delivered at Wilson Hall, University of Melburne, on 22 August, 1951—25 A.L.J. 386 esp. at 388-389.

Tinney

JUSTICE FOR BARRISTERS:

BARRISTERS pursue the most unpopular profession. Policemen, since old Dixon passed on to the eternal station house and TV coppers took to wearing long hair, tearing about in old bangers and striking their suspects, have become extremely popular. But barristers remain resolutely bottom of the likeability poll.

The reasons for this are well known. Barristers are thought to be overpaid and they are known to be insincere. They plead eloquently for anyone who can scrape up the money to pay them, or, and this makes them even more unpopular, are thought to scrounge on public funds, showing a greater eagerness to rob the State than out of work actors or British Leyland strikers. Indeed, barristers are suspected of asking extra long questions so that, like taxis on a circuitous route, they may clock up even more money from legal aid.

Of course the charge of insincerity is well founded. The barrister's ideal is to pick up whoever hails him, like a cab driver; or do his best for anyone however unpleasant, like a doctor. The idea that even the worst sinner is entitled to have his case put as favourably as possible is neither ignoble nor unchristian.

And it may be said that in these days of method acting and Jimmy Carter, the virtues of sincerity have been overestimated. The greatest horrors of our world, from the executions in Iran to the brutalities of the IRA, are committed by people who are totally sincere. There is a great deal to be said for the man whose only true commitment is to getting people out of trouble.

Finally Sir Robert Mark has spoken: Commissioner McNee has spoken. These eminent legal figures seem to believe that trials are, at best, a wearisome formality and usually a huge spoonful of salt in the perfect engine of Justice as administered by your friendly neighbourhood D.I. of the Serious Crimes Squad. Along with Magna Carta, the Bill of Rights, the presumption of innocence, the Judges' Rules and an accused's right to silence, barristers, in the current police view, prove a powerful threat to the nation's simple touching faith in the guilt of whoever the police may have put in the dock.

The extent to which this view has gained acceptance is the measure of our dwindling regard for individual liberty, and no one can doubt that in the last 10 or 15 years it has dwindled to such an extent that Pym and Hampden would be ashamed of us, John Stuart Mill would view us with disfavour and Voltaire with dismay.

Mrs Whitehouse is an appalling phenomenon, not because of her views on sex, which are entirely her own business, but because she believes in censorship and criminal sanctions against those who disagree with her. And Mrs Whitehouse has reached her apotheosis in the approval of the House of Lords in the Gay News case, those craven souls in charge of the BBC tremble at her name, and she has been granted the accolade of a respectful interview by David Dimbleby.

The porn backlash is not important because it shows that we are living in a more puritanical age; what it demonstrates is that we are living in an age which is no longer concerned about free speech.

Hard won liberties are only too easily lost. A man had a right to be tried by his peers, and to have some chance of getting a jury which looked vaguely like his fellows, the sort of men and women who might have some understanding of his life, he was allowed seven challenges to jurors. By a scarcely debated clause in some Criminal Justice Act this has now been reduced to three. No one protested. The seven challenges were unpopular because barristers used them, and used them in some cases where (speak softly so as not to arouse the wrath of Commissioner McNee) the accused was actually acquitted.

Victorian Bar News

So I would like to inaugurate this legal column with a plea for the defence barrister, the non QC or Old Bailey hack. He may not go down the mean streets; but he certainly goes into some pretty mean courts and his average income is, according to the latest Bar Council figures, about £6,700 a year before tax.

He is no great shakes as a lawyer, but he has a lifetime's experience in cross-examining policemen on their notebooks and he knows that many officers like to ensure against any miscarriage of justice by putting such well-known phrases as "You got me bang to rights" or "It'd come as a relief really if I now told you all about my involvement" in their suspect's mouths.

He is dedicated to the principle that Justice is more outraged by the conviction of the innocent than the acquittal of the guilty (a view firmly held by such unsentimental old parties as Blackstone and the late Lord Goddard).

Because of this precious system a barrister really has no scope for dishonesty in the conduct of his cases; he is not paid by results, he can't manufacture evidence, and although his private life may be in an appalling muddle and his VAT long unpaid, you can be pretty certain that he would never knowingly deceive the court.

Because he has no firm, and because a good advocate is usually a poor business man, he has no pension; and if he is worth his salt and has not been afraid of a row in court he is unlikely to join the Civil Service as a Circuit Judge. He will go on till he's far too old for work, defending inadequate or merely villainous generations, before judges who come to look increasingly like his deeply disapproving sons.

When the defending barrister is attacked, as he is today, freedom is attacked, and our long held legal rights are put in danger.

John Mortimer QC
of the English Bar
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permission of the
author)

FROM THE "DARWIN NEWS"

"He (the accused, Pepperill) appeared to be wrapped in a blanket and his head was in a plastic bucket," he said in answer to the Crown prosecutor, Mr. Dean Mildren.

"Const. Bell held a spotlight on the man and I was told it was Sammy Pepperill. We placed him in the rear of the police vehicle and took him to the Ti Tree police station."

Cross-examined by Defence Counsel, Mr. John Coldrey, Const. Hessian said Pepperill's head was definitely inside the bucket.

Mr. Coldrey, "You, sort of, Harry Butler like, removed him from this small hollow habitat?"

Const. Hessian, "No, I removed it from him.

"You sure he was not lying on top of the bucket? — That is correct, he had his head inside the bucket.

"Was this a size six or seven bucket? — No, it was a standard four gallon one.

"Did he have the handle under his chin? — No.

"At the time you noticed him there, he was very drunk I take it? — Yes, he was as a matter of fact.

"Was he asleep at the time you shone this bright spotlight on him? — Yes.

"You woke him up and he was too drunk to talk, is that right? — He could speak, but I was unable to obtain the full gist of what he was saying.

"Dear Henry" (referring to his colleague, Defence Counsel Mr. Henry Spooner), "wants me to ask this . was there a hole in the bucket? — I took no notice of the bucket in particular.

"So, if we can summarise your evidence, Mr. Hessian, you took him from the bucket and put him in the can?"

Mr. Justice Gallop: "I don't know what we'd do without you, Mr. Coldrey."

From a report of R.v. Pepperill and Ors. in "Darwin News" 17th March 1981

COMPUTER DOCUMENTS AS EVIDENCE

(The following article is from a paper presented by McLennan to the Leo Cussen Institute. The full text is available from the Institute.)

INTRODUCTION

The conjunction of new technology with old legal ideas has seldom, if ever, proved to be a happy experience. The law attempts to accommodate itself to the age in which it lives, but it moves slowly, barely keeping up with the present, and fearing that by some precipitate action it may destroy old values or precepts which are perceived as worthy of preservation. Every now and then, however, something daring is done. On these rare occasions new concepts are employed and the law is thrown into situations which its practitioners find difficult to cope with.

It is submitted that computers and computer technology are about to have such an effect on the law. Since the first electronic computer started with a hum of valves and a clicking of archaic-looking relays in the 1940's, the advances have been startling, not only in terms of technology, but also in the creation of a new priesthood with its own ritual jargon. With that development has come a kind of mystique surrounding the computer itself.

The basic proposition to bear in mind, however, is that a computer is nothing more than a clever idiot.

THE COMPUTER

The computer in operation is, very basically, a composition of two parts, referred to as the hardware and the software. The hardware is the actual machinery, including such elements as a central processing unit, memory, arithmetic logic unit and input and output peripherals. In general it is itself a fairly reliable article if it is housed in a benign environment. But things can go wrong, and somewhat peculiar results can come about.

The hardware on its own is useless. To run, the computer needs the other element – software. Software is the term used to describe the programs which run the computer. Operating programs give it a basic education and tell it how to react in given situations. Systems programs are those used by the owner for his own busines or other requirements. They include such things as accounting procedures, billing and costing and word processing. Again the computer is told what to do, and in order to obey, the computer applies the systems program by reference to its application or operating system.

Clearly, it is in the area of programs and their input and output that lawyers are going to have to be educated. They have to recognize areas where errors occur, and why they occur. Basically there are five areas giving rise to error in computer functioning.

(a) An equipment or hardware failure or aberration.

(b) A malfunction due to environmental conditions, heat, cold, power surges and drops and the like.

(c) A defect in the program.

(d) A data error. If the operator feeds errors into the system the output will be inaccurate.

(e) A processing error where correct operating procedures are not maintained.

COMMON LAW PRINCIPLES

Computer evidence has traditionally had to cope with the lawyers' aversion to hearsay and to any evidence which is not the best evidence. Furthermore, to the extent that the raw data fed into the computer is processed, the output threatens to enter into the area of opinion evidence.

In the case of business records maintained in accordance with an established system, the common law has tended to wink at the strictness of the hearsay rule and the best evidence rule: *Potts v. Miller* (1940) 64 CLR 282 at 303; *Re Montecatini's Patent* (1973) 47 ALJR 161 at 169.

An application of the common law rule permitting the reception of conclusions emanating from notoriously reliable scientific instruments has often enabled a party to tender evidence of printouts from certain electronic devices: see for example *Mehesz v. Redman No. 2* (Full Court S.A.) (1981) ACLD 020.

But in Victoria and in Federal Courts the practitioner is now assisted by legislation: Evidence Amendment Act 1905 (Cth.) ss. 7A-7S enacted in 1978, and Evidence Act 1958 (Vic.) ss.55B-56 enacted in 1971.

THE LEGISLATION

In each statute the computer evidence is receivable in both criminal and civil proceedings.

But the general scheme of the Commonwealth legislation is essentially different from that in Victoria. The Commonwealth computer provisions are an integral part of the legislative scheme for the admissibility of business records. The Victorian sections relating to books of account are separate: ss.58A-58J. It may well be that computer records could be admitted under these sections independently of the provisions of ss.55B-56. But the computer sections are not limited to business records.

The operative sections may be compared:

Commonwealth	Victoria
7B(1) "Subject to this Part, where in any proceeding, evidence of a fact is admissible, a statement of that fact in a document is admissible evidence of the fact if . . ." (certain requirements are satisfied).	55B(1)"In any legal proceeding where direct oral evidence of a fact would be admissible any statement contained in a document produced by a computer and tending to establish that fact shall be admissible as evidence of that fact . . ." (subject to certain conditions).

So, in Victoria, the conditions for admissibility of computer statements in s.55B(2), may be summarised –

(i) The document was produced by a computer in a period of regular use.

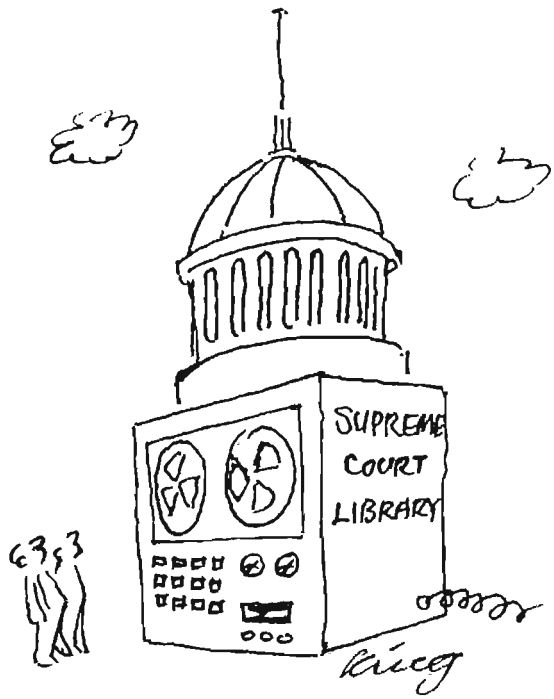
(ii) During that period the computer was regularly supplied with information of the kind contained in the statement.

(iii) The computer was operating properly during the period.

(iv) The information supplied by the computer was the result of information supplied to the computer in the ordinary course of its regular use.

The requirements may be proved by certificate s.5B(4).

The Commonwealth Act S.7B, sets out the general requirements for admissibility applicable to all proceedings. These are not identical to those in the Victorian statute.



" THE B.L.F. MADE THEM KEEP THE DOME . . . "

The section makes the statement admissible notwithstanding the rules against hearsay, the rules against secondary evidence of the contents of a document, that any person concerned in making the statement is a witness in the proceeding, whether or not he gives evidence consistent or inconsistent with the statement, and that the statement is in such a form that would not be admissible if given an oral testimony. But it does not make admissible a statement that this is otherwise inadmissible. That apparently aimed at distinguishing between the form and the substance.

The Commonwealth Act imposes further rules controlling the admissibility of computer records in criminal trials. Section 7D requires that where such evidence being either a statement made by a person or reproduces or is derived from information supplied by a person and the party to the proceeding against whom the evidence is to be called requires the person concerned in making the statement to be called, the evidence may not be tendered unless that person is called, or it is made to appear to the court that the maker is dead, unavailable, that the person cannot be identified, or although identified could not be effluxion of time be reasonably expected to recall the event, or that undue delay or expense would occur.

COMMONWEALTH SAFEGUARDS

The Commonwealth provisions are detailed and appear to give a very free hand to a party to call computer documents. Yet several safeguards have been built in.

One obvious safeguard has already been discussed, that is the requirement that the maker be called in criminal trials unless certain events happen, or are proved by the proponent of the document.

Section 7F deals with the probative weight of computer documents. The tribunal is to bear in mind the contemporaneity of the event and its recording. Further there must be borne in mind any incentive or motive the person may have to conceal or misrepresent any relevant matter. The reliability of the computer and the means whereby the statement is derived or reproduced must be regarded. Section 7F(2) sets out the following.

> In estimating the weight (if any) to be attached to evidence admissible under section 7E, regard shall be had to all the circumstances from which an inference can reasonably be drawn as to the accuracy or otherwise of the evidence, including whether any person concerned with the system had any incentive to omit recording the happening of the event concerned and, if so, the nature of that incentive.

Section 7G reinforces 7B in so far as the document may be admissible though the maker is not called. But a failure to call the maker does not render him immune from any attacks on his credibility as a witness which would have been permitted if he had been so called.

Section 7C provides that a statement under section 7B is not admissible in a proceeding if it was made or obtained for the purpose of, or in contemplation of, any judicial or administrative proceeding. It may well be that the provision also protects the privilege which may attach to such a document.

Section 7E is an interesting collection of ideas. By sub-section (1), where the happening of an event is in question, not only is a record of it capable of providing evidence that it occurred, but also the lack of any record where one might be expected is capable of providing evidence that it did not occur. In sub-section (2) where evidence is, or is proposed to be, tendered of the lack of any record the Court may –

(a) require the whole or a part of the record concerned be produced.

(b) where it is not so produced, reject the evidence or if it has been received, exclude it.

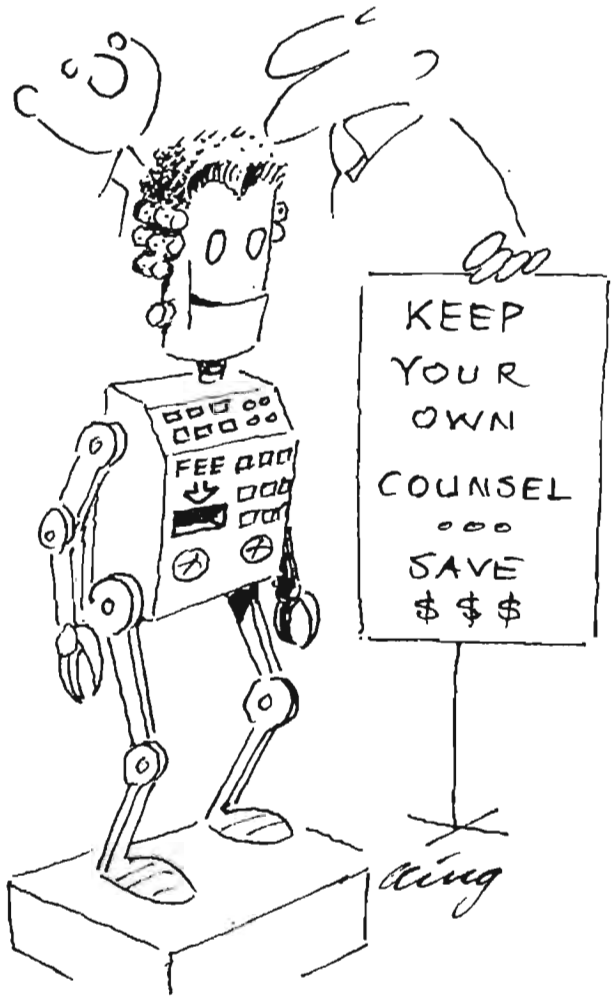
Section 7C(2) gives the court power, where a person proposes to tender, or tenders a statement in evidence, to require that any other document related to the statement be produced, if this document is not produced the Court may reject or exclude the statement tendered or received.

It should be noted that section 7P provides in terms similar to s.56 of the Victorian Evidence Act that a document cannot corroborate the evidence of its maker where the law requires that that evidence is to be corroborated. Section 7L provides, again in terms similar to s.55D, that a document or copy of a document may be authenticated in such manner as the court approves.

Finally, the court has an overriding discretion under section 7M to reject the document where its weight is too slight to justify admission, or where its utility is outweighed by the probability that it will unnecessarily prolong the trial. Further it may be excluded on the ground that it may by unfair to any other party, or where it may mislead a jury. Section 7N enacts the intent of *Driscoll's Case* (1977) 137 C.L.R. 517 by providing that where there is a jury, a statement tendered under these provisions shall not be given to the jury during the course of its deliberations if the jury might give the statement undue weight.

These provisions are very explicit and give the court very wide powers in relation to production and exclusion of computer produced documents. The Commonwealth law is very similar to United States law, whether it be the Federal Rules of Evidence or the highly developed common law. The United States decisions will no doubt be used to see how the provisions will apply.

Spring 1981



" THIS ONE HAS A BAKED STUFF FINISH ... THE DEARER MODEL COMES IN SILK! "

COMMENTS

The Victorian provisions have been kept separate from the Business Records provision in the Act. In the absence of s.55B, it is arguable that the definition of "document" in section 3 would have been sufficiently wide to have included computer records in s.58A, and therefore within the meaning of "Book of Account". No other conditions of admissibility additional to those applying to any other book of account would have applied, although section 58G, providing for copies of entries in books of account, may have proved difficult.

However, the provisions in section 55B will not allow of this interpretation. Do other sections in Division 3 have any bearing on section 55B and its interpretation? It is submitted that section 55B stands on its own. Its very terms give rise to the inference that it is designed to allow into evidence a particular class of evidence. Clearly, sections 55 or 55A cannot have any effect on section 55B. Section 55 relates to civil and criminal trials, making provision for certain eventualities arising in both. Many of those provisions are applied to computer derived information in the Commonwealth Act. Section 55B(1) does start by providing:

> In any legal proceeding where direct oral evidence of a fact would be admissible . . .

And it is clear that section 55 relates to admissibility of documents. But it, too, starts in similar terms. If section 55 was meant to apply to computer documents, why not include the computer provisions under that section? Both section 55 and section 55B are concerned with the admissibility of documentary evidence if that documentary evidence could be the subject of admissible oral evidence. In both cases, the test of admissibility is that hearsay evidence is not involved. This distinguishes the Victorian provision both from the civil provisions applicable in the United Kingdom and the Commonwealth legislation. Where there is a connection provided in the Act between sections 55 and 55B, as in sections 55C and 55D, they are treated as separate entities. By reason of their structure and placement, it must follow that section 55B is not dependent on other provisions for its interpretation.

If that is correct, then there are many shortcomings in the legislation which will eventually lead to a very considerable body of case law dealing with individual situations. This in itself is undesirable when provisions similar to those contained in the Commonwealth Evidence Act would have made this unnecessary.

A computer is defined in the Victorian Act as –

> . . . any device for storing or processing information and any reference to information being derived from other information is a reference to its being derived therefrom by calculation, comparison or any other process.

The difficulty about this definition is that is so vague. What is information? Without that expression being defined, the whole definition is useless. Does it mean information obtained by the computer independently of human intervention? When derivation is referred to, it is said to be by way of calculation, comparison or any other process. What does that mean? "Any other process" may be too wide if given a literal interpretation. It would seem to be arguable that it would have to be interpreted in the light of the words "calculation" and "comparison". As the computer is basically capable of only adding or comparing, does it mean that the words "or any other process" simply mean a process involving arithmetic functions, such as the production of reports, graphs or statistical summaries. The definition of a computer as a device for storing or processing information would tend to confirm this as the most likely interpretation. The interpretation is too limiting. If the intention of the legislation was to give a broader sweep and application than simply in the area of bankers books, it would seem to have failed in the attempt. One thing is obvious. Computers can perform many other functions when programmed to do so. Although its basic skills are addition and comparison, a combination of those functions, together with an ability to find its own data puts a computer far beyond the definition allowed it in the Act. Three dimensional medical scans, and other optical scanning devices raise questions of admissibility under the section which clearly would be admissible under the Commonwealth legislation.

An example of this sort of function and the problems raised can be seen in *R. v. Pettigrew* (1980) 71 Cr. App. R.39.

There are other problems which are of a much more immediate nature. The Victorian legislation qualifies computer evidence on the basis of the proper operation of the computer over the relevant period and that the computer was used and the information supplied to it in the ordinary course of its intended activities. Information shall be taken to be supplied to a computer if it is supplied in any appropriate form.

The first area which concerned the Victorian legislature was how well the hardware works. That is understandable. Cf. Commonwealth Evidence Act Section 7F(b). But in the Act, care is taken to distinguish between the computer and its means of producing the document. The only other consideration, apart from the requirement that the computer be used in the normal course of activities, is that the information be supplied in an appropriate form. There is no requirement, either express or implied, that the information be accurate. Of course it may be argued that, if the information is demonstrated to be inaccurate, the judge may exclude it in the exercise of his discretion. But this demonstration may be made well after the evidence is received.

As to the state of the art stands at the moment, faults in output due to computer malfunction are becoming rarer. It is the involvement of the human factor at program, input and operation level that gives the most cause for concern.

In "Federal Rules of Evidence" (1979) 7 *Rutgers Journal* 157, Singer argues that, despite the limits imposed by the American courts, the grounds for admissibility still make it too easy for the proponent of a computer document to get it into evidence. Her arguments have particular value in considering the Victorian legislation. She points out that the verification or authentication of the record is done by the person tendering it. A document which is prepared for the purposes of litigation is not admissible, the maker has a motive to falsify a result. See Evidence Act (Cth) s.7C, 7D(3), 7F(1)(a)(ii). A person seeking to tender a document has exactly the same motive. Therefore the requirement that there be evidence that the document was created in the normal course of busines should be more than a mere formality.

Further, she argues, a too great reliance is placed on computers. Tribunals are overawed by the mystique surrounding these devices. There needs to be a greater awareness that they do produce wrong results. So, the proponent of the evidence asserts the expertise of those who run the system. But, the statutory requirements for admissibility are such that further proof of the reliability of the computer evidence is not really required of the proponent. The statute should require the proponent to lead evidence of matters such as the existence of specific applications controls barring human error, the security procedures (if any) governing access to the data file, programs and equipment so as to reasonably guarantee accurate systems results. The absence of such requirements means that there is a virtual reversal of the onus of proof. It is placed on the person much less suited or educated to bear it. Even supposing that the opponent can find and afford a consultant to assist him to demonstrate the unreliability of the computer evidence, such an expert, as the law now stands, has little, if any, access to material which may be used to test the evidence.

In the result, it is her position that all data and programs should be made available on discovery if it is proposed to tender computer documents. That, in turn, would start a fight between the programmers, systems analysts and lawyers over trade secrets and copyright. Happily that troubled subject is well beyond the scope of this discussion.

To return to the Victorian position. Scarcely any qualification evidence is required. And this may be tendered on certificate. There is no apparent power in the Court to reject a properly completed certificate. Faced with such a certificate, the opponent would have to try and formulate his challenge on the basis of the certificate and printout alone. It will be recalled that it is the printout which is tendered. The printout would not be in the form of a tape or disc pack. It would most likely be in the form of a printed account, inventory statement or the like. The opponent is virtually powerless to go behind the document to see for himself how the document was generated. On the face of the legislation, he would have no access to a listing of the program, the input data, or the programmer or operator. At least in a Federal Court he could get his hands on the program or data.

Spring 1981

In relation to this foundation testimony, the Commonwealth Act is much more explicit than the Victorian. Matters such as incentive to lie, the recency or otherwise of the making of the statement of the matters dealt with, the reliability of the computer and its functions, and the accuracy and credit of the person making the record are but a few spelt out. The position of the opponent in a Victorian Court is particularly serious, in that the legislation applies to both civil and criminal trials, without any of the additional safeguards for a criminal trial imposed by the Commonwealth Act. If a Victorian judge felt uneasy about the evidence, he would have to fall back on his discretion to exclude evidence where it seems expedient in the interest of justice to to do: Section 55B(7). This is unsatisfactory. The House of Lords recoiled from this approach in *Myers v. D.P.P.* (1965) A.C. 1001, and there is no reason to suspect that the Victorian Judge would be more ready to undertake such a task. A series of provisions similar to those in the Commonwealth Act should be enacted. This has been done in New South Wales and South Australia. The only other State to adopt the Victorian approach is Queensland.

Looking at the Evidence Act (Vic.), one can see no reason for making the provisions equally applicable to criminal and civil cases. No such need was found to exist in the formulation of s.55.

No cases have as yet been reported in Victoria relating to an interpretation of s.55B. However, the section is so deficient in many aspects that a review is needed, and needed urgently. If it was intended that it provide a wide base for the admission of computer evidence, it is submitted that they fail, as they are still fettered by the old hearsay rule in many areas where that rule should no longer apply. There is a failure to appreciate the dangers inherent in admitting computer documents into evidence in a criminal trial, and no safeguards have been applied to ensure a fair trial. In both civil and criminal trials, there is insufficient requirement for foundation evidence to be given by the proponent of the evidence. For this reason, and by reason of the absence of any discovery procedures relating to anything save the document itself, there is little scope for a meaningful challenge to the reliability of the evidence.

Investigation behind the document is virtually excluded.

It is appreciated that a purpose of any modification to the law of evidence is to enable the law to keep up with the facts of life. However, when a rule of convenience involves denying a defendant a chance to properly meet the case against him, has the effect of reversing the onus of proof, and places him in a situation where he cannot afford to defend himself, then that rule of convenience must be reassessed.

• • •

"When is a policewoman not a police person?

The complainant in a rape case had made two statements on separate days, to different policewomen. The following cross-examination reveals a peculiar distinction drawn by some members of the police force.

Howard: What was unsatisfactory about the first statement so far as you were concerned?

Detective: I have not read it since. If I could look at it now I could tell you. Perhaps I think probably I was concerned when I read it, that if the circumstances were correctly outlined in that statement that the statement should have been taken by either a policewoman or a detective and not by the uniform member.

Howard: But that uniform member was a policewoman?

Detective: No, she is not a policewoman.

Howard: What is she?

Detective: A female member of the Police Force, a police person. There is a difference. A policewoman is trained in taking statements, and this other female who is a married woman . .

Howard: This is Constable Williamson, she is a policewoman?

Detective: She is not a policewoman, no.

Howard: She is a woman member of the Police Department?

Detective: There are no policewomen at Traralgon. She is a member of the Traralgon Police Station, she is uniform and she is a police person.

Howard: Is Constable King a policewoman?

Detective: Yes, and always has been.

Howard: What makes her a policewoman?

Detective: The special training; trained in looking after children and taking these statements.

Howard: That is what qualifies a policewoman, otherwise they are known as police persons, is that what you are saying?

Detective: Yes."

Police v. O'Hare
Morwell Magistrates Court
19th May 1981

A SELF-EXECUTING ORDER

Included in a recent bundle of junk mail, members will have noticed an "invoice" from a Legal Directory based in Hong Kong. A careful perusal of the faint print on the reverse of the document indicates that it is not an invoice or an account at all.

The Trade Practices Commission has recently issued a press release warning legal practitioners against the activities of the publisher. They are advised to check before making payment on such statements, whether the directory exists and is circulated as claimed, but more important, whether payment of the fee charged is worthwhile.

M.L.G.A.A.

The Monash Law Graduate Alumni Association has recently been established. It is open to all Monash graduates both LL.B and LL.M and it is hoped that those members of the Bar who have graduated from Monash will join. A social gathering for members is planned for 18th November.

For further information, contact John Miller Rm.723.

LAWYER'S BOOKSHELF

P. GILLIES: "THE LAW OF CRIMINAL CONSPIRACY" THE LAW BOOK COMPANY LTD. 1981
(pp. vi. to xviii; 1 to 215) $25.00

> "When I use a word," Humpty Dumpty said, in a rather scornful tone, "it means just what I choose it to mean – neither more nor less."
>
> "The question is," said Alice, "whether you *can* make words mean so many different things."
>
> "The question is," said Humpty Dumpty, "which is to be master – that's all."
>
> *(Carroll: Through the Looking Glass, Ch.VI.)*

A reading of the work currently under review will indicate that, unfortunately, the words have vanquished the author.

In an area of criminal law which stands in urgent need of lucid exposition, it would have been a pleasure to hail this work as a vital second volume in the notable Nurseryland Criminal Law Series. But that would have done less than justice to the immortal first volume – "Noddy's Book of Criminal Law" – so successfully cited in Judge Mitchell's court during His Honour's celebrated blue period.

Gillies' book is as difficult to review as it is to read. The author's attempt to contribute to the law of conspiracy is marred by distorted syntax, flaccid logic and a depressing verbosity. Soon, one longs to find a proposition of the clarity of Viscount Dilhorne's in *R. v. Churchill*, (1967) 2 A.C.224,232.

But it is always useful to have access to a collection of many of the reported cases on a subject as amorphous as conspiracy. Nevertheless, the reader should bear in mind that this collection is not exhaustive. Some of the more immediately apparent omissions are: *Mitchell* (1971) V.R.46; *O'Connor* (1843) 5 St. Tr. (N.S.) 936; *Kerr* (1921) 15 Cr. App. Rep. 165; *Ardalen* (1972) 2 All E.R.257. Hence, its use as a practitioner's work should be undertaken with some caution.

The treatment of topics as crucial as the mens rea of conspiracy, the particularizing of overt acts and duplicity are, at best, confusing. In the area of duplicity, no attempt is made to use *Greenfield* (1973) 3 All E.R.1050. *Coughlan* (1976) 63 Cr. App. Rep.33. or *Ardalan* (supra) to explain the apparent difference between *West (1948) 1 K.B.709 and Griffiths* (1966) 1 Q.B.589.

The author repeatedly refers to "consummated conspiracies", but ascribes to that phrase two entirely different meanings. On the one hand, the term is used to describe the carrying of the agreement to completion, and on the other it is used to describe the formation of the agreement. This mixture of meanings makes it difficult for the reader to gather the difference between the agreement which *is* the conspiracy, and the overt acts, from the perfomance of which the underlying agreement may be inferred.

There are many sweeping comments – for example that *Tripodi* (1961) 104 C.L.R.1. is the only reported decision to canvass the proposition that statements by one accused in furtherance of a crime are admissable against all *Eccles* (1881) 7 V.L.R. 36, *Rex & A.G. (C/wealth) v. Associated Northern Collieries* (1911) 14 C.L.R.387 or *Thomas v. Thomas* (1930) 31 S.R.(N.S.W.) 159?

In discussing the question whether the acquittal of one of two conspirators need not lead to a successful appeal by the other if convicted, Gillies examines *D.D.P. v. Shannon* (1975) A.C.717. But nowhere is *Dharmasena* (1951) A.C.1. even mentioned; which, until the High Court gives its reserved decision in *Darby* (Full Court, Unrep. 19th November 1980.), remains the binding authority in Victoria.

Those of us lucky enough to posess $25 to spend towards a book on criminal conspiracy would be well advised to invest it with a building society against the rumoured publication of a second edition of R. S. Wright's "The Law of Criminal Conspiracies and Agreements" (Butterworths, London 1873.).

Hollis-Bee

G. NASH: BOURKE'S CRIMINAL LAW, 3RD EDITION, BUTTERWORTHS, 1981.

$95.00 (any subsequent services separately charged.)

Quetelet, the nineteenth century professor of the Royal Academy of Sciences in Brussels, once observed that "man is not driven to crime because he is poor, but more because he passes rapidly from a state of comfort to one of misery". It is noted, with some interest, that the author of the third edition of Bourke's Criminal Law recently underwent the transition from the office of Dean of the Faculty of Law at Monash University, a state of relative comfort, to membership of that band, one of 700 odd souls, whose search for a full-time living at the Victorian Bar is followed with such enthusiasm by "The Age" newspaper.

In leafing through the latest edition of Bourke's Criminal Law, one cannot help but be struck, not only by the gaudy plastic wrapping of the tome, but also by those unmistakable and unfathomable Gerard Nash trademarks – a table of cases which omits any reference to the citation of the case and thus diminishes its usefulness. For example, the index lists no fewer than twenty-five cases entitled *R.v. Smith* decided between 1837 and 1968, and that vexatious litigant, Jones, figures prominently in nineteen cases between 1773 and 1978. The index is an improvement on that contained in his work entitled "Nash on Magistrates' Courts" (1975), but it contains many lacunae. It often has the reader flicking from subject to subject, in a vain endeavour to discover under what possible heading the author has listed the particular subject of concern. Nash also exhibits a singular reluctance to include references to unreported decisions – the "purple gutsers", that bane of all criminal lawyers (other than Prosecutors for the Queen).

But, as one American critic has remarked, "It is a barren kind of criticism which tells you what a thing is not". Gerard Nash has produced a valuable work which will undoubtedly find its way onto the shelves of many practitioners in the criminal jurisdiction. For many years, Victorian criminal lawyers have bemoaned the absence of a comprehensive work on criminal law, practice, procedure and evidence. The third edition of Bourke's Criminal Law will not fill the gap which exists for such a work, but coupled with such works as Fox's "Victorian Criminal Procedure", Antalfy's "Crown Pleas in Victoria" and Archbold, it will help fill the void which has hitherto existed in the field.

For those unfamiliar with the previous editions of Bourke's Criminal Law, the work is basically an annotation of the Crimes Act, 1958 together with a selection of associated legislation – for example, the Crimes (Alibi Evidence) Regulations 1976, the Community Welfare Services Act, 1970, the Criminal Appeal Rules, 1965 and the Criminal Injuries Compensation Act, 1972. Doubtless, its usefulness as an "authority on Victorian criminal law", as it was described by Butterworths in its pre-publication blurb, would have been enhanced it it had been modelled more closely upon Watson and Purnell's and Watson and Bartly's work entitled "Criminal Law in New South Wales". This work which, although voluminous and covering some of the material already contained in Nash's earlier work on Magistrates' Courts, is the closest one comes to an Australian authority on criminal law. Nash's book is clearly and helpfully set out in numbered paragraphs. Each paragraph deals with a different subject or different aspect of the same subject. For example, in treating the defence of insanity, the author has devoted seven separate numbered paragraphs to the subject. They range from the concept that every man is presumed to be sane, the defence's requirement to prove insanity, to the question whether the defence of insanity is appropriate to a transitory malfunction of the mind. The annotations are comprehensive and, for the most part, concise and accurate. As an annotation of the Crimes Act, the book must inevitably suffer from those defects inherent in all annotation-it is limited in scope for example, it omits reference to a number of major common law offences and important legislation such as the Poisons Act. Moreover, the brevity of the notes can be at times, misleading. Such a work is best utilised as an adjunct to research and a guide to, rather than a definitive statement of, the relevant law on a particular subject. But on the whole, those who practise in the field of criminal law will be thankful that Gerard Nash was so driven to crime.

Rapke

MISLEADING CASE NOTE No. 15

Muppets Inc. v. Mooroopna University Press

MacHinery J. (in Chambers) said:

This is an application for leave to deliver a Rebutter, pursuant to Order 23 rule 3 in an action that can only be described as a pleader's picnic.

The Defendant is the publishing branch of Mooroopna University, well known in the community for its range of educational books. To counter flagging sales, it has recently undertaken an extensive merchandising campaign, and, as part of that campaign, it has engaged a team of dancing girls similar to the Carlton Bluebirds. Dressed in a shortened version of academic dress, they have been promoted as "The Muppettes", and have had, I am told, a dramatic effect on sales.

The Plaintiff is apparently the owner of the copyright in multinational television puppets known as "The Muppets". It has commenced an action against the Defendant alleging misleading conduct contrary to Section 52 of the Trade Practices Act, and breach of copyright. I interrupt myself here to say that I cannot understand paragraph 4 of the Statement of Claim which commences "Miss Piggy is particularly offended by the comparison with brazen hussies . . .". This is probably a misprint paragraph which was meant to commence a claim for "Misprision", not "Miss Piggy". Since it is not necessary for me to decide that point I expressly express no view upon it. I interrupt myself again to wonder whether such an action is maintainable in this Court.

The Defendant has counterclaimed that it is the owner of the name and style it has created, and the owner of the copyright therein, and seeks a declaration that it is entitled to use the name "Muppettes". By its Reply, the Plaintiff has joined issue with the Defendant, alleging that the Defendant's alleged copyright is non-existent, as being not original under Section 32 of the Copyright Act; and in particular as being not original by reason of its essential similarity to the Plaintiff's puppets' generic name, and thus a breach of the Plaintiff's copyright therein.

By Rejoinder delivered by leave, the Defendant has joined issue with the Plaintiff's Reply, alleging that it is an educational institution and thus immune from any breach of the Plaintiff's copyright, under Section 200 of the Copyright Act. By surrejoinder, the Plaintiff traversed the allegations in the Defendant's Rejoinder. The Defendant has therefore sought from me leave to deliver a Rebutter joining issue with that traversal.

The gist of the matter before me seems to be this: If Defendant's contention that is is an educational institution is right, its Rejoinder and Rebutter are well founded, and it would presumably be entitled to judgment. If not, the Plaintiff must, I think, succeed. The question is therefore whether, or not, the Defendant is an educational institution of a genuine type.

Evidence was led before me that the Defendant, as part of its present campaign to boost sales and to keep itself economically viable, has started a course for its junior proof readers. Nothing, off course, is more anoying t the readers eye than a misprint , and good proof readers are thus essential to a modern publisher. That course is called the "Readers Course", or as I shall hereinafter refer to it, the Course.

Evidence was also led before me on behalf of the Plaintiff, however, that the Course is a sham, designed more for publicity purposes than for real effect. I was told by proof readers who have attended the Course that it cost them $500 for two months of lectures of variable quality; and that nothing in the way of course outlines, lecture notes, or any other of the

indicia of modern education were provided for that money. It was even suggested that the Course is designed more to deter aspiring young proof readers from entering the business than to train them.

I am of the view that, if a body such as the Defendant chooses to run a course such as it attempts to do, it should do it properly. Half measures and unprofessional attitudes do more harm than good, in the long run, in my view. It is not for me to advise the Defendant, but perhaps it should engage a professional teacher to run the Course.

Rather than form a final view at this stage, however, I will allow the Defendant leave to deliver its Rebutter, and leave it to the trial judge at a later stage to determine whether or not the Course is genuine.

And I so order.

Gunst.

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ABORIGINAL LAW BULLETIN

The Aboriginal Law Research Unit in association with the Legal Service Bulletin Co-operative Ltd. and with financial assistance from the Law Foundation of New South Wales is publishing the Aboriginal Law Bulletin.

Aboriginal Law Bulletin is to be published quarterly. It aims to "become a source of useful practical information for people working in the field of Aborigines and the Law." In addition to news and comments it includes notes of cases affecting Aborigines.

Subscription: $5 p.a.

Apply to: Legal Service Bulletin
C/- Faculty of Law
Monash University
Clayton. 3168

HELP WANTED

The present splendour of Bar News is due in no small part to the enthusiasm of cartoonists, photographers, lay-up artists and contributors of all kinds.

The Editors would welcome any contribution of talent especially from junior members.

Those interested contact Byrne D. Pax. 199.

SPORTING NEWS

We felt justified in referring to the steed, "Station Street", as "Stationary Street" in the light of its performances prior to July of this year. We have been forced to eat humble pie following its two recent wins. One of its connections, Jack Forrest, has earned the nickname "P.O.W." as he simply refuses to give any information regarding this horse and the stablemate, Fittapaldi, which saluted first up at Werribee at 15/1. The latter is also part owned by Dove Q.C. and Bowman who had great success with Rake's Pride in Brisbane during the winter carnival. Forrest alleges that he endeavoured to contact his brethren advising them to back "Station Street", but he was "held up" whilst on circuit at Shepparton. Since this run of success, we note that Forrest has purchased a new house and has been to New South Wales for a boating holiday.

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"Live Oak", in which Pannam Q.C. and Merkel have an interest, is a most promising hurdler and a win in town would not surprise – particularly with the sting out of the ground. Pannam has a property at Mount Macedon which must be bliss for the several horses which he has on the farm.

● ● ●

Halpin does a lot of work for the Greyhound Racing Control Board – a body which had Mr. Griffin, the former Chief Stipendiary Magistrate, as Chairman until recently. Halpin is a licensed public trainer and had a dog named Onomatopoeia in a recent hurdle race being broadcast by two racing broadcasters. One was heard to offer the other a Dictionary at one stage. The attempt to pronounce it during the race resulted in great mirth and one was heard to say when it fell – "thank God that's out of the race". We intend to give some more details of the dishlickers in the next edition.

● ● ●

Gillies used to be a keen active sportsman until he suffered a badly dislocated shoulder when playing football at the University. He has resisted the surgeon's knife despite entreaties from eminent gentlemen of the medical profession. He has, in the past, acted on behalf of Plaintiffs in actions against surgeons for alleged negligence, but denies that his reluctance to face the blade is in any way connected with this factor, or is in any way functional. His exercise now involves trotting out the mower, although he can water ski with one arm.

● ● ●

This is not really the best time of the year for sailing and there is not a great deal to report. We have it on good authority, however, that Ian Crisp, normally a quiet and gentle soul, undergoes "marine metamorphosis" when he grabs the tiller of his Seaway 24 in competition. His success as a skipper is largely attributed to his aggressive approach evidenced by his victories in the Winter Series.

● ● ●

What do the following have in common – Nicholson Q.C., Meldrum, Joe Dickson, Bill White and Crossley? All are learned gentlemen practising in different areas of the law – all like the sea and good food. All, apparently, are quite partial to the amber fluid and kindred beverages, according to our spy who saw them embark at Shute Harbour prior to their trip through the Whitsunday passage during the Bar vacation. A new record was set for the largest ontake (and intake) of intoxicants in the history of Shute Harbour. It is customary to radio to base at the end of each day to report the precise location of the chartered boat and some interesting calls were noted. Poor navigational advice and the inability to decipher complicated charts were advanced as reasons for some confusion as to their position from time to time.

● ● ●

We pointed out in our last edition that Padua Prince, part owned by Peter Young, looked destined to die a maiden. It promptly came out and won at Flemington at a very nice price. Any time this horse is in a 2000 metre race at Flemington on a heavy track, it has to be very hard to beat.

● ● ●

"Four Eyes"

Victorian Bar News

VERBATIM:

S.M.: Do you have any legal representation?

Defendant: My Solicitor was here earlier but he said he had just received an urgent message from his office and had to see his adjudicator.

S.M.: What do you mean his adjudicator?

Prosecutor: I saw his solicitor earlier today, Sir, and I think he means his auditor .

Cor. Barnes S.M.
Ferntree Gully Magistrates Court
15th April 1981

● ● ●

New South Wales practitioners engage in the very civilized tradition of taking tea with the Magistrate during the mid-morning break.

Faris, Dunn and Howard recently had the pleasure at the Murwillumbah Court House. The following note was pasted to a very old-fashioned money box sitting on the "kitchen" table:

"God's gifts are bountiful and free,
Unfortunately he missed the court house tea.
You may think it sad or funny
'Cos the thing we need now is *YOUR MONEY.*

30c Please. No Free List."

● ● ●

"Appearing in the Court of Criminal Appeal is a bit like going in the Olympic Games.

It's not so much a matter of winning, as competing without making a fool of yourself."

John Barnett,
20th July, 1981
(just before entering C.C.A.)

● ● ●

The Common Law is a law of Mercy, for it prevents the malignant from doing mischief, and the innocent from suffering it.

Coke, L.C.J.
The Poulterers' case
(1610) 9 Co. Rep. 56b

● ● ●

A man with a number of convictions for exceeding 0.05 was applying to be allowed to be relicensed:

S.M.: "How long since you had your last drink?"

Applicant: "2 years ago."

S.M.: "Was that on medical advice?"

Applicant: "No, on yours."

Cor. Curtain S.M.
Cohuna Magistrates' Court
16th June 1981

● ● ●

"The fault with juries nowadays lies not in convicting when they should acquit but in acquitting when they should convict".

Lawton, L. J.
R. v. Coughlan & Young
(1976) 63 Cr. App. R. 33 at 37

● ● ●

"Well Mr. Fox, any judge who shuts a Plaintiff out for failing to provide an affidavit of documents gets my silver medal. My gold medal goes to the judge who says to an accused in a criminal trial 'I accept that you were not present when this crime was committed, and I accept what your alibi witnesses have said, but I will not admit that evidence because you did not give notice of alibi in accordance with the rules'."

Judge Kelly
County Court Chambers
26th May 1981

● ● ●

Walmsley, having obtained an order nisi to prohibit Judge Murdoch from further hearing the trial announced the fact to the Court.

Morrissey (prosecuting): "May it please Your Honour . . . the last good thing to come out of prohibition was Al Capone . . ."

R. v. Reardon and Others
County Court
5th August 1981

LEGGE'S LAW LEXICON

"F"

Factoring. Formerly a species of usury by which finance companies battened on small business men. Now a form of depeculation q.v.

Faint Action. Contribution proceedings between two defendants indemnified by the same insurer.

Fair Comment. My opinion of you. The plaintiff is not entitled to particulars.

Falsa Demonstratio Non Nocet. Addressing a S.M. as "Your Honour".

Family Law. A code in accordance with which a wealthy husband of forty-five and his twenty year old wife (preferably with one child) may commit felo de se for the benefit of the legal profession.

Family Arrangement. A compromise of a custody dispute. Long since extinct and indeed now thought to have been a fiction q.v.

Fardel. About one hectare. Two fardels make one nook and four nooks make one yard-land.

Farmer. A Silk or senior junior specializing in taxation.

Fast Day. The first Saturday after the long vacation (see "McNab").

Fees. The life blood of the profession.

Fee Base. On scale "A".

Fee Conditional. A fee vested but which may become divested in the event of judgment for the defendant.

Felony. Addressing a County Court Judge as "Your Worship".

Feme Covert. A woman who may be subject to the control or interference of her husband over herself or her property. Long since extinct and indeed now thought to have been a fiction q.v.

Feoffee. A fee due more than six years and owed by a feoffing defaulter.

Victorian Bar News

Fiction. A false affirmation on the part of the plaintiff which the defendant is not allowed to traverse e.g. in an action in the Federal Court the allegation that the respondent is a company.

Fild Ale. The extortionable practice of officers of the forests compelling persons to contribute to supplying them with ale etc. Until recent times still practised in certain courts of petty sessions.

Final Judgment. An order either granting or refusing special leave to appeal.

Fine. A debenture issued by Barristers Chambers Ltd. as an inducement for practitioners to sign the Roll of Counsel.

Firkin. See "feoffee"

Fixed Charge. The remains of a presentment defaced by plea bargaining.

Fixtures. Cases listed to be heard in the Supreme Court on a stated day. All dates between the 14th and the last day of the month are "fictions" q.v.

Fly for it. At a hearing of the V.F.L. Tribunal it was usual after a verdict even if not guilty to enquire "Did he fly for it?". Forfeiture of goods followed a conviction upon such an enquiry. Abolished by the Criminal Law Act 1827.

Forfeiture. Clerks Fees.

Fornication. Sexual intercourse without benefit of clergy.

Fortune Teller. It is an offence to carry on business as a fortune teller without a license under Securities Industry Act 1975 s. 34.

Fourching. The act of delaying legal proceedings.

Fowls Domestic. If they stray onto a highway and cause injury to a cyclist their owner is not responsible in damages (1907) 2 K.B. 345.

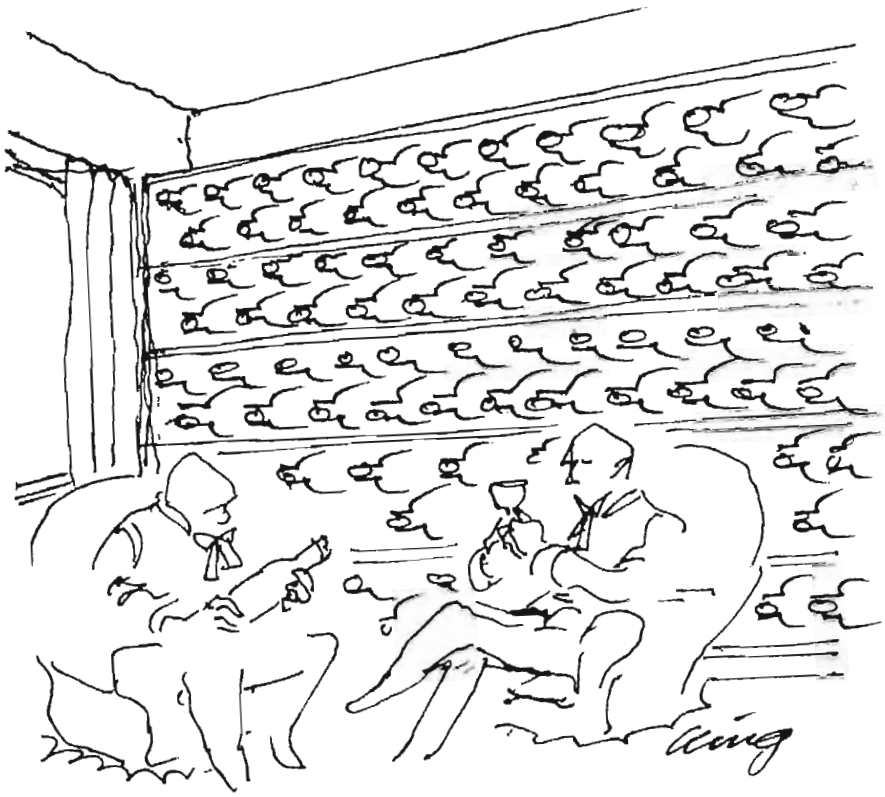
Fribusculum. The peace that passeth all understanding. Also a temporary separation between husband and wife.

Friends, Society of. The Victorian Bar.

Full Court. A tribunal with jurisdiction to deal kindly with the eccentricities of its absent members. Consists of three chosen from the whole body of judges of a Supreme Court (in accordance with a mensual formula which is not wholly understood).

Functus Officio. A County Court Judge on Friday afternoon.

Fuz. ??



"... OF COURSE, I HAD TO TOSS OUT HALSBURY, THE ALL ENGLAND AND MY V. R'S ... !!"

MOVEMENT AT THE BAR

Members who have signed the Roll since the Winter 1981 Edition

Garry Keith DOWNES (N.S.W.)
Leslie GLICK (re-signed) Clerk S

Members who are retiring from Active Practice

G. R. Pitcher
J. W. Galbally Q.C.

Members who have had their names removed from the Roll of Counsel at their own request

J. F. Fitz-Gerald
R. D. Jonas
W. D. Forrest
A. C. C. Farran
P. J. Turner
B. W. Macaulay
T. M. Sheehan (from 11/9/1981)

Number in active practice – 722.

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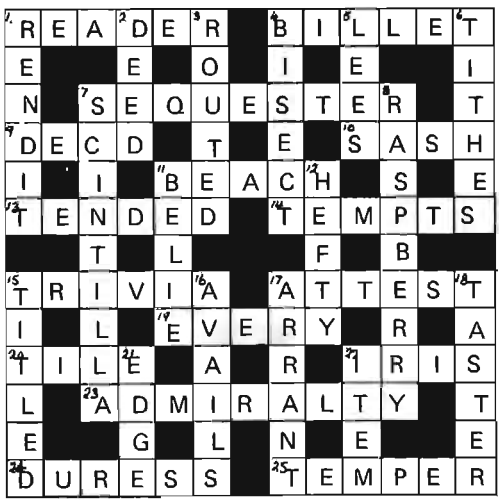
SOLUTION TO CAPTAIN'S CRYPTIC No. 37



NEW TOY

On his vacation trip to Fiji, McInerney, J. was presented with a gavel.

Practitioners appearing in the Court of Criminal Appeal on the first day after the vacation had the chance of seeing its inaugural judicial airing. There was the gavel taking pride of place before McInerney J. bounded by books and water jug and more extremely by Murray J. and Gobbo J. It was conveniently set for a right-handed judge to catch it up quickly.

We feel sorry for His Honour's associate. Damocles can have felt no greater apprehension. He must fear what may happen to him when the judicial biro fails to attract his attention.