Mordue 45

James Blair Tait.

283

This Photo was taken just after he had taken his LL.B. degree at the University of Melb. in Dec. 1916 when he was 26 years of age

"Him with "Mad serves a perfect heart and a willing mind"

"That our sons may be as plants grown up in their youth."

283

On arriving home about 2 o'clk, I found Mrs. Jno McNeil waiting for me. I could not give her a written valuation of Mr. Hagues house at Barnes Heads, which she proposed purchasing for a Boarding House. Mr. Howat sent her to me. She was disappointed, but I ascertained that Mr. H. as Executor, had decided not to make the purchase. I forgot to post a letter Mr. Gillies gave me, had to go in to the City Post Office with it

James joined the Rowing La Crosse Club last winter, & this year he was appointed Secretary, & took a great interest in the games. This photo is from the Group taken at the close of the Season.

I bought wood from a carpenter & made a Ladder - 10 feet long, which I find very useful.

On Sat 23 Apl I went to Wmd. by 6.30 train & after

"To do good & communicate forget not." Heb. 13. 16.

COVER: Facsimile pages from the handwritten volume "Years of Life" written by the Rev. John Tait – the father of Sir James Blair Tait. It was kindly made available by Mrs. Nancy Stephens.

VICTORIAN BAR NEWS

SPRING 1983

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BAR COUNCIL REPORT

Council Meetings

There have been 31 meetings of the Bar Council (excluding the formal inaugural meeting of the new Council) between September, 1982 and 8 September, 1983. The attendance figures for members of the Council are as follows:

Shaw, Q.C.	22
Hampel, Q.C. (to March 1983)	11
Charles, Q.C. (leave of absence for 9 meetings)	14
McPhee, Q.C. (from April 1983)	11
Barnard, Q.C.	25
Liddell, Q.C.	19
J.H. Phillips, Q.C. (leave of absence 4 meetings)	12
Cummins Q.C.	21
Dowling, Q.C. (leave of absence for 6 meetings)	19
Nicholson, Q.C. (to November 1982)	4
Chernov, Q.C.	17
Meldrum, Q.C. (from December 1982, leave of absence for 4 meetings)	15
Hansen, (leave of absence for 2 meetings)	21
Mandie	23
McArdle	26
Murphy	18
Adams	22
Gunst	25
Lewitan	25
Kellam	18

Micro-Computer System

Members of Counsel may have noticed that invoices from the Bar Administration have been computerised. This is a result of the purchase, prospectively noted in the last **Bar News**, of a Toshiba T-200 micro-computer with associated software, for use by the Bar administration.

Proposed New Telephone System

The Bar Council has approved the purchase and installation of a new telephone system for all Counsel's Chambers. The new system will have both direct out-dial and in-dial facilities, together with the facility for any Barrister to dial any other Barrister's Chambers direct. The new system will be installed early in 1984.

Professional Indemnity Insurance

A proposal which would require compulsory professional indemnity insurance to be taken out by members of Counsel was considered by the Bar Council. The proposal following recent changes to the English Bar Rules is to be put to a general meeting of the Bar.

Portrait of Sir Henry Winneke

The Bar has purchased a portrait of Sir Henry Winneke, painted by Sir William Dargie. The portrait is presently displayed in the premises of the Essoign Club.

Civil Justice Committee: Discussion Paper on Costs.

A discussion paper on costs in civil matters from the Civil Justice Committee has been received by the Bar Council, and distributed to all members of Counsel. Comments were invited as a matter of urgency, to enable the Bar Council to respond to some of the rather surprising proposals and propositions contained therein. A precis of the Bar Council's submission to the Committee appears on page 24.

Congestion of Civil Lists in the Supreme Court

The Bar Council has submitted a report on the new listing procedures in causes in the Supreme Court to the Chief Justice and the Listing Master. The present difficulties will probably not be resolved until the State government appoints a sufficient number of new Judges to cope with the Supreme Court's workload.

State Government Fee Fixing Tribunal

The Bar Council has prepared a report for submission to the State Government on its proposed fee fixing tribunal for professional persons. The progress of this proposal is being monitored closely by the Bar Council.

Taxation Department Enquiries

The Honorary Secretary reported that an officer from the Taxation Department attended his Chambers, to enquire as to the average annual earnings of Barristers. This enquiry was not answered.

Sharing of Chambers

In light of the present accommodation crisis, the Bar Council has decided that members of Counsel under 5 years call may be permitted to share chambers.

ETHICS COMMITTEE REPORT

Since last reporting, the Committee has held four summary hearings arising out of complaints. Two complaints were dismissed and the results of the other hearings may be summarised as follows: –

(i) A member of Counsel was suspended for one month after having been found to have committed a number of disciplinary offences, including failing to return a brief after an appearance, failing to reply to numerous communications from instructing solicitors in two separate matters and conducting his practice as Counsel in a manner showing gross disregard of his duties and responsibilities as Counsel by, inter alia, failing to attend to his practice or give proper or adequate attention thereto;

(ii) A member of counsel was fined $100 for unseemly conduct in Court (in relation to another member of Counsel) both before and after the Judge came into Court.

The Committee also made a number of rulings on specific problems raised by Counsel.

It is noteworthy that a substantial part of the Committee's time is taken up by the preliminary investigation of complaints, many of which do not result in a hearing. The avenue of complaint to the Committee by a lay client is becoming more popular but it is very evident that many complaints turn out to be the expression of dissatisfaction or grievance as to the loss of a case or second thoughts about a compromise. Nevertheless, when a complaint contains an associated allegation of improper conduct by Counsel, the Committee must seek and consider Counsel's explanation in response to the complaint.

Philip Mandie

BAR HANGS ON

Judges may whinge about lack of pay and perks, but they are at the top of the social tree. Barristers come fourth in status, ahead of archbishops and university professors. The G.P. has been humbled to number eight in the top ten jobs in Australia.

This is the picture of Australian Society in "Power, Privilege and Prestige: Occupation in Australia", by New South Wales Sociologist Dr Ann Daniel.

Prestige is a measure of income and authority or influence, according to the author. Some judges may agree with her that prestige does not indicate how exciting, imaginative or important an occupation is.

In the book's classification, category one represents the upper class, categoriest two, three and four the middle class, and five and six the working class. In category two are Dentists, Architects, Scientists and Bank Managers. Category three includes Master Builders, Journalists and Computer Programmers.

TOP 10 JOBS

Judge
Cabinet Minister
Medical specialist
Barrister
Managing director
Church leader, eg Archbishop
University professor
General practitioner
Army general
Permanent head of Government department

WELCOME: MASTER EVANS

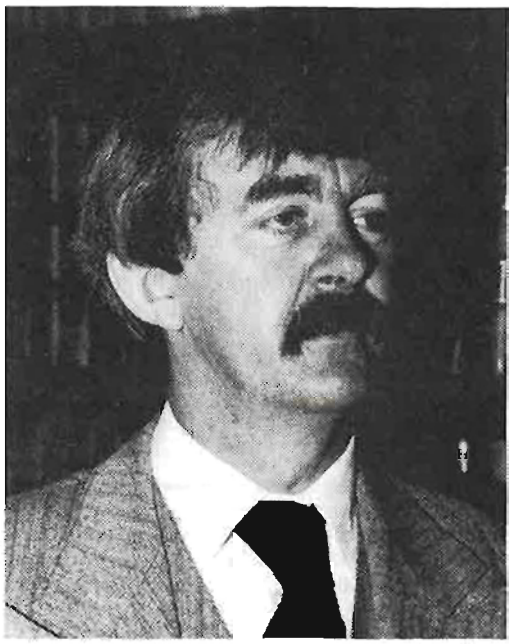
In July 1983 Ewan Kenneth Evans was appointed Master of the Supreme Court of Victoria. Master Evans, who was born on the 20th March 1943, was educated initially at Cobram State School and ultimately at Geelong College, graduating as a Bachelor of Laws from Melbourne University in 1965. He was admitted to practise on the 1st March 1966 serving his articles with Messrs. Aitken, Walker & Strachan. Thereafter he was engaged as a solicitor with Messrs. Maddock, Lonie & Chisholm and ultimately, for a period of some four years, with Messrs. Moule, Hamilton & Derham. Subsequent to his resigning from that firm he signed the Bar Roll on the 1st March 1973 and read with John Lyons. Master Evans from the outset had an active Supreme and Federal Court practice specialising in commercial causes. He has for many years been the co-editor of Williams Supreme Court Practice with his former colleague at Moules, Mr. David L. Bailey.

Master Evans did not linger long in the Magistrates' Court after signing the bar roll. He rapidly established a reputation in the profession as a diligent and knowledgeable practitioner. His paperwork practice had a reputation for being both punctual and attentive to detail. He was always available to his peers for advice on any aspect of his area of expertise.

Master Evans is married with two children and has a variety of sporting interests including tennis and golf. He is an avid collector of wines, particularly reds.

By virtue of his editing of Williams Supreme Court Practice and in particular his vast experience in related fields at the Bar, he brings to the office of Master of the Supreme Court an expertise which must inevitably benefit the profession as a whole.

The Bar congratulates him on his recent appointment and looks forward to the application of his varied skills which are so necessary for this ardous office.



Court Shifts

The High Court's Melbourne registry has moved after 55 years in Little Bourke Street. The court will be located on the 13th floor, of 200 Queen Street, on the corner of Little Bourke Street.

The new premises will contain the registry and a hearing room for cases heard by Mr Justice Dawson, now the only Victorian judge of the High Court.

WELCOME:

JUDGE OSTROWSKI

(Photo courtesy "The Age")

Leonard Sergiusz Ostrowski is neither Polish Prince nor Count. He was born on 9th September 1935, the son of a Paymaster in the Polish Railways who lived in Wolomin not far from Warsaw.

As a Pole in an occupied country he was not permitted to attend primary school. Nevertheless his parents arranged for him to receive surreptitious education as soon as he was old enough.

In the upheaval that followed the uprising in Warsaw he and his close family were trucked to a series of camps until they finally located in the Austrian Tysol. From there they escaped to Switzerland. It was not until 1950 that the fifteen year old future judge arrived in Melbourne.

His secondary schooling lasted three years: at C.B.C. Yarraville and at St. Joseph's C.B.C. College, North Melboune for the Matriculation year where he topped his class in English. He studied law at Melbourne University as a clerk articled to Mr Tom Butler of Heffey & Butler. Following his admission to practice be became an associate of that firm in 1959 and in 1959 moved to Rylah & Rylah where he was a partner from 1962 to 1966.

His Honour signed the Bar Roll on 13th April 1967 and read with R.G. de B. Griffith, then an outstanding Equity Junior, for this was the field in which he wished to specialise.

In turn he had two readers, Barbara Hocking and Mark Derham before he took silk in 1981.

Whilst at the Bar, His Honour was for a time an editor of Vickery's Motor and Traffic Law, a member of Amnesty and Legal Advisor to the Senate Standing Committee on Regulations and Odinances.

The Bar wishes the new judge well.

AVIATION LAW ASSOCIATION OF AUSTRALIA

Following upon last year's highly successful Sydney Conference of the Aviation Law Association of Australia, the association will hold a national conference in Melbourne on the week-end and Monday immediately preceeding Cup Day, Tuesday 1st November.

The Melbourne Conference covers a wide variety of topics. Lee Kreindler will speak on "opportunities for Australians to bring aviation product liability claims in the United States" and Peter Martin will present a paper on "Legal Aspects of Aviation Insurance". The Honourable Kim Beazley will discuss "Government Policies in Relation to the Aviation Industry", whilst Mr. Bryan Gray will speak on "The Establishment of a Third Airline".

Other topics to be covered include Light Aircraft Litigation (McDonald Q.C.) Flying Discipline in the Services (Francis Q.C.) Noise Pollution (Ron Ashton) Legislative Control of General Aviation (Colin Freeland) and International Regulation of Civil aviation (J.M. Smith).

For further information contact – Ireland.

TRIBUTE: JUDGE WRIGHT

Members of the profession assembled in substantial numbers in the County Court on Wednesday, 3rd August, 1983, to pay tribute to the late Judge Wright, who died on Friday, 29th July, 1983.

Robert John Davern Wright, who was affectionately known to his colleagues as "Davern", was well known to us all in recent years as a Judge who performed his judicial duties with distinction until the very day of his sudden death.

His Court was one in which courtesy prevailed, industry was evident and judicial patience came to be expected. The combination of these attributes when combined with his scholarship and erudition made his Court not only an efficient medium for the administration of justice but also a pleasant place for the profession to appear.

To those of us who are a little more senior, R.J. Davern Wright, Q.C., was known as a fine leader at the Inner Bar where he practised from 1960 to 1971. Those of us who had the good fortune to be his junior knew him to be scholarly in his research, painstaking in his preparation and persuasive in his Court presentation. Although his specialty was in the field of Equity, his practice embraced all jurisdictions.

To those of us who are yet a little more senior, R.J. Davern Wright was a capable and industrious member of the Junior Bar from 1936 to 1960. During that period he developed a wide general practice again with emphasis on matters of strict law and equity. His interest in Testator's Family Maintenance resulted in his authorship of the standard work in Australia and New Zealand on that subject which was first published in 1954. His practice at the Junior Bar was interrupted during the second World War when he was commissioned as an artillery officer and later served in intelligence in the Allied Translator and Interpreter Service. He was officer in charge of the detachment of that service with the 9th Australian Division in the Campaign at Labuan, North Borneo and was the principal Allied Japanese interpreter at the surrender of the Japanese forces in that area.

To many of us the following is hearsay but Davern Wright commenced his career at the Victorian Bar under the pupillage of the late Sir Edward Hudson in whose chambers he read in 1936. He had been an outstanding scholar at Xavier College, where he was Dux of the School and thereafter at the University of Melbourne where he completed a Masters Degree in Arts, Majoring in Classics, before graduating in law.

Davern Wright was described in the tribute which was paid to him in the County Court as a cultured, warm-hearted and gentle man, devoted to his wife, his four sons and his three daughters, with the capacity to enjoy his work, his leisure time spent largely at his seaside retreat at Mornington and his country property at Mayfield, and all aspects of a well ordered life.

In his last moments he had the consolation to look back upon the deeply religious faith which he practised throughout his life and which motivated him to be prominent in the affairs of the Catholic Community for a number of decades.

The Bar extends to Mrs Wright and to the members of her family its deep condolence. They will be comforted by the fact that we all share in his loss for we, too, have lost a friend.

May he rest in peace.

FAREWELL: MASTER BERGERE

On 15th October next Noel Bergere would have been a Master of the Supreme Court for twenty years.

Born in 1915, Master Bergere was educated at Wesley College and University of Melbourne, where he shared the Contract Exhibition with Sir Rupert Hamer. He was admitted to practise in 1940 and signed the Bar Roll on 6th March 1944.

Most of us will have spent some time outside his Chambers waiting to be called in. All of us will be aware of the Master's physical disability. In fact he contracted poliomyelitis at the age of three and has been disabled ever since. It is difficult for us to appreciate what a handicap this must have been for a young barrister. Have we ever paused to count the steps up to the Magistrates' Court at Fitzroy or in Russell Street? Have we ever had to wonder whether it would be possible to park our car close to court? Perhaps we take for granted that good physical health is an important attribute for life at the Bar.

Master Bergere has found time for many interests notwithstanding his magisterial duties. He was Chairman of the Melbourne University Graduate

Union Council 1957-1958 and is still a Councillor of the Union. A foundation member of the Victorian Disabled Motorists' Association, he was its president 1954-1956 and 1965. He has been vice-president of the Kew Philharmonic Society from 1960-1973 and its President from 1973-1979.

The Master took leave at the end of June 1983 preparatory to his retirement. The Bar wishes him well.

FAREWELL: GIFFORD QC

Ken Gifford retired from active practice on 27th July 1983. The Victorian Planning Appeals Board marked the occasion with an extraordinary meeting at which Chief Chairman Opas QC paid a tribute to the remarkable and unique contribution made by Gifford in the field of Local Government and Town Planning.

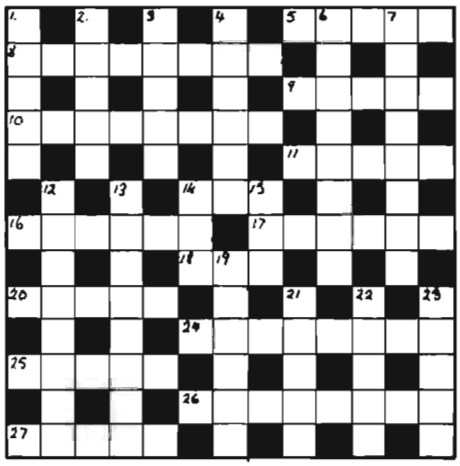
Throughout his professional life he displayed extraordinary energy. At the age of 26 he collaborated with the late Mr Heymanson in writing "Legal Profession Law and Practice" in 1949. This was not his first published work. It was certainly not his last. His publications range from legal text books to poetry and literary criticism. He has edited journals and Reports. He has lectured throughout the world in his speciality. Those who have been his juniors attest his tirelessness. His midnight conferences were legendary.

He has been the recipient of singular honours: Freeman of the City of London, Total Community Development Award, Honorary Fellow, Institute of Municipal Administration, Honorary Fellow Royal Australian Planning Institute, Life Member National Trusts of Victoria and of Scotland.

But his career has not been exclusively devoted to the law. His deep involvement in the Uniting Church, in Freemasonry, in the Scouting Movement and in the Old Scotch Collegians' Association, all show the other side to his character. At the Bar he was always ready to help others. In private life this characteristic has brought him to many charitable interests in Masonic and other circles.

In his tribute, Chairman Shaw QC acknowledged on behalf of the Bar the extraordinary career of Ken Gifford and the value to the community in what he has done over more than thirty-five years in his practice in the law.

CAPTAIN'S CRYPTIC No. 45



ACROSS:

5. John Johns the Welsh Master (5)
8. He who gives effect to a will by hanging? (8)
9. Council water closet (5)
10. As of favour (2,6)
11. Lasting damage to freehold (5)
14. Since (3)
16. What a victim did for assault (6)
17. Raise money on security of debts, title etc. (6)
18. Each of the ayes should have one (3)
20. Monetary penalties (5)
24. Tell-Tale (8)
25. Periodic payments due from tenant (5)
26. House including its gardens and sheds (8)
27. For cricket it's eleven (5)

DOWN:

1. Roman Laws (5)
2. Russian name for rough cloth (5)
3. Deponent's details at end of affidavit (5)
4. Foolishly infatuated (6)
6. Difference between pleading and evidence (8)
7. Three's a new deal (8)
12. What the postman does (8)
13. Accused (8)
14. Supplement (3)
15. How many a time in the Rialto you have rated me? (3)
19. Small amount of snow leopards (6)
21. Could be an assemblage of commitatus to enforce the King's Writ (5)
22. Equine mothers throw dirt (5)
23. Placed on trial (5)

(Solution Page 37)

CASE OR NO CASE

The question of no case submissions in criminal cases has recently been the subject of a Full Court judgment.

It came about in the usual way. At the close of the Crown Case, counsel for an accused submitted that there was no case to answer. After argument the trial judge agreed. He directed the jury to acquit. The Crown did not take this lying down. A recent amendment to the Crimes Act (s. 450A) permitted the Attorney-General to refer to the Full Court a point of law. Such a reference or any decision on it does not affect the verdict.

The Reference

The points of law referred to the court were:

" 1. Was the learned trial judge bound or entitled to direct the jury to acquit the said accused in the following circumstances, (which in fact happened): –

(a) A submission of no case to answer was made on behalf of the accused in respect of each of the counts of theft at the conclusion of each of the Crown Case.

(b) Proof of the accused's dishonest intention was based upon inferences of fact which could be drawn from circumstantial evidence.

(c) The judge was of the opinion that a reasonable hypothesis consistent with the innocence of the accused was capable of being drawn from the evidence?"

Victorian Bar News

" 2. Was the learned judge, bound or entitled to direct the jury to acquit the said accused in the following circumstances (which in fact happened):

(a) A submission of no case to answer was made on behalf of the accused in respect of each of the counts of theft at the conclusion of the Crown Case.

(b) Inferences of fact could properly be drawn from the evidence which were consistent with the innocence of the accused and other inferences of fact could properly be drawn from the evidence which were consistent with the guilt of the accused depending on which evidence in the case was accepted by the jury?

There was a third ground. The court did not find it necessary to decide on it.

The Court's Opinion

The court delivered its judgment on May 13, 1983 and the case is, of course, **Attorney-General's Reference No. 1. of 1983.**

The Court's opinion was "... that questions 1 and 2 should be answered to the effect that the learned Judge was neither bound nor entitled to direct the jury to acquit the accused in the circumstances."

The Court's opinion in respect of questions 1 and 2 has aroused considerable interest and debate as to whether, in a case where there is some Crown evidence sufficient to meet a no case submission by the defence, a Judge may have a discretion to direct the jury to acquit the accused.

It has long been the practice for counsel for the accused at the conclusion of the Crown case to submit that the trial judge should direct the jury to acquit where there is, strictly speaking, a prima facie case but that such evidence is tenuous or patently unreliable. In support of such submissions both at trial and in the Court of Criminal Appeal decisions such as **R. v. Young** (1964) 1 W.L.R. 717; 48 Cr. App R. 292; **R. v. Hipson** (1969) Crim. L.R. 85 and **R. v. Falconer-Atlee** (1974) 58 Cr. App. R. 348, have often been referred to. Such submissions at trial have from time to time been acceded to and juries directed to acquit even though it could be said that the Crown had made out a prima facie case.

Since the Court delivered its opinion in Attorney-General's Reference No. 1 of 1983 there has been speculation as to whether a judge is now entitled so to direct a jury.

The ruling in the trial from which the Reference came was:

> "If I were to come to the conclusion that the evidence taken at its highest is such that the jury, properly directed, could not lawfully convict the accused upon it, my duty would be to direct the jury to find him not guilty of the Crimes charged"
> **R. v. Galbraith** [1981] 1 W.L.R. 1039; 73 Cr. App. R. 124.

The Full Court said at page 6 of its judgment:

> "In the first passage we have quoted from His Honour's ruling he correctly stated the problem. In the application before him, the learned judge . . . fell into error".

At page 10 the Court continued:

> "The Question whether the Crown has ultimately excluded every reasonable hypothesis consistent with innocence is a question of fact for the jury and therefore, if the Crown has led evidence upon which the accused **could** be convicted, a trial judge should not rule that there is no case to answer or direct the jury to acquit simply because he thinks that there could be formulated a reasonable hypothesis consistent with the innocence of the accused which the Crown has failed to exclude".

And at page 12-13 the Court said:

> " . . . a case should only be left to the jury if there is evidence upon which the accused '**could** lawfully be convicted' ".
>
> "Where, however, there is evidence upon which the accused **could** lawfully be convicted, the trial judge should so rule notwithstanding that he may think that a verdict based upon such evidence would be unsafe."

The Court concluded its ruling citing with approval the following passage from **R. v. Galbraith** [1981] 1 W.L.R. 1039; 73 Cr. App. R. at 127:

> "How then should the judge approach a submission of no case? (1) If there is no evidence that the crime has been committed by the defendant, there is no difficulty. The judge will of course stop the case. (2) The difficulty arises where there is some evidence but it is of a tenous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence.
>
> (a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, he has a duty to stop the case.
>
> (b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of witnesses' reliability or other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury".

Discussion

It is clear from looking at this last passage that the Court recognises the right and duty of a trial judge in the circumstances referred to in 2 (a) (above) to direct a jury to acquit even though it might be said that there is a prima facie case.

Referring then to Question 1 (c) of the Attorney-General's Reference it is argued that in the instant case the question for the jury was:

> "Can we on the whole of the evidence exclude the reasonable hypothesis consistent with innocence?"

If this could not be done then the jury could not be satisfied beyond reasonable doubt of the guilt of the accused. If, however, the jury could on the whole of the evidence exclude the hypothesis consistent with innocence then it would be entitled to convict. Accordingly, it follows, that in the instant case there was a question to be determined by the jury. Depending upon the view that they took of the facts there was evidence upon which they could **properly** convict.

This is further illustrated when looking at Question 2 (b) of the Reference which states inter alia:

> " . . . other inferences of fact could properly be drawn from the evidence which were consistent with the guilt of the accused depending upon which evidence in the case as accepted by the jury?".

It follows that the court has decided only that **in the circumstances of the instant case** it was proper for the matter to be left to the jury. That is, there was evidence upon which a judge was neither bound nor entitled to direct a jury to acquit.

The following pasage from judgment of Gobbo J. in **R. v. Williams** (unreported, 12th May 1983) supports this view.

> "The nature of a no case submission was the subject of an advisory opinion by this Court. See Attorney-General's Reference No. 1 of 1983. Where there is some evidence sufficient to meet a no case submission,

a Judge may nonetheless have a duty to invite the jury to acquit the accused . . . But I leave for future consideraton the question as to what is the precise power of the trial judge to invite jury to acquit, where there is a case to answer." Young C.J. & Anderson J. concurred.

The English authorities on this question are reviewed in Archbold 41st edition para. 4-385. The authors conclude that the proper test to be applied is that contained in the passage cited from **R. v. Galbraith** above. It is of interest to note the view both in England and as expressed by the Full Court in Attorney-General's Reference No. 1 is that an Appellate Court may set aside a verdict on the ground that it is unsafe or unsatisfactory. (See also Hassett "Notes on the Unsafe Ground" **Bar News** Spring 1979). But a trial judge with the same view would not be entitled to direct an acquittal on that basis alone.

KENT

• • •

Mouthpiece

"What sort of a barrister were you?" I asked.

"Not bad", he said, "but I used to get easily rattled, and Lord knows I made plenty of mistakes."

"Did you win more than you lost?" I must have been very young and brash then to have asked a question like that.

"Hard to say", he said after a pause. "No", he said after another pause, "I think I would have lost more than I won".

"Could you always tell if you won or lost?"

"No I couldn't always", he replied "but usually you get a bit of a feeling".

"What sort of cases gave you the most pleasure?"

"The cases that had a definite finish to them, apart from the wins. Some cases just dragged on for ages and I didn't like them much. They'd peter away and then flare up. No I didn't like them much".

"Are you always so self deprecating?"

"No I'm not self deprecating at all. I'm just trying to answer your questions".

"Well are you always so honest?"

"I think I am now, mostly. When I was younger I wasn't very much. I used to tell fibs about all sorts of things – how much work I had, what wins I'd had, how well I knew the judges, and so on".

"What caused you to become honest?"

"I am honest reluctantly. I think the Bar forced me into it. You see we can't sell favours between ourselves or penalise someone who is a bit shady. And every other barrister I dealt with was seemingly so honest that, in trying to copy them, I just fell into the way of it."

BYRNE & ROSS D.D.

WALTER COLDHAM
1860 – 1908
THE GREAT JUNIOR

We humble Rumpoles of the Bar, our spasmodic successes liberally scarred by the arrows of outrageous fortune, would be less than human if we did not cast an envious eye on the few among us, who move so swiftly to the highest pinnacles – monotonously successful, admired by judges, courted by solicitors and soon legends amongst their colleagues. A hundred years ago just such a man was Walter Coldham, perhaps the greatest junior of them all.

Born near Branxholme in 1860, Coldham was the third son of John Coldham, an Anglican Minister from Norfolk, who migrated to Tasmania in 1839 and later became a Western District squatter. His mother, Josephine, came from County Cork. Coldham was educated at Hamilton College and Melbourne Grammar where in 1879 he was dux of the school. He also excelled at a variety of sports and set a record in the hundred yards. Coldham then entered Trinity College, Melbourne where he studied Arts and Law graduating with final honours.

In 1884 Coldham went to the Bar and read in the Chambers of the great J.L. Purves. The two quickly formed a strong, close and lasting friendship – that close relationship not uncommon between master and reader, which is one of the most admirable features of our Bar. Like Purves, Coldham coupled great eloquence with swift wit, but had the added qualities of a first class legal brain and great application. When, in 1886, Purves took "silk", the two soon formed a formidable forensic combination. As "Table Talk" expressed it, Purves "dishes up in attractive style the good things worked up for him". Coldham's talents proved an invaluable supplement to Purve's brilliant but less industrious capabilities, and they appeared together in many notable cases.

In 1890 Coldham won wide acclaim in the Victorian Bridge Case. Laura Swain, who was at first believed to have committed suicide by jumping from the bridge into the Yarra, was later alleged by the Crown to have been the victim of foul play. Coldham, in his sixth year at the Bar, was briefed for the accused. His successful defence was astute, eloquent but above all courageous. As Philip Jacobs in his "Famous Trials" wrote: "No man took his troubles more lightly. He not merely smiled, but laughed, in the face of adversity". Coldham's reputation was permanently established and his growing practice boomed. Thereafter his services were universally sought. His unusual facility for mathematics, engineering and science enabled him to specialise in the flourishing patent jurisdiction, but he was at home in all jurisdictions. In one case Purves was called as a witness for Coldham's client. When Coldham asked his occupation, Purves, looking at him with assumed disdain, replied "A trainer of puppies".

Victorian Bar News

In the great libel action **Speight v. Syme,** Coldham appeared for the Defendant with Frank Duffy Q.C. against his old master and Alfred Deakin. The Plaintiff Speight, a former Commissioner of Railways, sued David Syme proprietor of "The Age" for libel. The action lasted some months and acquired the nickname "Space v. Time". Syme was victorious, the Plaintiff being financially crippled by the inordinate length of the litigation.

An article in "The Australasian" of 20th November 1897 well described his progress–"Mr. W.T. Coldham was at first an understudy of Mr. Purves (who is proud of his pupil) but now acts star parts of his own". It also added that "During the Christmas holidays he sometimes rides private road races with Mr. Pirani who requires an 80 gear to keep up with him"

Coldham excelled at a wide variety of sports. In the Victorian Amateur Athletic Association he was a talented sprinter, hurdler and high jumper, and later became its Vice-President. With Purves he was first doubles pair in the Mosspennoch Tennis Club which won the first Victorian Clubs Championship. With Carre Riddell he won the Victorian doubles championship in 1884 and 1886, and on the latter occasion also won the inercolonial doubles championship. As a cricketer his performances were notable, and he was also a fine shot. His skill with the gun was recognised alon the length of the Murray where he often spent his July vacations.

Coldham with his cheery smile and hearty laugh became immensely popular with his colleagues. He was also a brilliant conversationalist and after dinner speaker. Some of his witticisms not only passed down to Victorian posterity but also acquired an international recognition. On one occasion in the High Court after an invitation to expound a particular point, Griffith C.J. commented somewhat unkindly that the Court was "not much wiser for his lengthy exposition". "No" replied Coldham blandly, "not wiser, your Honour, but better informed". The remark was later recounted to the great F.E. Smith, who on a suitable occasion, used it as his own.

At a time when most members of the Bar were active in politics Coldham unsuccessfully contested the Legislative Assembly seat of St. Kilda in 1894 and Geelong in 1897, but his interest in politics was never deep.

Unfortunately in 1901 at the height of his career, Coldham developed carcinoma of the foot, and despite a number of operations the cancer slowly spread. Perhaps, for this reason he never took silk, a step fully warranted by his wide practice and great ability. He continued to chaff and joke till the end, but to deaden the pain his evening sessions with his colleagues at the Old London Hotel in Elizabeth Street became a little longer. Amongst his regular fellow drinkers was one of the Dethridge family (nicknamed by Coldham "rigor mortis"), who had taken a great fancy to the group's favourite barmaid Rosie. One evening when Rosie was reported to be absent sick, to the enquiry "What's wrong with her?" Coldham, quick as a flash, replied that "She was in bed with rigor mortis".

Although he knew his end was near, Coldham continued bravely to the last. In November 1907 he collapsed in Court never to return.

When in May 1908 he died at his home in St. Kilda, Purves, who was deeply affected by his death, paid him a great tribute. He said of Coldham that "His wit loved to play and not to wound. He had the singular faculty of being able to work hard and play hard . . ." adding that "he has been like a son to me". In the Bankruptcy Court, the Bar's former Test cricketer Judge Moule, adjourned proceedings to pay from the Bench an equally handsome tribute.

Although he was only 47 when he died Walter Coldham soon became a legend and was one of the few juniors to merit a special biography in Dean's "Multitude of Counsellors". When almost forty years later his grand-nephew Peter Coldham (now Coldham J.) came to the Bar in 1946, there were still a few older practitioners who remembered well and warmly his great-uncle Walter.

FRANCIS Q.C.

SMALL CLAIMS COMMISSION CHAIRMAN

On 21st June 1983 Rodney Leslie Crisp was appointed as Chairman of the Small Claims Tribunal. He signed the Bar Roll on 8th March 1973 and read with Spence.

The Bar welcomes the appointment and wishes Crisp well in his new office.

CONFIDENTIALITY, PRIVILEGE AND BLOWING THE WHISTLE

Recent decisions which have restricted not only the range of communications to which legal professional privilege has attached but also the circumstances in which the privilege can be claimed haved caused disquiet within the profession.[1] The privilege has been justified by the necessity for candour between client and lawyer. However, the candour of a client may create even greater difficulties for his counsel. The question will arise whether in addition to being required to answer a question in court or to disclose a document to a civil servant, a lawyer is under a positive duty to report to the authorities information provided by his client.

Australian newspapers have reported yet another instance of the parents of an American girl bringing an action against a psychiatrist in respect of the conduct of his patient.[2] In **Tarasoff v. Regents of the University of California** a psychiatrist, having learned from his patient, the murderer, of his intention to kill the girl failed to warn her. The Supreme Court of California concluded that "the public policy favouring protection of the confidential character of patient-psychotherapist communications must yield to the extent to which disclosure is essential to avert danger to others. The protective privilege ends where the public peril begins."

Accordingly the court overruled a demurrer to a complaint which alleged that the relationship between a therapist and his patient imposed upon the therapist a duty to take reasonable care to protect a potential victim from the patient's conduct.[3] Hard cases, perhaps, make bad laws; but they serve at least to point up the various principles which should determine the resolution of more mundane. The question arises whether counsel is under an analogous duty?

Legal professional privilege is related, of course, to the duty of confidentiality which a lawyer owes to his client. In addition to the ethical duty, the legal duty is extensive. Damages have been awarded against a solicitor who revealed defects in his client's title to a lender contemplating it as security.[4] Of course, a lawyer can be compelled by law to disclose information confided to him by his client. The only immunity lies in the privilege and this can be cut short by statute and narrowed by interpretation. Plainly enough, the duty of confidentiality is much broader than the privilege against disclosure.

In cases of privilege, the lawyer seeks merely to resist repeating a communication. The paradigm cases in which the responsibility requires more than mere passivity lie in the cases of the guilty accused and perjury. The problems are not dissolved by the proper diffidence of the lawyer who understands not only that a client is a poor judge of his cause but also that it is not for the advocate to usurp the function of the Court. The issue will be less one of a confession of guilt as it will be the confession by the client of one of the facts that tend to operate in proof of guilt, e.g. that he killed the victim or that he entered the premises by forcing the lock.

The responsibility of counsel depends, in the first instance, upon the time he receives the confession. If he can do so without compromising the position of the accused, he should withdraw from the case. The reason, it seems, is not that the defendant is somehow undeserving; rather, such a confession would inhibit a proper defence of the case.

Where the moment for withdrawal has passed, the duties of counsel are complex and their discharge requires some considerable subtlety. Jeremy Bentham stated the duty of confidentiality as follows: "[T]he law adviser is neither to be compelled, nor so much as suffered, to betray the trust thus reposed in him."[5] In **Tucklar v. The King,**[6] the trial judge having received evidence from two witnesses that the defendant had confessed his guilt, granted an adjournment so that counsel for the defence could discuss the evidence with the defendant. Upon resumption of the hearing, counsel in open court said "he was in a predicament, the worst predicament he had encountered in all his legal career." The judge and counsel retired to the judge's chambers and when the trial was concluded the defendant was found guilty. Whereupon counsel for the defendant, again in open court, announced that the defendant had confirmed to him the truth of the evidence. The High Court found the conduct of counsel insufferable: "[C]ounsel seems to have taken a course calculated to transfer to the Judge the embarrassment which he appears so much to have felt. Why he should have conceived himself to have been in so great a predicament, it is not easy for those experienced in advocacy to understand. He had a plain duty, both to his client and the Court, to press such rational considerations as the evidence fairly gave rise to in favour of complete acquittal or conviction of manslaughter only.... Whether he be in fact guilty or not, a prisoner is, in point of law, entitled to acquittal from any charge which the evidence fails to establish that

he committed, and it is not incumbent on his counsel by abandoning his defence to deprive him of the benefit of such rational arguments as fairly arise on the proofs submitted. The subsequent action of the prisoner's counsel in openly disclosing the privileged communication of his client and acknowledging the correctness of the more serious testimony against him is wholly indefensible. It was his paramount duty to respect the privilege attaching to the communication made to him as counsel, a duty the obligation of which was by no means weakened by the character of his client or the moment at which he chose to make the disclosure... Our system of administering justice necessarily imposes upon those who practise advocacy duties which have no analogies, and the system cannot dispense with their strict observance."[7]

The duties of counsel in court "to press such rational considerations as the evidence fairly gave rise" would require him to test the evidence adduced by the prosecution and canvass any defence not inconsistent with what he has been told. However, it is not open to counsel to suggest defences or any other case which is inconsistent with the confession. Where counsel becomes aware that his client has either suppressed material evidence or is insisting upon perjury he is under a positive duty to seek the permission of the client to disclose the evidence suppressed or to correct the false testimony. Where the client refuses to do so, counsel will withdraw.[8] The duties of counsel out of court are even more difficult to define. If the duty of confidentiality arises out of the contractual relationship of lawyer and client, then it cannot exceed the bounds of contract. Illegality will avoid any contract.

In any event communications in futherance of a crime or fraud are not privileged whether or not counsel is aware of the illegal object.[9] Of course, if counsel is aware of the illegal object, he may well be party to a conspiracy.

This abrogation of privilege is based on the fact that the policy underlying the privilege must yield to the policy that the law does not lend any assistance to criminal or fraudulent conduct. In **Re Bell** (1980) 30 A.L.R. 489, the High Court held that a lawyer is not entitled to claim privilege where to do so would frustrate the processes of law. In that case a solicitor for a wife refused to provide information to the Family Court as to the whereabouts of a child of the marriage, custody of whom had been granted to the husband. It is not difficult to suppose other circumstances where a similar appeal to policy might be made to restrict further the client's expectation that confidence communicated to his lawyer will be respected.

It is a very difficult matter to determine what amounts to a communication for the purposes of the privilege. For instance, where incriminating physical evidence comes into the possession of defence counsel, does he have an obligation to turn it over to the prosecution? In **O'Reilly v Commissioner of the State Bank of Victoria,**[10] Mason J. said that "if communications in written form are to be privileged they must still be confidential communications between solicitor and client made for the purpose of advice or for the purpose of use in existing or anticipated litigation. The documents must come into existence, and be prepared for, that purpose... The privilege cannot attach to contracts, agreements and extracts of other transactions."[11] Of course, the importance of **O'Reilly** lies less in its dicta relating to the nature of privileged communications as it does in its holding that the privilege is confined in its operation to judicial and quasi-judicial inquiries. Whatever the obligation to hand over evidence, it has become plain that investigating authorities in Australia are now being issued with warrants to search the offices of solicitors and the chambers of counsel.

It has been held in the United States that a criminal defence attorney, having been served with a subpoena duces tecum, is under an obligation to produce physical evidence that the attorney obtains from his client. The attorney is under no obligation to give any indication of the source of the material, and, if asked, can claim privilege. However, if the evidence is discovered by the attorney without any assistance from his client or is provided by a third party, no privilege attaches.[12]

On 2 August 1983, the House of Delegates the American Bar Association at its annual meeting in Atlanta voted to adopt the Model Rules of Professional Conduct.[13] The draft rules had been debated for over six years.[14] Rule 1.6 of the Model Code deals with confidentiality of information. It provides that a lawyer "may reveal such information to the extent the lawyer reasonably believes necessary: (1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm, or (2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim

against the lawyer based upon conduct in which the client was involved, or to respond to allegation in any proceeding concerning the lawyer's representation of the client. There is a comment to the rule. "[T]hird, the lawyer may learn that a client intends prospective conduct that is criminal and likely to result in imminent death or substantial bodily harm. At stated in paragraph (b (1), the lawyer has a professional discretion to reveal information in order to prevent such consequences. The lawyer may make a disclosure in order to prevent homicide or serious bodily injury which the lawyer reasonably believes is intended by a client. It is very difficult for a lawyer to "know" when such a heinous purpose will actually be carried out, for the client may have a change of mind. The lawyer's exercise of discretion requires consideration of such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. Where practical, the lawyer should seek to persuade the client to take suitable action. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to the purpose. A lawyer's decision not to take preventive action permitted by paragraph (b) (1) does not violate this Rule."[15]

Although a psychiatrist might be more likely to hear threats of violence, it is quite possible that counsel may hear them in his chambers, for example, by a client disaffected by a decision of one of the courts. There appears to be no decided case which bears upon the duties of counsel in this situation but it is quite open to a court to find that a duty to take care exists which is breached by the failure to warn.[16] Certainly, courts have proved more willing to protect the rights of counsel, if not the privileges of their clients.[17] However, the courts have recently recognised that an omission may be every bit as culpable as an action,[18] a point long accepted in philosophy, if not yet in paediatrics.

Santamaria

[NOTE: –
On the 19th day of August 1983 two police officers attended Rozene's Chambers. They had a search warrant. Pursuant to it they took a document from a brief.

Tadgell J. later that day refused to interfere with the police action.

Eds.]

Footnotes

1. **Grant v. Downs** (1976) 135 C.L.R. 674; **O'Reilly v. Commissioner of State Bank of Victoria** (1982) 44 A.L.R. 27; Charles, **Legal Professional Privilege: continues erosion** (1983) **Law Institute Journal** 832.
2. **Furr v. Spring Grove State Hospital** (1983) 51 L.W. 2448; Maryland Court of Special Appeals (1 July 1983).
3. **Tarasoff v. Regents of University of California** (1976) 17 Cal (3d.) 425; **Thompson v. County of Alameda** (1980) 167 Cal Rptr. 70.
4. **Taylor v. Blacklow** (1836) 3 Bing. N.C. 235, 132 E.R. 401; **Carter v. Palmer** (1839) 1 Dr & Wal. 722, at p. 743; affirmed (1841) 8 Cl & Fin 657 (H.L.). In relation to the duty of confidentiality between doctor and patient, see, **Furniss v. Fitchett** [1958] N.Z.L.R. 396. See, generally Richard Fox, Ethical and Legal Principles of Confidentiality for Psychologists and Social Workers in M.C. Nixon (ed.) **Issues in Psychological Practice: A Book of Australian Readings.** Monash 1982.
5. **Rationale of Judical Evidence** (J.S. Mill ed., 1827) 302.
6. (1934) 52 C.L.R. 335.
7. Ibid , at p. 346-347.
8. Gowans, **Professional Conduct, Practice and Etiquette** (1979) at p. 72.
9. **R. v. Cox and Railton** (1884) 14 Q.B.D. 153; **Phipson on Evidence** (20th ed.) 1982 15-14 (at p. 299).
10. (1982) 44 A.L.R. 27.
11. Ibid., at p. 39-41. Compare the decision in **O'Reilly** with **Pyneboard Pty. Ltd. v. Trade Practices Commission** (1983) 57 A.L.J.R 236 and **Sorby v. Commonwealth** (1983) 57 A.L.J.R. 248 on the privilege against self-incrimination.
12. **State v. Olwell** (1964) 64 Wash. 2d. 828; 394 P. 2d. 681; **Morrell v. State** (1978) 575 P. 2d. 1200 (Alaska).
13. A complete text of the Model Rules is already available in (1983) 52 L.W. 1 (Statute Section).
14. See, for example, (1983) 69 **American Bar Association Journal** at pp. 271, 421, 879.
15. An earlier draft of this rule included a duty to report a client's fraud to the affected person. However, an amendment limiting discretionary disclosure to cases of killing or physical harm was proposed by the American College of Trial Lawyers and accepted by the drafting committee; see (1983) 69 A.B.A.J. 422. Legislation has however been introduced before Congress which if enacted would require Attorneys to disclose the criminal or fraudulent acts of their clients; (1983) 51 L.W. 2510; 2653.
16. **Anns v. Merton L.B.C.** [1978] A.C. 728, at pp. 751-752.
17. **Rondel v. Worsley** [1969] 1 A.C. 191; **Saif Ali v. Sidney Mitchell & Co.** [1980] A.C. 198; **Searle v. Perry** [1982] V.R. 193.
18. **Goldman v. Hargrave** [1967] 1 A.C. 645; **Geyer v. Downs** (1977) 138 C.L.R. 191; **Leakey v. National Trust** (1980) Q.B. 485; **Commonwealth v. Introvigne** (1982) 56 A.L.J.R. 749.

LAWYERS' BOOKSHELF

INDICTABLE OFFENCES IN VICTORIA,
Ian W. Heath and John T. Hassett
1983 Victorian Government Printing Office – $15.00

The expression "purple gutzer" is supposed to have been coined by the late John Moloney, the prosecutor. He had an uncanny ability to anticipate an opponent's arguments. He often used to be able to turn up in advance an unreported case on which his opponent's submission would founder. Sometimes Moloney would be asked how his opponent had fared. Moloney assumed you knew that unreported judgments are duplicated in purple print. How had his opponent fared? "He came a purple gutzer" croaked Moloney.

So all unreported decisions came to be known as purple gutzers. In times gone by, the defence counsel's fear of John Moloney extended to the prosecutors at large. They all were issued with the unreported decisions of the court of criminal appeal. Any flash argument you dreamed up ran the risk of coming a purple gutzer. One prosecutor I know of had his unreported judgments neatly filed under "P.G.R." — Purple Gutzer Reports.

Two things have alleviated the apprehension of defence counsel. The first is the abstracts of unreported decisions noted in the **Bar News**. The second is this new book by Heath & Hassett. Implicitly it contains an account of how prosecutors' minds work by two who know. It also contains a fair swag of most of the more important unreported decisions.

This is what they say in their preface:

"The material in the book falls into two parts. The first section contains a discussion of a number of aspects of criminal pleadings, including the availability of alternative verdicts, problems relating to duplicity and the method of charging the various parties connected with the commission of an offence. There follows material relating to each of more than one hundred specific offences. In the latter material we have attempted to point to the essential differences between one offence and another and to indicate, in relation to each particular offence, other offences which might more appropriately be charged on the available material. The discussion of each specific offence includes notes as to the scope and nature of the offence and the matters to be proved in order to secure a conviction."

I like the layout of the book. It is going to make its own contents and other materials easy to find. For example there are three indexes. The first is a table of offences referring to where the offence originates (e.g; Crimes Act or Common Law) and where it is to be found in the book. The second index is a table of cases including those purple gutzers. And the third is an index of where in the book the various sections of the Crimes Act are referred to.

This book is going to prove very handy during the hard preparatory work in chambers – isolating the elements of the offence, methods of proof, possible defences, appropriateness of the presentment, and all those other fiddly bits that take up so much time; and it will prove a comfort in court.

The book succeeds in its purpose. It is the archetype reference. It has been written for that purpose by two criminal barristers of long standing. It will prove to be a heavily thumbed text on the shelves of all those barristers who appear in criminal cases.

DAVID ROSS

SIR JAMES BLAIR TAIT, Q.C.

"The Last of the Straight Backs"

At the date of his death, Jim Tait was, I believe, the oldest member of the Bar on the Practising List – he was 92 – having been born on 15th October 1890. After nearly sixty-four years on the Practising List, he was surpassed only by Lou Woolf who was admitted on 8th December 1876 and remained on the Practising List until his death on 6th July 1942. Third place would, I think, go to P.A. Jacobs, admitted 15th July 1895, who transferred from the Practising List in September 1956.

But no one, I believe, served the Bar for so many years, so faithfully and with such distinction as Jim Tait.

The son of a Presbyterian Minister, Jim was educated at Geelong College. He graduated LL.B at Melbourne University in December 1916 and thereupon enlisted in the A.I.F., becoming a Lieutenant in the Australian Flying Corps in No. 3 Squadron. The photograph on page 22 of a very young looking Lieutenant Tait seated in his aeroplane bears an inscription to the effect that he and his observer were 'about to take off for a flip over back areas'.

Jim saw active service over the battle fields of France. He did not often go into details of that service but did hand down to us, his juniors, that he celebrated the advent of Armistice (11.00 a.m. on 11th November 1918) by flying low (and upside down) over the German and Allied trenches, and that later that night he and his fellow officers entertained the Prince of Wales (later King Edward VIII) in their Mess – to such good effect that very few of them, probably including His Royal Highness, would have had a very clear memory of the events of the later part of the evening.

On demobilisation, Jim returned to Australia and was admitted to practise on 1st August 1919. He signed the Roll of Counsel on 11th September 1919. He was No. 166 on the Roll. He read with Owen Dixon – one of only three who had that privilege, the others being R.G. Menzies, and (Sir) Henry Baker of Tasmania. All his life Jim was a close friend of Owen Dixon.

It appears from Sir Arthur Dean's history of the Bar 'A Multitude of Counsellors' that Jim was Mr Junior at the Bar Dinner in 1919 at which the Bar guests were Sir William Irvine (newly appointed Chief Justice of Victoria), Justices Mann and Schutt of the

Supreme Court and Judges Woinarski and Williams of the County Court.

In addition to his Law Degree, Jim had an Accountancy qualification, – he was a Fellow of the Australian Society of Accountants (F.A.S.A.), and by virtue of his ability to read balance sheets and profit and loss accounts more quickly and with greater understanding than most members of the Bar he quickly built up a substantial practice in taxation and commercial law cases. When I came to the Bar in 1935 – a Bar which then numbered only approximately 100 members on the practising list – Jim enjoyed a substantial practice as a Senior Junior, briefed by most of the leading firms of Melbourne. He had one reader, Norman Jones, who later left the Bar and became a successful business man in New South Wales.

When Jim came to the Bar there was, no doubt in consequence of the land boom failures and the years of the Depression, a great reluctance to take silk. Acknowledged leaders of the Bar such as Leo Finn Cussen (later Sir Leo Cussen), Hayden Starke, Frederick Mann (later Chief Justice of Victoria), William Schutt, Charles Lowe and the incomparable advocate Leo Bernard Cussen, never took silk. There were after World War I, isolated exceptions such as John Latham, Owen Dixon, Eugene Gorman, R.G. Menzies and Wilfred Fullagar. Indeed I remember that when I was Mr Junior at the Bar Dinner in 1935 the only three guests were John Latham, Russell Martin (recent appointees to the High Court and Supreme Court respectively), and Wilfred Fullagar, who was a guest simply because he had taken silk.

But after Edmund Herring took silk in 1936, followed by men such as Norman O'Bryan (Senior), and Ted Hudson, and World War II had brought with it a string of constitutional cases arising mainly out of the National Security Regulations (in many of which cases Jim was retained by or on behalf of the Commonwealth), the climate changed and a new breed of Victorian Silks emerged, among them Jim Tait who took silk on 9th January 1945. Jim figured in many of the leading constitutional cases of that era, including the Bank Nationalisation case.

Concurrently with all this, Jim served from 1942 to 1949, as Chairman of the Australian Hirings Commission which took leases, for Defence purposes of properties ranging from farmlands (for airfields) and hospitals to schools. He flew all over Australia, leaving as his wife said, a shirt in every port – to be cleaned and recovered on his next visit. He was entitled to and was offered the rank of Brigadier, but rejected it. "I'm an airman not a soldier" he declared. Though Jim was a man then in his 50's he flew long distances, e.g. Darwin to Port Hedland, in a DC 3 (C47 Douglas) stripped of all internal fittings save for two benches running fore and aft the plane – spartan conditions!

Jim's expertise in taxation, accountancy and commercial law matters, led to a number of invitations to accept directorships in companies and he became a director (later Chairman of Directors) of Equity Trustees Company Ltd. (from 1946-1980), Austin Motor Company (Aust.) Pty. Ltd., Colonial Mutual Life Assurance Society Ltd., Group Holdings Ltd., to mention only some.

Jim's experience in company matters, his standing in the commercial community generally, his reputation, his absolute integrity and his sound business judgement proved to be of inestimable value to the Bar when what had at first been a mere pipe dream became an actual project for building a new home for the Bar. This project got underway in about 1958 and from then until 1961 Jim was a member of the Building Subcommittee of the Victorian Bar Coucil. Jim was, in 1958, at 68 years of age, the tenant of one of the best sets of chambers in Selborne Chambers, with accommodation for his own secretary (Miss Cleary). It would have been understandable if he had, like some relatively senior members of the Bar, declined to become involved in any project for a new home for the Bar. This is all the more so since to outward appearance Jim presented as a somewhat reserved, austere man whose true friendliness was little known outside the ranks of the Bar Council.

Yet this man, with apparently nothing to gain from any move from Selborne Chambers, was in truth deeply concerned with the plight of many young barristers who from 4.30 p.m. onwards each day clustered (for want of chambers of their own) in the corridors of Selborne Chambers (within earshot, of course, of their clerks' offices) in case a last minute brief came to hand.

At all events, Jim threw himself heart and soul into the business of acquiring a suitable site for the building of a home for the Bar, interesting insurance companies and banks in offering to lend money to the Bar, and devising generous terms for young barristers to enable them to subscribe for shares in the company or make deposits in the Bar Superannuation Fund on a terms basis. When in 1961 the project was sufficiently underway for Barristers

Chambers Ltd. to be incorporated, Jim was appointed its first Chairman of Directors, and occupied that position until 1979.

It was only right and proper, in those circumstances that Mr Justice Gillard, put forward to R.G. Menzies the proposal that Jim Tait should be knighted for services to the law, and this honour was in fact conferred on Jim in the Queen's Birthday Honours of 1963. It was also right and proper that Barristers Chambers Ltd. in 1966 commissioned Paul Fitz-Gerald to paint Jim's portrait, and in 1969 named Tait Chambers after him. On the occasion of his 80th birthday (15th October 1970) the Bar Council tendered Jim a Dinner for which Peter (now Judge) Rendit composed his celebrated verses in honour of 'Our Bar's Own Peter Pan.'

Jim remained on the Practising List until his death, although he had virtually retired from practice from 1969 onwards. In recognition of his great services Barristers Chambers Ltd. permitted him to retain his chambers although he was not actively practising and of course he carried out his functions in relation to Barristers Chambers Ltd. and the Victorian Bar Superannuation Fund long after he had ceased to be engaged in active practice.

I have used the title "The Last of the Straight Backs". It is a phrase coined, I think, by Jack Hyland, arising from the fact that when, soon after World War II, the late Jim Foley became a barrister's clerk, he persuaded Jim Tait to enrol as a "regular" visitor at a gymnasium and thereafter the pair of them – both veterans of World War 1 – became object lessons in fitness and erect bearing for the younger men of the Bar.

Jim was fortunate in the happiness of his family life. He was twice married: first in 1922 to Anne Howard, by whom he had one son (Blair) who predeceased him, and one daughter Nancy. Blair inherited from his mother a talent for music which Jim did not possess. The saying in the family was that Anne and Blair could play while Jim and Nancy could not sing. For many years Jim spent his Long Vacations in his house at Portsea. His daughter Nancy once told me that Jim was "the most marvellous father any child could have". She told me that he would rouse her and Blair early in the morning and take them for a swim before breakfast, teaching them to observe the wonders of nature. He would take great pains to educate them on the identification of birds (on which, Nancy says, he was not an absolute expert) and plants. He could not bear to see a beautiful morning wasted by sleeping.

Sir James is in the driving seat.

Jim suffered great sorrow in the death in 1962 of his beloved wife Anne but he was fortunate enough to have happiness restored to him following his second marriage, on 29th September 1964, at Westminster Abbey, to Sophie Tait, the widow of his deceased brother John, who had practised for many years as an urologist in Melbourne and had later retired to England. Jim's marriage to Sophie prompted one of Sir Alistair Adam's more memorable puns. The marriage was (he said) "Tete-a-Tete".

I was in England at the time for a case in the Privy Council and Jim did me the honour of having me as his Best Man at that wedding. The story of the conditions which I am alleged to have laid down is so firmly enshrined in Bar tradition as to have assumed the character of "Bar History" but it is, I regret to have to say, apocryphal.

After Jim's second marriage and often on Sophie's incitement, she and Jim became regular globe trotters, doing not only the routine overseas trips to England and the Continent, but visiting also several off the beaten track countries such as China, Turkey, Zimbabwe, and several countries in South America. Jim undoubtedly enjoyed these travels.

Up to the last of his life Jim was still a sprightly, active and erect man. He managed to retain a current driving licence up to the day of his death, having succeeded in the last year of his life in passing a test required of him by the police. He "crammed" for the Learner's exam and took two lessons from an R.A.C.V. Driving Instructor. He claimed that unless he drove he would be blown over by the wind. He sustained a fall and broke his hip and underwent an operation for a replacement hip but the shock of the operation was, I think, too much for him and in the end, as Sophie and Nancy put it, he silently folded his tents and died in his sleep.

For good or ill the system of law reporting enshrines for posterity some record of the existence of those members of the Bar who are appointed to judicial office. But the record of those members of the Bar who, like Jim, never attained judicial office (there were very few appointments in his time) survives generally only in oral tradition, and that is often lost. I have accordingly, at the request of the Editors, set out this account of Jim's achievements in the hope that there will be some record (other than the transient and fading memories of contemporaries) for those members of the Bar who are too young to have really known Jim Tait, and for those who join the Bar in the future.

Vale, Jim Tait – when shall we look upon his like again? To Sophie, to his daughter Nancy, and his daughter-in-law Olive, and to his grandchildren, we offer our sympathy.

MURRAY V. McINERNEY

APPENDIX

Sir James Tait's Committee Membership Etc.

Member of the Committee of Counsel (later the Victorian Bar Council) from March 1939 to September 1974, Treasurer of the Committee of Counsel from 1939 to 1951.

Chairman of the Bar Council 1952-1953.

Vice-Chairman of Bar Council 1955-1958.

Treasurer of the Bar Council 1957-1974.

Representative of the Victorian Bar on the Law Council of Australia 1946-1959.

Treasurer of the Law Council of Australia 1946 to 1950.

Vice President of the Law Council of Australia 1952-1955.

Representative of the Bar on the Council of Law Reporting for Victoria 1961-1978.

Director of Selborne Chambers Ltd. (the Company which owned Selborne Chambers (the main home of the Bar before Owen Dixon Chambers was opened in 1961) from 1939 to 1961.

Director and Chairman of the Directors of Barrister's Chambers Ltd. (the company which owns and operates Owen Dixon Chambers) 1961-1979.

Trustee of the Victorian Bar Superannuation Fund from 1960-1982.

Chairman of the Victorian Bar Superannuation Fund from October 1976-1982.

To these may be added:

President of the Graduate Union 1965 to 1971.

Chairman of the Australian Hirings Commission 1942 to 1949.

BAR COUNCIL SUBMISSION

ON

COSTS

The following is a precis of the Submission on Costs prepared on behalf of the Bar and submitted to the Civil Justice Committee.

Monopoly
The submission rejects in the strongest terms any notion that the Bar as a whole occupies any monopoly position. There are no substantial impediments to any aspirant to join the Bar. True, he must satisfy the requirements of the Legal Profession Practice Act 1958. This is to ensure that he has acquired the necessary expertise and skill in the law. Indeed with University education now being free, it is easier for people of all walks of life to enter the profession.

Within the profession itself, the Bar occupies no monopolist position. The economic barriers to commencement of practice at the Bar in Victoria are not substantial. No substantial capital investment is required. Courses intended to provide newcomers with the basic skills to practise as barristers have been developed within, and by drawing on the experience of the Bar itself, and are heavily subsidised by more senior barristers by way of commitment of unpaid time.

Moreover, with the modern phenomenon of proliferating "court substitute" tribunals, not only do non-lawyers enjoy a right of audience whether for themselves or others, but there is often a provision excluding lawyers from participation. Furthermore, in their advisory practice, barristers are not protected from competition from numerous other kinds of consultants and advisers. Finally, in many areas of practice barristers must face competition from solicitors.

Far from enjoying the traditional economic strength of the monopolist, members of the Bar find themselves having to cope with substantial and increasing power exercised by consumers of their services. Institutions such as the State Insurance Office and the Legal Aid Commission are increasingly seeking to standardise fees paid to barristers in accordance with scales which they consider appropriate.

Market Forces
It is true that neither the Bar nor institutional consumers of its services, such as the Legal Aid Commission, can ignore the position of the consumer itself when proper fees are negotiated from time to time. This is a fact of commercial life. The Bar's submission, however, rejects as wrong any suggestion that any public authority charged with the responsibility of fixing proper fees, for party and party purposes, permit itself to be unduly influenced by the perceived market power of either provider or user of the service. Any adjustment to existing scales should be made on the basis of objective criteria.

In the determining of fees between counsel and solicitors, the market does play a role. Subject to the avoidance of touting there is no rule against the marking of a fee less than that specified in a scale or recommendation. Certainly court scales, concerned as they are with party and party costs, contain no such limitation. A party has the right to negotiate a greater or lesser fee with the counsel.

The Submission recognises that in practice scale fees represent the commonly charged fees or the fees below which it is not usual to charge. This is so, first because they are fixed on the assumption that the work will be performed by a competent and experienced barrister, but make no allowance for the special skills that a given barrister may have. Secondly, scale fees have become generally accepted as representing responsibly fixed minimum fees. The fact that fees may exceed the scale often results from the infrequency of revisions of the scales themselves while costs are rising. But even this tends not to happen in areas of practice where a public authority represents a substantial consumer.

The difficulty in excluding these market forces by imposing upper limits on fees that might be demanded by counsel is that a wide range of services are provided by the Bar and a wide range of abilities is possessed by those providing them. It would be unrealistic to exclude the market from operating in the usual case while permitting it to operate in some limited area. It is better recognise that the market operates throughout, but that the context and operation of this operation will differ between various jurisdictions and the various levels of expertise of the Bar.

Regulation of Fees

The Submission accepts a need for court scales and recommendations of fees. But it is neither necessary nor desirable to impose some subjectively chosen artificial restriction upon fees by a statutory authority.

The Civil Justice Committee Discussion paper alludes to the possibility that machinery for the fixing of legal fees may be used in the pursuit not merely of the traditional objectives of court scales, but also of "income equalisation" policies. Such a proposition is rejected by the Bar Council.

Income redistribution has long been a legitimate concern of governments whose responsibility it is to implement economic policies. Such policies are effected through the taxation and the Social Welfare System. But they are, in fact and in economic theory, quite distinct from policies (if there be any such) pertaining to the fixation of the appropriate price or rate for particular commodities or for labour. Income distribution policies are, moreover, implemented without discrimination between occupational groups. Any attempt to apply a discriminatory earnings policy to the professions as a whole, or to the legal profession in particular, would only serve to distort efficient allocation of resources in the labour market. The consequence of any attempt to force down the level of legal fees would be to drive away from the practice of law the most able practitioners.

It may be, however, that a Govenment would wish to retain wages and incomes generally within some policy-defined limits as part of a general prices and incomes policy. But such a policy must be seen to operate universally and the Bar can claim no exemption. The Bar Council in recognising this principle has maintained recommended Supreme Court fees for civil jurisdiction at the same level since late 1981. Notwithstanding that revisions have been due, it has not pressed for changes in other scales during the wages pause.

So too, in respect of any fee fixing authority, or combination of authorities which may operate in the future, does the Bar Council recognise the right of the Government, representing the public interest, to advance submissions as to the economic impact of any fee adjustment proposal, in the same way as it does before wage fixing tribunals and, one would expect, other tribunals having a role in the fixing of prices or wages (such as rent tribunals). This is not to say, however, that the tribunal or authority ought itself feel imposed to follow general policies tending to the 'equalisation' of incomes.

Relations between Barristers and Solicitors

The discussion paper suggests that friction on each side of the profession is bound to be created by the circumstance that solicitors are not fully indemnified by the present scales for counsel's fees.

The Bar Council Submission points out that this suggestion does not hold true where the solicitor and the

barrister follow the existing fee marking procedures agreed between the Bar Council and the Law Institute in December 1962. Under these procedures a solicitor who does not mark or fix the fee before counsel appears in court is obliged to pay the fees claimed unless they are unreasonable or contrary to the practice of the Bar. As between himself and his client, the solicitor would normally be entitled to recover upon taxation a fee which was not unreasonable or contrary to the practice of the Bar. If he agreed the fee before the trial, the prudent solicitor would first obtain approval of his client to do so.

Recruitment to the Bar

A lawyer making a decision to undertake practice at the Bar will have regard to the availability of work in the field in which he might wish to practise and to the level of fees which he might obtain for this work. His assessment will have regard, not so much to his initial prospects, but to his long term expectations.

In Victoria the initial financial disincentives operate predominently on the income side: initial capital cost disincentives are less than elsewhere as a result of deliberate policies of the Bar. This is thought to be in the public interest.

Artificial restriction on the long term financial prospects of barristers would change the whole picture. The operation of the labour market would not ensure a sufficient recruitment to meet future demand. For those in practice, the emasculation of the natural pricing mechanism of the market whereby more difficult cases command higher fees, and therby more competent counsel, would leave no incentive for barristers to do the really difficult work.

Contribution of Different Types of Work to Income

It is a commonplace that the practice of one barrister will differ from that of others. There are some who specialise in paper work; others are constantly involved in court appearances. There are some who specialise in particular jurisdictions; others have a general practice. In terms of work and time required there are great differences between these practices, and these differences are to a large extent reflected in the different conventions that have arisen with respect to fees for settled cases, preparation fees, fees for days set aside but not used and the like. That these differences should be reflected more formally in a comprehensive scheme may be a consideration worthy of merit. However, the Bar Council is unable to perceive why it is necessary; in order to fix proper fees and to lay down the rules and conventions as to their application in particular cases, for there to be an investigation of the profitability of individual practices.

Brief Fees

The brief fee is a well known basis for remunerating a barrister for an appearance in court. Nevertheless, many prefer to mark daily fee. Some, also, see advantages in fixing fees by reference to the number of hours reasonably spent in doing the work in question including preparation.

The Bar Council recognises the diversity that exists in practice at the Bar. Its view is that any system of fixing fees ought to be sensitive to this diversity and the need for flexibility in the manners in which counsel and solicitors may agree fees which are appropriate to the circumstances of the various cases.

Fixing of Fees

Existing procedures, where scales of fees are fixed by the judges or magistrates in the court in which the work is performed, or by recommendation of the Bar Council, have the merit of being under the control of those most intimately concerned with their implementation.

There are deficiencies in the present system. But not all of the criticisms listed in the discussion paper may be legitimately regarded as failings in the system. Some of these criticisms are arguments in favour of a unitary system. Some represent the argument that fee fixing bodies should have access to greater financial expertise. The Bar Council accepts as legitimate the criticism that existing procedures do not make public the evidence received or publish their reasons. Equally it acknowledges as a deficiency the failure of such bodies to keep scales under proper review and to indicate when they may be reviewed again and what the prospects might then be.

But the Bar Council does not accept those criticisms which are based on an assumption that a role qualitatively different from that presently obtaining is envisaged for any fee fixing authority, whether or not centralised. These criticisms are that the existing fee fixing bodies appear to operate in a policy vacuum without formally defining criteria upon which decisions are based; that the bodies do not receive submissions from consumers of legal services; that the bodies are not organised in a fashion which enables the experience which they derive to be utilized promptly for the purpose of bringing about procedural and jurisdictional reforms and, that the role and purpose of the government in such bodies varies according to the forum involved and is unclear. The Bar Council considers that there has been no proper evaluation such as would permit acceptance of the philosophy behind the allegation that these matters are unsatisfactory features of the present system.

The Discussion Paper raises several questions. First there is the efficiency of operation of existing fee fixing authorities. Secondly, there is the question whether the system would benefit from some unification or centralisation of function. Thirdly, whether those fees which are presently subject only to the Bar Council recommendation should be dealt with be an appropriate authority. These are all matters which the Bar Council considers appropriate and proper for investigation, given existing assumptions as to the role and purpose of fee scales or recommendations. However, the Discussion Paper moves into a fourth area: whether the objectives or purpose behind the fixing of scales ought to be fundamentally altered. Any such alteration, the Bar Council considers, is both unnecessary and undesirable.

The Bar Council would welcome the introduction of a single fee fixing authority if the shortcomings of the existing fragmented system of fee fixation would thereby be alleviated. But it considers it important that, in advance of its establishment, there should be a clear understanding of the role of the authority, of its constitution, and of its jurisdiction and powers.

The role of the authority should be that of the traditional fee fixing authorities.

As to the constitution of the authority, there are two possibilities. The first is that it be a committee representing the various interests affected by fee fixing. If this model is adopted the Bar Council urges that at least one half of the members be nominees of the Bar. But any system which has barristers' fees fixed by a committee in the constitution of which solicitors of their nominees were included as those representing the recipients of the fees so fixed would be intolerable. This is because solicitors would not be representative of those recipients and would in fact have a pecuniary interest in restricting upward movements in barristers' fees.

The second possibility is that the authority perform an adjudicative function. In such a case an impartial and independent person, after hearing submissions from interested parties would make a binding determination.

Of the two systems the Bar Council favours the adjudicative system. This would achieve the objectives of impartiality and would best be able to take into account the public interest.

As to jurisdiction and powers of the authority, the Bar Council Submission is that they should be confined to the fixing of fees payable in and in connection with litigation as such. This would cover most of the work of the Bar and, certainly, all of the commonly performed items of work.

The Bar Council submission urges that the authority be not invested with the power to fix a minimum or a maximum fee which may be charged. This is based on two considerations. First the diversity of work performed and the capacity of those who perform it militates against compulsory standardisation. The second is the desirability that solicitors and their clients should be free to engage services of a particular barrister at an agreed fee, regardless of the extent to which they might be indemnified on party and party taxation. Indeed, to attempt to impose restraints, in the form of statutory maxima, upon fees which may be agreed would, by distorting the operation, and emasculating the responsiveness, of the labour market, work only to the short term benefit of non-legally assisted litigants, and would in the long term produce an excess of demand for the services of the Bar over the supply of them: the objective of creating conditions which conduce to the broad accessibility of legal expertise for all in the community would thus be frustrated at the outset.

Spring 1983

COUNTY COURT BUILDING CASES RULES

On 7th September 1983 the new County Court (Building Cases) Rules 1983 (1983 S.R. 207) came into force.

The scheme of these rules is similar to that of the Supreme Court Building Cases Rules (Chapter 11 0.4) which has been in operation since 1972. Like these rules, the new County Court procedures are concerned with conferring of power upon the Judge in charge of the Building Cases List to make all interlocutory orders necessary to prepare the case for trial speedily. After it is set down the case will receive no special treatment from the Court under the new rules.

The Supreme Court Rules definition of "Building Case" is tied to actions concerning Building Contracts. This has meant that actions brought in tort arising out of Building Constructions have encountered difficulty in being dealt with under those rules. The County Court Rules definition is not so limited:

> " 'Building case' means any action in which the claim of the Plaintiff against one or more of the Defendants arises out of or is in any way concerned with any agreement express or implied involving (whether exclusively or not) the performance of work of any description in connection with or incidental to any building or structure actual or proposed or with any constructional project of any kind whatsoever."

Unlike the Supreme Court procedure, the case is not entered in the List by an endorsement to that effect by the Plaintiff. Application for entry must be made to the Judge.

With two notable exceptions, the Judge is not given any special powers over and above those conferred by the Rules for all civil cases. This means that his power to send out issues for determination by a referee or an Arbitrator is still to be found in Order 25. The first exception is that, by Rule 5 (3) the Judge may direct that the parties provide particulars in a prescribed form. This form resembles the Scott Schedule that is sometimes used in Arbitrations. Under this Rule it would be possible for the Judge to require that the Builder list his claimed extras and that the Proprietor state his position with respect to each and give his valuation of each. It might likewise be usefully adopted for a Proprietor's Defects List.

The most innovative exception is the power conferred on the Judge by Rule 6 to appoint a Mediator whose function is "expeditiously and without involving substantial expenditure to consult with the parties in an endeavour to assist the parties to reach a speedy resolution of their differences." The Mediator is to be selected from a Barrister and Solicitor or a person appearing to be experienced in the kind of Building Works the subject of the dispute. All communications with the Mediator are to be treated as privileged. The Mediator is not required to make any report to the Judge irrespective of whether or not any resolution of differences is achieved. The parties are to bear equally the fee of the Mediator.

Judge Lazarus is the Judge in charge of the new Building Cases List.

FRANCINE McNIFF–
FIRST WOMAN MAGISTRATE

On the 30th August 1983, the first woman Magistrate in Victoria was appointed. Francine McNiff became the first salaried Children's Court Magistrate. However the nature of the appointment does not allow Miss McNiff to be described as a Stipendiary Magistrate. Thus she is not able to preside over rape committals nor hear appeal bail in cases other than her own.

Miss McNiff was born in Melbourne, one of four children. She undertook her Secondary education at the Star of the Sea College. After matriculating, she attended Monash University and completed her Bachelor of Jurisprudence in 1968 and Bachelor of Laws in 1970. Thereafter she undertook a Post-Graduate Diploma in Criminology at Edinburgh University, and returned to Australia in order to undertake a Teaching Fellowship at Monash University. She spent the next nine years teaching in the areas of evidence, criminal law, common law, company law and welfare law. Whilst at Monash University Miss McNiff undertook her Masters Degree and submitted as her topic of interest, a "History of Children's Court in Victoria" in 1973. The Masters Degree was completed in 1977 and conferred in 1978. Her research into the area proved to be invaluable when she decided to publish a book on the Children's Court in 1979.

A later government appointment in 1982 to the Policy and Research Section of the Attorney-General's Department enabled Miss McNiff to expand her areas of interest and, ultimately, she became involved in policy, decision-making and legislation. As one of the nine legal officers as advisers to the Attorney-General, Miss McNiff worked on bills relating to Equal Opportunity, Human Rights, Magistrates Summary Proceedings, Juries, Defamation and the practice of solicitors. As acting Director of this section for approximately nine months, her work ranged from working with the Attorney-General and Counsel assisting, to the briefing of interested bodies on the impending changes in legislation.

As to Miss McNiff's legal practice, she attended the Leo Cussen Institute in 1980 and thereafter worked with Martin Bartfield & Associates on a consulting basis. Although Miss McNiff has not practised for a lengthy period, it appears that she does not feel any disadvantage from her having not done so. Her appointment continues a recent trend to appoint the the magistracy persons other than Clerks of Courts. Other recent non-clerk appointments have been Mr. Von Einem and Mr. Golden. Miss McNiff believes that a strong theoretical grasp of law and fundamental principles extremely important, and that she could catch up on the practical procedures in court.

As to the changes which she has observed over the last ten years in the Children's Court system, Miss McNiff feels that youth unemployment and lack of prospects generally would appear to be the basis of many problems coming before the Court. The motive for offending appears to be a desire to satisfy the need to purchase a consumer item, or to cater for a drug/drinking habit. It is apparent to Miss McNiff that the Police Warning System is extremely successful in reducing the number of possible cases which could come before the court in that the Warning System enjoys an 85% non-recidivist rate. There appears to be a higher number of voluntary assistant bodies, and diversion techniques available today for a Magistrate to call upon or utilize prior to considering Court action. The greater use of pre-disposition reports and facilities for placement of children in institutions other than government ones, can be considered as a distinct advancement.

The Bar welcomes Miss McNiff's appointment and we hope she will have a long, satisfactory and happy career on the Children's Court Bench.

THE MICROCHIP LIVES

Those members of the Bar with a better than average memory for trivia may recollect articles in previous editions of the **Bar News** in which I put forward some personal views of the manner in which we will be performing legal research before the end of the decade. (See Spring, Autumn and Winter 1980 and Autumn 1981.) Rapid progress is now being made. Formal agreements have been entered into by both the Victorian and New South Wales Governments with Computer Power Pty. Ltd. Though the precise terms of the agreements are confidential, they provide the framework within which a computerised legal information retrieval system (CLIRS) will be established. It is anticipated within eighteen months or thereabouts a CLIRS system will be in operation within Victoria.

In an address to the Australian Law Librarians' Group on 25 July, 1983 the Managing Director of Computer Power Pty. Ltd. detailed the programme which his company is intending to follow to establish the CLIRS and also foreshadowed certain arrangements which it is hoped will take place in the future and the effect that such arrangements will have on the whole system.

Over the next year to eighteen months, Computer Power Pty. Ltd. will put all the Acts and Regulations of Victoria and New South Wales into the data base. It is planned that all such material will be available in their respective current forms. In the longer term, it may be possible for such documents to be searched historically so that a search could be made of a statutory provision as it was at a particular date. However, such a system involves a considerably augmented electronic memory and is comparatively expensive to operate. So far as case law is concerned, it is intended that from the commencement of the system New South Wales Reports will be included from 1901 and Victorian Reports from 1957 together with all recent unreported decisions. Investigation is currently being made as to the possibility of incorporating in the data base cases which fall outside these periods but which are considered important. The system will also have available to it the Commonwealth Government data base which includes legislation, regulations and Commonwealth Law Reports. The system operated by the Commonwealth Attorney-General operates the STATUS software; Computer Power Pty. Ltd. will operate the Victorian and New South Wales CLIRS using the same software.

Development is proceeding with regard to a new video terminal which will be available (but not mandatory) for access to the system. If current projections are correct, such a colour terminal will be available at the time of commencement of the system for one half of the present price. The terminal will have a number of dedicated function keys. Such keys assist the user by reducing the number of separate key strokes necessary to input a given command. It will also have a telephone dialing facility which is integral within the system, and therefore, obviates the necessity for manual dialing to access the system. Commercially available

terminals, however, will be capable of being used. Members of the bar who might be considering the purchase of word processing machinery or personal computers should ensure that the equipment is capable of data communication according to the Teletype Protocol. Provided that the monitor screen has a width of 80 characters and is capable of receiving 24 line transmissions, such equipment should be capable of accessing the legal retrieval system. Before any purchase is made, it would be advisable to confirm the specific technical requirements with Computer Power Pty. Ltd.

I understand from Computer Power that they are obliged to provide the facilities of the computerised access system to any publisher of information who desires to place his material thereon. Negotiations with legal publishers have already commenced. It is to be hoped that many publishers will see the benefit of electronic publishing in addition to their present publications in hard copy.

A further positive technical feature of the CLIRS is that the system will be capable of access through the Videotext network. Thus domestic television sets adapted for Videotext retrieval will allow a subscriber to the CLIRS to have access to the data base anywhere in the country.

In the longer term, it is anticipated that, through the one terminal, Computer Power will provide access to a number of data bases. Other State governments are currently negotiating for the provision of an electronic system along the lines of the Victorian and New South Wales systems. If carried through, the Victorian user will be able to search all Australian jurisdictions with one command. Further, and at present tentative, ideas are for access to Court records, Titles Office records and Corporate Affairs material. In the very long term, the system could co-ordinate with a Land Information System which would incorporate M.M.B.W., C.R.B. and other records relevant to land use.

More easily available and more immediately likely to be incorporated in the operating system will be access to U.K. Law Reports through "Eurolex" and to United States Law Reports through "Westlaw". Each of the above systems currently operate within their respective jurisdictions to provide Acts, Regulations and case law to practitioners. Reciprocal facilities would probably be offered so that the users of the American and U.K. systems would have access to the Australian material.

Once in operation, a CLIRS could fairly simply provide a practitioner subscriber with an electronic diary and allow him to receive mail electronically from colleagues also on the system. Whenever he connected his terminal to the system, it would report to him that a letter or letters were ready for collection. If he then desired to read the material, he could have is produced immediately on his screen; hard copy could also be printed for record purposes. An electronic diary could provide a prompt for a practitioner to remind him of the approach of important dates, in particular litigation. Thus any impending expiration of limitation periods could be brought to the attention of the person handling the particular file. An individual barrister could also avail himself of private data storage within the system. Such storage would be confidential to him and would allow him to search his own material for precedents, or research performed many months or years ago. Solicitors may be more interested to use such a system for litigation support. Such systems are in regular use in the United States whenever it is anticipated that a case will concern more than 10,000 documents. Each document discovered in the case is then incorporated into a separate data base and access to each document can be obtained instantaneously by all persons handling the file without fear of losing documents. Furthermore, cross referencing can be performed electronically and speedily.

It would appear probable that groups of barristers, for example those on a single floor or in a suite, would become subscribers to the system and share a common terminal. Each building or floor of a building might share a printer. Access to the information will be charged to each user individually. A fixed monthly subscription would permit a specified amount of computer time; thereafter, the user, would pay according to use. The present projections of cost are in the region of $100 per hour of search time. As the machine can perform many functions within a fraction of a second, such costs appear reasonable. Though it is difficult to be precise, an average search for information may take 30 seconds or so.

The microchip is, therefore, almost upon us. We had better learn to master it before it masters us.

DAVID LEVIN.

LEGGE'S LAW LEXICON
"N"

Name. By a constitution of Archbishop Peccham priests were to take care not to permit wanton names to be given to children, especially of the female sex. (1946) 1 Ch. 187. Why this further injustice to women?

National Compensation Scheme. An arrangement devised to save insurance companies from bankruptcy by replacing the wisdom of a jury with the parsimony of a public servant.

National Trust. A general election.

Nationalisation. A form of theft distinguished from expropriation only by its more respectable name. When carried out for political reasons it invariably substitutes losses for profits, subsidies for capital, monopoly for competition, bureaucracy for management and politicians for shareholders.

Natural Justice. The minimum amount of legal principle which needs to be learnt to make a layman behave like a lawyer.

Necessity. A common term of abuse amongst opponents in the whispering jurisdiction.

Negligence. The categories are never closed, **(1932) A.C. 619.** For promoters of creative litigation the following are suggested:
Judicial Negligence – not knowing that adultery can take place in the front seat of a lorry, (1945) 1 A.E.R. 186. (imperitia culpae annumeratur)
Family Negligence – failing to take reasonable precautions against bringing the plaintiff into a miserable and foreseeable existence (quaere the defence of inevitable accident).
Social Negligence – introducing your brother's third wife by the name of his first wife.
Literary Negligence – (or things that could have been put better). "Dr. Hemsworth said that while overseas recently he had worked on a Netherlands project designed to measure the influence of a stockman's relationship with his pigs on the reproductive performance of the breeding herd". "The Age" 10.6.80.

Negotiable Instrument. The back-sheet on a five o'clock special.

Nemo Dat Quod Non Habet. The only defence to an action by a moneylender.

Next Friend. A plaintiff who is required to be joined in an action for the purpose of replenishing the lifeblood of the legal profession.

No Case. Evidence sufficient for a commital.

No Fault Liability. The probability of an estate agent, moneylender or hire purchase company succeeding as a defendant in the County Court.

Nolumus Leges Angliae Mutari. The motto of the Chief Justice's Law Reform Committee.

Nominal Damages. The reward of a housekeeper who successfully sues her octogenarian employer for breach of promise of marriage.

Non Justiciable. A partnership dispute between three or more solicitors.

Non Est Factum. The defence of an octogenarian employer sued by his housekeeper for breach of promise of marriage.

Victorian Bar News

Non Inter Sequestration. The doctrine of implied immunities? 54 A.L.J.R. 480E per Barwick, C.J.

Non Mi Recordo. A witness who can tell lies without committing perjury.

Not Negotiable. An offer from counsel for the Insurance Commissioner made before hearing the Plaintiff's opening address.

Notice. A barrister is deemed to know not only what his secretary actually told him but what he would have known if he had been listening to her when she was telling him and also what she would have told him if he had had time to listen to her.

Notice to Quit. An overgenerous payment into court on the second day of the trial.

Novation. An asexual triangle.

Nullity. The ability of counsel in the Family Court to make something out of nothing.

Nunc Pro Tunc. An excesive or extravagant offering as when a man forgets his wedding anniversary.

Nuzzer. ? ? ? ? ? ? ? ? ? ?

• • •

VERBATIM

Heard in County Court Chambers –

Counsel: We seek an Order by consent in accordance with these draft minutes. As Your Honour will see there will be a cast of thousands at the trial.

His Honour: Shall I order that wigs and gowns will be worn or do you consider that some other form of gladiatorial attire would be more appropriate?

Cor. Judge Walsh
1983

● ● ●

Brian Bourke appeared for the Defendant in prosecution under Liquor Control Act –

SM: What's this all about Mr Bourke?

Bourke: Selling grog at a Hotel at 11. a.m. on Anzac Day (before 1. p.m.).

SM: What's the plea?

Bourke: This was on Anzac Day – the Defendant doesn't want to go down.

SM: Come on, what's the plea?

Bourke: I suppose its got to be 'guilty'.

SM: What's the name of the Hotel?

Bourke: The Court House at North Melbourne.

SM: You're pretty lucky – that's the pub where I had my first beer.

Bourke: Well I should be a certainty for a bond!

SM: Well – we better hear the evidence.

PS . . . The result was never in doubt.

Police v Standing
Cor Dugan SM
Melbourne Magistrates' Court
9th August 1983.

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Mukhtar ". . . and I seek an order for certification of Counsel . . ."

Cor. Judge Fricke
26th August 1983.

● ● ●

"In the nature of things a contention that a sentence is manifestly excessive is not capable generally of sustained argument: the excessiveness is either manifest or it is not. Notwithstanding that observation, it is often debated at considerable length . . ."

R. v. McGinley
Young CJ, Court of Criminal Appeal
May 4, 1983.

● ● ●

At the conclusion of a short matter just after 10 o'clock, Crafti asked to be excused from the bar table.

Caven SM: What if I say no?

Crafti (sounding startled): I guess I'll just have to sit here.

Caven SM: You're going to be pretty bored by 4 o'clock, Oh go on – off you go!

Melbourne Magistrates Court
22nd August 1983.

● ● ●

Civil Action involving "The Khyber Pass Indian Restaurant" (as Defendant).

SM – to Clerk of Courts: "Call the Khyber Pass Indian Restaurant."

— (Clerk duly does so, no appearance at that stage on behalf of the Defendant).

SM (with grin on his face); "I think we will put that matter to the end of the list".

Melbourne Magistrates' Court
Cor. Dugan SM
18th August, 1983

● ● ●

Two Chinese gentlemen were applying for bail. A Chinese interpreter was in attendance –

SM: There is a letter here on the file. It may assist me, but it is written in Chinese. Is there a translation available?

Interpreter: I gave a translation to the magistrate who heard this case before.

SM: Can you tell me who that was.

Interpreter: No. They all look the same to me.

Cor. Dugan SM
Police v. The Kaw Teh
and Ng Long Seng
17th June, 1983.

● ● ●

Senior Constable on court duty:

"Keep the silence down, please".

Pummeroy SM: "Senior, I'd rather they keep the noise down."

Hastings Magistrates' Court
3rd August, 1983.

● ● ●

In the course of a County Court Appeal:

His Honour: There are orders for costs in the court below. That carries on .

Lopes: I would like to be heard on that. Witnesses' costs were allocated at the Prostitute's rate. If that is true, I would be objecting.

His Honour: I would not have thought so. $196 over two days, Mr. Lopes. It is hardly the figure that I have heard in this court.

Lopes: My apologies, Your Honour, I withdraw that.

His Honour: It is more like a Judge's salary, Mr. Lopes.

Cor. Judge Nixon
6, 7, 8, 9 June 1983.

● ● ●

Spring 1983

FOR THE PERIPATETIC

International Bar Association Conferences

1983

November 2-4 – London
Leisure time sharing.
November 14-15 – London
Law Office Management and Technology

1984

January 26-27 – Brussells
European Community Law
February 4-5 – Bombay
Regional Conference
February 19-24 – Houston, Texas
Energy Law
June 26-27 – Hong Kong
Arbitration Law
June 28-29 – Hong Kong
Real Estate Investment in the US and Canada
September 3-7 – Vienna
Twentieth Biennial Conference

1986

September 14-20 – New York
Twenty-first Biennial Conference

Enquiries: I.B.A., 2 Harwood Place, Hanover Square
London WIR 9HB, ENGLAND

Fifth International Family Law Conference
Fiji November 2-9, 1983

Enquiries: Wallis International Pty. Ltd.
P.O. Box 555 Broadway N.S.W. 2007

Seventh Malaysian Law Conference
Kuala Lumpur –
31st October – 2nd November 1983

Applications by 15th October to Bar Council,
States of Malaysia, Lot 5.55, 5th Floor,
Wisma Central, Jalan Ampang, Kuala Lumpur.

LETTER TO THE EDITORS

Dear Sirs,

> As I was going up the stair,
> I met a man who wasn't there.
> He wasn't there again today,
> Oh, how I wish he'd go away.

As I am Irish, I collect memorabilia. Since coming to the Bar (an event which came after, and may well have been triggered by, the onset of male menopause), I have avidly collected that which I shall be able to hoard until, one day, in my declining years, whilst I am resting by the fireside, contemplating my memoirs, I shall be able to reach for my collection marked "Victorian Bar" (which shall be as dear to me as the packet marked "Irish Bar"), and show to my children's children (in the unlikely event of my having any such) the bits and pieces I have gathered over the years.

My collection will include my $600 receipt from the Readers' Course, the menu from my first Bar Dinner, my very first backsheet, and, it was to be hoped, the first issue of the Victorian Bar News in which would be announced, to a cold and cynical world, that I had joined the Victorian Bar.

It was thus with no little excitement that I eagerly seized my copy of the Winter Edition 1983 when it came my way. In this, on page 38, so I had been told, was a list of those who had recently signed the Roll of Counsel.

With trembling hands, I leafed through the pages until I came to page 38. With anxious eyes I scanned the entire page. And with shattered heart I saw that I was not there. Shock and fear coursed through my body. Perhaps I had ceased to exist. That I thought I was, was really all an illusion.

I looked closely at the list. There was one person with the same, exactly the same Christian names as myself (the Litany of Catholic saints, with the ancestral Protestant thrown in for good luck, and as a safeguard against God really being C. of E. and not one of us). However, the surname was not the same, so it could not be me.

But then I noticed – I saw that this other person was shown as having the same Master and the same Clerk as I thought that I had (that is, until I started to doubt my existence). With the cold and clammy hands of fear clutching at my heart, I leapt up nine flights of stairs (rather like an Irish Superman) to Room 905. I entered cautiously – and doubt and fear and things not nice assailed me. For there, sitting at what I had thought was my desk, was a pretty girl.

A tear came to my eye, and my feet went cold. I knew that I had been a bit of a disappointment to my Master. For when he had asked me to assist him with his Irish pleadings (my Master being learned and cultured and a member of the Irish Bar), I had had to resort to an English/Irish dictionary, it being so long since I had lived in the old country, that I had quite forgotten the subtleties of my own tongue.

The pretty girl was so intent on what she was doing (obviously, Irish pleadings I thought) that she was unmindful of my presence, which was only more proof that I did not exist.

I grabbed by gown and bar jacket and crept away, determined to end my miserable life, and to give the said gown and jacket to the St. Vincent Society (formerly St. Vincent de Paul). However, I was saved. Before I could end it all by crossing William Street in peak traffic, a kindly and gentle soul came to me and explained that the pretty face at my desk was not a replacement, but rather the girl from Anstat who was updating our statutes.

I was so relieved, I nigh broke down and wept (right there, on the steps of O.D.C.). With stiff upper lip, I returned to my fortress home, looked in the mirror and at my letters patent, and convinced myself that I was really there. It is with this confidence that I pen this letter to you, dear sirs.

As I do exist, and as I am (I think) a member of the Victorian Bar, would you please be kind and gracious enough to include in your next issue, as one who is, the following, that is to say,

> John Francis Patrick Cyril
> Colclough Walsh of Brannagh
>
> Sean Proinnsias Padraig Coireall
> Colcloch Breathnach de Bhreathnach.

And may all the blessings of Old Ireland be with you always.

Yours, hoping that I shall continue to be,
WALSH OF BRANNAGH

SPORTING NEWS

The measuring stick for devotion to a particular sporting cause is usually regarded as the support given by those who are prepared to travel from Melbourne to Sydney to see the "Sydney Swans". Rattray has changed all that. He is heading off to Newport, Rhode Island, to support Alan Bond in the quest for the America's Cup. Stopping at Hawaii on the way, he and some mates are chartering a yacht at Newport for accommodation, whilst the races are run. The yacht will then be used to cruise around "Martha's Vineyard". He rejects the notion of a "booze cruise". All being well, he intends to then participate in the E22 World Championships to be conducted by the America Yacht Club, New York.

• • •

Reference to "The Curragh" conjures up thoughts of long green pastures and the sounds of hoofbeats pounding the turf. It is an area abounding with successful studs. Bourke has a farm named "The Curragh" on Scotchman's Hill near Point Arlington. On that farm he has a number of cows. He purchased a bull after having relied heavily on representations as to the bull's virility. He drew a blank – it was firing them, apparently. Bourke, the father of four daughters was not amused. Proceedings were drawn and listed before Judge McNab at Geelong. Judge McNab indicated that he knew the Plaintiff and the action was ultimately transferred to Melbourne and, needless to say finally settled.

• • •

Golfing fans are asked to keep Tuesday 28th February 1984 free as this is the day set aside for the annual Match of the Bar and Bench versus the Solicitors. It will be held at Royal Melbourne. Meantime, the Bar was represented by L. Ross, McTaggart, Williams and Cashmore at Yarra Yarra on the 29th August 1983 in the match involving the Victorian Council of Professions. The Dentists tended to pull to the left; the Medicos did not operate as a team; the Accountants couldn't figure the greens; the Surveyors got lost; the Vets strayed into paddocks; other professions did not play like professionals. Les Ross accepted the Shield on behalf of the Bar and McTaggart, true to form, collected the trophy for the best individual score.

"You've got to get up early to beat Nicholson" is the catch cry on the Sale circuit. Shatin and Shannon are keen tennis players and don't object if beaten fair and square. Nicholson J, however, insists that the first serve be launched by 7 a.m. and Shannon is probably justified in complaining that he can't see the ball in the dark.

• • •

Hampel J was doing some moonlighting as a ski instructor at Buller in July. Following a lesson given to a group of Japanese tourists, His Honour was seen to be gratified when one of his students complimented him on his excellent command of English.

On another occasion one of his students was having trouble with his bindings. His patience was fast ebbing when His Honour suggested that he go inside and attend to them. It was then that the student turned nasty –

"It's all very well for you professionals. I'd like to see you in an office in a suit."

"FOUR EYES"

• • •

SOLUTION TO CAPTAIN'S CRYPTIC No. 45

MOVEMENT AT THE BAR

Members who have signed the Roll since the Winter 1983 Edition

A.M. GRUZMAN (N.S.W.)
R.M. DOWNING (re-signed)
G. McD. Harris/Foley

Member who has had his name removed from the Roll of Counsel at his own request

K.H. GIFFORD Q.C.

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

SENIOR MASTER K.J. MAHONY
R.L. CRISP
MASTER E.K. EVANS
L.S. OSTROWSKI Q.C.

Members who have ceased active practice

P.C. MARTIN (Crown Prosecutor)
N.J. WEBB

Member who has died

SIR JAMES TAIT Q.C.

TOTAL NUMBER IN ACTIVE PRACTICE: 844

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MORE UNREPORTED JUDGMENTS OF THE COURT OF CRIMINAL APPEAL

For copies of these judgments see Ross D. (ODC 406)

APPEAL

Proviso to S. 568 (1) applied

R. v. Clarke June 7, 1983.

Where a ground of appeal is that at trial the judge wrongly refused to direct the jury to acquit, the question on appeal it has there been a miscarriage of justice.

R. v. Kronssoratis and Povodj (No. 2) June 23, 1983

"compromise verdict"

The basis for quashing a conviction when it is said that the verdict is a compromise verdict is either that the verdict returned is inconsistent with some other verdict or that it is a verdict that is simply not open on the evidence before the jury.

R. v. Piggin May, 5, 1983

ATTORNEY-GENERAL'S REFERENCE

How such a reference is made

Attorney-General's Reference No. 1 May 13, 1983

CONFESSION

An adopted confession may be tendered in evidence unless unfair (*Driscoll v. R.* 137 C.L.R. 517). Adoption may be by signature, initialling, marking or by a reading back verified by tape recording.

R. v. Sanftl June 23, 1983

CONSPIRACY

The crime of conspiracy requires the Crown to prove an agreement to commit a particular crime. The Crown evidence is insufficient when it only points to the commission of a number of offences.

R. v. McCaul & Anor.

(*R. v. Thomas* C.C.A. Sept. 29, 1980 [unreported] followed).

CORROBORATION

The finding of heroin on the accused person capable of corroborating evidence of accomplices on a charge of trafficking in heroin.

R. v. Parker May 13, 1983

CRIMES ACT S 399

Where the evidence upon which the application by the Crown under s. 399 is based forms a necessary part of the defence of an accused the discretion (to allow cross-examination on prior convictions) can be exercised only in exceptional circumstances.

R. v. McCaul & Anor April 21, 1983

(*R. v. Cutajar* C.C.A. Dec. 12, 1980 [unreported] followed)

Evidence putting the accused in a good light or suggesting his good conduct is not of itself sufficient reason for the exercise of discretion.

R. v. McCaul & Anor. April 21, 1983

(*R. v. Crawford* 1965 V.R. 586 per Smith J at 591 followed)

CRIMINAL DAMAGE

A sentencing judge is entitled to take into account the circumstances in which the criminal damage was inflicted. He is not restricted to a consideration of the amount of damage only.

R. v. Marani August 10, 1983

DRIVER'S LICENCE DISQUALIFICATION

Accused convicted of theft of motor car. Disqualification under s 96 (3) requires a sentencing Judge to exercise the same discretion as in the imposition of other penalties.

R. v. Tilley August 10, 1983

EVIDENCE

Murder trial – accused speaking to police about murders not on the presentment – those answers should have been excluded, but the Crown led evidence linking the accused with the other murders – Proviso to s. 568 (1) applied.

R. v. Mallard July 15, 1983

EXPERT EVIDENCE

Expert witness must be capable of giving opinion evidence outside the knowledge or judgment of jurors. Further the conditions precendent to evidence of opinion being received.

R. v. Haidley & Alford August 19, 1983

IDENTIFICATION

Witness sees accused outside court and gives evidence of that, and that he was in the vicinity of the crime. Dock identification. All evidence admissible.
R. v. Williams May 12, 1983

Trial judges should in charging juries avoid the tendency to adopt a cumulative approach that takes up issues raised in prior cases (on identification). The real object is that the jury understand the possible weakness in identification evidence and the need to take particular care in its use.
R. v. Williams May 12, 1983

Similar sentiments expressed in
R. v. Haidley & Alford August 19, 1983

JUDGE'S CHARGE

Trial judge said in his charge "you have got to decide here who is telling lies, who is committing perjury". That is erroneous and would vitiate the trial. The correct direction is that the jury must be satisfied that the police are truthful and accurate. It is wrong for a trial judge to refer to "no evidence of police conspiracy". [Proviso to s. 568 (1) applied]
R. v. Clarke June 7, 1983

MANSLAUGHTER

Criminal negligence. The objective test applies (*R. v. Wills* (unreported) 15.2.83 applied)
R. v. Taylor August 4, 1983

NO CASE SUBMISSION –
(See Case Note p. 10)

A-G's Reference No. 1	May, 13, 1983
R. v. Williams	May 12, 1983
R. v. Haidley & Alford	Aug 19, 1983

Asking the jury "the question"

"Where there is some evidence sufficient to meet a no case submission, a judge may nevertheless have a discretion to invite the jury to acquit the accused". (p.10) (*A-G's Ref. No. 1* referred to)
R. v. Williams May 12, 1983

PERJURY

Crimes Act S. 315 – materiality not an ingredient of the offence of perjury.
R. v. Giannarelli April 19, 1983

RECENT POSSESSION

Charges of burglary and handling – accused remained silent when first shown the stolen goods and made an unsworn statement at the trial. Trial judge should have directed the jury that the silence of the accused in the first instance could only be used to evaluate the credit of his unsworn statement.
R. v. Biason June 22, 1983

SELF-DEFENCE

Self defence may be an issue notwithstanding the accused had not been struck. It may arise where the accused reasonably believes that the deceased intended to make a destructive onslaught upon him.
R. v. Lane April 22, 1983

SENTENCE

Appeal

Against sentence. Not open to applicant to reply on an argument abandoned before the sentencing judge.
R. v. Saysombath April 11, 1983

Armed Robbery

DPP's appeal. Sentence increased from 2 years, minimum of 1, to 6 years, minimum of 4.
DPP v. Smith & Ors. August 11, 1983

Crimes Act s. 176

Maximum sentence for receiving a secret commission is inadequate where the secret commissions exceed $1m.
R. v. McGinley May 4, 1983

Manifestly Excessive

In the nature of things, a contention on appeal that a sentence is manifestly excessive is not capable generally of sustained argument: the excessiveness is either manifest or it is not.
R. v. McGinley May 4, 1983

Offer to give evidence

Where some sentencing benefit is sought by an offer to give evidence for the Crown, the accused should show that such offer was dictated by remorse, or would result in real benefit to the public.

R. v. McGinley May 4, 1983

Parity

Accused gaoled while co-accused with worse prior history given a bond.

per Starke J. "It would cause an ordinary, conscientious fair minded member of the community, seised of all the facts to come to a conclusion that the applicant had been unfairly treated". (p. 7)

per Murphy, J. "A reasonable person, informed of the facts" would conclude the applicant had been unfairly treated (p. 8)

per O'Bryan, J. "Well intentioned and . . . well informed members of the community might regard the disparity . . . as unjust (pp 10-11)

(Applicant's sentence of 2 years imprisonment quashed – given bond).

R. v. Rawson July 25, 1983

Probation

It is not open to a judge to sentence an accused to a term of imprisonment on one count and to admit him to probation on another.

R. v. Pearce May 13, 1983

Section 435A

Taking other offences into account pursuant to S. 435A "must have the effect of hardening the sentence . . . . appropriate for those offences" on the presentment.

R. v. Bakopoulos April 12, 1983

Statistics

Sentencing statistics can at best be an approximate guide to a sentencing judge, and no more than that on appeal.

R. v. Giannarelli & Anor. April 19, 1983.