Victorian Bar News

SUMMER EDITION 1982

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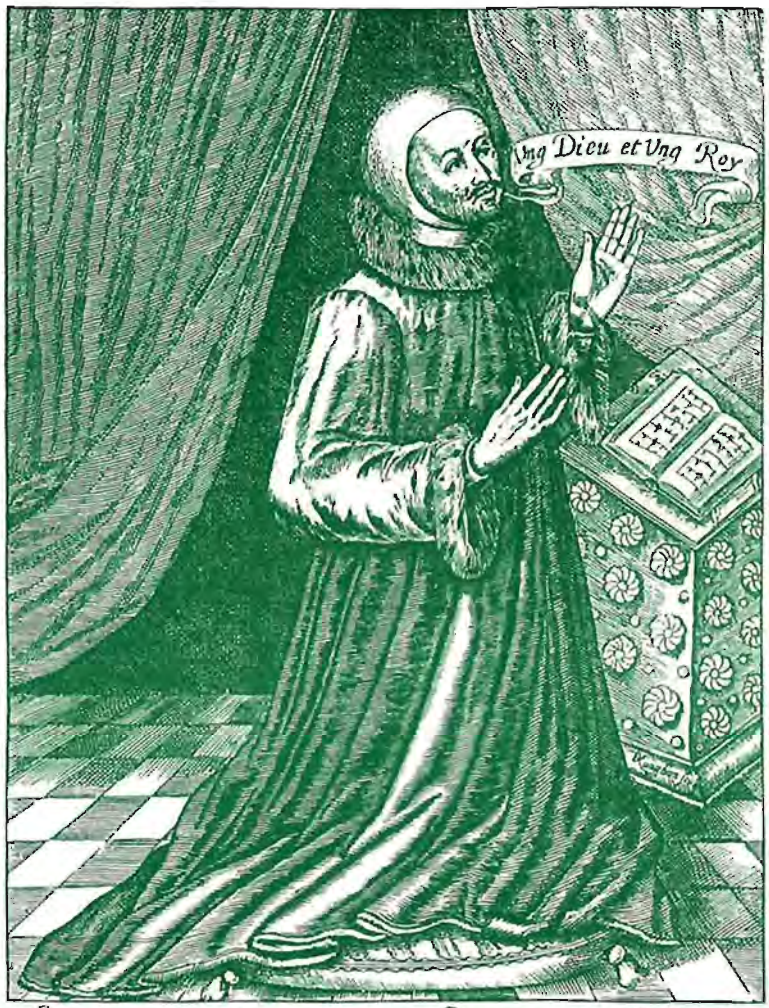

The true portraiture of Iudge Littleton *the famous English Lawyer*

VICTORIAN BAR NEWS

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BAR COUNCIL REPORT

Office bearers in the new Bar Council

After the annual election, Shaw, Q.C. was elected Chairman of the Bar Council and Hampel Q.C. the Vice Chairman. Chernov Q.C. was elected honorary treasurer with Hansen the assistant honorary treasurer. Habersberger was elected honorary secretary of the Council, with Finkelstein the assistant honorary secretary.

Delay in Publication of Decisions and Council of Law Reporting

The Bar Council has considered the question of the dispute which presently exists between C.C.H. Australia Ltd. and the Council of Law Reporting with respect to the publication of decisions of Victorian Courts. It was resolved that the Council was in favour of the most rapid dissemination of information concerning such decisions, consistent with the need for the present high standard of reports and for their authenticity to be maintained.

Taxation Advice

The question of the advice of Counsel given in taxation matters, particularly of an entrepreneurial nature, which was referred to the Ethics Committee some time ago, has still not been resolved.

Meat Inquiry and Mr. Justice Woodward

An extract from Hansard of 21 September, 1982 relating to the Royal Commission into the meat industry was circulated and discussed. The Prime Minister's speech attacking the Royal Commissioner, Woodward J. was considered, but no motion was passed in respect of it.

Aickin Chambers

The new building for Barristers Chambers, Aickin Chambers, was opened at a reception given by the Bar Council early in November. The Chief Justice, Sir John Young who, for many years shared chambers with and was friend of the late Sir Keith Aickin, made a short speech and declared the Chambers open.

Service of Medical Reports in Personal Injury Actions

A report has been received from the sub-committee of the Bar Council, relating to the service of medical reports upon the opposing party in personal injuries actions. After considering the practice in New South Wales and the differing methods of trials of actions in that State, the sub-committee recommended that the procedure be not adopted in this State. That report was adopted by the Council as its report.

Expansion of Chambers in Owen Dixon Chambers

It was resolved that the Bar Council inform Barristers Chambers Ltd. that the Council is of the view that except in special circumstances, expansion of rooms in Owen Dixon Chambers ought not to be allowed.

Changing of Rooms by Members of Counsel

It was resolved by the Bar Council that where an applicant for Chambers in Owen Dixon Chambers is not prepared to treat on a reasonable basis for bookshelves and cupboards in the room in respect of which he is the most senior applicant, the Directors of Barristers Chambers Ltd. give preference to the next senior applicant who is prepared to do so.

Portraits

The Portrait of Sir Zelman Cowen commissioned from Andrew Sibley will be on display at the Christmas Cocktail Party to be held in the Essoign Club on 17th December 1982.

The Council has resolved to engage Sir William Dargie to paint a portrait of Sir Henry Winneke.

Bar Council Newsletter

It was resolved that a fortnightly newsletter containing items of interest be compiled by Rachelle Lewitan in conjunction with Cummins Q.C. to be settled by the Chairman and distributed to all counsel in Chambers.

A.B.C. BUILDING SUBCOMMITTEE REPORT

The Bar in the poll held in May 1982 authorised the development of the A.B.C. site by mortgage finance, debenture finance, strata titling, or sale and lease back as the Bar Council should approve. The Bar also authorised the disposal of Owen Dixon Chambers as an integral part of the development.

Armed with this authority, the Bar Council by its A.B.C. Sub-development Committee chaired by O'Callaghan QC has received a number of proposals from interested developers.

Meantime the tenant of the building, the A.B.C. has moved out. At the end of August, the Architects retained by the Bar for the fitting out of its existing accommodation, lodged with the City of Melbourne application for a demolition permit in respect of the A.B.C. site and a permit to use the site as a temporary car park following demolition.

On the 31st August, 1982 and thereafter, proposals were submitted by Hooker Corporation Ltd in pursuance of their proposal to develop a Legal Centre which involves the demolition of Owen Dixon Chambers and the erection of a high rise building on the A.B.C. site with access to William Street through a plaza which would replace ODC. Pursuant to a recommendation of the A.B.C. Building Sub-Committee, the Bar Council, on the 7th of October, 1982, resolved inter alia that –

> "The most recent Hooker proposal be given exhaustive consideration so as to either exclude it from consideration or adopt it as the preferred development of the A.B.C. site."
>
> . . . . . .
>
> "If there is no prospect of the Hooker development proceeding then within one month of that being known (in any event no later than 31.12.82) the Bar Council exercise the authority conferred on it by the general meeting of the Bar and choose which of Hansen & Yuncken Ltd., Civil & Civic or Silvertons is to develop the A.B.C. site and the form of such development."

Pursuant to the above, negotiations and discussions have taken place with Hooker in relation, inter alia, to the price which the Bar would receive for ODC and the A.B.C. site and the terms of a long term lease by the Bar of the high rise building to be erected on the A.B.C. site. These discussions are still continuing and no agreement, in principle or otherwise, has, as yet, been achieved.

On the 16th of October, 1982 the City of Melbourne refused the application for a permit to use the A.B.C. site for a carpark and granted the demolition permit subject to the following conditions –

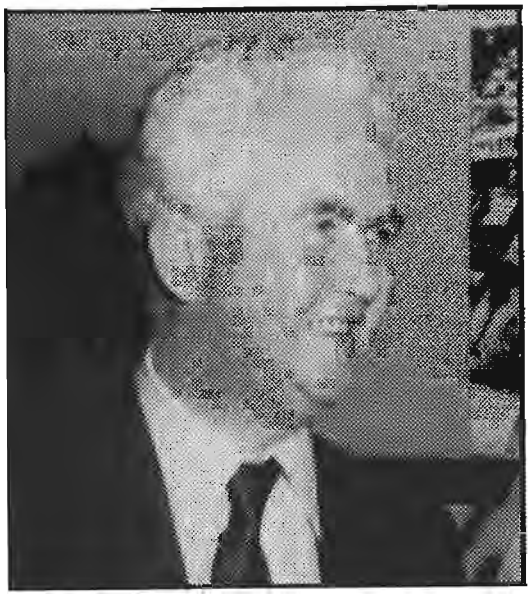
(1) The permit shall expire unless the demolition permitted thereby is carried out within 2 years of the date of issue of the permit.

(2) No buildings or any part of any building shall be demolished until all permits for the re-development of the land required by or under the Town and Country Planning Act 1961 or any other Act to be obtained prior to the commencement of the redevelopment, have been obtained, and the owner has entered into a bona fide contract for the construction of such redevelopment. For the purpose of this permit "redevelopment" does not include the use of land for a surface carpark. That is to say a permit or contract for a surface carpark shall not be deemed to allow the demolition to proceed.

(3) The building or buildings shall be maintained to the satisfaction of the Responsible Authority until they can be legally demolished."

Appeals are to be lodged against the refusal and also the conditions in respect of the demolition permit.

Having regard to the deadline contained in the Bar Council resolution of 7th October, it is expected that the Committee will be able to report substantial progress for the Autumn edition of **Bar News.**



WELCOME:

NICHOLSON J.

On Monday the 22nd of November 1982 His Honour Mr. Justice Nicholson was welcomed by the profession as a Judge of the Supreme Court of Victoria.

His Honour was born in Melbourne on the 19th of August 1938, although his family at that time were generally resident in Papua New Guinea. He was educated at Scotch College Melbourne where he was a boarder from 1946 until 1954, the year of his matriculation. He commenced his law course at the University of Melbourne in 1955 and graduated with LLB in 1959. During his years at University he was a resident at Ormond College.

Upon graduation he served his articles with Messrs. Aitken Walker and Strachan. It was here that he met his future wife, Lauris, who was then secretary to his watchful principal, the late John De Ravin. The courtship was conducted in the same manner as His Honour carried on his future practice at the bar: with charm, skill, discretion and, of course, success. After serving his articles and two further years as a solicitor with Aitkens, he signed the Bar Roll in 1963, reading in the Chambers of Peter Coldham, now a Deputy President of the Conciliation and Arbitration Commission.

Soon after commencing practice at the bar, His Honour developed a wide ranging general practice, with particular emphasis on common law, local government and administrative law. His early years also saw him involved in a number of lengthy criminal trials. He built up an extensive circuit practice in the Western District, Hamilton and Horsham, and in his latter years at Sale. His career at the Bar has been particularly distinguished by his involvement in a series of Commissions and Boards of Enquiry: the Croxford Inquiry (1972), the Blythe Star Marine Court of Inquiry (1974), the Royal Commission into the Petroleum Industry (1975), Counsel Assisting the Board of Inquiry into the Victorian Liquor Industry (1977) and, of course, as Chairman of the much – celebrated Board of Enquiry into the Richmond City Council (1981/1982). His Honour took silk in November 1979. During his years as a junior, His Honour had a stable of seven readers: Slim, George Crisp, McMullin, Theo Lusink, Southall, Atkins and Devenish.

His Honour achieved a considerable degree of publicity during the Enquiry by the Australian Broadcasting Tribunal into the acquisition of Television Channel ATV-10 by the Murdoch company, News Corporation. His Honour, who was representing the Victorian Branch of the Australian Labour Party, conducted a sudden "walkout" during the course of proceedings (in company with his junior) in protest at the severe limitations being placed on his ability to cross-examine witnesses, an act of which the Full High Court later approved in its unanimous judgment in a successful Prohibition Application:

> "The Tribunal's rulings had been so adverse to the presentation of the case which he wished to present that it would have been pointless for him to remain". (1980) 54 A.L.J.R. 314 at 322.

From 1965 His Honour has been on the legal panel of the R.A.A.F. and 1973 was appointed Judge-Advocate. At the time of his appointment to the Bench he held the rank of Wing Commander in the R.A.A.F. Reserve.

His Honour is married with three daughters aged 15, 14 and 11. Apart from his family, his interests are the Turf, Sailing, Bushwalking and Haute Cuisine: his regular excursions to Cafe Populare, Stefani's *et al.* as part of the "Friday lunch time Mafia" (in which Meldrum Dowling and Black were also prominent) became a matter of some notoriety. Less known to those other than to the urbane locals of Schute Harbour and Airlie Beach, were his "sailing" expeditions through the Whitsunday Passage in company with Meldrum, Crossley, Joe Dickson, Balfe and Fricke. On these occasions His Honour was accorded the title "Great Navigator", more in irony, it is said, than as an accolade to his sailing expertise.

His Honour brings to the Bench qualities of great all round legal ability, human understanding, and a fierce desire for truth and impartiality. His elevation is to be applauded.

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JENKINSON J. TRANSLATED

On 23rd November Jenkinson J. resigned as a Judge of the Supreme Court following his appointment to the Federal Court Bench.

His Honour has served with distinction for over seven years on the Supreme Court following his elevation to the Bench on 18th February 1975.

The Bar wishes him well in his new office.

RETIREMENT OF TED LAURIE QC

It is rare indeed that the announcement of retirement from active practice of a member of the Bar evokes the type of response which was seen when this action was recently taken by E.A.H. (Ted) Laurie. But there have been few barristers who have attained the respect and standing which have been his over many years. An undoubted leader of the Common Law Bar, Ted has practised in a wide range of civil and criminal matters, before industrial law courts and tribunals, and at all levels of appellate courts. During the 1960's he appeared for objectors to conscription for the Vietnam war. In these cases he was often opposed by Stephen QC.

Ted signed the Bar Roll on 6th June 1946. He says that he was political, even then, and is still grateful to Gowans for taking him as a pupil. Gowan's political views did not coincide with Laurie's.

Always a wily jury advocate, Ted appeared recently for the defence in a trial of a young man for manslaughter in the County Court. The deceased had died as a consequence of drug overdose to which it was alleged by the Crown the accused had contributed. During the course of the trial, the junior expressed a little concern that perhaps his leader was not being sufficiently aggressive. Ted on the other hand remarked that his junior was a very nice young fellow but maybe a little too enthusiastic. Needless to say, the accused was acquitted.

During the course of a long career, Ted Laurie has been called upon to appear in difficult and demanding situations, but none could compare with the responsibility which he had to shoulder when, as a very junior member of the bar, adherence to personal principles and his forensic abilities were tested in the proceedings before the Royal Commission into the Communist Party. When his leader became ill immediately before they were to appear before the High Court, Laurie successfully argued the famous constitutional law case which forestalled the Commonwealth Government's attempts to pass legislation banning the Communist Party of Australia. This victory and the referendum which followed have been of vital significance in the political and social history of the country over the last thirty years.

However the notoriety which these endeavours attracted to Ted Laurie during the height of the Cold War resulted in a long and difficult period for him in his ordinary practice. It might have been easier, if he had been prepared to compromise his principles, but this has never been an acceptable course to him.

The refusal of the then Chief Justice, Sir Edmund Herring to recommend him for silk because of Ted's political views was in itself regrettable and a source of embarrassment to members of the Bar until the situation was rectified upon the appointment of a new Chief Justice. The failure of the Bar to press for his appointment when it was so unreasonably denied, was accepted by him with a sense of deep disappointment, but without rancour.

In the ultimate, Ted emerged, as his old adversary, Sir Ninian Stephen said recently at the Hyland list dinner, a Red Baron of the Bar.

Victorian Bar News

MILESTONES

During the year past the following milestones were attained:

45 Years

Sir J. Minogue	Admitted	3. 3.37
R. L. Gilbert	Admitted	3. 5.37
	Signed	21. 5.37
N. A. White	Admitted	3. 5.37
	(Retired 21.10.82)	

40 Years

P Opas QC	Admitted	1. 3.42
Judge Harris	Admitted	3. 9.42

35 Years

Coldham J.	Signed	14. 2.47
W. E. Paterson QC	Admitted	1. 5.47
K. H. Gifford QC	Admitted	1. 8.47
	Signed	1. 8.47
A. P. Webb QC	Admitted	3. 8.47
B. O'Keefe	Admitted	1. 9.47
Judge Ogden	Signed	5. 9.47
W. Magennis	Admitted	1.12.47

30 Years

Judge Dixon	Admitted	3. 3.52
Judge Mullaly	Admitted	3. 3.52
G. G. O'Brien	Admitted	3. 3.52
Treyvaud J.	Admitted	3. 3.52
Davies J.	Admitted	1. 8.52
J. P. Wright	Admitted	3.11.52

25 Years

M. N. O'Sullivan QC	Signed	1. 2.57
Judge Tolhurst	Signed	1. 2.57
V. F. Ellis	Admitted	1. 3.57
L. Flanagan QC	Admitted	1. 3.57
Judge Kelly	Admitted	1. 3.57
P. A. Liddell QC	Admitted	1. 3.57
D. G. Williamson QC	Admitted	1. 3.57
F. X. Costigan QC	Signed	13. 5.57
J. J. Hedigan QC	Signed	13. 5.57
A. E. Endrey QC	Admitted	1. 7.57
R. H. Searby QC	Admitted	31. 7.57
P. Furness	Admitted	2. 9.57
R. R. Vernon	Admitted	2.12.57

GENERAL MEETING

The Bar Council resolved to hold another end of year General Meeting to obtain the views of the Bar upon two matters of importance. A large attendance, said to be in excess of 300 members, crowded into Four Courts Building on 29th November, 1982 in response to the bidding of the Bar Council.

Loans to Barristers Chambers Ltd

The first motion proposed the insertion of two new Rules in Counsel Rules –

"41A. The Bar Council may by resolution require Counsel on the Roll to lend or to have on loan to Barristers' Chambers Limited an amount specified in the resolution, but not exceeding $5,000, on terms acceptable to Barristers' Chambers Limited.

41B. (a) If any Counsel does not comply with any resolution of the Bar Council referred to in Rule 41A, or if any Counsel does not pay to the Treasurer in the manner and within the time required the amount of any fine imposed on him under Part IIA of the Legal Profession Practice Act 1958, the Bar Council may order that the name of such member be struck off the Roll of Counsel either forthwith or in default of payment or subject to such other conditions as it thinks fit and thereupon or upon the order taking effect as the case may be the name of the defaulter shall be struck off the Roll of Counsel accordingly.

(b) The Bar Council may at any time rescind any order made under subclause (a) of this Rule."

This motion was greeted with considerable suspicion. Was it intended to impose a further levy on the Bar in addition to the $2,000 debenture which was approved by the General Meeting of 16th March 1981? Members doubtless had in mind the events of 1981. They recalled how the March resolution was rescinded by a ballot in May, but, in the ensuing referendum, the Debenture was approved by 210 to 157.

No, Hampel assured the meeting, the Bar Council did not intend to raise more money. This was merely to enable the Bar Council to enforce the existing levy. It was true that the existing liability of barristers was only $4,500 and not $5,000. Of this sum, $2,500 might be contributed by payments to the superannuation fund, by purchase of shares in Barristers Chambers Ltd or by loan. It was correct in that the proposed Rule 41A did not cover these possibilities.

The Meeting resolved that the consideration of the whole of these amendments to Counsel Rules be deferred in order that they be reformulated:

Lions 1 : Christians 0

Court Dress

There were two motions dealing with this issue. They were presented to the meeting pursuant to the resolution of the Bar Council (comprising 15 members) on 2nd September 1982 that "the Bar Council being in favour of the abolition of Court Dress, save for gowns should take appropriate steps to submit that question to the body of the Bar for its decision".

The motions were in the following terms –

"Should any change be made to the special court dress required to be worn by practitioners when appearing in court?"

"Save on ceremonial occasions should the special court dress required to be worn by practitioners when appearing in court be changed to a gown only?"

Chairman Shaw announced that, notwithstanding the attendance, he determined that the question be put to a poll.

Lions 1 : Christians 1

Those that remained, treated the meeting to an analysis of the issues.

Hedigan informed the meeting that when the question of robes was put to the N.S.W. Bar in 1975, 60% wanted to retain wigs, 80% gowns, 63% jackets, 60% bands and only 50% collars.

The meeting began to liven when Spry submitted the Chairman to cross-examination. Is it not correct that the Bar Council was divided 5:4 in favour of recommending the motion to the General Meeting? Despite audible reminders from certain Bar Councillors present, Shaw was unable to recall the vote.

Debate raged back and forth. The tone of the meeting was restored to a semblance of legal propriety when Simon Wilson read some passages from **Russell v. Russell** (1976) 134 C.L.R. 495, showing conclusively that it was beyond the competence of the Commonwealth Parliament to direct State Courts as to matters of procedure, including Dress. If it was beyond the power of the Federal Government, he argued, what did the Bar think it could do? Shaw unrepentant, declined to withdraw the motions.

Cummins, a supporter of robes said that the motions were illogical. If robes were to be abandoned, let us abandon them all. Let us appear in Court dressed in normal conservative attire.

The motions survived efforts at amendment, and eventually the meeting terminated. As a result of the meeting three questions will be placed before the Bar –

(1) That no change should be made to special court dress required to be worn by practitioners when appearing in court.

(2) That save on ceremonial occasions the special court dress required to be worn by practitioners when appearing in court should be changed to a gown only.

(3) That save on ceremonial occasions there shall be no special court dress required to be worn by practitioners when appearing in court.

By the time this article is published the results of this poll will be known.

BYRNE D.

HENRY BOURNES HIGGINS BUILDING

The Law Department will ocupy the new building constructed on the old Law Institute site. Into that building, it is hoped to fit three additional County Court Civil Jury Courts. Proper jury facilities and amenities for Judges will also be included. There is an obvious benefit to have close communication between members of the same court. Accordingly, it is hoped to re-arrange accommodation within the existing County Court Building to provide Chambers for all the Judges. Accommodation for Judges in the new County Court Building will provide chambers and services appropriate for a Judge during the hearing. It is expected that the new Courts will be available during 1983 so as to provide courtrooms for the additional County Court Judges which the Government intends to appoint.

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CLOSURE OF SOME COUNTRY MAGISTRATES COURTS

Commencing in 1983, a number of underutilised and in some instances non-utilised County Magistrates Courts, will be closed – 51 in all. These closures pursue, more actively, the existing policy of rationalising court facilities in country areas and centralising them at places where qualified Magistrates are available.

The following are the criteria adopted for selecting courts to be closed:

1. Courts which sit less than 50 hours per year.
2. Those Courts which are within 50 km of a nearby Court which can absorb the increased workload.
3. The Courts not to be closed should be capable of being serviced by qualified magistrates.
4. The nature of the cases heard of the Courts to be closed. In traffic cases there are many instances where all parties concerned, complainants, defendants, witnesses and magistrates are required to travel to the Court.
5. The demographic changes occuring within the locality of the Court to be closed, and in particular whether the population has increased or decreased in that area.
6. If there is a special legal need, then the Court may remain open to service that particular requirement.

LIABILITY OF BARRISTERS FOR NEGLIGENCE

In the Peasants' Revolt of 1381 more Judges and Lawyers were killed than any other single class of person. When the men of Kent reached London they first burnt down the house of the Lord Chancellor, then the Temple, the home of the advocate even then for over 200 years and then broke into Newgate to free the prisoners. One disappointed chronicler described the escape of many lawyers from the flames: –

> "It was marvellous to see how even the most aged and infirm of them scrambled off with the agility of rats or evil spirits."

Anyway, wasn't it Sir Robert Megarry who said, "You can always tell the state of a lawyer's health by looking at his mouth: if it is shut, he is dead?" In any event modern man is showing much more enthusiasm for suing, rather than killing, all the lawyers; which is hardly surprising because most actions against lawyers nowadays are successful. Even the traditional immunity of the advocate has been called into question.

Is an advocate liable?

Rondel v. Worsley (1969), AC 191, commenced the process of diluting the advocate's immunity from suit. There the House of Lords decided that a barrister was immune from an action for negligence at the suit of a client in respect of his conduct and management of a cause in court and the preliminary work connected therewith such as the drawing of pleadings. This limited immunity was based on public policy and long usage in the administration of justice. In **Saif Ali v. Sydney Mitchell & Co.** (1980) AC 198, the House of Lords further examined the scope of that immunity and confined it to what was done in court and to pre-trial work "Where the particular work is so intimately connected with the conduct of the cause in court that it can fairly be said to be a preliminary decision affecting the way that cause is to be conducted when it comes to a hearing." The advocate's immunity was once thought to exist as a corollary of the absence of contract. That notion was expressly disclaimed in **Rondel v. Worsley,** which instead put the public policy argument on three grounds –

1. The administration of justice required that a barrister should be able to carry out his duty to the court fearlessly and independently;

2. That actions for negligence against barristers would lead to re-trying of actions and the prolongation of litigation;

3. Barristers are obliged to accept any client, however difficult who seeks their services.

That barristers are obliged to accept any client may be true but the client will nevertheless pay and – one would have thought – is entitled to have reasonable skill employed in the conduct of his case. The fact that an action may have to be retried has not, in other areas, dissuaded courts from embarking on the task. The obligations of independence and complete frankness with the court may well conflict with the barrister's duty to the client. But that would result simply in questions of more difficulty arising attempting to determine what is and what is not, negligence. That a problem is difficult of resolution does not usually deter a court from embarking on the attempt to deal with it, nor ought it do so. Equally the fact that there may be some difficult problems ought not to obscure the situation that there are many perfectly clear cases of negligence on the part of barristers, which undoubtedly caused their paying clients very serious financial loss. It is now extremely difficult to justify any immunity on the part of the advocate – which is not to say that the court should not give a sympathetic reception to reliance in any appropriate case by a defendant barrister on his duty to the court. In **Demarco v. Ungaro et al** (1979) 21 O.R. (2d) 673 at 692-3, 697, Krever J concluded

> "That the public interest . . . in Ontario does not require that our courts recognize an immunity of a lawyer from action for negligence at the suit of his or her former client by reason of the conduct of a civil case in court. It has not been, is not now, and should not be, public policy in Ontario to confer exclusively on lawyers engaged in court work an immunity possessed by no other professional person . . . In Ontario a lawyer is not immune from action at the suit of a client for negligence in the conduct of the client's civil case in court."

Furthermore, in **Banks et al v. Reid,** (1978) 81 DLR (3d) 730 at 735, in words which have particular relevance in the Australian context, the Ontario Court of Appeal threw doubt on the application of the **Rondel v. Worsley** immunity in a fused profession, and suggested that if it applied at all, it "should be confined to issues between a barrister and his client in the discharge of the barrister's duties before a court and is dependent upon consideration of the barrister's duty to the court and duty to his client." If the advocate retains this immunity, it would seem of no consequence whether the practitioner is barrister or solicitor, or both. **Rondel v. Worsley** expressly asserted that a solicitor while acting as advocate has the same immunity as a barrister, and **Saif Ali** confines the barrister's immunity to his actions as an advocate (if one includes necessary pre-trial actions within that description). These conclusions are implicit in the judgment of Bray C.J. in **Feldman v. a Practitioner,** (1978) 18 SASR 738, where the immunity was in fact applied to the fused profession in South Australia.

Michael Zander has commented on the difficulties that will arise in drawing the line. As he put it –

> "Any acts done in the preparation of litigation may be said to influence the ultimate conduct of the case, and judges may, therefore, disagree as to what pre-trial acts are 'initimately connected' with the conduct of the case in court."

An example of this is **Biggar v. McLeod** (1977) 1 NZLR 321, where the defendant, a barrister and solicitor, had acted for the plaintiff in matrimonial proceedings. The defendant informed his client (after the trial had commenced) that the proceedings could be settled on terms; and after they had been outlined to her, the client elected to accept. The judge was informed that settlement had occurred, and a formal order was made to give it effect. Mrs Biggar later claimed that the defendant had misinformed her as to the terms agreed on and alternatively that he had negligently concluded a settlement on a basis falling outside that indicated to his client. The courts at first instance and on appeal dismissed the action on the basis of the barrister's immunity from suit. Woodhouse J put the test as follows –

> "Once it is accepted that the immunity exists . . . and that it extends to the conduct of litigation, then the simple question is whether the step of ending current proceedings by a compromise rather than by obtaining the judgment in due course should properly be regarded as part and parcel of the work of counsel in carrying forward the proceedings to a conclusion. I am in no doubt that this must be so." (1978) 2 NZLR 9 at 10.

Sir Robert Megarry a year ago reminded us of Roger North's succinct phrase for incompetent advocacy: "Much squeak and no wool, and but an impertinent contention to no profit." Take the following example. In an Irish court at the turn of the century an advocate, Sir Francis Brady, who had a passion for music, was conducting a prosecution before Lord Justice Fitzgibbon. As recalled in Maurice Healy's splendid book, The Old Munster Circuit, the story goes as follows –

> "Sir Francis, debonaire and heedless of all around him, opened his brief, probably for the first time, as the witness was sworn, and the following somewhat unusual scene occurred. 'Your name is Marmaduke Fitzroy?' 'It is not.' 'And you live at Rocksavage, on the Douglas Road?' 'I do not.' 'And you are a retired Army officer?' 'I am not!' Fitzgibbon had by this time recovered from his laughter at the first answer, which was hardly a surprise from the somewhat rough lips that had spoken it. 'Sir Francis, Sir Francis!' he cried, 'The witness doesn't agree with a word you are putting to him!' Sir Francis lowered his brief, and for the first time caught sight of the coalheaver who had been answering his questions, if questions they might be called. He looked at the ceiling, whistled a few bars of 'Let Erin remember,' looked at the witness again and said blandly: 'Then who the deuce are you? And what are you here to swear?'

What conceivable justification could there be for granting immunity to the advocate who doesn't read his brief, does no preparation, causes his client to lose his case by crass negligence, or even fails to appear at all? It is said that advice will become conservative, questions prolix, every point will be taken. But what of the surgeon operating under stress, with the power of life and death in his hands? He is liable. Let us turn then to less tender areas, where an advocate **is** now said to be liable.

A solicitor cannot absolve himself from liability merely by briefing counsel. In **Mainz v. James and Charles Dodd,** "The Times" 21 July 1978, Watkins J. said that where counsel is dilatory, the solicitor has a duty to take the brief away and give it to another counsel. But conversely in **Smith v. McInnis** (1979) 91 DLR (3d) 190, a solicitor had consulted counsel about the steps to be taken in the preparation of an insurance claim. Counsel knew, but the solicitor did not, that there was a one year limitation period. Pidgeon J. took the view that when counsel was consulted by a solicitor who obviously did not know what he was doing, he came under an obligation to tell him everything he needed to know.

In a recent decision in Ontario an advocate was required personally to pay the opposing party's costs because his "loquacity and repetitious discourse and explanations and his undue interference with the conduct of discovery by examining counsel constituted an obstruction of the due process of the court and a failure of his duty as a solicitor" and had added greatly to the cost of the proceedings." **Sontag v. Sontag** (1974) 24 O.R. (2d) 473, 477.

I myself believe that insurance is the only thing that can make practice bearable. Lord Denning has put it that the recent extensions of liability would have been intolerable for all concerned without insurance. From the viewpoint of the standard of service each individual offers to the public, I doubt if a person can now guarantee quality unless he or she insures. Otherwise one's practice will be conducted in an increasing atmosphere of nervous claim-riddled tension, the very atmosphere, I suggest, that is conducive to the making of mistakes.

The Standard of Care and the Scope of the Retainer

It may be helpful to bear in mind the qualities a good solicitor should have. These are set out in a work published in 1669 called "The Compleat Solicitor" as follows –

> "First, he ought to have a good natural wit.
>
> Secondly, that wit must be refined by education.
>
> Thirdly, that education must be perfected by learning and experience.
>
> Fourthly, and, lest learning should too elate him, it must be balanced by discretion.
>
> Fifthly, to manifest all these former parts, it is requisite he have a voluble and free tongue to utter and declare his conceits."

The author adds various moral requirements such as patience and prudence, a calm content, and "a certain staid and settled manner of living." It is something of a comedown to record that the modern standard of care required is that of the reasonably careful and competent solicitor: **Midland Bank Trust v. Hett, Stubbs & Kemp** (1979) 1 Ch 402-3. As MacNair J. pointed out in **Bolam v. Friern Hospital Management Committee** (1957) 1 WLR 582, 586, it is not the standard of the ordinary man in the street (who has not got the special skill), it is the standard of "the ordinary skilled man exercising and professing to have that special skill." See too **Neilson v. Watson** (1981) 125 DLR (3d) 326

This must be measured against the scope of the retainer which will frequently be crucial. In **Duchess of Argyll v. Beuselinck,** (1972) 2 D.L.R. 172, the defendant's retainer was held to cover advising as to taxation aspects when he had actually been retained mainly in relation to libel and copyright problems related to the publication of the plaintiff's memoirs. However, in the **Midland Bank Trust case** Oliver J. held that there was no general or continuing duty arising out of the son's retainer of the solicitors to consider the enforceability of the option on every occasion on which they were consulted as to a possible exercise. Similarly the Court of Appeal in **Yager v. Fishman & Co.** had held that it is ordinarily no part of a solicitor's duty to a client to remind the client that the date for exercising an option is approaching. More recently, McPherson J. in Queensland has held that the mere fact that a client retains a solicitor to act in an action does not entitle him to advice as to the existence of legal aid and his eligibility for aid: **Re Elgis and Somers** (1982) A.C.L.D. 382. Possibly the hardest case was **Griffith v. Evans** (1953) 1 WLR 1424, where a workman consulted solicitors about a potential problem with workers' compensation. The Court of Appeal held (over a strong dissent by Denning L.J.) that the retainer was limited to workers' compensation issues, so that the solicitor's failure to advise him of his common law rights did not constitute negligence. It would be unwise to rely on the majority judgments in the present judicial climate. At the other end of the scale is the pronouncement by Ruttan J. in **Tracey v. Atkins** (1977) 83 DLR (3d) to, that failure to give advice or direction when the circumstances called for such is as much a breach of duty as when wrong advice is tendered. There is no reason to doubt that comparable principles apply to counsel.

Errors of Judgment

One is not guilty of negligence merely by being wrong. If one has committed a "mechanical" error (eg. allowing a limitation period to expire, or failing to search an appropriate register) one is more likely to be found negligent than if one has committed a simple error of judgment. Similarly the standard expected must be viewed in the light of the existing state of knowledge of the profession. This is illustrated by **Max Garrett (Distributors) v. Tobias** (1976) 50 ALJR 402, where the High Court held that solicitors were not negligent in failing to institute certain proceedings because of the doubtful state of the law at the relevant time as to the effect of a failure to lodge a caveat upon equitable priorities. A recent example of the question whether an error of judgment amounted to negligence is to be found in **Whitehouse v. Jordan** (1980) 1 All E.R. 650. It is important to notice the difference in phraseology between the view of Lord Denning M.R. in the Court of Appeal and that of various members of the House of Lords where the Court of Appeal's decision was affirmed.

Representations Including a Contract

Most unsuccessful litigants have nothing other than the law to thank for their adverse verdict, even if they are likely to attribute the result to a biassed judge or incompetent counsel. Given the modern tendency to sue, one can forecast that some claims will be put in the alternative, (a) negligent handling of the case or (b) a negligent pre-contractual representation by the solicitor – "Yes, I can help you, you've got a good case!" Since **Esso Petroleum v. Mardon** (1976) 1 QB 801, such actions must have prospects of success. Before 1964, of course, a defendant was not liable in damages at all for innocent misrepresentation and the defendant could only succeed on an argument such as collateral warranty. The difficulties inherent in such an argument were highlighed in **Lambert v. Lewis** (1980) 1 All E.R. 978, where the collateral warranty approach was expressly rejected.

In **Esso Petroleum v. Mardon,** Esso wanted a tenant for its petrol station at Southport. It represented to Mr. Mardon that it had made a forecast of the estimated annual consumption of petrol at 200,000 gallons a year. Mr. Mardon relied on the estimate, which was wholly false – the actual throughput was more like 60,000 gallons a year. Mr. Mardon invested

all his capital in the venture and lost the lot. Esso's conduct cannot have done other than raise the temperature in the court. While Mr. Mardon's losses continued, Esso gave him no help, and when he could not pay cash for petrol supplied, it cut off deliveries. Lawson J. found the plaintiff on negligent misrepresentation and the Court of Appeal increased his damages. As Lord Denning M.R. put it –

> "It seems to me that (Hedley Byrne), properly understood, covers this particular proposition: If a man, who has or professes to have special knowledge or skill, makes a representation by virtue thereof to another – be it advice information or opinion – with the intention of inducing him to enter into a contract with him, he is under a duty to use reasonable care to see that the representation is correct, and that the advice, information or opinion is reliable. If he negligently gives unsound advice or misleading information or expresses an erroneous opinion, and thereby induces the other side to enter into a contract with him, he is liable in damages." (1976) IQB at 820.

It may be some comfort that Lord Denning had on an earlier occasion expressly disclaimed the existence of the duty when "a solicitor meets a friend in a railway train and casually gives him advice on a point of law", **McInerny v. Lloyds Bank** (1974) LL L. R. 246, 253. But nowadays the lawyer who casually says to a friend "Yes, you must win that case", or, when declining instructions says "Go to X, he is an expert in this field", when X is not, risks in some circumstances accepting liability for the accuracy of the statement.

The Disclaimer

In a contractual situation, properly worded disclaimer will afford the defendant a good defence. But what of the claim in tort? If the defendant in **Ross v. Caunters** (1980) Ch 297, had said to the testator "I accept no responsibility for defective work!", would that have affected the plaintiff's action in tort? It must be remembered that it was only the disclaimer which prevented the claim succeeding in **Hedley Byrne.** In an interesting passage in **Evatt's case** Barwick C.J. raised doubts as to whether a disclaimer would always be effective. He said –

> "I doubt whether the speaker may always except himself from the performance of the duty by some express reservation at the time of his utterance. But the fact of such a reservation, particularly if acknowledged by the recipient, will in many instances be one of the circumstances to be taken into consideration in deciding whether or no a duty of care has arisen and it may be sufficiently potent in some cases to prevent the creation of the necessary relationship. Whether it is so or not must, in my opinion, depend upon all the circumstances of and surrounding the giving of the information or advice." 122 CLR at 570.

If the tax lawyer gives an opinion to an accountant about a particular scheme, knowing that the opinion will be shown to a class of persons who are contemplating embarking on the scheme, one can imagine that liability would not be avoided by the lawyer asserting orally to the accountant that he accepted no liability for his views, or was responsible only to the accountant. Lawyers plainly will not be enthusiastic about embarking on the practice of disclaiming liability for their work – it won't encourage custom – but it would be much more likely that the disclaimer would be effective, if embodied in the opinion. The effects of a disclaimer will be equally important in assessing the degree of responsibility assumed by the person disclaiming and in deciding the width of the class of persons entitled to rely on the skill of the person disclaiming. Possibly the most effective disclaimer of all is to make sure that one's legal opinion is based and the exact limits of the advice given. In a paper delivered in a seminar in Singapore in July 1976, S.E.K. Hulme, Q.C. pointed to the importance of the exercise of as much control as possible in relation to the ambit of distribution of the disclaimer, as by obtaining agreement that one's opinion will not be shown to anyone other than particular parties and then only in full.

The High Court in **Shaddock v. Paramatta City Council** (1981) 36 ALR 385, has widened the liability for giving wrong advice in circumstances involving a developer who had sought information about whether the property he was about to buy would be affected by any road proposals. The council negligently omitted to mention a road widening programme which eventually reduced the value of the land, and the developer successfully sued for damages. The decision is interesting in part because it extends liability for negligent mis-statement beyond persons giving advice as professionals.

Mason J. (with whom Aickin J. agreed and with whom Murphy J. probably agreed) expressly adopted the views of Barwick C.J. in the M.L.C. Case (**Mutual Life & Citizens' Assurance Co. Ltd. v. Evatt** 122 C.L.R. 556 at 572-3), that:

> "Whenever a person gives information or advice to another upon a serious matter in circumstances where the speaker realizes, or ought to realize, that he is being trusted to give the best of his information or advice as a basis for action on the part of the other party and it is reasonable in the circumstances for the other party to act on that information or advice, the speaker comes under a duty to exercise reasonable care in the provision of the information or advice he chooses to give."

As Mason J. went on to point out, liability for negligent mis-statement is, on that view, not confined to those who carry on, or profess to carry on, a profession, business or occupation involving the possession of skill and competence. (36 A.L.R. at 404-405). Gibbs C.J. however, added the rider that "a person should not be liable for advice or information if he had effectually disclaimed any responsibility for it" (36 A.L.R. at 389).

Some Side Effects

The practice of the supposedly highly skilled legal profession has been made much more difficult by the proliferation of legal reports and other "aids", at a time when plaintiffs in professional negligence suits are ever more ready to appear. On the one hand, the law is easier to find, with the appropriate digest or CCH reporter. On the other, it is far easier to miss a relevant regulation, section or decision, especially if, as the Law Institute of Victoria recently complained, delays and omissions in official reporting of decisions are allowed to occur. There is an increasing tendency towards specialization, which adds to the dangers of the generalist. One cannot over-emphasize the perils of holding one's self out as prepared to practise in an area of the law with which one is not familiar – or even only half familiar. The legal profession's regulatory bodies are showing ever more enthusiasm for certifying the specialties of practitioners. This may be helpful to the public, but carries with it obvious dangers to the certifier. If a Law Society chooses to take upon itself the task of certifying that a practitioner is peculiarly qualified in certain areas of the law, and does so incorrectly and carelessly, one would have thought liability may well follow. The judges who decided **Dutton v. Bognor Regis** and **Anns Case** would probably be well disposed to such claims. Insurance is compulsory now in a number of states and presumably will soon become so for barristers as well as solicitors. As claims increase in number, premiums will rise and the cost of legal services will mount, in turn. All of which might serve to give the courts a public policy argument for limiting the circumstances in which claims may be made, and the damages which may be recovered.

Conclusion

Given an atmosphere in which judge and advocate may both be sued, I wonder if we will ever again experience a scene such as this. Tom Doyle, an Irishman at the Melbourne Bar who died in 1961, was cross-examining a new Australian. He had driven him into a corner and, moving in for the kill, asked: "If that is so, then why did you say this to the plaintiff?" The witnes cowered back into the box and said "I no answer da quest." Doyle leaned forward and said: "If you no answer da quest, da judge, he make for you plenty of troub!" He then turned to the judge and said: "I must apologize to your Honour for parading my linguistic abilities in this way." The judge replied: "That is quite alright, Mr. Doyle, you said exactly what I was about to say myself." Dean; A Multitude of Counsellors p 233.

This is an edited portion of an address delivered by Charles QC to the Tasmanian Bar Association in October 1981.

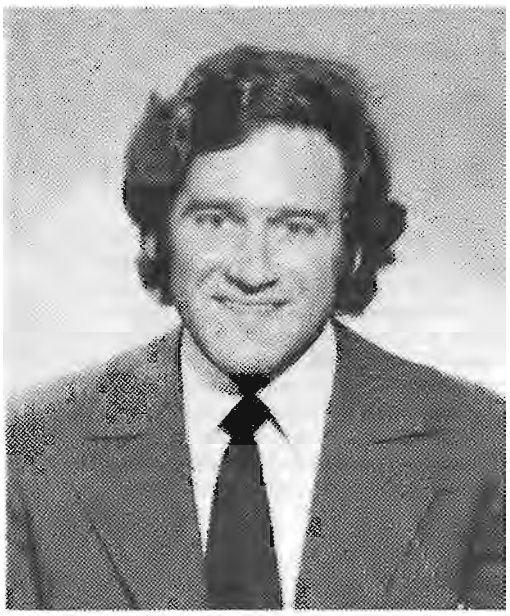
THE NEW SILKS

ALWYNNE RICHARD OWEN ROWLANDS

Date of Admission – 1. 3.63
Date of Signing – 7. 3.63
Master – Storey
Readers – Graham Davies, P.W. McDermott, Maguire, G.M. McDermott

ALBERT GRAEME UREN

Date of Admission – 1. 3.63
Date of Signing – 4. 2.64
Master – S. Strauss
Readers – Michael Ryan, Ian Miller, Tony Nolan, Rose Weinberg, W. Stuart, Jopling, Tracey



RONALD MERKEL

Date of Admission – 2. 3.64
Date of Signing – 10. 6.71
Master – Forsyth
Readers – Carter, Foster, Howie

JOHN GRAEME LARKINS

Date of Admission – 2. 4.64
Date of Signing – 19.11.64
Master – Greenwood
Readers – Pryles Digby
Levin Houghton

DOUGLAS RAYMOND MEAGHER

Date of Admission – 1. 5.64
Date of Signing – 28. 5.64
Master – Woodward
Readers – Monester Fitz-Gerald
Saw Paul
Strong

DAVID McCARTIN MICHAEL BYRNE

Date of Admission – 1. 5.64
Date of Signing – 30. 9.65
Master – Gobbo
Readers – Turley
Rizkalla
Spicer
Karkar
Bevan-John

RONALD KENNETH JOHN MELDRUM

Date of Admission – 1.11.67
Date of Signing – 10.1167
Master – Lazarus
Readers – Joan Dwyer Judd
John Richards Keely
Devenish Griffin

SUPREME COURT JUDGES' SALARIES

The Red Judges who administer the Common Law and make the prerogative writs run still retain an aura that their federal counterparts cannot match.

However the terms of employment are not, at present, as attractive on the Supreme Court of Victoria as in the Federal Court of Australia. A salary advantage Supreme Court Judges enjoyed in 1981 has gone. A Supreme Court Judge's work load appears heavier yet his judgments, it seems, must be written after dark. A car is available only for special occasions.

The Commonwealth Remuneration Tribunal recommends each year such alterations it considers desirable in the remuneration and allowances payable to Justices of the High Court and Judges of the Federal and Family Courts.

Its recommendations for 1981 and 1982 were accepted by the federal government.

In the course of its reasons in 1981 the Tribunal relied on a table which showed salaries and allowances in May 1981.

SALARIES AND ALLOWANCES: HIGH COURT, STATE SUPREME COURTS AND FEDERAL COURT OF AUSTRALIA, 30 MAY 1981
($ per annum)

	Chief Justice/ Chief Judge		Justice/Judge	
	Salary	Allowance	Salary	Allowance
High Court	77,000	4,000	70,000	3,350
Federal Court	65,000	3,075	59,000	2,800
Family Court	59,000	3,075	52,000	2,800
			48,000	2,800
New South Wales	70,570	4,278	64,658	3,450
Victoria	77,352	3,750	68,757	3,000
Queensland	69,800	3,640	60,170	2,430
Western Australia	63,495	2,400	58,295	2,100
South Australia	63,567	Nil	57,686	Nil
Tasmania	57,112	Nil	51,401	Nil
Australian Capital Territory	61,000	3,075	59,000	2,800
Northern Territory	61,000	3,075	59,000	2,800

The Tribunal then went on to recommend increases for Federal Judges. The results of these recommendations in 1981 are reflected in this table which was used in the 1982 report:

On 19 July 1982, the salaries of New South Wales judges were increased by 14.3% to take effect from 1 January 1982. The increase was granted pursuant to a particular reference. The New South Wales legislation envisages that a determination will be made of, inter alia, judicial salaries, on 1 October each year. It is not known what will take place during the present year."

SALARIES AND ALLOWANCES: HIGH COURT, STATE SUPREME COURTS AND FEDERAL COURT OF AUSTRALIA, 30 JUNE 1982

($ per annum)

	Chief Justice Chief Judge		Justice/Judge		Date of
	Salary	Allowance	Salary	Allowance	Effect
High Court	87,000	4,400	79,000	3,675	1 7.81
Federal Court	73,000	3,375	67,000	3,075	1. 7.81
Family Court	67,000	3,375	59,000	3,075	
			55,000	3,075	1. 7.81
New South Wales	87,782	4,278	80,467	3,450	1. 1.82
Victoria	77,352	4,088	68,757	3,270	7. 5.81
Queensland	76,160	3,640	67,700	2,740	1. 7.81
South Australia	70,900	Nil	63,561	Nil	1.10.81
Western Australia	75,000	3,600	69,000	3,150	
			67,100	3,000	1. 1.82
Tasmania	65,818	Nil	59,236	Nil	1. 7.81

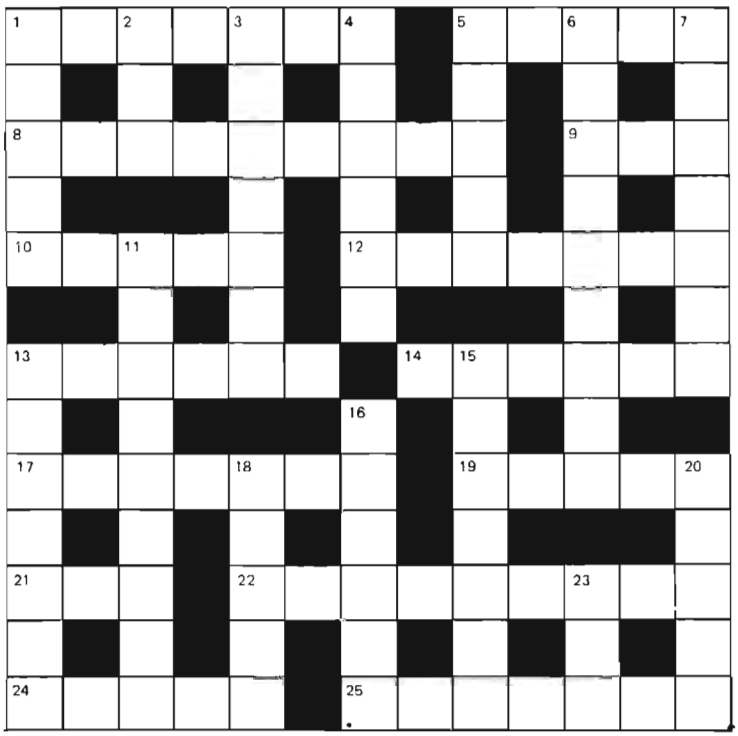
The increase in the N.S.W. Supreme Court Judges' salaries may, particularly in the absence of knighthoods, have been an attempt to stop a "brain drain" to the federal jurisdiction. The N.S.W. increase was substantially higher than average weekly earnings which increased by 16.4% between June 1981 and June 1982. The figures reveal that Victorian Supreme Court Judges have been allowed to fall from a position second only to High Court Justices to one substantially below their Federal Court brethren.

An increase in salary and allowance for Victorian Supreme Court judges is presently before Parliament. If implemented, it would take the Chief Justice to $86,000 plus, and allowance of more than $4,000. Puisne Judges are to receive $76,450 plus an allowance.

The Tribunal's 1982 report recommended the following increases:

Title	Rate per annum of Salary $	Rate per annum of Allowance $	Travelling Allowance per over night stay $
High Court of Australia			
Chief Justice	93,000	5,000	Capital City – 120
Justice	84,500	4,500	Other than Capital City – 85
Federal Court of Australia			
Chief Judge	78,000	4,500	
Judge	71,500	4,000	
Australian Conciliation and Arbitration Commission	Pursuant to an amendment to the **Conciliation and** Arbitration Act 1904 enacted in 1977, the salaries and allowances to be as for the Chief Judge and Judges of the Federal Court of Australia respectively.		
President			Capital City – 110
Deputy President			Other than Capital City – 80
Supreme Court of the Australian Capital Territory			
Chief Justice	73,500	4,500	
Judge	71,500	4,000	
Supreme Court of the Northern Territory			
Chief Justice	73,500	4,500	
Judge	71,500	4,000	
President of the Administrative Appeals Tribunal	71,500	4,000	
President of the Trade Practices Tribunal	71,500	4,000	
Chairman of the Commonwealth Grants Commission	71,500	4,000	
Chairman of the Law Reform Commission	71,500	4,000	
Family Court of Australia			
Chief Judge	71,500	4,000	
Senior Judge	64,500	3,500	
Judge	60,500	3,500	

CAPTAIN'S CRYPTIC NO. 42



ACROSS

1. Licensed Excuse (7)
5. Sharpeners in the arranged papers (5)
8. Came by an inheritance (9)
9. 252 wine gallons (3)
10. Search for (5)
12. Those holding by lease (7)
13. Not in a particular musical key (6)
14. Characteristics (6)
17. More Exalted (7)
19. Stiff head wind (5)
21. French duke (3)
22. New J. (9)
24. Animal track (5)
25. Moslem tribe said to have sprung from Sarah (7)

DOWN

1. And foll. (2, 3)
2. Sounds like Hulme Q.C. is dry (3)
3. Tendency to stay as is (7)
4. Latin faith (5)
6. Chancy Common Law Nuisances (9)
7. Cavities to nostrils (7)
11. By virtue of his office (2, 7)
13. Refers to (7)
15. Bitterness (7)
16. True values (plus a little extra for the asking) (6)
18. Temple for barristers' interiors (5)
20. Lordless samurai (5)
23. Bag of membrane (3)

SOLUTION PAGE 34

THE PRIVILEGE AGAINST SELF INCRIMINATION
— WIGMORE REVISITED

The Spring 1982 edition of the **Bar News** featured a number of articles of great interest and topicality under the general title "Trial by Inquisition."

Naturally much of the discussion was concerned with the privilege against self incrimination. Several of the contributors asserted that the privilege is confined to the privilege against "testimonial compulsion" and referred to **Wigmore on Evidence** (revised edition) paragraph 2263 and **King v. McClellan** (1974) V.R. 755.

It is undoubtedly true that the Full Court in **King v. McClellan** stated that the privilege against self incrimination: –

> ". . . has always been accorded, and has only been accorded, in respect of a right to refuse to answer incriminating questions or not to incriminate himself, when being interrogated in some form of judicial enquiry." (1974) V.R. at 776.

To encapsulate the concept of "some form of judicial enquiry" the Full Court coined the term "Curial Proceedings." (The etymology of the word however has connotations which are legislative rather than judicial or forensic. The curia was one of the thirty divisions into which the Roman patricians were distributed by Romulus. The term came to be applied to the meeting place of the curia and later to the senate house and the senate itself).

In Melbourne Home of Ford Pty. Ltd. v. Trade Practices Commission (No. 1) (1979) 36 F.L.R. 450, 469-471 the majority of the Full Court of the Federal Court (Franki and Northrop JJ) followed **King v. McClellan.** There are, however, two problems with **King v. McClellan.** The first of these arises from the fact that the Full Court relied substantially on the following passage from **Wigmore** (McNaughton revision (1961) paragraph 2263): –

> "The history of the privilege (paragraph 2250 supra) – especially the spirit of the struggle by which its establishment came about – suggests that the privilege is limited to testimonial disclosures. It was directed at the employment of legal process to **extract form the persons own lips** an admission of guilt, which would thus take the place of other evidence. . . In other words, it is not merely any and every **compulsion** that is the kernel of the privilege, in history and in the constitutional definitions, but **testimonial** compulsion." (Wigmore's emphasis)

However, a reference to the full text of Wigmore makes it clear that he was using the term "testimonial" in relation to disclosures which were **communicative** or **assertive** (see p. 378). The learned author was concerned with process which relied on a person's "moral responsibility for truth telling" as distinct form mere physical examination, finger printing, etc. Wigmore clearly regarded the compulsory production of documents as within the privilege because: –

> ". . . there is a testimonial disclosure implicit in their production. It is the witnesses' assurance, compelled as an incident of the process, that the articles produced are the ones demanded." (at p. 380)

That Wigmore was using the word "witness" as a convenient label for the person subject to the compulsion and not as suggesting a limitation to persons giving evidence in a witness box is shown in the immediately following passage: –

> "No meaningful distinction can be drawn between a communication necessarily implied by legally compelled conduct and one authenticating the articles expressly made under compulsion in court."

Among the authorities cited by Wigmore, there are at least two which deal with the application of the privilege in plainly non-curial situations, but there is no suggestion that the privilege in inapplicable for that reason. In **New York v. Reardon** (1910) 197 N.Y. 236 the privilege was held to be available to a stockbroker called upon to produce books of account by a State Tax Official. The State statute was held to be unconstitutional. At page 245 of the judgment it was stated: –

> "... no one shall be compelled in any judicial **or other** proceeding against himself to disclose facts. (emphasis added)

In **Grant v. The State of Georgia** (1952) 69 S.E. 2d 889 a police officer took alleged lottery tickets out of the hands of the Defendant who was sitting in a motor car (such recovery being no doubt encouraged by the officer placing his hand on his holstered pistol). It was held that the obtaining of the lottery tickets in these circumstances infringed the privilege against self incimination which was enshrined in the State Constitution of Georgia.

If Wigmore had meant to say that the privilege was confined to "curial" proceedings in the sense used by the Full Court in **King v. McClellan,** it would have been pointless for him to discuss no less than eleven categories of fact situations (e.g. finger printing, extraction of substances from inside the body of a suspect, examining the body of a suspect etc.) as being "testimonial" or otherwise. The short answer would have been that such disclosures were not made by a witness in the course of giving evidence. Wigmore, however, was not concerned with this. In prefacing the discussion of the eleven categories, it is stated (at p. 386) : –

> "Unless an attempt is made to secure a communication – written, oral or otherwise – upon which reliance is to be placed as involving his consciousness of the facts and the operations of his mind in expressing it, the demand made upon him is not a testimonial one."

The second problem with **King v. McClellan** is that the Court did not refer to the decision of the N.S.W. Full Court in **ex parte Grinham** (1961) S.R. (N.S.W.) 862 That was a case where the Court had to consider a regulation under the N.S.W. Transport Act purporting to confer power on an authorised officer to stop a public vehicle and request the driver to furnish information which the officer might require. Grinham, a taxi driver, was charged with an offence against the regulations, in that he failed to answer questions put to him by an authorised officer in a Sydney street where Grinham was driving his taxi – hardly a "curial" setting. It was held (at p.870) that the regulation could not be construed to confer powers which were "repugnant to the general law", including "the common law rule against self incrimination." See also pp. 871, 972, 873.

Grinham's case was consistent with the decision of the High Court in **Kempley v. The King** (1944) Arg L.R. 249 which concerned prosecutions under the National Security Regulations for selling liquor at prices higher than those prescribed. The point on appeal was the admissibility of statements made to an authorised officer who was acting under a regulation which gave him power to require the furnishing of information. The officer had informed the appellants that they were bound to answer. The argument was that the appellants were not bound to provide answers which might incriminate them and that the wrongful assertion by the officer that they were so bound amounted to a misrepresentation or inducement which made the admissions involuntary and therefore inadmissible. Latham C.J. (at p. 251) held that the regulation was not limited by any restriction enabling a person to refuse to answer questions as to offences possibly committed by him. Starke J. (at p. 253) said that: –

> "Where authority is given to compel the examination of persons, the ordinary rule of the common law which protects a person from answering questions which intend to incriminate him applies unless expressly excluded."

His Honour pointed out that whether the rule is excluded depends on "provisions of the legislative act or the nature of the subject" but that answers are only inadmissible if the objection was taken and the answers nevertheless improperly compelled. McTiernan J. (at p. 253) said that the regulation did not contain any express provision excusing a person from answering on the ground that the answer might incriminate him. Williams J. (at p.254) held that privilege did apply, but was for refusing special leave on other grounds. No member of the Court suggested that the privilege was inapplicable merely because the questions asked by the officer were not asked in the course of "curial" proceedings.

It seems strange that the Full Court in **King v. McClellan** (at p. 778) referred to the judgment of Latham C.J. in **Kempley** as authority for the proposition that the privilege was "only a rule of evidence and... must give way to statutory regulation." If the theory of the "curial" restriction were valid, on the facts of **Kempley** no question of the privilege giving way to statutory regulation would arise – the appellant's claim would have been met at the outset with the answer that he had not been questioned in any "curial" proceedings.

It is suggested that the privilege against self incrimination has as its genesis a doctrine of the common law which became firmly established in the 17th Century for historical, philosophical and political reasons. That doctrine operates to protect individuals subject to compulsory interrogative process but it does so in juristic forms which may differ depending on the setting in which the need for protection arises. A witness giving evidence in a court can rely on the privilege because it has become enshrined as an exception to the general laws of evidence and procedure which make a witness compellable to answer all relevant and admissible questions. In another context, where some official is given statutory power to compel the answering of questions or the production of documents that power will, as a matter of statutory construction, be read as being subject to the privilege against incrimination unless the contrary is provided expressly or by necessary implication: e.g. **Mitcham V. O'Toole** (1977) 137 C.L.R. 150, **Crafter v. Kelly** (1941) S.A.S.R. 237; **Hammond v. The Commonwealth** (1982) 56 A.L.J.R. 767 at p. 770 per Gibbs C.J.; Pearce, Statutory Interpretation in Australia (2nd Edition) paragraph 115. The doctrine of natural justice is analogous. There are common law has, out of regard for certain notions of fairness seen as self-evidently valid, developed a rule of statutory construction which will import the rules of natural justice into a grant of statutory powers of the appropriate kind: **Salemi v. MacKellar** (No. 2) (1977) 137 C.L.R. 396, at pp. 440-401 per Barwick C.J., at p. 419 per Gibbs J.

PETER HEEREY

AMERICAN TRIAL LAWYERS IN HONOLULU

The American Trial Lawyers Association (ATLA) will be holding its Mid Winter Convention in Honolulu in the week of 22 – 28 January 1983. For those members of the Bar reluctant to return to work at the end of the Summer Vacation this ATLA Convention, with its headquarters at the Sheraton Waikiki, offers a pleasant break before the rigours of February.

The Convention is primarily directed to the training of Trial Lawyers in the actual preparation and conduct of common law actions, with a number of papers by top American Trial Lawyers and technical experts. The program will also demonstrate various trial techniques including the presentation of evidence-in-chief and cross-examination, and showing of videotapes.

After a Sunday of welcoming festivities, the opening day of the Education program (Monday 24th January) covers the field of Expert Witness with segments on "Sources of Expert Testimony" and "How to Use Unusual Experts" including such witnesses as Human Factors Specialists, Psychologists and Rehabilitation Experts. The second day is devoted to "Unique Uses of Demonstrative Evidence" with such diverse topics as Medical Illustrations & Models to Prove Injury, Videotape Presentations in Court and Thermograms, now used in America to corroborate scientifically the presence of actual areas of pain resulting from soft tissue injuries.

On Wednesday 26th January a two day program commences on "Experts on Experts" which will include Highway Safety, Safety in the Workplace, Auto Design, Toxic Injuries and Aviation.

ATLA, now hopes to send a team of American trial lawyers to Australia in 1984 and will welcome the presence of Australians at its Honolulu Convention. The extensive social program should ensure a most enjoyable and instructive working holiday.

(Travel arrangements for Australian Delegates are in the hands of Compass Travel Pty. Ltd. — Phone 699-9766).

Mouthpiece

"Ten thousand a month multiplied by twenty months equals 100 barristers."

Whitewig glanced at Flossie. It seemed like the old chap had finally succumbed.

Together they watched the Waistcoat making frantic calculations on the back of an envelope. His breathing was becoming shorter. It looked as if he was going to explode. Finally it all burst out –

"In November 1979 I supported the Bar Council when they wanted to buy the ABC site. Remember, the meeting was held in a great hurry so as to enable the new building to go ahead without delay . . ."

These last words and small remnants of his cigar were sprayed among the half dozen gathered around in the Common Room.

". . . 'Without delay', they said. Hurumph. They said then in mid 1981 they wanted money to enable the development to proceed, that delay was costing us $10,000 a month in rising building costs alone . . .

"Then they asked for $2,000 from each of us, to be sent on an unsecured debenture . . . "

He was becoming apoplectic. Until some kind soul thrust another glass of port into his hand.

"And I supported them again!! I persuaded you youngsters to put up $2,000 for such a good cause – for the benefit of the Bar as a whole. And I had confidence in them!!

"I reckon now that twenty months have gone by. And what has happened? Does anyone know? O'Callaghan has demolished the B.L.F. but the A.B.C. building is still intact.

"What happened? The only thing I'm certain of is that the debenture money put up by you, my dear young friends, has gone down the plug hole. And it's all my fault."

"There, there," said Flossie, handing him a kleenex to stifle his un-manly sobbing, "I'm sure that there is a committee working on it. Besides, they must all be ever so busy . . . "

BYRNE & ROSS D. D.

LABOUR LAW AND SOCIAL SECURITY CONGRESS –

The International Society for Labour Law and Social Security is holding an Asian Regional Congress in September 1983 with its dates designed to cater for the needs of legal practitioners wishing to attend the Commonwealth Law Conference in Hong Kong.

The Society's Asian Regional Congress will be held in Seoul, South Korea, between the 14th and the 16th of September.

The International Society for Labour Law and Social Security, is a multi-disciplinary body bringing together legal practitioners, academics and other interested and involved parties to the industrial legal process and areas of the law relating to workers' compensation, rehabilitation and income security. The international body's Australian affiliate is the industrial Relations Society of Australia which has some 3,500 members, Australia wide, drawn from employer representatives, trade union officials, members of the legal profession, academics, the public sector and others interested in industrial relations and industrial law.

The programme of the conference has not yet been completely finalised but will deal with broad regional issues within the sphere of influence and interest of the international body.

The Industrial Relations Society of Australia hopes that delegates proposing to attend the Commonwealth Law Convention may be interested in travelling, in conjunction with the Hong Kong convention, to the Congress in Seoul.

Further details can be obtained from the Hon. Secretary/Treasurer of the Industrial Relations Society of Australia, Mr Tim Moore, LL.B., M.P., P.O. Box 210, Gordon 2072 N.S.W.

COMPUTER NEWS FROM OVERSEAS

While efforts are but slowly made to provide a computerised legal information system in Victoria, events overseas are proceeding at an increasingly rapid pace. The latest information from Eurolex, the computerised legal system operated by the Thompson International Group, revealed that over one hundred subscribers now use the system in the United Kingdom. The Eurolex data base is continually expanding. The following "Libraries" were capable of being searched in May 1982;

Weekly Law Reports (from 1967)
Times Law Reports (from 1967)
Current Law Yearbooks (1977 – 1979)
Current Law Monthly (from 1980)
Scots Law Times (from 1975)
Criminal Appeal Reports (from 1970)
Reports of Patent Cases (from 1970)
Fleet Street Reports (from 1963)
Industrial Cases Reports (from 1972)
Common Market Law Reports (from 1962)
European Commercial Cases (from 1978)
European Human Rights Reports (from 1979)
European Law Digest (from 1973)
Council of European (from 1949)
Statutes in Force: –
Tax Group (1980 – 1981)
Sale of Goods (1983 – 1979)
Common Market Official Journal "L" series for 1980.

Eurolex has now embarked upon a number of collaborative ventures with other publishers and operators of similar systems. It has agreements with Gee and Co. (Annotated Tax Cases), Kluwer (U.K.), the European Patent Office, Kenneth Mason (Road Traffic Reports) and Sweet and Maxwell. The agreement with Sweet and Maxwell will result in the White Book becoming available on the data base soon, together with all updated references. In the future it is proposed that secondary materials such as The Journal of Planning Environment Law, Property Compensation Reports and the British Tax Encyclopaedia and Encyclopaedia of Value Added Tax will be incorporated into the data base material. A further agrement has been entered into by Eurolex with the West Publishing Company. West's operates the Westlaw information system, the only major competitor to Lexis in the United States. When operating this will provide access through the Eurolex system to U.S. Federal and State reports and will thereby greatly expand the material available for searching.

For Australian practitioners concerned at the costs involved in accessing material through such systems, it is worth noting that the present pricing structure in the United Kingdom for Eurolex subscribers is for a user charge of £45.00 for the time spent "on line." There are no subscription charges or monthly connection fees payable to Eurolex, although hardware has to be leased or owned, and a telephone line has to be available.

A further development which may have a far reaching implications for lawyers all over the world is the announcement by National Law Library Ltd., of a software package for the retrieval of information specifically designed for the use of lawyers. MicroBird is a software package designed to operate a Micro computer such as Apple II. It can be put to use in a number of ways. For example it could handle the output of a word processor, store opinions of counsel, maintain a fee book, assist in litigation support and hold legal texts for easy access. The searching of materials is by search of the complete text without prior indexing or formating. Such a search is interactive, that is to say as the answers are provided by the machine the user can refine or restructure his search to take account of information being provided and thereby save time and money. Development is now proceeding to enable the MicroBird system to be used on other micro computers. In the future it may well be that through the use of such software packages publishers will provide publications direct to users in electronic form, rather than in the form of hard copy texts.

National Law Library Trust is a charity set up by the Law Societies and Bar Councils of the United Kingdom, in collaboration with Society for Computers and Law. It supports and funds a variety of research projects geared to serve lawyers specifically in the United Kingdom.

If any member of the Bar desires further information of any of the matters referred to above I would be delighted provide the same.

Levin
Chairman Victorian Bar Computer Committee

Letter to the Editors –

Dear Sirs,

I am aware that there is a great issue which agitates the minds of Counsel and of The People. I refer, of course, to the question of Court Dress. I set out the following proposals as my contribution to The Discussion.

For Juniors of less than three years standing:

An open gown with bell sleeves of Terylene cloth coloured brown with verdant facings. The colours are to symbolize the remote place to which such Counsel repair in pursuit of a brief.

For Juniors or more than three years standing:

A closed gown of black crepe de chine with plain lawn jabot and weepers. The gown and accoutrements are to symbolize the sobriety and humourless demeanour (I use the word in its ancient and proper sense) necessary for those who aspire to success in the mediocracy which is the profession of the Bar.

For Queens Counsel:

A gown of aquamarine damask figured with a '$' motif. The gown is to symbolize the bottom of the harbour schemes which such Counsel either advise or would be in, if they dared. On festal occasions such Counsel may wear a cappa magna of the same cloth and colour faced with ermine. The ermine is to symbolize the office which is sought by those who profess to despise it and which is despised by those who profess to seek it.

For County Court Judges:

A closed gown of blushing pink taffeta with rochet sleeves appliqued with particoloured lozenges. The gown is to symbolize the diverse expertise and interests of the Judges, outside of the law.

For Supreme Court Judges:

A closed gown of blushing pink taffeta with rochet sleeves the whole shot with vermillion, orange, yellow and indigo. The gown is to symbolize the sunset of the power and prestige of the Court over which those judges preside.

For High Court Judges:

These lawyers present a problem because their employment is to tell us that the law is not what we all thought it was, or to tell us that the law is what we all thought it was not, all the while asserting that they are compelled to their assertions by irresistable logic. On the principle of the tale of The Emperor's New Clothes the High Court Judges must wear nothing.

Finally I conclude by a few words which may be apt:

"Costly thy habit as thy purse can buy,
But not expressed in fancy; rich, not gaudy;
For the apparel oft proclaims the man,"

Yours faithfully,

Sophia Logos

At the Annual Dinner of the Royal Victorian Association of Honorary Justices held on Friday the 19th November 1982, Chief Judge Waldron was described as having been for some years the Chairman of the Bar's Ethnics Committee.

Misleading Casenote No. 20 — R. v. Fabian

The Chief Justice recently read the following judgment:

"This is a case stated for the consideration of this Court by His Honour Judge Shillelagh of the County Court. We have reserved our judgment, since the case raises several interesting questions of law.

"The accused, Mark Fabian, was presented (which word I use in its ancient and proper sense) for trial at the County Court on a count of indecent assault upon a female person. It was alleged against him that by certain divers glances and stares at the prosecutrix whilst they were both seated on a tram (a word which, we are told by the learned Prosecutor, denotes a type of electrically motivated public conveyance) he put her in fear, thus committing an assault in circumstances of indecency.

"Apart from a general denial of the facts surrounding this event, which denial can be gleaned from the transcript of so much of the evidence as was received before the case was stated to us, the accused has raised for this court a formidable problem.

"Shortly after the commencement of the trial the accused, who appeared on his own behalf, laid a complaint against the Crown before the Equally Opportune Board, alleging that by presenting him for trial the Crown had discriminated against him on account of his sex (which word I use in its ancient and proper sense). This complaint was heard by the Chairman of that board, Mrs. Die-hard, who issued an order prohibiting Judge Shillelagh from proceeding with the trial. During the course of the Crown evidence, this order was served upon the learned Trial judge. It was upon the question of whether or not he should comply with that order that His Honour stated this case to us.

"The Equally Opportune Board is a body established by Act of Parliament to investigate and redress those grievances of subjects of the Crown which arise from discrimination on the basis of (inter alia) sex. Its powers are wide, albeit little used. In addition to its coercive powers it has a seemingly laudable public relations function, designed we were told, to "maximise multi-partite interface in an ongoing non-competitive contextual assessment situation" (which words I use as little as possible). Leaving that aside, however, the Board has prima facie the power to issue orders of the type that was served upon the County Court in this case.

"In laying his complaint before the Board, the accused Fabian alleged that the charge against him, one of indecent assault against a female, was one which would not have been laid against him if he had been female. Without wishing to encourage female lasciviousness, that proposition appears to me to be right. If that is so, then the Board had the undoubted power to issue the order that it did, and the trial cannot therefore proceed.

"The accused can, of course, be prosecuted before the Equally Opportune Board for the same conduct which constituted the charge before Judge Shillelagh, since any indecent assault upon a female by a male constitutes an act of discrimination against that female vis-a-vis other persons. It may be the case that he would be dealt with more severely by the Board than would have been the case before a judge and jury, but the choice was his before he applied to the Board for the order prohibiting Judge Shillelagh from proceeding with his trial.

"The result in this case may seem at first glance to be unprecedented; but it is in fact not. Centuries ago one had a choice of tribunal in which one could be prosecuted – the courts spiritual or secular. More recently Parliaments of all sorts have seemed determined to increase the diversity of tribunals available to hear disputes, seemingly to disperse rather than to concentrate specialist judicial skills. Four years ago, for example, the High Court pointed out that the Family Court would become the unhappy, and less than perfect, forum for the determination of a wide range of criminal matters, together with company, trust and probate disputes: see **Burns v. Ross** (1978) M.C.N. 1. Such an observation should not be limited to the Family Court. To name a few, the Federal Court, Market Court, Small Claims Tribunal, Administrative Appeals Tribunal, Planning Appeals Board, Motor Accidents Board, the Drainage Tribunal and Equally Opportune Board have all contributed to this state of affairs."

Machinery J. said:

I concur.

Tanner J. said:

I have been on this bench for some months, and have so far seen nothing but causes and juries, all of which have settled. I have thus had little opportunity to speak from the bench. Although I concur with the Chief Justice, I do no wish this opportunity to go by without saying something. I concur.

GUNST

Victorian Bar News

LEGGE'S LAW LEXICON
"K"

Karite. The best beer in a religious house, e.g. the Mitre Tavern.

Kazi. A Mohommedan judge. His jurisdiction was extended to the East Indies by the writ "in konsimilu kazi".

Keeper Of The King's Conscience. The duties of this officer are now discharged by the superior courts of eighty-two Common law jurisdictions. The conscience has become correspondingly attenuated.

Keeping The Peace. One of the functions of the Chairman of the Bar Council.

Kidder. An engrosser of corn to enhance its price. Thus counsel for the plaintiff in the commercial causes list.

Kidnapper. A Silk who settles with a very junior counsel on the other side.

Kilderkin. Two ferkins.

Killyth Stallion. A custom (the opposite of droit de seigneur) by which the lord of the manor was bound to provide a stallion for the use of his tenants' mares.

King's Bench. A court in which the cost of the proceedings often exceeds the amount at stake.

Kipper Time. The time in which fishing in the Thames was forbidden, thus Examination in Chief.

Kirby's Quest. An ancient record remaining with the remembrancer of the Exchequer. It contains in the first one hundred and twenty-eight volumes (the Michael Mass) all the unacceptable proposals for law reform since the reign of George VII.

Kissing The Book. The practice of kissing the thumb or some part of the book instead of the book itself was emphatically condemned by the late Mr. Justice Byrne in 1901 as treating the oath with contempt. Thus the traditional response of the English Bar to a contemptuous offer of settlement, "kiss my thumb".

Kiss Of Death. The result of cross-examining a brick dropper.

Kleptomania. The irresistable impulse to stop at supermarkets.

Knacker. A barrister whose opponent succeeds on a summons for final judgment in County Court Chambers.

Knight. Originally a horseman. One who looked down on the commonalty and thus by analogy one who has done so for many years from the bench of the Supreme Court.

Knighthood. By 16, Car. I.c.20, "no man can be compelled to take the Order of Knighthood." Mr. T. Smith, Q.C. (as he now is) is the only recorded instance of a judge knowing of the existence of this statute.

Knight Of The Bath. The Order of the Bath is the baptism of the establishment.

Knight's Fee. A ferkin of dubbing.

Knock For Knock Agreement. A conspiracy between insurance companies to defeat the profitable administration of the common law. Formerly the misdemeanor of non-maintenance.

Know How. The ability to get something for nothing.

Knowledge (Actual). The hypothetical state of mind of an affidavit maker.

Knowledge (Constructive). An acquaintance with the building cases list.

Knowledge (Imputed). The evidence of a hostile witness.

Kymortha. Kymortha???

Summer 1982

VERBATIM

Before the Full Liquor Control Commission on 10th August, 1982 Sher, Q.C. announced his appearance with Brian Bourke:

"I appear with a letter from Mr. Bourke."

Later, on applications for prerogative Writs arising out of the earlier hearing:

Pannam Q.C.: "If your Honour pleases, unlike my predecessor Mr. Sher, who appeared with a letter from Mr. Bourke, I actually have him here."

Cor. Anderson J.
20 October, 1982.

● ● ●

When the jury was empanelled, it contained a Malaysian gentleman by the name of Kok Tai Chew. There was some muttered suggestion from the bar table that it was the designation of an esoteric common law offence.

Judge Dixon was technically incorrect but impeccable in propriety when, on an occasion which required him to speak to that juryman he addressed him as Mr Chew.

R. v. Cooper
Cor. Judge Dixon & jury
6 October, 1982.

● ● ●

Merkel QC was cross-examining witness as to Mr Gallagher's allegedly contemptous remarks to journalists –

Merkel QC: There was no pre-arranged order in which the questions were asked – it was first come, first served? . . . As I recall.

Merkel QC: And Mr Gallagher answered the questions as and when they were asked and indeed when one looks at some of it, two questions were asked and they were answered consecutively by subsequent answers, is that a fair description?

Lloyd QC: My friend is falling into the very vice he attributing to the journalists of asking two questions in one.

Merkel QC: I withdraw the question.

Llyod QC: Both of them?

Merkel QC: I withdraw both of them.

Durack v. Gallagher & Ors.
22 September 1982.

● ● ●

Granat: "You don't use bad language?"

Witness: "Oh, sometimes I do, if I get in a shitty."

R. v. Kronsseratis and Porodja.
27 October, 1982.

● ● ●

It was an Appeal against conviction and sentence on a charge of "Shop-Lifting". The "Store Detective" – a Mrs. Archer – was called by the Crown. At the end of her evidence the Crown applied that she be excused.

His Honour asked Counsel for the Appellant if there were any objection.

Hennessy, for the Appellant: So long as Mrs. Archer can be recalled, if needed, I have no objection to her departing now.

His Honour: If she is recalled it will be tomorrow morning.

Hennessy. I cannot forebear to remark upon the coincidence of having Archer in this Court on Cup Day.

His Honour: If Archer is here tomorrow, the Court will be Rising Fast.

Hennessy: On a charge of Light Fingers.

Cor, Judge Walsh
Cup Eve 1982

● ● ●

Counsel: I understand you saw the fracas from your window?

Witness: Would you please repeat that question?

Counsel: Certainly. Is it right that, when you looked out of your window, you saw the melee at the end of the street?

Witness: Saw what?

Counsel: Come, come Sir, the question is quite clear. Did you see the shemozzle that was going on?

Witness: I don't know what you mean.

Counsel: Well, wasn't the shenanigan obvious to you?

Witness: I don't understand.

Judge: Try him in English.

From "And Nothing But The Truth"
King-Hamilton Q.C.

● ● ●

Golvan for the Plaintiff, opening another building case –

"May it please Your Honour, this is an interesting plumbing case . . ."

His Honour . . .

"Little chance of going on . . ."

Wren (for the Defendant) –

"Looks like going down the drain".

● ● ●

And From the Casino Enquiry

During cross-examination of an elderly cleric about his opposition to gambling"

Benjamin (for J.C. Williamson): "Didn't Christ's disciples draw lots to find a replacement for Judas?"

Connor Q.C.: Mr. Benjamin, my memory of the record is admittedly suspect. But I don't recall that there was any smart money on Nicodemus.

● ● ●

Witness (referring to casinos): It is difficult to think of any other business that can generate such vasts amounts of cash money.

Hansen (not very sotto voce): My Lawnmower man."

● ● ●

Hart Q.C.: I have here a copy fo the second interim report of the New Jersey Governor's Task Force on Casinos. We have not been able to find the first interim report."

Guy Michael (Lawyer from New Jersey): "There was a first interim report. It was very cursory. The substance of it was that there would be a second interim report."

JUDGE BELIEVES HIS WIFE WAS 'POSSESSED'

— The Lord Chancellor has ordered an investigation to determine whether a manic-depressive judge who believed his wife was possessed by the devil can continue to sit on the bench.

Lord Hailsham – the only man in Britain with the power to remove a judge for incapacity or misbehaviour – launched the inquiry one day after Crown Court Recorder Francis Radcliffe was divorced by his wife for "unbalanced behaviour and thoughts," a spokesman for the Lord Chancellor's office said.

Testimony in the divorce hearing indicated that Radcliffe, 43, a part-time judge, or recorder, since 1979, believed his wife, Nicolette, had been "got hold of by the devil" and that he repeatedly beat her.

Mrs Radcliffe, 45, testified her husband once said they "should go together" because both of them were possessed by the devil. She said she assumed this meant her husband would kill her, court records said.

Radcliffe, who acted as his own counsel in the hearing said he had to beat his wife to calm her down when she flew into uncontrollable rages. He also said she had assulted him frequently.

Radcliffe also claimed the courts did not have jurisdiction to end any marriage and cited the divorce in 1533 of Henry VIII and Katherine of Aragon in evidence.

Doctors said Radcliffe had been diagnosed as a manic depressive in 1978, but that they believe he had been stabilised by medication.

The divorce judge said Radcliffe once told doctors there could be nothing wrong with him because he was a recorder.

A spokesman for the Lord Chancellor's office said Radcliffe, a lawyer by profession, had sat in court for 40 days in 1982, ruling on cases involving theft and robbery.

"It is not possible to say how long the inquiry will take, or what the outcome will be," the spokesman said. "The Lord Chancellor is responsible to the queen for appointments of recorders. He also has the power, should he see fit, to terminate such appointments."

(from "The Hong Kong Standard" 31 October 1982)

LAWYERS IMPRISONED IN BANGLADESH

The Council of the International Bar Association, a federation of Bar Associations and Law Societies from 59 countries, themselves representing over 600,000 lawyers, at its meeting in New Delhi, India, on 22 October 1982 was deeply concerned to learn

- **that** the Government of Bangladesh has arrested a number of lawyers of its Supreme Court, including present and past Presidents of the Bar Association and two former Attorney-Generals
- **that** many other lawyers have been threatened with imprisonment
- **that** lawyers are being prevented from freely exercising their profession due to Government interference

and as a consequence, **urges** the Government of Bangladesh to respect the rule of law by releasing those lawyers imprisoned and by permitting a free profession of practising lawyers who can exercise, without State interference, their profession, including the defence of their clients in the Courts, and uphold the principles of Human Rights.

SOLUTION TO CAPTAIN'S CRYPTIC NO. 42

SPORTING NEWS

Shatin is the Captain of the Balwyn Club XI which plays in the Eastern Suburbs Cricket Association. At this stage the team is second on the ladder and is undefeated in the first six matches. In addition to Barristers Radford, Stuart, Morris, and Coish the team boasts other members of the legal fraternity, including Ernie Burrows. The Vice Captain is a policeman from the Fingerprint Section, and the Deputy Vice Captain is a trade union leader. A member of the Australian Broadcasting Commission also plays for the team. The team has an award known as the Medibank Trophy for the player who suffers the severest injury for the season. Last year the players were adept at dodging the red cherry, although there was some suggestion that Burrows suffered severe mental trauma when he won neither the bowling, batting, nor fielding trophies.

● ● ●

The Big "M" Marathon from Frankston to the Arts Centre attracted a large field of enthusiastic marathon runners anxious to show their courage. The "hares" included Danos and Guest and, amongst the "tortoises" was John Larkins. Danos, as expected, ran the 26 miles and 385 yards in fast time. Guest, with the aid of a pain-killing injection for a back injury (the origin of which is unknown), set off at a cracking pace. By the time that Guest had come to Brighton, his body and soul broken, he gratefully accepted a lift form a sympathetic motorist, Pinner, and was driven home and, from there, to the intensive care section of a nearby hospital. We fear that he, like Hyperno, will not come back. The patient, plodding Larkins pounded the pavement in relentless fashion and, with face contorted in pain, crossed the finishing line. Guest claims that he was not suited to the heavy track and that one can expect a better run next time when he is on top of the ground.

● ● ●

The sporting pages of our newspapers abound with details of cricket matches between various states and even rebel groups playing against the South Africans. On the 3rd of October, 1982, a match took place which did not make national television nor our daily newspapers, but it was certainly contested in a manner reminiscent of the test series for the Ashes. The match was between the "Upstairs" team and the "Downstairs" team from Tait Chambers. It was held at an Albert Park ground and equipment was provided by various clubs which had some contact with some of the players. Liz Murphy was the umpire and, armed with her cigarette and glass of Scotch, made decisions with such vehemence and feigned authority that no disputes took place. Stuart, who had never played before in his life, was appointed Captain of the "Upstairs" team and batted quite well. Graham was adjudged "Man of the Match" initially, but was disqualified when it was learned that he was a professional cricketer. The umpire then substituted Julien Fitzgerald as "Man of the Match" until it was discovered that he had recently left the Bar. By process of elimination, Gregurek achieved that doubtful status due to some reasonably good bowling. Cash was Captain of the "Downstairs" team and he and the other male members of the teams encouraged several attractive females, including Douglas and Rizkalla as they attempted to put some runs on the board. The "Upstairs" team won by six runs and there is a suggestion that they will play "the rest of the Bar" at the MCG next year if the government is prepared to allow the Crown land to be used.

● ● ●

"Four Eyes"

MOVEMENT AT THE BAR

Members who have signed the Roll since the Spring, 1982 Edition

C.R. Williams	re-signed
D.B. Milne	N.S.W. Q.C.
B.G.K. Ross	re-signed
Dafed WILLIAMS	McLennan/Duncan
Nicholas PAPAS	Perkins/Duncan
David Anthony PARSONS	Richter/Bloomfield
Ian Maxwell WHITE	Radford/Spurr
David WHITCHURCH	Griffin/Hyland
Geoffrey Arthur NETTLE	Hansen/Stone
Stephen Alexander SHIRREFS	Zahara/Foley
Morry Aaron NIGHTINGALE	Ashley/Hyland
Anthony Laurence BULL	McArdle/Stone
John Charles HALL	Collis/Dever
Francis Dennis SACCARDO	Hore-Lacy/Dever
Reginald Francis EGAN	Adams/Dever
Ivan Louis HIMMELHOCH	J.R. Perry/Howells
Michael Joseph CRENNAN	Bongiorno/Duncan
Michael John COLBRAN	Neesham/Foley
Robert Donald SHEPHERD	Harper/Howells
Denis Michael McDONALD	P.F. O'Dwyer/Duncan
Pamela Elizabeth DARLING	P.M. Guest/Foley
Richard Francis PIRRIE	Morrish/Howells
Michael John Francis SWEENEY	Lally/Howells
Ian Leslie GRAY	Connor/Duncan
Malcolm McKenzie PARK	Wheeler/Bloomfield
Geoffrey Edwards CHANCELLOR	Tebbutt/Spurr
Geoffrey Standish LESTER	Keon-Cohen/Howells
John Frederick GOLDBERG	P.R.A. Gray/Hyland
John Edward FRANKCOM	J.R. Moore/Howells
Phillip James COISH	Kayser/Bloomfield
Ian Stephen WILLIAMS	Strahan/Bloomfield
Neemer MUKTAR	Clark/Bloomfield
Lynette Joan EVANS	Ellis/Bloomfield
J.R.B. NORRIS	A.C.T. Q.C.
M.J. PRYLES	re-signed

Members who have transferred to the Masters and Other Official Appointments List

J.B. GAFFNEY
P.A.H. FURNESS

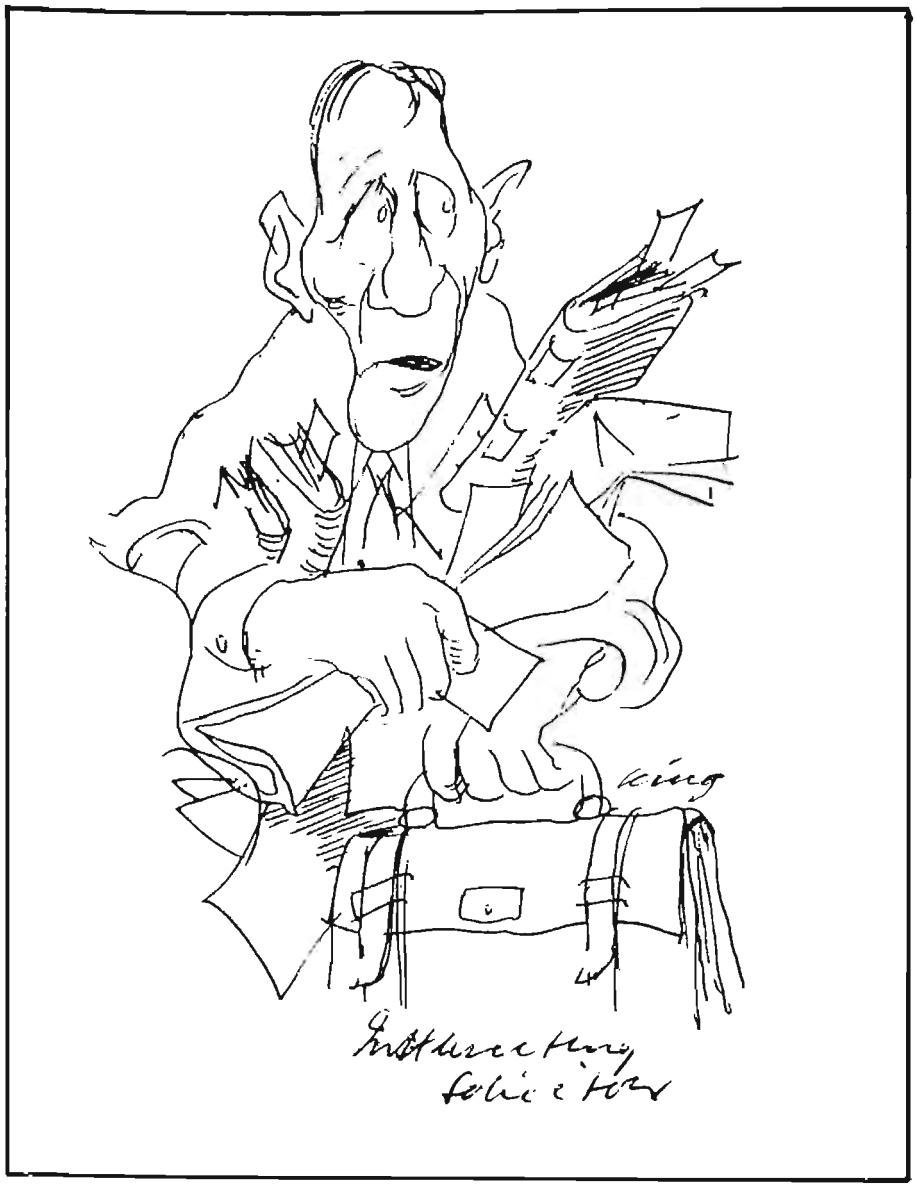
Member who has retired form Active Practice

B. O'Keefe

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

N.A. WHITE
J.T. FINN
J.R. THERRY-WARD (N.S.W.)

TOTAL NUMBER IN ACTIVE PRACTICE: 808



Summer 1982

VICTORIAN BAR NEWS

ISSN-0150-3285

Published by:
The Victorian Bar Council,
Owen Dixon Chambers.
205 William Street.
Melbourne 3000.

Editors:
David Byrne Q.C., David Ross.

Layout and Cover:
David Henshall.

Editorial Committee:
Max Cashmore, Charles Gunst, John McArdle.

Cartoons by:
L. King,

Phototypeset and Printed by:
SOS Instant Printing.