VICTORIAN BAR NEWS

No. 63 Summer 1987

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The Editors' Backsheet

Judgespeak

A familiar category of Judgespeak is the Crosscourt Backhand Profession of Neutrality (with or without Topspin). What appears literally as an assertion of impartiality as between two possible views based on the absence of evidence nevertheless signals unmistakeably the speaker's true feelings.

Connoisseurs will savour this outstanding example from the judgment of Sir John Donaldson MR in **Attorney-General v Guardian Newspapers Ltd.** [1987] 1 WLR 1248, 1274. The case concerned applications for the discharge of interlocutory injunctions granted the previous year against certain newspapers to prevent publication of the Peter Wright memoirs. The ground of the application was the recent publication of Mr. Wright's book "Spycatcher" in the USA and its consequent availability in the UK.

The Master of the Rolls said

> " .... there is no evidence of how much, if any, of the text of 'Spycatcher' has any basis of truth. For aught I know it may all be true or it may all represent the embittered imaginings of an elderly man in poor health or there may be some mixture of fact and fiction."

Definitely the Topspin version.

Disappointed Cricket Fans

Normally Bar News does not publish anonymous contributions. But the genuine pathos shining out of the following letter, signed only *"ABA Cricket Fan"*, would melt the sternest editorial hearts —

> "I thoroughly enjoyed **Bill Gillard's** enthralling account of the triumphant ABA cricket tour of England and Ireland.
>
> But I have been distressed to discover a major fixture which was overlooked, or perhaps even eliminated because of the Bar Council's notorious penny-pinching.
>
> It seems the ABA XI played Little Wallop under Dollop at their picturesque ground. The locals were a fearsome combination, including a former member of the Trinidad and Tobago Post Office Third XI and a chap who often plays snooker with Ian Botham's brother-in-law.
>
> On a crumbling pitch and a fading light Bill hit three sixes into the duck pond resulting in an unprecedented outbreak of RSI among the ducklings. The RSPCA are believed to be still investigating."

Increase your word power

Those jaded with mundane words might care to follow the example of D.M.J. Bennett Q.C. of the NSW Bar who in a paper at the 24th Australian Legal Convention in Perth spoke of the *"floccinaucinihilipilification"* of the distinction between misapprehensions of fact and misapprehensions of law: *Equitable Estoppel and Related Estoppels* (1987) 61 ALJ 540, 551. The urbane and sophisticated editors of Bar News were of course completely familiar with the term, but just to refresh our memory we turned up the Shorter Oxford, where the meaning is given — "the action or habit of estimating as worthless".

The late Stewart Collie

We note with sadness the recent death of Stewart Henry Collie, a Master of the Supreme Court from 1961 to 1976.

A sprightly diminutive man, his good-natured but forthright approach to his task made him a much liked figure among members of the Bar.

He had a distinguished career with the RAAF during the Second World War in the South Pacific. He reached the rank of Squadron Leader and was mentioned in dispatches.

The Commercial List

We think Ray Johnstone was being a bit hard on the Commercial List in his article in Spring 87 Bar News issue No. 62.

It is now quite common for trials in the Commercial List to be heard within two to three months of issue of writ. In some cases the time elapsed has been substantially shorter, and on occasions measured in days rather than weeks.

Such prompt processing of litigation — and usually substantial and complex litigation — is to our mind a major achievement for which the judges and practitioners working in the Commercial List deserve credit. Without doubt there has been some rough handling along the way of delicate sensibilities. The stately and measured tread of interlocutory process has been given a rude shakeup. For example, interrogation is almost a

dirty word. But the results speak for themselves. It's the customer who counts and the customers here — the litigants in the Commercial List — are regularly getting results very much quicker. If there is ground for criticism in our view, it is not that the Commercial List is too fast but that the rest of the civil jurisdiction is too slow. There is a lot of force in the comment that a company can get a hearing of a claim for a hundred thousand dollars within a few months of issue of writ whereas a seriously injured plaintiff needing to restart his life might be looking at a delay measured in years.

The Commercial List shows what can be done. The community ought not to be asked to put up with substantially worse service in other jurisdictions. It comes down to a matter of funding and resources (i.e. what used to be known vulgarly as money). The provision of an efficient system of justice ought to be a high priority. In considering competing priorities, there is, in the words of Sir Anthony Mason when addressing the recent Australian Legal Convention, a case for reduced expenditure on marginal government activities.

Should the User Pay?

While on the subject of the Commercial List, the comment can be made that commercial enterprises get pretty good value. Last year there was massive litigation spawned by Mr. Holmes a Court's takeover bid for BHP — see Helen Symon's excellent article "BHP Bell and the Bar" in the Spring 1986 issue of Bar News. The parties were striving to either gain or retain assets worth billions. They were able to utilise virtually the full time services of Marks and Beach JJ for months, along with courtrooms, court staff and other resources paid for by the community. Their contribution? Each time a writ was filed the stamp duty of $79 was paid. Affidavits were $11 a time. Transcript was paid for. And that's about it. The total was probably the equivalent of a few reasonably decent boardroom lunches.

By contrast, the same parties subsequently engaged in an arbitration. The arbitrators were Lord Roskill, Sir Maurice Byers Q.C. and Robert Ellicott Q.C. One can reasonably assume that such a distinguished board made substantial charges for their work, which in one sense benefited the parties in precisely the same way as did the litigation in the Commercial List — viz it provided a dispute resolution service.

We do not agree with the view vigorously advocated on a number of occasions by Attorney-General Jim Kennan Q.C. that it is inherently wrong that litigation be used as a weapon in a takeover battle. If an action is an abuse of process, a defendant has the right to have it struck out. But whether the community should have to foot the bill, let alone give such litigation priority, is another matter.

If commercial litigants get the benefit of accelerated hearing in a special list, there is a case for them making a substantial contribution to the cost of providing those benefits. Further, there seems to be a good argument for relating that contribution to the amount involved. For example, 1 per cent up to $100,000, .5 per cent up to $1 million and .1 per cent beyond. Like jury fees, the amount would be payable by the plaintiff before the start of a trial and would of course be recoverable as part of the plaintiff's costs if the claim succeeded. A lesser amount would be payable for each succeeding week of the trial.

If that proposal is thought too radical, the fee for issuing a writ in the Commercial List or transferring a proceeding to the List could be increased to $1,000. Last year there were 286 writs issued and another 61 proceedings transferred. A realistic fee for issuing and transfer would meet the salaries of the judges and court staff concerned and probably provide a surplus which could be used to improve services for other litigants.

The Editors

Criminal Bar Association Report

Fees

Essentially in the recent past the fixing of increases to fees payable to counsel in the criminal jurisdiction came about as a result of discussion and negotiation between the Criminal Bar Association and the Legal Aid Commission. This was done with the blessing of the Bar Council. The last of such increases occurred on the 27th October 1986 and provided for a 7.5% increase across the board. Although there does not exist a Fee Fixing Tribunal as such, within the last twelve months a Cost Co-ordination Committee has been created and includes Douglas Meagher Q.C. as the member representing the Victorian Bar. This committee has already dealt with the fixing of increased fees to counsel both in the County Court and Magistrates Court. Although it is not contemplated that the committee will deal with fees payable in the criminal jurisdiction, the Criminal Bar Association is of the view that it is desirable, in all the circumstances, that representations in respect of increased fees in the criminal jurisdiction should now be dealt with by the Bar Council Fees Committee. It is envisaged that by early 1988 the scale of fees payable to counsel in the criminal jurisdiction will have been reviewed.

Compulsory finger printing

On Wednesday 9th September 1987 at an extraordinary General Meeting of the Criminal Bar Association the following resolutions were passed unanimously:

1. That in the view of this Association there should not be at present any legislation to make finger printing compulsory without further and sufficient public debate.
2. That the Criminal Bar Association is at present opposed to legislation which would —
   (a) make it an offence to refuse to give finger prints;
   (b) enable any adverse inference to be drawn against an accused person from such refusal.
3. The Criminal Bar Association opposes the introduction of legislation which has the effect of authorising or permitting any use of force or violence which enables the obtaining of finger prints from a person suspected of having committed a criminal offence.
4. The Criminal Bar Association views the introduction of legislation authorising or permitting the use of force or violence in a Police Station as contrary to the common law rights and fundamental rights of the individual and inimical to the best interests of the community.

Although similar legislation as contemplated can be found in other States within the Commonwealth it is the unreserved view of the Association that legislative endorsement of the use of force or violence in a Police Station introduces a totally new aspect into the criminal investigation process, the ramifications of which give rise to considerable disquiet.

Law reform

On 5th November 1987, members of the Association met with Mr. George Zdenkowski, ALRC Commissioner in charge of the Sentencing Reference. The Reference on sentencing was given to the Law Reform Commission by the Federal Attorney-General in 1978. In 1980, an Interim Report was tabled and the Reference was revived in 1984. Various discussion papers have been prepared and deal exhaustively with all aspects of sentencing, including procedure, penalties, prisons and the sentencing process insert. The Association is keenly interested in being involved in this area of law reform and has been invited to make comment or submissions in respect of the Reference. Counsel interested are invited to inspect the discussion papers and make such submissions or comments as they feel should be forwarded on to the Law Reform Commission.

Magistrates' Court Bill

The Magistrates' Court Bill seeks to establish the Magistrates' Court of Victoria and the repeal of the Magistrates' Courts Act 1971 and the Magistrates' (Summary Proceedings) Act 1975. The Bill provides for, inter alia, an increase in the monetary jurisdiction in criminal matters from $10,000 to $40,000 and an increase in the number of indictable offenses which may be heard and determined summarily to 61. Although the jurisdiction of the Magistrates Court is to be substantially upgraded, Section 9 of the Penalties and Sentences Act 1985 is not to be amended with the result that the maximum sentence that a Magistrate may impose in respect of an indictable offence dealt with summarily remains at two years.

It is foreseeable that, in the not too distant future, there will be a clamour for increased sentencing power in the Magistrates' Court.

The Criminal Bar Association has made submissions in respect of the proposed Bill to the Bar Law Reform Committee. The Bill is seen as not only adjusting anomalies in this area but as having the effect of ridding the higher courts of the substantial backlog of work. These supposed beneficial effects must be seen, in the final analysis, as militating against persons right to trial by jury despite the Bill's requirement that the defendant must consent to a summary hearing. Any backlog in the Magistrates' Court will undoubtedly be dealt with by Acting Magistrates whose appointment is empowered by the proposed Bill.

A. Shwartz

Common Law Bar Association

The attention of the Committee of the Common Law Bar Association has continued to be focused on the issue of the listing of personal injury cases in both the Supreme Court and the County Court. Of recent times, problems have been experienced more in the listing of cases in the Supreme Court than in the County Court.

With respect to the Supreme Court, it has been the view of the Association that because so few cases are being listed, litigants and, in particular plaintiffs, are being disadvantaged. As well as this, practitioners in the personal injuries jurisdiction have encountered difficulties in conducting their practices.

Representatives of the Committee of the Association have met with representatives of the Law Institute of Victoria on several occasions in an endeavour to formulate submissions acceptable both to the Law Institute and to the Bar which could then be made to the State Government with a view to resolving this ongoing problem.

Tom Wodak

Law Council of Australia Report

New Executive

John Faulks, Canberra barrister and solicitor, succeeded Daryl Williams Q.C. as President of the Law Council following the Annual General Meeting held in Perth at the end of the highly-successful 24th Australian Legal Convention.

The Vice Presidents are Denis Byrne, solicitor, of Brisbane, and Alex Chernov Q.C., of Melbourne. These three most senior officer-bearers will bring to their positions a diversity of background while meeting the constitutional requirement that one of the three be a person practising solely as a barrister.

Mahla Pearlman, of Sydney, was re-elected Treasurer. Daryl Williams, of Perth, remains a member of the Executive as Immediate Past President.

Bernie Teague, solicitor, of Melbourne who with Alex Chernov was appointed to the executive for the period up to the AGM following the constitutional changes made in June this year, was elected to the new Executive as was Bruce Debelle Q.C. , of Adelaide.

Michael Gill, of Sydney, after serving in all Executive positions, has now ceased to be a member of the Executive.

Bicentennial Convention

Following a great 24th Australian Legal Convention in Perth, it is time to announce plans for a special Bicentennial Australian Legal Convention in 1988.

This extra Convention, the 25th, will be held in Canberra next year from 28 August to 2 September. The normal biennial Convention is scheduled for Sydney in 1989.

Three distinguished overseas guests already have accepted invitations to Canberra: The Chief Justice of the Supreme Court of the United States, the Hon. William Rehnquist; the Vice President of the Supreme People's Court of the People's Republic of China, Mr. Ren Jianxin; and the Rt. Hon. Lord Justice Sir Michael Mustill, of the Court of Appeal, London. The Governor-General, Sir Ninian Stephen, has agreed to open the Convention.

The Convention theme is 'Beyond 200'. It is designed to encourage speakers and delegates to think about what the legal profession has to learn from Australia's first two centuries that will provide directions for the future.

Lobbying co-ordination

One of the many important meetings held in Perth during the Convention was that of the chief executive officers of the Law Council and its constituent bodies. The major topic discussed was co-ordination of effort in preparing and making submissions to the Federal Government and other federal authorities.

It was generally agreed that there should be close consultation so that the Law Council and the constituent bodies would know what matters were being worked on, and that there should be co-operation aimed at achieving maximum co-ordination.

The Council, at the subsequent Annual General Meeting, also considered this matter. It noted the importance and benefits of co-ordination of lobbying efforts and asked the Executive, Secretariat, Sections and committees of the Law Council, and the constituent bodies, to make every effort to achieve this co-ordination in the interests of the effectiveness of lobbying on behalf of the profession and reduction of duplication of effort.

Common law rights

The Council in Perth approved the approach to be taken in arguing for the retention of common law rights for Commonwealth Government employees. The Government has announced its intention to abolish those rights in the workers compensation area. Earlier, the Common Law Rights Committee, chaired by David Miles, met in Perth to prepare recommendations to the Council. In response to representations already made to a range of ministers, MP's and Senators there have been requests for further information and discussions. The Council's views also have been made known to the unions to which Commonwealth employees belong and to the public, notably through The Canberra Times.

Submissions update

Recent submissions by the Law Council to the Federal Government and other authorities have proposed that

— common law rights for Commonwealth employees be maintained
— the Australia Card legislation not be passed in its existing form

— the Government accept a duty of care for the security of persons lawfully upon federal court premises
— Singapore's Internal Security Act should be repealed
— the rule of law should be maintained in Fiji
— arrangements should be made for W.A. Family Court judges holding commissions in the Family Court of Australia to sit in Sydney to alleviate delays there
— there should be consultations with the Law Council on the proposed child support formula
— two fundamental principles of criminal law — proof of guilt beyond reasonable doubt, and the right to remain silent — would be undermined if a persuasive burden of proof was placed on a defendant.

Welcome — Mr. Justice Teague

With the possible exception of a few Trappist monks and abalone fishermen, all Victorians would have been aware of the appointment to the Supreme Court of Victoria of Bernard George Teague. Supreme Court appointments are usually fairly low profile media events, rating probably about the same attention as the engaging of a new assistant coach for Fitzroy Seconds. The reason for this unusual attention was clear — his Honour was the first member of the Supreme Court whose entire professional career had been spent as a solicitor.

The rights and wrongs of such an appointment as a matter of general principle have been debated elsewhere. It is with his Honour as a man and as a new Judge that we are now concerned.

His Honour has had an extensive career as a common law litigation solicitor stretching back to the very early sixties. As is well known, for many years he acted for the Herald and Weekly Times Group in libel matters. His Honour handled that demanding task with characteristic efficiency and common sense and developed a deep understanding of the law of defamation. The notorious fact that libel litigation in Victoria is but a fraction of the volume north of the Murray is probably due in no small part to the restraining influence that his Honour's prudent advice had on the enthusiasm of the would-be Woodwards and Bernsteins writing for the Herald stable.

His Honour was also much concerned with personal injuries, insurance and other forms of common law litigation.

Members of the Bar who worked professionally with his Honour in his days as a solicitor have appreciated his qualities of reliability, good humour and capacity for hard work. It was moreover a colourful experience in the most literal sense since his penchant for multi-coloured shirts and bow ties would enliven the most dreary conference or hearing. We hope his Honour's tours of duty in the Practice Court show similar sartorial adventurism.

One feature which stands out in his Honour's career to date is his whole-hearted and selfless devotion to the organisations to which he belonged, and in particular the Law Institute and his firm Corrs Pavey Whiting & Byrne. He has been the quintessential team man. The depth of gratitude and affection which his Honour's fellow solicitors felt for him was apparent at his Honour's welcome and was well expressed in the warm and eloquent speech of the President of the Law Institute Mr. Ian Dunn.

Chairman's Message

The Bar Council's new Chairman, ***Charles Francis Q.C.*** *on the challenges facing the Bar — and some brief nostalgia*

When I first came to the Bar, it was in numerical terms smaller than the larger Clerks' Lists are today. The Bar Council met three or four times a year only, and the Chairman's duties involved less work than that of the Chairman of a Clerk's List today. At that time the Chairman of the Bar Council was ordinarily referred to as "the Leader of the Bar" and our then Leader was E.R. ("Ted") Reynolds Q.C.

One can look back at that time with nostalgia and a certain amount of envy. Ted Reynolds was a skilled cross-examiner and a silver tongued orator. His speeches at Bar Dinners, welcomes and retirements were small masterpieces. When "Jimmy" Macfarlane retired in 1949 everyone wondered what Ted would say. Jimmy was an able but bad tempered judge, who had fought personally with almost every member of the Bar, an impossible task today. Ted, nevertheless, made a good speech with only passing reference to "a certain intellectual impatience" of His Honour. Ted, at that time, made a good leader of the Bar, but he was inclined to be lazy.

Ted Reynolds' approach to practice was relaxed and as a silk he frequently wandered off to his club for lunch about 12.35 leaving his junior in charge. Often he was not back until after 3 p.m. having enjoyed his cigars and port after lunch. I do not believe, however, the present Bar would or could have a corresponding Chairman today.

May I say I am very honoured to be the Chairman of the Victorian Bar but I fully realise that the Bar expects a great deal from anyone who is given the job. The Bar today is very much under attack — at times we seem almost in a state of siege — and consequently there is very much a need for leadership and, in particular, in our dealings with outside bodies and government. That leadership, however, has to be appropriate for a body which consists of almost a thousand highly intelligent individualists with widely differing views.

Further the job of Chairman now involves chairing a Bar Council confronted with a wide range of major problems, many of which are heightened by the present economic climate, and which may well become worse in the next year or so. Some of the important jurisdictions which provide so many of our members with their bread and butter are shrinking because of legislative intervention and may even cease to exist. Some of these changes are, I believe, also detrimental to the public interest, but when the Bar expresses its views on such subjects it is usually accused of speaking only in self-interest. Nevertheless we have a duty to question seriously any system of compensation where the victim does not receive fair, adequate and full compensation.

It should not be forgotten that because in the 19th Century English juries consistently gave relatively large verdicts for victims of railway accidents British railway companies were compelled to develop the safest railway system in the world. Rather than tinkering with the present legal system, it may be better for government to concentrate on enforcing higher standards of safety on the roads and in the work-place and so reduce the number of personal injury claims. Furthermore the Courts are likely to prove far more effective than administrators in exposing bogus or exaggerated claims, when such claims are adequately investigated and then thoroughly tested in Court by skilled cross-examination. On matters such as this the Bar is in a very good position to advise the public but we have a real problem in publicising our message.

Consequently one of the most important tasks of the new Bar Council and of myself as its Chairman is to ensure that our views come before the public, and also that when the Bar

expresses a view the public understands we have a genuine contribution to make to the debate, and that the public listens to our views with interest and some respect.

Our internal problems have become well identified in the last twelve months. At a time of shrinking jurisdictions and some restriction on legal aid the average barrister finds himself with a modest income but spiralling costs. Our rents are high and many other items such as professional indemnity insurance are increasing. The present Board of Directors of Barristers' Chambers Limited is already hard at work investigating how we can save money to thereby reduce the burden for individual barristers. We have also deliberately chosen one of our most junior members to be a Director of Barristers' Chambers Limited to ensure that the problems of the junior bar can at all times be fully ventilated before the Board. Equally the Bar Council recognises the very important task of addressing the concerns of the large junior Bar to ensure that barristers with genuine talent can survive until they become adequately established.

Although our problems are numerous one cannot but be cheered by the knowledge that within our Bar we have an enormous wealth of diverse talent. The proper utilisation of that talent to solve our problems may well prove to be the most important task of all. Perhaps above all the Bar needs a Chairman and Council who are skilled administrators. The Chairman and the Bar Council can no longer perform all their many duties properly without adequate delegation which, in turn, requires appropriate co-ordination. Organisations such as the Criminal Bar Association are now important independent bodies within our Bar and may increasingly have to take on duties previously performed by the Bar Council.

During my recent trip to the London Bar September Conference I observed that many of the tasks we have undertaken as a Bar Council are in England performed by the barristers' clerks and their staff within each set of Chambers. Increasingly in England barristers' clerks have tertiary education especially in the field of business administration. Smaller groups of barristers are obviously more sensitive to their own particular needs than any Council administering a Bar of our size. Some barristers will want to make full use of modern technology and will see the benefit of spreading the cost across the Bar. On the other hand many junior members need to be protected from a situation in which they are locked into what is to them a relatively high financial commitment. The resolution of these apparent conflicts of interest is another important question.

The present Bar council intends to keep the Bar fully advised on what it is doing. We hope we will be a Council to whom all members of the Bar can relate and we realise the importance of communication and accessibility.

As the Lord Chief Justice of England Sir Geoffrey Lane said on 25th September this year "We need the Bench and the Bar. They are the foundation of our freedoms, which lie in the independence of the Bar and of the Judiciary". We are vital to democracy and we must maintain strength and independence so that the Bar can continue to serve the public in accordance with our best traditions.

Discourtesy and Contempt

by Stephen Charles Q.C.

It is said of Lord Russell of Killowen, Lord Chief Justice at the turn of the century, that a certain gentleman visited his chambers whilst he remained at the Bar, to ask him to support an application for a position. Russell's clerk required the visitor to put his request in writing, after which the clerk ushered him in to The Presence. What followed may be instructive to the young barrister, hoping to make an impression on solicitors —

> "Visitor: 'How do you do, Sir Charles? I think I had the honour of meeting you with —'
>
> Russell: 'What you you want?'
>
> Visitor: 'Well, Sir Charles, I have endeavoured to state in the letter which I ...'
>
> Russell (taking up the letter): 'Yes, I have your letter, and you write a very slovenly hand.'
>
> Visitor: 'The fact is, Sir Charles, I wrote that letter in a hurry in your waiting-room'
>
> Russell: 'Not at all, not at all; you had plenty of time to write a legible note. No, you are careless. Well go on.'
>
> Visitor: 'Well, Sir Charles, a vacancy has occurred in ...'
>
> Russell: 'And you are very untidy in your appearance.'
>
> Visitor: 'Well I was travelling all night. I only arrived in London this morning.'
>
> Russell: 'Nonsense, you have had plenty of time to make yourself tidy. No, you are naturally careless about your appearance. Go on.'
>
> Visitor: 'Well, Sir Charles, this vacancy has occurred and ..... asked me to see you ...'
>
> Russell: 'And you are very fat.'
>
> Visitor: 'Well, Sir Charles, I am afraid that is hereditary. My father was very fat ...'
>
> Russell: 'Not at all. I knew your father well. He wasn't fat; it is laziness.'" (Oxford Book of Legal Anecdotes 269-70)

Now it must be said that few modern advocates aim at so inspired a level of insolent invective. Still fewer (with the possible exception of R.P. Meagher QC of the N.S.W. Bar) achieve it on such a sustained note. It must be remembered that Russell was actually Attorney-General at the time (although I am not to be taken as suggesting that Jim Kennan should profit from this example). But it is one thing to achieve such heights in chambers or the Bar News, quite another to scale them in court.

F.E. Smith did. The same source records (279-80) that "his worst insults were reserved for Judge Willis, a worthy, sanctimonious County Court Judge, full of kindness expressed in a patronising manner. F.E. had been briefed for a tramway company which had been sued for damages for injuries to a boy who had been run over. The plaintiff's case was that blindness had set in as the result of the accident. The judge was deeply moved.

> 'Poor boy, poor boy', he said. 'Blind. Put him on a chair so that the jury can see him.'

F.E. said coldly:

> 'Perhaps you Honour would like to have the boy passed round the jury box.'
>
> 'That is a most improper remark', said Judge Willis angrily.
>
> 'It was provoked', said F.E., 'by a most improper suggestion.'

There was a heavy pause, and the Judge continued,

> 'Mr. Smith, have you ever heard of a saying by Bacon — the great Bacon — that youth and discretion are ill-wed companions?'

'Indeed I have, your Honour; and has your Honour ever heard of a saying by Bacon — the great Bacon — that a much talking Judge is like an ill-tuned cymbal?'

The Judge replied furiously,

'You are extremely offensive, young man."

And F.E. added to his previous lapses by saying:

'As a matter of fact we both are; the only difference between us is that I am trying to be, and you can't help it.'

The failure on the part of the judge to commit F.E. instantly — or at least to report him to the Benchers of Gray's Inn — can only be explained on the ground that the judge had correctly predicted F.E.'s rise to the Lord Chancellorship.

Of course there are rare occasions on which discourtesy is necessary. These seem to have arisen usually in Ireland and the Irish advocates have naturally demonstrated a rare ability to insult without the provocation of terminal wrath. For example, the Lord Chancellor in Ireland was at one time Sir Ignatius O'Brien. His Court of Appeal was a disaster and counsel were usually unable to make the simplest statement without interruption. O'Brien insisted upon informing counsel of the way his mind was operating. According to Maurice Healy, in "The Old Munster Circuit" (at 189) Serjeant Sullivan once interrupted such a soliloquy by sweetly suggesting that the operation of what his Lordship was pleased to call his mind, would become relevant if his Lordship would first listen to the facts of the case. Quite a lot of progress was then made during the remainder of the day. It was another Irish counsel, Curran, who offended Mr. Justice Robinson, to the point where the judge cried out, 'If you say another word, sir, I'll commit you'. Curran responded 'Then, my Lord, it will be the best thing you will have committed this year'.

Contemplate the following situation in a court presided over by the Irish Lord Chief Justice Sir Peter O'Brien (universally known, because of his lisp, as Pether), who liked it to be thought that he was, even then, a gay Lothario; it was said that a pretty witness would often turn the case before him and a veiled reference to the weaknesses of mankind would always revive his failing interest. Maurice Healy relates (op.cit. 48-49) that one Paddy Kelly was endeavouring to bolster up an application for which he had not much legal support by reading the more salacious parts of the correspondence.

"After a while Pether lifted a deprecating hand. 'Mithter Kelly', he lisped with a melancholy smile, 'Mithter Kelly, it won't do, it won't do at all. There wath a time when thuch thingth interethted me; but I regret to thay I am an exthinct volcano!'
Paddy was not in the least put out;
'Begor, me Lord', he grinned, 'I think there's a r-rumble in the ould crathur yet!' Pether sat back, delighted; Paddy got his order!"

I have enjoyed contemplating which members of the present Victorian Bench would respond in like fashion. Another tale recorded by Maurice Healy (op.cit. 55) involved the great Lord Chief Baron, Sir Christopher Palles, who "came into court one day and began to sniff very threateningly.

'There is a very unpleasant smell in this Court,' he said.

'Oh yes, my Lord,' said one Hyacinth Plunkett, [a more than ordinarily venerable junior who spoke in a round falsetto voice that in moments of stress was more piccolo than flute] 'We noticed it even before your Lordship came in!'

But then things were always different in Irish courts. An Irishman was giving evidence before Mr. Justice Darling, in an English Court, in terms which led the judge to doubt the veracity of the witness. Darling at last turned to the Irishman sternly and said:

'Tell me, in your country what happens to a witness who does not tell the truth?'
'Begor, me Lord,' replied the Irishman, with a candour that disarmed all criticism, 'I think his side usually wins!'

What then are the advocate's obligations in the context of discourtesy? They are easily stated and quite obvious. The advocate must be immaculately robed, punctual, impeccably courteous, fully in control of all the facts and the relevant law, persuasive, deferential to the Bench, resolute and fearless in defence of his or her client, prepared to argue the client's case with courage, vigour and determination, willing to combat and contest strongly any adverse views of the judge expressed during argument, and to object to and protest against any course the judge may take which the advocate may think detrimental to the interest of the client; but, above all, acting at all times responsibly and respecting the dignity and authority of the court. Precedent can be found without difficulty for any of these propositions. The very statement of them demonstrates that one is

likely to be in imminent danger of contempt every time one enters a courtroom; it may be helpful to add for those who propose to enter the lion's den that the best text book on the Law of Contempt is Borrie and Lowe's excellent book, a Butterworth publication.

Fortunately for those who practise in Victoria, our judges have "a specially high professional reputation for courtesy", as we were told by the President of the New South Wales Court of Appeal in a recent speech. This fact, which came as a mild surprise to some, will obviously not prevent the occasional clash between judge and counsel where the advocate believes, rightly or wrongly, that the judge has taken a set against the client or the advocate, or where the judge rules against a line of questioning or argument which is essential to a particular case. An advocate may be late for a hearing, or unable to attend at all, in circumstances which are occasionally justifiable. An apparent refusal to accept instantly a judge's ruling may appear discourteous, even though the judge has failed to grasp the point being made by the advocate. And what of the judge who on entering the court requires counsel to bow a second — or third — time on the ground that the first attempts were inadequate? Or the judge who insists that counsel should not make facial submissions? Or the judge who demands that counsel at the back of the court sit upright, without slouching?

Victoria's judges did not always enjoy so high a reputation for courtesy. The first of them, Mr. Justice Willis, set so unpleasant a standard that on several occasions counsel appearing withdrew — as the Crown Prosecutor, Croke put it once, "It appears useless for me to continue" — followed by all the other counsel sitting in court in sympathy. When Croke withdrew, the most senior members of the Bar wrote to the judge the next day protesting at what they considered to be an unwarranted attack on the prosecutor and informing the judge that they had every confidence in the way Croke had handled the case. At the next sitting of the court, Willis read out the barristers' protest and then announced that if members of the Bar did not wish to appear before him that was allright with him, as both he and the court could get on quite well without them. When a solicitor, Mr. Edward Sewell, appeared in Willis's court wearing a fiercely luxuriant moustache, Willis

> "was startled and stared with much wonderment. He wriggled in his seat, and with much difficulty restrained himself until the business in hand was disposed of, and then, Sewell, advancing towards the Bench, asked permission to appear for a client in an Equity suit, as all the limited Bar has been retained by the other side. The judge regarded him with astonishment, as if unwilling to recognise him in his disguise. At length he roared out that his court was not a place for 'a whiskered pandour or a fierce hussar'. If the person who had spoken was desirous to appear as counsel, he ought to have assumed the semblance of one. As it was, his physiognomical get-up was enough to frighten a man out of his wits! He had better clear out, or he would not long be an officer of that honourable court."
> (Garryowen, The Chronicles of Early Melbourne 1935-1851, 70)

Recent admittees might note that an English Court in February, 1970 rebuked a woman for wearing a trousersuit whilst attending a court.

Occasionally bibulous discussions in chambers suggest that Victorian advocates may not realise how well off they are. Take, for example, **Maharaj v Attorney-General for Trinidad and Tobago** [1977] 1 All E.R. 411. In this case the judge and three members of the Trinidad Bar were all surnamed Maharaj, but their relationship does not appear to have been attended by that air of charming domesticity which normally invests family situations. The judge, who was clearly the sort of judicial officer we need in Victoria to get our Commercial List moving at a satisfactory pace, had set down a number of matters (8 to 10) to be heard each week. He repeatedly refused adjournments of these matters, even when both sides requested them. The appellant was briefed in several of these cases but was absent arguing a case in the Court of Appeal which had lasted much longer than expected. In the first case in which the appellant was briefed for the plaintiffs, counsel for both parties sought the adjournment, but the judge refused the application and dismissed the plaintiffs' claim without giving the plaintiffs, who were present in court, any chance of being heard. In the next case the appellant was briefed for the defendants. Again an application for an adjournment was refused. The defendants being unrepresented, the judge took what the Privy Council called "a most strange and unfortunate course". He sent for the appellant's wife, who was also a member of the Bar, then appearing in another court, and when she appeared, told her that the case must proceed and that she must represent the defendants even though she had not been retained to do so nor had any instructions from them. In these days of equal opportunity, pleasing prospects of diversified practice will open

for Messrs. Winneke QC, Morrish QC, Weinberg QC, J.B. Richards and Crennan, should this course commend itself to members of the Victorian Bench. Not surprisingly judgment was entered for the plaintiff and a counterclaim was dismissed; the Privy Council doubted "whether the appellant's clients left court that day without feeling that they had received something less than justice". After various other such incidents the appellant finally appeared before Maharaj J. and asked him to disqualify himself from taking any further cases in which the appellant was involved on the ground that the judge had behaved unjudicially. The appellant later expanded this as meaning that the judge had entered judgment against his clients without giving them any reasonable opportunity of being heard. The judge then charged the appellant with contempt of court and sentenced him to seven days' imprisonment, on the grounds that he had made a "vicious attack on the integrity of the court".

The Privy Council concluded that the committal for contempt was vitiated by the judge's failure to explain to the appellant that the contempt with which he intended to charge him was a "vicious attack on the integrity of the court", and because the appellant had not been afforded the opportunity to explain what he had meant by his allegation of "unjudicial conduct". The Privy Council incidentally said that the law does not require that anyone charged with contempt in the face of the court should necessarily be given the opportunity of consulting solicitors or counsel before he or she is dealt with.

A related case is **Lloyd v Biggin** [1962] VR 593, significant for the Victorian Bar because part of Woods Lloyd's cross-examination is immortalised both in the report and more recently in Borrie and Lowe's text. It demonstrates the difficulties which occur when a determined advocate is confronted by an equally determined magistrate. Borrie and Lowe assert that the case also exemplifies that a persistent line of questioning in defiance of the judge's wishes may amount to contempt. Lloyd had been asking the magistrate to rule whether he would determine the admissibility of some evidence of a witness then under cross-examination. The magistrate intimated that that was for somebody else to decide. The report continues as follows —

> "Mr. Lloyd said: 'But your Worship must determine', and the statement was interrupted by the magistrate saying 'Carry on with your case'. Mr. Lloyd said: 'Your Worship with great respect, I wish your Worship to determine whether your Worship proposes to rule ...'. The magistrate said: 'Carry on with your cross-examination'. Mr. Lloyd said: 'I cannot carry on with any cross-examination unless your Worship informs me whether this ...' The magistrate said: 'I have had enough of your impertinence. I have put up with it for two days. You're ...' Mr. Lloyd said: 'Would you Worship just hear me?' The magistrate said: 'You're fined five pounds for contempt of court. If you do anything more I will commit you'. Mr. Lloyd said: 'Your Worship if you would just hear ...' The magistrate said: 'You're committed. Constable, remove that man and place him in the watchhouse for three hours'."

The rest of the story appears neither in the report nor in Borrie and Lowe. The constable concerned had recently been cross-examined by Lloyd to some effect and removed him with great satisfaction to the police station next door, where a second constable — better disposed to Lloyd — gave him a cup of tea. The first policeman then asserted that Lloyd was supposed to be in the cells. The place was Kaniva, the time was mid-summer and the temperature was over 40°C. The cells were a small contraption in the backyard, in full sun. The accommodation proposed was roughly comparable to modern Argentinian means of extracting improved examination grades from intransigent university students. Lloyd flatly refused to enter the cells. The affronted constable returned to the court and complained that Lloyd wouldn't go into the cells. The magistrate then said that if he didn't put Lloyd in the cells, he too would be committed for contempt. It required the intervention of an inspector from Horsham to calm matters down and later Smith J. set aside both the fine and the committal as having been wrongly imposed.

One wonders what Maharaj J. would have done to another member of the Victorian Bar, the appellant in **Lewis v Judge Ogden** 153 CLR 682. Lewis, in the course of his address to the jury, made the following remarks:

> "This trial has been or is going to be just slightly unusual from most trials. Most trials have the situation where there are three very clearly defined roles going on in front of you. There is the defence who are on this side who defend, there is the prosecutor on that side and he prosecutes and obviously this is the arena proper and you have got a judge who judges. You normally think of a judge as being a sort of

umpire, ladies and gentlemen, and you expect an umpire to be unbiased. You would be pretty annoyed if, in the middle of a grand final, one of the umpires suddenly started coming out in a Collingwood jumper and started giving decisions one way. That would not be what we think a fair thing in an Australian sport. It may surprise you to find out that His Honour's role in the trial is quite different. That His Honour does not have to be unbiased at all except on questions of law. On questions of fact, His Honour is entitled to form views and very obviously has done so in this trial."

The trial judge took the view that these remarks might have had a tendency to react adversely in the minds of the jury and discharged the jury without verdict. He then heard submissions on behalf of the barrister as to why he should not be found guilty of contempt of court. After hearing argument, he found Lewis guilty of contempt, in that the passage set out above was a wilful insult to the court and fined the counsel $500. The matter reached the High Court after proceedings in the Supreme Court for certiorari, in which King J. quashed the imposition of the fine on the ground that the judge had not provided Lewis with an adequate opportunity to adduce evidence or argument on the question of penalty but did not disturb the conviction. Lewis appealed to the High Court, by special leave, against the refusal to set aside the conviction.

The High Court allowed the appeal, concluding that what was said was neither insulting nor intended to be so. The joint judgment of the court contained the following —

> "The appellant's remarks are susceptible of the interpretation that the judge had expressed a consistently adverse view of the accused's case and its presentation, that the judge's treatment of it was one-sided, and that, accordingly, there was a real risk that his summing up would be of the same character. The appellant had no means of knowing in advance what the trial judge would say in his summing up. Having concluded that there was a risk that adverse comments would or might be made, the appellant was placed in the difficult position of endeavouring to counter such comments in advance by raising the matter directly in his address. The appellant, in embarking upon this delicate undertaking, by his reference to the Collingwood umpire and the statement from the dock, and the manner and tone of his delivery — a matter to which the judge referred — came close to insulting the judge. However, having regard to the interpretation which we place on what the appellant said, namely that his Honour's attitude to the accused's case was adverse and unfair in the sense of being "one-sided", we do not consider that the learned judge could have been satisfied beyond reasonable doubt that the appellant's comments amounted to an insult. The appellant's conduct was extremely discourteous, perhaps offensive, and deserving of rebuke by his Honour, but in our view, it could not be said to constitute contempt."

These comments demonstrate that mere discourtesy is insufficient to amount to contempt, the hallmark of which is wilfully insulting conduct.

The three cases last discussed each are important for the emphasis they place on the necessity for the tribunal to particularise the alleged contempt with precision and to give the contemnor an opportunity of answering the charge and dealing with penalty. **Lloyd's** case also provides a person dealt with by a magistrate with a clear means of review of any such decision. The position in relation to other courts remains obscure.

At common law words or conduct in the face of the court or in the course of proceedings, in order to constitute contempt, "must be such as would interfere, or tend to interfere, with the course of justice": **Parashuram Detaram Shamdasani v King Emperor** [1945] AC 264, 268. In **Parashuram,** a litigant in person after being accused by opposing counsel of misleading the court as to the nature of the issues raised in the action, said: "I do not keep anything back at all. My fault is that I disclose everything, unlike members of the Bar, who are in the habit of not doing so and misleading the court". The Privy Council held that these words did not, and could not, amount to a contempt. But a wilful insult to a judge, or for that matter a juror, during a trial necessarily interrupts the course of the trial and tends to divert attention from the issues to be determined. For example, in **ex parte Pater** (1864) 5 B. & S. 299, a juror said in relation to the defending counsel that "counsel had no right to insinuate that the witness was not speaking the truth", to which the barrister replied that it would be as well for him, the foreman of the jury, not to get into collision with him. Later, in his address, the counsel said "I thank God that there is more than one jury man to determine whether the prisoner stole the property with which he is charged, for if there was only one, and that one the foreman, from what has transpired today there is

no doubt what the result would be". The judge immediately said that that was a very improper observation to make and insisted upon its withdrawal, but the barrister declined to do so. After the barrister's client had been convicted and sentenced, the barrister was dealt with for contempt of court and a fine of £20 was later upheld on appeal.

In almost every case in which counsel is said to have been in contempt, the allegation will be that it was committed "in the face of the court" in which case the contempt is both criminal and justiciable by the court itself. The power to punish such conduct has long been recognised as a necessary incident of the courts of justice and is a corollary of the unfettered power courts possess to regulate conduct of their own proceedings. It is small comfort to the determined advocate that it has been repeatedly stressed by the highest courts that the contempt power is rarely, if ever, exercised to vindicate the personal dignity of a judge. Not all judges will react with the majestic condescension of Lord Denning MR in **Balogh v Crown Court of St. Albans,** saying that "insults are best treated with disdain — save when they are gross and scandalous" [1975] 1 QB 73, 86. In **Balogh,** the defendant had said to the judge "You are a humorless automaton. Why don't you self destruct?', a remark which was allowed through to the keeper while the judge dealt with the defendant for other matters. When Malins VC had a egg thrown at him by a disappointed litigant, the judge retained sufficient presence of mind and humour to say "that must have been intended for my brother Bacon"; **Re Cosgrave** (1877) The Times, 17 March. The fact that the egg missed, breaking on the wooden canopy behind the judge's seat, and the laughter of all in court did not prevent Robert Cosgrave remaining a guest of Her Majesty for more than 5 months after which the court required the Keeper of the Prison to place him on board a steamship bound for New York. It had not previously been noted that the court's inherent and apparently unlimited powers in relation to contempt might yet extend to transportation.

Courts will allow advocates considerable freedom in the presentation of cases. The classic example, so often drawn upon, is the confrontation between Erskine and Buller J. in the **Dean of St. Asaph's case (R v Shipley,** cited in Campbell's Lives of the Lord Chancellors). A disagreement arose as to the wording of the verdict delivered by a jury. Finally, Erskine said: "I stand here as an advocate for a brother citizen and I desire that the word 'only' may be recorded". Buller J. replied: "Sit down, Sir; remember your duty, or I shall be obliged to proceed in another manner". Erskine said: "Your Lordship may proceed in whatever manner you think fit. I know my duty as well as your Lordship knows yours. I shall not alter any conduct." The judge took no notice of this reply and did not repeat the threat of committal.

Discourtesy may of course involve misbehaviour directed to one's opponent. In **Bryans v Faber and Faber,** a litigant in person who had been unsuccessful in the Court of Appeal hit opposing counsel on the head with a carafe of water. For this he was imprisoned for three months. It might have been thought unnecessary to point out that hitting or threatening one's opponent could lead to committal for contempt. That a threat can also lead to disciplinary proceedings for professional misconduct was demonstrated by **Prothonotary of the Supreme Court v Costello** [1984] 3 NSWLR 201. The report shows that the proceedings concerned twelve separate episodes of alleged misconduct on the part of a barrister but it is necessary to obtain a full transcript of the judgments to ascertain the actual interchanges of which complaint was made. Perusal of that transcript is particularly interesting in showing the lengths to which the Court of Appeal was prepared to go to explain repeatedly heated interchanges between the barrister and various tribunals, and the judges' readiness to attribute responsibility for some of the exchanges to the tribunals concerned. Priestley LJ said (at 209):

> "The courtroom is a place where conflicts of many kinds are intended to take place and, at the end of the process, to be decided. In the progress of the case towards decision it is part of rather than interference with the proper administration of justice that opposing views are expressed. It is inevitable that expressions of view sometimes become very forceful and, when met with opposition cause heat between the people putting the differing views forward. Heat leads to sharp words and sometimes rude exchanges. These things are regrettable and usually regretted by the participants. In the over-whelming number of cases it never occurs to anyone that these incidents constitute interference with the proper administration of justice. They are part of it. When matters become extreme the power to punish for contempt is available. The comparative rarity of the use of this power in contrast to the innumerable incidents of heated behaviour in courtrooms shows how fully accepted it is that conflict in court is part of the ordinary routine of the proper administration of justice."

The judgment suggests that the kitchen in New South Wales maintains a somewhat torrid temperature. But the case is also a timely reminder for barristers at least that every incident involving alleged contempt will raise questions of professional misconduct for which the barrister may be disciplined by domestic tribunals. One of the incidents involved resulted in the reaffirmation by Lee J. (of the Supreme Court of NSW) of the power of a magistrate to exclude an advocate from the courtroom (and from all further participation in those proceedings) in circumstances where counsel "treated Mr. Norton SM with contemelious disregard for his position as a justice responsible for administering justice in the court on that day and displayed a standard of insolence which is rarely seen in members of the Bar". (**Bell & Anor. v Norton & Ors,** unreported, 10th August 1983.)

Decided cases show that it is particularly dangerous to accuse a tribunal of being biased, unjust or incompetent. What then does the advocate do who wishes to raise bias or lack of impartiality? Sir Maurice Byers QC frequently prefaces submissions with "the most profound and unfeigned respect". It is clearly established that counsel may properly raise the matter of bias or lack of impartiality when there are reasonable grounds for doing so, even if the judge is not biased: **R v Essex Justices, ex parte Perkins** [1927] 2 KB 475, 487-8. The dividing line appears to be crossed when actual injustice is imputed. In **Reece v McKenna** [1953] QSR 258 an accused was found to have been properly fined for contempt when he said to a magistrate "You are too hard. I want to be tried by another magistrate". Philp J said (at 264) "To impute injustice to a justice is to insult him in respect of the very title he wears; it is like imputing blindness to a bishop". And in **R v Jordan** (1888) 36 WR 797 a solicitor was found guilty of contempt when he interrupted a county court judge during the course of his judgment with the words: "That is a most unjust remark". Well over the line is an accusation of incompetence. In **R v Shumiatcher** (1967) 64 DLR (2d) 24, Davis J said (at 32) that:

> "It is inconceivable that any counsel worthy of the name would have the indelicacy — and the effrontery — to accuse one of Her Majesty's Justices of the Court of Queen's Bench in open court and before a jury and a considerable audience (among whom were a number of young people) of pushing about and badgering a witness."

The court thought that counsel had indulged in "the regrettable practice of needling the court in the hope that something might be said or done which would ensure a new trial, if one became necessary". Borrie and Lowe comment that deliberate misconduct by counsel aimed at obtaining a new trial is surely a most serious contempt and that Shumiatcher was fortunate only to be fined. Advocates who propose to engage in confrontationist tactics (or otherwise ape F.E. Smith) should also read **Ex parte Bellanto, re Prior** [1963] SR (NSW) 190. For an example of a careful submission limited to an allegation of apparent bias but without abandoning the possibility of the existence of actual bias, see **R v Maurice ex parte Attorney General for the Northern Territory** (1987) 73 ALR 123, 139.

What if counsel is late, or fails to attend at all?

There seems to be no doubt that if an advocate fails to attend, intending to hinder or delay a trial, such conduct would be calculated to delay or disrupt proceedings and amount to contempt. In **Izuora v R** [1953] AC 327 the Privy Council reversed a conviction for contempt in circumstances where a counsel did not attend the handing down of judgment, having been ordered to do so. It was said that not every act of discourtesy amounted to contempt; and the failure to attend, though clearly discourteous, did not cross the line. Scottish courts have shown no hesitation in holding an advocate's non-attendance to be contempt, English courts have taken a lenient view of an advocate's absence, and the Canadian position is in between. Borrie and Lowe submit

> "that a middle position should be adopted. An advocate's avoidable absence from proceedings is something to be deprecated since it is wasteful of court time and unfair to clients. On the other hand the courts should not be over-zealous to exercise their contempt powers. An advocate's absence should be explained but provided the explanation is reasonable, no offence should be committed. Further it is submitted that absence due to mere inadvertence should not be punishable as a contempt."

Courage is an essential element of the armoury of the advocate. Carson demonstrated this in full measure. Richard Du Cann in "The Art of the Advocate" tells (at 53-54) of Carson appearing for Lord Clanricarde before a commission set up to inquire into the wholesale evictions of tenants then (1892) occurring in Ireland. When he applied to cross-examine the first witness, the President of the Court, an English High Court Judge who should have known better, refused to allow him to do so:

"President: 'I decline to hear you.'

Carson: 'I must press this matter. I will ask for a vote to be taken to see if every Commissioner takes your view.'

President: 'I will not hear you further, and I will order you to withdraw.'

Carson: 'I insist upon my right till every Commissioner orders me to withdraw. I will stand up here and no for justice to be done to Lord Clanricarde as well as to everyone else.'

President: 'The Commissioners have consulted and we have come to the unanimous conclusion that we will not hear you ...'

Carson: 'My Lord, if I am not allowed to cross-examine I say the whole thing is a farce and a sham. I willingly withdraw from it. I will not prostitute my position by remaining longer as an advocate before an English Judge.'

President: 'I am not sitting as a Judge.'

Carson (in a loud whisper): 'Any fool could see that.'

And having remained on his feet throughout this exchange, Carson threw down his papers and walked out of the room."

Carson's conduct effectively destroyed the moral authority of the commission. Advocates of discretion will, no doubt, ponder the consequences of emulating such forceful advocacy. It is not recommended for inexperienced counsel. An attempted withdrawal from a case was treated as a contempt in **R v Swartz,** where a lawyer attempted to withdraw after being unexpectedly and apparently unjustifiably refused an adjournment ([1977] 2 WWR 751). The Manitoba Court of Appeal reversed the decision, holding that both lawyer and judge had overreacted; but the implication of the decision was that the conduct could have amounted to contempt if the advocate's withdrawal had been a deliberate tactic to gain a retrial.

There must be something about the North American climate. In **Offutt v United States** (1954) 348 US 11 a judge summarily committed a trial lawyer for ten days for contempt. The record sets out interchanges which included:

"The Court: 'Motion denied. Proceed.'

Mr. Offutt: 'I object to Your Honour yelling at me and raising your voice like that.'

The Court: 'Just a moment. If you say another word I will have the Marshal stick a gag in your mouth.'"

And later

"The Court: 'Don't argue with the Court.'

Mr. Offutt: 'I am not arguing with the Court, your Honour.'

The Court: 'Don't answer back to the Court, either.'"

And later

"The Court: 'You have forfeited your right to be treated with the courtesy that this Court extends to all members of the Bar.'"

The US Supreme Court in a majority opinion delivered by Frankfurter J said:

"The question with which we are concerned is not the reprehensibility of petitioner's conduct and the consequences which he should suffer. Our concern is with the fair administration of justice. The record discloses not a rare flare-up, not a show of evanescent irritation — a modicum of quick temper that must be allowed even judges. The record is persuasive that instead of representing the impersonal authority of law, the trial judge permitted himself to become personally embroiled with the petitioner. There was an intermittently continuous wrangle on an unedifying level between the two. For one reason or another the judge failed to impose his moral authority upon the proceedings. His behaviour precluded that atmosphere of austerity which should especially dominate a criminal trial and which is indispensible for an appropriate sense of responsibility on the part of court, counsel and jury." (at 17)

The committal was duly set aside.

One of the difficulties for Victorian lawyers is the doubt which surrounds the very existence of a right of appeal where the decision to convict for contempt has been made by a Supreme or County Court judge. The Law Reform Commission's Report on Contempt suggests that there is no general, unrestricted right of appeal for a convicted person. Certiorari may be available in certain limited situations. Fortunately convictions of counsel for contempt are sufficiently rare to leave some prospect of a special leave point. But then the High Court has often said, hasn't it, that the disciplining of the profession is a matter eminently well-suited to being left in the hands of an intermediate appellate court.

After so much bad news, it is some comfort to be able to assure readers that there is Australian authority for the view that it is a contempt, and a grave offence, to impersonate a barrister: **In the Marriage of Slender** 29 FLR 267.

Courts Advisory Council

An account of the working of the Courts Advisory Council by ***J.M.E. Sutton,*** *Associate to the Chief Justice of Victoria and Secretary of the Council*

The Courts Advisory Council was set up as a result of a recommendation of the Civil Justice Committee. As the report of that Committee shows (p.354) the idea grew out of the Committee's consideration of the suggestion that there might be an independent courts commission to administer all the courts. That suggestion was rejected, but instead the recommendation was made that a Courts Advisory Council should be established to monitor the new machinery and to make suggestions as to how the machinery might be modified. The Committee also thought that such a council might assist in maintaining a balanced view of the whole civil justice system and perform a co-ordinating role between the Councils of Judges and the Courts Management Division of the Attorney-General's Department.

The Council was set up by the Attorney-General on 6th August 1985 with the following terms of reference:

"1. To review the recommendations of the Civil Justice Committee, to ascertain which of those recommendations have been implemented, to report to the Attorney-General quarterly upon the implementation of the recommendations and the reasons why any recommendations have not been implemented. To make suggestions as to how the recommendations might, if necessary, be modified.

2. To report to the Attorney-General on any matter which he may refer to it from time to time with the agreement of the Chief Justice."

The Attorney-General has stated that reports from the Courts Advisory Council to the Attorney-General will be tabled in Parliament whenever that is requested by the Council.

The Council is chaired by the Chief Justice and in addition consists of the following members:

Mr. Justice McGarvie) (nominated by the
Mr. Justice O'Bryan) Supreme Court Judges)
* Chief Judge Waldron
Judge O'Shea (nominated by the County Court)
Mr. J. Dugan, Chief Magistrate
Mr. B. Clothier, Deputy Chief Magistrate
* Mr. R. Stanley, Q.C.
* Mr. W. Clancy (Molomby & Molomby)
* Ms. Mary Patten (Director of Nursing, Royal Children's Hospital)
* Mr. W. Byrt (Senior Associate, Graduate School of Management, University of Melbourne)
Professor R. Baxt (Monash University)
Mr. John B. King (Secretary to the Attorney-General's Department)
Mr. D. Hourigan (Deputy Secretary, Courts Management)
Mr. B.N. Nicholls (Assistant Director-General Budget and Resources Management, Department of Management and Budget)
* Members of the Civil Justice Committee

The Civil Justice Committee emphasised that the Council should be adequately staffed and that the staff should be independent of the Attorney-General's Department. Unfortunately it has not been possible to obtain any funds for the Council but independence from the Department is maintained by the Council's appointment of Mr. J.M.E. Sutton, Associate to the Chief Justice, as its Secretary. Mr. Sutton also acts as Secretary to any committee established by the Council. The lack of funds has severely restricted what the Council has been able to achieve. Funding by the Victoria Law Foundation made possible the projects mentioned hereunder but more could be done more quickly if money were available.

The Council has not reported formally to the Attorney-General as envisaged in the terms of reference, but many informal discussions have taken place with him, chiefly through the Chief Justice or the Secretary to his Department. Nor has the Council yet asked for any reports to be tabled in Parliament. It is, however, envisaged that as the work of the Council develops it may decide to issue formal reports and to ask that they be tabled.

The Council held two meetings in 1985 and eleven meetings in 1986. It now meets regularly in most months between February and December.

In addition to considering the implementation of the recommendations of the Civil Justice Committee, the Council has initiated several projects which it regards as of considerable importance. All are joint projects with the Victoria Law Foundation.

The first is a project which involved bringing to Australia Professor Carl Baar, to advise upon a number of matters concerning Records and Information Systems. The actual Terms of Reference given to Professor Baar were "Having regard to the recommendations of the Civil Justice Committee and the Shorter Trials Committee, the proposed computerisation of court records and information systems, and the proposed changes to the Rules of the Supreme Court and, consequently, to the County Court Rules, the consultant is asked to:

1. Advise on the policy options for dealing with caseflow management problems in the courts;
2. Advise on the requirements of management information systems for the courts;
3. Advise on the requirements of caseflow management information systems including data elements, individual and aggregate statistics and personnel;
4. Design record systems which will support suitable caseflow management information systems."

Professor Baar spent about a month in Melbourne during the year and whilst here conducted one or two seminars. He quickly obtained a grasp of the court system in Victoria and made a number of useful suggestions. His formal report has not yet been completed although a draft of it arrived in Melbourne in October last year. His final report is expected in the very near future.

The second project is a Case Release Project. The project is to devise and establish a Case Release System for the civil jurisdictions of the Supreme Court, the County Court and the Magistrates' Courts and to develop specific criteria upon which decisions to transfer cases between the Supreme Court and the County Court, and the County Court and the Magistrates' Court may be made. Mr. Wright, Lecturer in Law, University of Melbourne, Mr. Epstein, Senior Lecturer in Law, Monash University and Mr. Akers, Senior Research Assistant, Monash University are undertaking the necessary research and the project is supervised by a small committee (Mr. Justice McGarvie (Chair), Chief Judge Waldron, Mr. J. Dugan, Chief Magistrate, Mr. W. Byrt, Mr. J. Ardlie, Manager, Courts and Tribunals, Mr. R.H. Gillies Q.C. and Mr. A.J. Parnell, Middletons Oswald Burt). The project is proceeding satisfactorily and is expected to be completed late in 1987 or early next year.

The third project, now completed, was known as the "Solomon Consultancy on Caseflow Management" and consisted of 15 workshops and 5 seminars conducted by Mrs. M. Solomon from 23rd April to 20th May 1987. A preliminary seminar was conducted by Mr. Mark Herron of the Victoria Law Foundation prior to Mrs. Solomon's arrival in this country. The workshops were attended by the caseflow management group consisting of a Supreme Court Judge, the Chief Judge and another Judge of the County Court, the President of the Administrative Appeals Tribunal, the Listing Master Supreme Court, the Deputy Chief Magistrate and another Magistrate, the Chief Executive Officer Supreme Court, the Prothonotary Supreme Court, the Manager Courts and Tribunals, the Director of Court Services, a Barrister representing the Bar Council, a Solicitor representing the Law Institute and another solicitor, the Executive Director AIJA, an Area Manager, the Registrar and Civil Listings Clerk of the County Court, the Co-ordinating Clerk of Courts and another Clerk of Courts, the Registrar Administrative Appeals Tribunal, a Senior Lecturer, Lecturer and Senior Research Assistant in Law. This project developed considerable knowledge in an enthusiasm for caseflow management among those who participated in the workshops.

The fourth project is still in the planning stage. it is the preparation of a Caseflow Management Research Strategy. This project is envisaged as being complementary to and parallel with pilot schemes for caseflow management being undertaken by individual courts. To be given top priority within the project is a scheme to monitor and manage caseflow of criminal cases across the three courts. Work has already begun with the Administrative Appeals Tribunal and is expected to begin with criminal cases in the very near future.

Each of the projects referred to above has been the result of work by various committees set up by the Council. Details of those committees are set out in the Appendix.

At a recent meeting of the Council concern was expressed that the legal profession and other agencies were not being kept informed about what the Council was doing or planned to do. One result of that discussion is this article which it is hoped will go some way towards filling the need for the dissemination of information but the Council intends to consider the matter further as well.

Editors' Note: Any member of the Bar interested in further information on the activities of the Council is invited to telephone Mr. Sutton on 603 6158.

APPENDIX
COMMITTEES OF COURTS ADVISORY COUNCIL

MEETING AT WHICH SET UP	NAME OR PURPOSE FOR WHICH SET UP	MEMBERS
No. 1 1986 27 February	To look at transfer of cases between courts	McGarvie J. Chief Judge Waldron, Mr. J. Dugan, Chief Magistrate, Mr. D. Hourigan
No. 2 1986 20 March	To identify areas where recommendations of Civil Justice Committee could be implemented	O'Bryan J. Chief Judge Waldron, Mr. J. Dugan, Chief Magistrate, Mr. R. Stanley Q.C., Ms. M. Patten Mr. D. Hourigan
No. 4 1986 15 May	To work towards implementation of Chapter V Civil Justice Report	O'Bryan J. Chief Judge Waldron, Mr. D. Hourigan or his nominee, Mr. J. Denahy, Acting Registrar County Court or his nominee, Mr. W. Clancy or his nominee, Mr. R. Stanley Q.C.
No. 4 1986 15 May	Case Release Committee	McGarvie J. A nominee of County Court Chief Judge Waldron, A nominee of the Magistrates' Court, Mr. J. Dugan, Chief Magistrate, A nominee of Courts Management, Mr. J. Ardlie, A nominee of Bar Council, Mr. R. Gillies Q.C., A nominee of Law Institute, Mr. A. Parnell, Mr. W. Byrt
No. 9 1986 8 October	To develop terms of reference for proposed caseflow project by Miller & Taylor in consultation with Mr. Herron	McGarvie J., Professor Baxt, Mr. W. Byrt, Mr. D. Hourigan
No. 10 1986 12 November	To look at the co-ordination of criminal listing	O'Bryan J. (Chairman) Chief Judge Waldron and Judge O'Shea Mr. B. Clothier, Deputy Chief Magistrate, Mr. J. King

The New Silks

KENNAN, Hon. James Harley

Admission:
1.4.69
Bar Roll:
2.9.71
Master:
Howard Nathan
Readers:
Edward de Zilwa, Margaret Harding, Shane Marshall
Practice:
Attorney-General for Victoria

NASH, Patrick Gerard

Admission:
3.3.58
Bar Roll:
6.8.59
Master:
Kevin Anderson
Readers:
Simon Gardiner, Rufus Davis, James Peters
Practice:
Commercial and Administrative Law

GILLARD, Roger Challis

Admission:
1.3.68
Bar Roll:
13.2.69
Master:
Brian Shaw
Readers:
Peter Gray, Paul Lacava, Thomas Hickey, Jason Cohen, Bruce Lee, Andrew Bristow, Fiona Stewart, Timothy Faulkner
Practice:
Commercial

CANAVAN, Christopher Joseph

Admission:
1.5.69
Bar Roll:
22.5.69
Master:
Haddon Storey
Readers:
Bruce Geddes, Jack Gaffney, Peter Kistler, Geoff Combes, Julie Davis, James Conquest, Marilyn Warren
Practice:
Town Planning and Local Government

WOINARSKI, Brind

Admission:
2.4.70
Bar Roll:
9.4.70
Master:
Peter Brusey
Readers:
Heather Carter, Ted Bassett, David Denton, Julie Mickolson, Ed Delany
Practice:
Criminal Appellate and Crime

CALLAWAY, Frank Hortin

Admission:
2.4.70
Bar Roll:
21.7.77
Master:
Ross Sundberg
Reader:
Albert Monichino
Practice:
Commercial

HABERSBERGER, David John

Admission:
1.3.72
Bar Roll:
22.2.73
Master:
Stephen Charles

Readers:
Rod Randall, Geoff McArthur, John Styring, Malcolm Strang, Peter Cawthorn
Practice:
Equity and Commercial

JESSUP, Christopher Neil

Admission:
1.3.72
Bar Roll:
13.2.75
Master:
Stuart Murdoch

Readers:
Geoff Giudice, Simon Marks, Brian Mueller
Practice:
Industrial Law, Administrative Law, Trade Practices

Some Statistics on Silk (Updated)

	1982	1983	1984	1985	1986	1987
Commercial	5	3	4	5	3	4
Common Law	1	3	2	2	2	–
Crime	1	2	3	1	3	1
Family Law	–	1	1	–	–	–
Industrial Law	–	–	–	–	–	1
Local Govt.	–	–	–	–	1	1
Patents	–	–	–	1	1	–
Politics	–	1	–	–	–	1
Average years since signing Bar Roll	16.5	17	18	17	15	16
Number of Applicants	?	?	?	?	?	?

Conference Confabulations
Australian Legal Convention Perth 1987

The 24th Australian Legal Convention was held in Perth from 20th-26th September. For those few of the Melbourne Bar who attended it was the consolation prize for the Conference held in London and Dublin in July of this year. Indeed, after a four hour flight from Melbourne to Perth (against a westerly headwind) I was readily open to the suggestion that we were well on our way to London. The weather was fine and warm, as was the local hospitality. The main convention centre was the newly constructed Merlin Hotel, which boasts of being the largest brick structure in the Southern Hemisphere. It certainly looked it. The main street, St. Georges Terrace, had every indication of once possessing superb examples of early colonial architecture, now however replaced by phallo/monolithic structures, many bearing the "Bond" logo. One could perhaps be forgiven thinking Perth to be the centre of the world's t-shirt and underpants industry. Fremantle is unique, still suffering however from withdrawal symptoms from the America's Cup.

The conference itself was impressive both with diversity of session topics and the quality of the speakers. Antonin Scalia of the U.S. Supreme Court was particularly amusing (certainly more so than his Appointor) in his address upon the somewhat abstruse theme "Winds of Change". Robert Alexander Q.C. (U.K.), reputedly the highest earner in the Commonwealth, showed why. The House of Lords was represented by Lords Ackner and Mackay of Clashfern, the latter (a Scotsman) having since then been appointed to the woolsack. The former Chief Justice of the Indian Supreme Court, Bhagwati J., provided some unwelcome drama by suffering a moderately severe heart attack on the opening day, not before, however, having also addressed on the "Winds of Change". The Melbourne Bar made significant contributions, with papers from (inter alia) Stephen Charles Q.C., David Byrne Q.C., Graeme Uren, Q.C., Alex Chernov Q.C., Kevin Andrews and Phillips J. A particularly sobering (perhaps depressing is a better word) session was that on Professional Negligence (with, it seemed, an unhealthy emphasis on the legal profession). Stephen Charles delivered the keynote paper, warning all those who are prepared to listen of the unfortunate implications of **Gianarelli's** case, were it to go the wrong way on appeal from the Full Court. Certainly many solicitors in attendance were prepared neither to listen nor agree (ask Geoff Masel). During subsequent commentary at the session, a turban bedecked delegate from Malaysia drew generous applause with his statement:

> "The disease of professional negligence has reached also our shores." (sic)

The social highlight of the conference was undoubtedly provided by the Gala Ball ("a Ritzy Affaire") held in the (wait for it) disused Fremantle Sea Passenger Terminal, adjacent to which was anchored, it seemed, half the U.S. Fifth Fleet, (whose members, thankfully, did not attend the ball). No expense was spared in rendering the occasion a truly ritzy affair. The main entertainment was provided by one Jackie Love, a local girl made good (in Hollywood I am told). She is blonde, long legged and remarkably talented. Her effect on some of the male members of the audience (including your correspondent) was immediately apparent; suffice to say, the sight of a Lord of Appeal in the Ordinary salivating into the remains of his lemon meringue pie is a memorable one. The occasion ended up vaguely reminiscent of an undergraduate law ball, 20 years on.

The conference concluded, as it began, in good humour and with general agreement that those in attendance were suitably charged (or chastened) until the next convention: an extraordinary Bi-Centenary Conference to be held in our national capital next year.

FOOTNOTE:

Since composing this article, I have received my September issue of the Australian Law Journal. By way of light reading, I had occasion to leaf through an erudite paper delivered at the conference by one D.M.J. Bennett Q.C. of New South Wales, intituled "Equitable Estoppel and Related Estoppels". I refer to page 551 where the learned author referred to the "floccinaucinihilipilification" of a distinction. I believe that some reference is made to this term elsewhere in this issue of Bar News. I must say, as a dabbler in matters equity myself, I recall attending the session at which Mr. Bennett delivered his paper, however I do not recall "floccinaucinihilipilification". Perhaps I was asleep by that stage .....

Tony Southall

The Barristers Tenants Committee and the Recent Bar Council Elections

The Barristers Tenants Committee was formed on 30th October 1986, by a meeting attended by 181 barristers, as a consequence of feelings of dissatisfaction by a significant proportion of the Bar. This dissatisfaction related largely to questions of rentals, which were perceived by many to have risen unduly.

Incomes of barristers range over extremes. The incomes of leading silks amount in some cases to many hundreds of thousands of dollars per annum. But the net incomes of many juniors are in the range from ten thousand to forty thousand dollars per annum. Indeed, many barristers earn little more, and some less, than secretaries. Especially where they must support families as well as themselves, such matters as the provision of inexpensive chambers, assistance or guidance for the collection of overdue fees and the sharing of rooms are of critical importance. For a silk or a prosperous senior commercial junior, large increases in rents do not have serious consequences. For large numbers of less prosperous barristers, such matters go to the ability to pay school fees or living expenses, and indeed to their very survival at the Bar.

In view of feelings of dissatisfaction that existed, it was finally decided by the Barristers Tenants Committee that the most satisfactory method of proceeding was to support particular candidates in the Bar Council elections of September 1987. Whilst this decision was taken reluctantly, it was regarded as necessary, and it was in the event approved by the large majority of those who voted at the election and who voted in favour of these candidates.

The candidates who were supported by the Committee and who were elected, filling fourteen out of the eighteen places on the Bar Council, were Charles Francis Q.C., Abe Monester Q.C., Howard Fox Q.C., Ian Spry Q.C., Rupert Balfe Q.C., Doug Meagher Q.C., Andrew Kirkham Q.C., Robert Kent, Chris Dane, David Brustman, Simon Cooper, Peter Elliott, Debbie Wiener and Greg Barns.

After the Bar elections, Charles Francis Q.C. was elected Chairman and Abe Monester Q.C. and Andrew Kirkham Q.C. were elected as Vice-Chairmen, with David Harper Q.C. as Honorary Treasurer.

The new Bar Council has addressed itself to many matters of interest to those who supported it. Garth Buckner Q.C. has been appointed Chairman of Barristers Chambers Ltd., in the place of Sek Hulme Q.C. An investigation is being made as to the number of barristers who wish to share rooms with other barristers. A committee has been set up to enquire urgently into overdue fees and the collection of fees generally.

As may be expected, decisions are being made carefully and indeed cautiously, although a firm position has already been taken by the new Bar Council in regard to such unsatisfactory matters as the appointment of solicitors as judges and the appointment of temporary judges.

I.C.F. Spry

"Look Sam, we can't go on meeting like this."

"You're right Charley, why don't we stand for the Bar Council?"

Turning Outsanding Fees to Cash

A brief outline supplied by ***Ficon Corporation Pty. Ltd.*** *on the Esanda Early Release Scheme*

The financial community (or at least one of its members) has finally realised the problems faced by barristers relating to outstanding fee accounts.

The "Early Release Scheme" is a factoring arrangement which works like an ordinary bank overdraft secured by outstanding fee accounts.

The effective cost is 19.5 per cent (less than bankcard) plus $50.00 per month and barristers can obtain (borrow) up to 80 per cent of the total value of acceptable outstanding fees, that is fees that are not more than three years old.

In the past bankers and lending institutions have not been keen to accept anything but bricks and mortar securities for advances and where personal loans have been made they have been far from generous.

The effect of the new concept is therefore to allow a new basis for fund raising.

Additionally, in the past unless borrowings have been used for income earning purposes the cost has not been properly tax deductible no matter how much one re-arranges the accounts. With factoring it is suggested that because the cost of the funding is a cost of collecting fees, this is deductible no matter how the funds are used.

The reasoning behind this is that as factoring is technically a sale of fee debts, the cost is traditionally deductible as a cost of collection. This is argued to be the proper tax interpretation even if the cost, as is the case here, is adjusted based on the time it takes to collect the fees, so that the net result is a rate of 19.5 per cent per annum adjusted daily.

Needless to say the Ethics Committee has looked at the documentation which has a special clause to satisfy the dictates as detailed in Chapter 15 of Gowans.

Editors' Note: Further information may be obtained from Ficon Corporation Pty. Ltd. (David Finney) 23/456 St. Kilda Road, Melbourne 3004, telephone (03) 267 2924.

Litigants Shouldn't be Guinea Pigs

(Letter to the Editor, Australian Financial Review)

Sir, In a recent article (AFR, October 20) an unidentified lawyer was quoted as saying in relation to qualifications for appointment to the Bench "if you're an intelligent person who has been around a bit, you will learn quickly".

The thrust of the comment was that government and academic lawyers and solicitors are just as qualified for appointment to the Bench as are members of the Bar.

A few moments' reflection should reveal the absurdity of this. Court cases are not decided according to the whim or instinct of the individual judge. Litigants require that there be a common set of rules applied to resolve disputes — there must be a level playing field so far as possible.

In order to achieve this there are a number of rules of evidence, practice and procedure, in addition to rules of substantive law.

The interplay of these rules in a particular factual situation is extremely complex. Mastery of them sufficient to fairly preside over a trial in which the rights of the citizen will be decided will normally not be achieved without something like 20 years of constant experience. This can only be acquired by those actually engaged in the conduct of cases of appropriate difficulty and complexity. This is the special field of the barrister. Government lawyers, academics and solicitors each have their own field of expertise. It is not forensic.

It is rather like appointing a gynaecologist to the position of chief heart surgeon at Royal Prince Alfred Hospital. He or she will have a medical degree and would be legally qualified to take up the position. It may even be that after training and experience the gynaecologist turns out to be a reasonable heart surgeon.

It would, on any view, be more sensible, and certainly safer for the patient, to make the choice from amongst the ranks of heart surgeons who had practised extensively in the specialty.

Individual solicitors, government lawyers and academics may make reasonable judges — some have.

However, litigants should not be used as guinea pigs for "trainee" judges without relevant experience, many of whom will fail.

R.V. Gyles
President, The Australian Bar Association

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1988 Canberra Legal Convention

The Law Council of Australia has announced that a special Bicentennial Convention (the 25th Australian Legal Convention) will be held in Canberra in 1988.

The Bicentennial Australian Legal Convention will run from Sunday 28th August to Friday 2nd September, and will be addressed by some of the world's leading jurists. The Convention is an Endorsed Bicentennial Activity.

The Convention theme will be "BEYOND 200" and will focus attention on what the legal profession has learned from Australia's first 200 years that can be put to good use as the nation enters its third century.

The Governor-General, Sir Ninian Stephen, will open the Convention at the Canberra Theatre on Monday, 29th August and sessions during the week will be held mainly at the Lakeside Hotel and the new Hyatt Canberra (the rebuilt and enlarged historic Hotel Canberra).

The Convention is being planned by a committee of representatives of the Law Society of the ACT and the ACT Bar Association, the Convention host organisations. Committee Chairman is Mr. David Crossin OBE.

The legal profession and Australia will be honoured by the presence of three leading world legal figures at the Convention:

> The Chief Justice of the United States Supreme Court, the Hon. William Rehnquist
>
> The Vice President of the Supreme People's Court of the People's Republic of China, Mr. Ren Jianxin
>
> Lord Justice Sir Michael Mustill of the U.K. Court of Appeal

There will be many other distinguished international and Australian speakers leading the wide variety of business sessions during the convention.

The principle sponsor of the Convention will be computer hardware and software and business systems marketers STC.

It is expected that many lawyers and their families from throughout Australia will want to take advantage of the opportunity to visit Canberra at the height of the spring season in 1988 and to see Australia's striking new Parliament House which will have been opened by the Queen and taken over by the Parliament shortly before the Convention.

Accommodation demands will be very heavy in Canberra throughout next year and early registration for the Bicentennial Convention will be essential.

Registration information will be available early in 1988.

Those interested in attending the Convention are invited to contact —

> Bicentennial Australian Legal Convention
> Capital Conferences Pty. Ltd.
> P.O. Box E345
> Queen Victoria Terrace
> CANBERRA ACT 2600
> (062) 852 048

so that further information can be provided.

Bar Hockey

Dusting off sticks hastily and making last minute adjustments to that highpoint of barristerial garb, the "Bar None" T-shirt, the Victorian Bar hockey team took the field eager to appear once again in vivid black and white in "Bar News". They were all to be disappointed — not a flash was to be seen.

Due to Richard Brear's sterling organisation, a practice match had earlier been played against RMIT. Unfortunately only half the team was in evidence, and various friends of those present became honorary members of the Bar for a night — with pleasing results. A win of 4-2 was recorded, and that without a goalie. Andrew Tinney and Peter O'Dea shared the pivotal centre-half role well, controlling the game and feeding the DPP with so many balls he forgot to use his stick, suffering badly bruised feet.

Although not bearing a camera, Judge Crossley did us the honour to attend the annual (and by now, after four years, traditional) Bar v. LIV match. As the artist responsible for the elegant design engraved on the "Scales of Justice" trophy, his Honour was indeed an appropriate person to award that symbol of sporting excellence. But alas, for the third year in a row the Bar was vanquished and the trophy was awarded to the solicitors.

We missed the hockey brain (and body) of Rupert Balfe (recruiting overseas for next year's game) and a number of stars of the past — Peter Burke no doubt still nursing his body after a painful experience last year. Nevertheless, our now familiar dominance in the equal opportunity field was not less overwhelming this year — a 3-1 win for the Bar.

Although we battled hard all night, we were always behind. Nevertheless, with five minutes left Tinney gave us hope with a well-taken goal smashed into the net past his ducking brother (a solicitor). However, the score remained at 4-3 and although it hurts to say it, the Law Institute had too much skill and pace up forward for us. However, we were always gracious in defeat and adjourned to Naughton's to admire the trophy and dream of victory next year. Perhaps one way to ensure that would be to have some of those Law Institute forwards appointed to the bench!

The team:

Brear
Coldrey (1 goal)
Dallas
Lynch
O'Dea
Seng Hpa
Sexton
Sparks
Tinney (2 goals)
Wodak

Those who filled in most admirably and often at short notice were:

Penny Byrne (RMIT), Ganasan Nirianasamy (Essendon), Tony Vanderfeen (Monash), Stuart Westmore and Ian Lewis (MUHC). Thanks also to Ganasan for umpiring.

P.S. Anyone interested in playing next year should ring Richard Brear (7579) or Ian Dallas (7438).

Bi-Centennial Run Sponsors

Sponsors to the Victorian Bar Team for the 200 km Charity Bi-Centenary Team Run :

The Law Book Company Limited

Butterworths Pty. Ltd.

The Commonwealth Bank, William St.

Alpha Blinds Company

Information Potential Pty. Ltd.

The Bar Team for Bi-Centennial Run

After considerable cajolling together with very generous support from the named sponsors the Bar Team has been able to raise its alloted amount for the entry fees.

Now comes the hard part — running the race. Fortunately, there are some young members of the Bar who will be able to shoulder the burden.

Our No. 1 runner is young Marcus Clarke, son of former world recorder holder, Ron, whose application to join the Bar was rushed through so that he would be available (not to mention his honorary law degree and admission to practice).

The No. 2 runner is probably better known for advertising honey-moon holiday resorts than his athletic prowess but I can assure those that saw him frolicking in the shallows of the Hayman Island Resort, when it was the subject of investigation by that highly successful T.V. programme called "Holiday" (remember it?), Kim runs much better than he swims.

John Higham is amongst our top runners and in his earlier days was an outstanding 800 metre runner. No one doubts John's ability to run, he makes a cadaver look healthy.

Andrew Ramsay is a well known Bar runner and has been over recent years the best performer for the Bar at the annual Legal fun-runs. A couple of youngsters at the Bar, Joe Tsalanidis and Royce Decker are well performed inter-club athletes and form part of the team.

The team is completed by Shane Collins, Bruce Geddes, Jim Duggan (of County Court fame) and your reporter. We fortunately have a number of strong reserves, namely Stan Spittle, John Coldrey (of DPP notoriety), Stephen Blewett and if ultimately we need genuine support from the top, Mr. Justice Vincent.

You will be pleased to know that to keep this rabble in some semblance of order Judge Dyett and Liz Murphy are managing the team.

The run which is on 30/31 January 1988 passes through most of the well-known holiday resorts frequented by the less energetic members of the Bar. If perchance one or other of you happened to be strolling between the Melbourne Hilton and Geelong, or take the sea airs on the Geelong-Queenscliffe Road then spare a thought for your Bar runner as he pounds past.

If however on Sunday the 31st you happen to be hob-nobbing it in Portsea, you could then be seen to urge on your representatives as they make their way from Portsea, via Frankston back to Melbourne. Any encouragement along the way will be greatly appreciated.

The Bar runners are most grateful for the support they have received from the Bar Council, the Bar and the very generous sponsors.

Tom F. Danos

Bar No. 1 runner Marcus Clarke with Manager Liz Murphy.

Clapham Omnibus Diving Society (C.O.D.S.)

In 1985 a number of serious minded Victorian scuba divers who, coincidentally, were also lawyers, formed an Association of Diving Lawyers. As reasonable persons, the choice of a name of the organisation presented little difficulty. One of the members of the fledgling organisation, as steeped in his knowledge of law as in the skills of scuba diving, was able, instantaneously, to provide a suitable nomenclature.

Thus, CODS was born, or more appropriately emerged from beneath the waves. Since that time, CODS has conducted some successful dinners, with appropriate guest speakers and lecturers where, fortified by appropriately vintaged bottles recovered surreptitiously from unnamed dive sites, the most esoteric of topics relating to diving and law have been discussed.

Apart from these intellectual pursuits a number of diving outings have been conducted in Port Phillip Bay and in the vicinity of Western Port Bay. A number of further diving outings are scheduled for the summer of 1987/88. Although plans are yet to be confirmed, it is hoped to conduct at least one weekend diving excursion living aboard a boat.

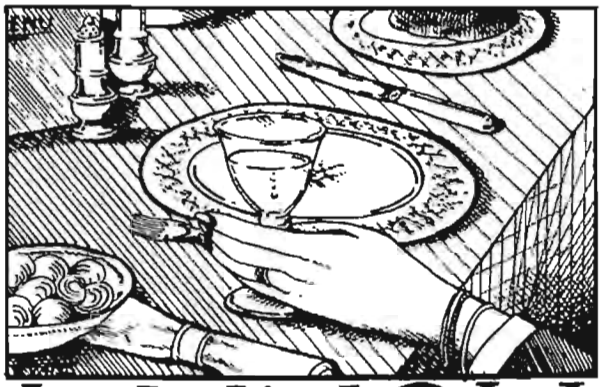
CODS is planning to conduct its first ever Diving Law Convention. This is to take place in July 1988 in Vanuatu, in conjunction with a Medico-Legal Conference, to be held in Vanuatu immediately preceding the Diving Law Convention.

Any member of the Bar wishing to join CODS or requiring further information about its activities is invited to contact the Secretary of CODS, Ms. Jodi Williams, c/- Messrs. Herbert Geer & Rundle, Solicitors, telephone 602 5155 of c/- Aus Doc DX 428.

Tom Wodak

Defendant's (Transport Accident Commission) Barrister:
OK, you offered $100,000 plus keep plus costs, we offered that the plaintiff pay the defendant's costs with penalties, withdraw from the action, beg the forgiveness of the judge, place a written apology in the Herald, buy a round of beers for the poor private detective who had to follow him and his cousins around for three years and shout the barristers lunch.

Plaintiff's Barrister:
Look I haven't got instructions, but just give me a moment and we've settled — how about the Drum for lunch?



L·U·N·C·H

Cafe Latin

The Cafe Latin by that name has been on its present site since 1919.

Since 1984 it has been owned by Cheryl from Tasmania and Bill from Italy. Cheryl runs the front of the house. She runs a very tight ship. For the customers she has lovely manners combined with a somewhat reserved personality. I think though that if you got to know her very well and dared to tickle her she might well giggle. Bill is the chef. He is a master tradesman and adds imagination and verve to great technical skill. The two of them are a fine combination. He provides the food and she makes sure that the service is impeccable. It is unobtrusive, kind, competent and intermittently attentive. A lot of its quality must be due to the nature of the staff but it is surely sharpened by her presence.

I was overjoyed to discover Marchetti's Cafe Latin. For a start ALL the waiters are sober. It is much frequented by a group connected with licensed premises; barristers, solicitors, real estate agents and sinners.

The main restaurant consists of two shops knocked into each other to make a large double room. It is well lit. The chairs are comfortable and the tables are far enough apart. There is a single room next to it large enough for barristers' lunches. It is nicely decorated in a whimsical Art Deco style. There used to be some fairly revolting water colours on the wall. They were even worse than the painting they replaced. Clifton Pugh's portrait of an ex Governor-General. He is portrayed slouched in a crumpled lounge suit. His lips forever slightly apart. His hands forever in his pocket. An almost vacant look in his eyes. Perhaps Max Gillies' aphorism is not entirely in jest. As Bill Marchetti said "Not the sort of picture you want hanging over you whilst eating". Now that Cheryl has got rid of Sir John Kerr and now that she has got the mortgage paid off (as one assumes) she is investing in a better class of art.

There you are. With your hand upon the door you are about to open it for the QC who is taking you to lunch. Jo rushes down the restaurant to open the door for you. Not knowing that you are the guest she says to you "Good afternoon sir" as though you lunch there every day. You sit down at what you hope is the best table. Behold a bowl of olives and pickled vegetables, a glass of iced water. No pre dinner drinks thank you. Let us see the wine list. Whatever the food I hope the silk orders red for you (except perhaps at the very height of summer). Quickly turn over the first page of the wine list (sparkling wines and cocktails). Page 2 is white wines; pino grigio if you like it, Cloudy Bay sauvignon blanc, Katnook chardonnay. All the good trendy names are there and some not so trendy but instead discerning.

The next page is the business end of the list; Margaret River, Mount Adam, Morilla and all the gutsy Victorian reds; Brown Brothers, Leckie, Redlank, Virgin Hill, Pikes.

Lunch for two: chocolate fettucine (combination venison ragout, pine nuts, raisins, dark chocolate and vinegar). For the main course the beef is good, but why go to an Italian restaurant for that? Scallopine alla Valdistano (baby veal, forest mushrooms and ham; oven baked with Fontina cheese — definitely not kosher) plus Italian fried potatoes. The fried potatoes are heaven for the good trencher man. The pasta is made from durum flour grown in South America and milled in Italy. What has your host ordered for herself? It is a waste of time going to an Italian restaurant if you do not eat pasta. Spaghettini neri (thin noodles with sauce of squid and its own ink, tomatoes and wine). It sounds odd and it looks odd but it tastes subtle and delicious. Then Risotto Marinara (Arborio rice from the Po Valley cooked in fish and crayfish sauce, mixed with manifold seafoods, the rice having absorbed just enough water).

If you go in for puddings take Tira-mi-su (pruriently translated as "Pick-me-up"). It will take you out of

this world — (mascarpone cream and sponge cake soaked in coffee and liqueur). I have eaten it all over the world but never like this. If this Tira-mi-su is 10 out of 10 the next best is 5 out of 10. For the simpler taste, blueberries and a sauce of lemon juice and sugar and preferably no cream.

I am not going to take you through the whole menu. I mention some things in passing. A simple dish is a good test of whether the chef has skill as well as style. Try gnocchi al pesto or insalata latino. The coffee is the best in Melbourne — short black with bitter almond biscuits.

The recorded music is Vivaldi or Sinatra. I have never heard anything else played there. It is soft enough to ignore. Price? If this is a sensible question for you to ask, see if you can get a lady silk to take you to lunch.

There are no comparisons amongst the best and this is one of our best. I have only one serious reservation. Bruce Ruxton recommends the place. Age Good Food Guide 1987 op. cit.

Anon.

Cafe Latin, 55 Lonsdale Street, 662 1986.
Open most days for lunch and dinner.

Lawyers Bookshelf

VOUMARD, THE SALE OF LAND IN VICTORIA
4th Edition by P.N. Wikrama
The Law Book Company Ltd.,
pp.1-62d, Cloth $89.50

Voumard has become a bible. Voumard during his life-time was revered. He was revered by barristers for his learning. He was revered by solicitors for his small fees. At $89.50 the latest edition of his text probably represents the fee he would have charged on an extremely long and erudite opinion.

But nowadays instead of Selbourne Chambers we have Owen Dixon West and instead of Voumard we have Wikrama. And a jolly good job he is doing.

There have been some comments on new editions keeping abreast of the times since the death of Voumard in 1974. This edition would appear to have answered some of the critics. Of course, a quick perusal of the book will show that it is, indeed, a book within a book. The footnotes are of such magnitude that they combine a text running parallel with the text. But the constraints of money and time may mean that placing much of them in the text would mean an extremely large and even more expensive form far in excess of the present 672 pages. You can't have everything.

But what you do have is a very able compilation and discussion of the changes in the law, especially since the last edition of 1978. Part performance and in particular the case of **Steadman v Steadman** [1926] AC 536 receive detailed attention at pp. 105-107. Other areas covering both caselaw and legislative changes receive detailed and knowledgable attention.

All in all the Wikrama Voumard remains a bible. But one can only conjecture at what Wikrama would charge for an extremely long and erudite opinion.

As the Law Book Company says, in one of its glossy pamphlets — which seem to bombard us at every turn — "A REQUIRED CONTEMPORARY ADDITION TO THE PRACTITIONERS BOOK-SHELF" .... so long as you are a land lawyer.

Paul D. Elliott

THE LAW OF CONSENT
by Peter W. Young,
Law Book Company, 1986, pps.229 + xxxvi,
Price $35.00

The author of this slim and somewhat unusual volume is both a Judge of the Supreme Court of New South Wales and a prominent lay member of the Anglican Church, holding, inter alia, the position of Chancellor of the Anglican Diocese of Bathurst. His Honour is not doubt better known to the members of the Victoria Bar as the author of a text on Declaratory Orders.

One might imagine that the Law of Consent had been adequately dealt with in a wide range of legal texts — why then write this separate volume? In His Honour's own words:

> "Some years ago, I became alive to the fact that in many areas of the law, the result of a dispute between parties could change dramatically if there was some consent given by one of more of them. ... It occurred to me that it might be a very worthwhile exercise to put together the situations where consent had this dramatic effect and to analyse what was meant by this conception of consent."

His Honour deals at some length with the meaning of consent and the various maxims concerning consent including qui tacet, consentire vedetur (he who is silent is deemed to have consented), which maxim he has illustrated with the example: "the girl who makes no protest at a proposal to kiss her in the moonlight has by her silence and inaction consented".

Various general issues are discussed, including "Motives and Consent", "The Time of Consent" and "Payment for Consent". "Factors Vitiating

Consent" are also canvassed; these include "Mistake", "Duress" and "Fraud".

His Honour examines Consent as an aspect of such major areas of law as Tort, Contract, Crime, Personal Relationships, Equity and both Private and Public law. There is also a short chapter on Medicine and Consent, which refers to the vexed question of blood transfusions for children.

This most interesting and useful text emphasises the wide scope of the concept of Consent in the law, ranging from the issue of consent in a rape trial to the commonplace seeking of a Court Order by Consent.

His Honour ends his book with a convenient summary of principles on Consent, the last of which is that "The only real rule so far as the law of consent is concerned is that expressed by George Bernard Shaw in The Golden Rule, viz. "The only golden rule is that there are no golden rules"."

Kim Baker

ANNOTATED TAKE-OVERS CODE

by D.D. McDonough, Law Book Company 1987
pps. 258 + xxv,
RRP $49.50 (limp cover)

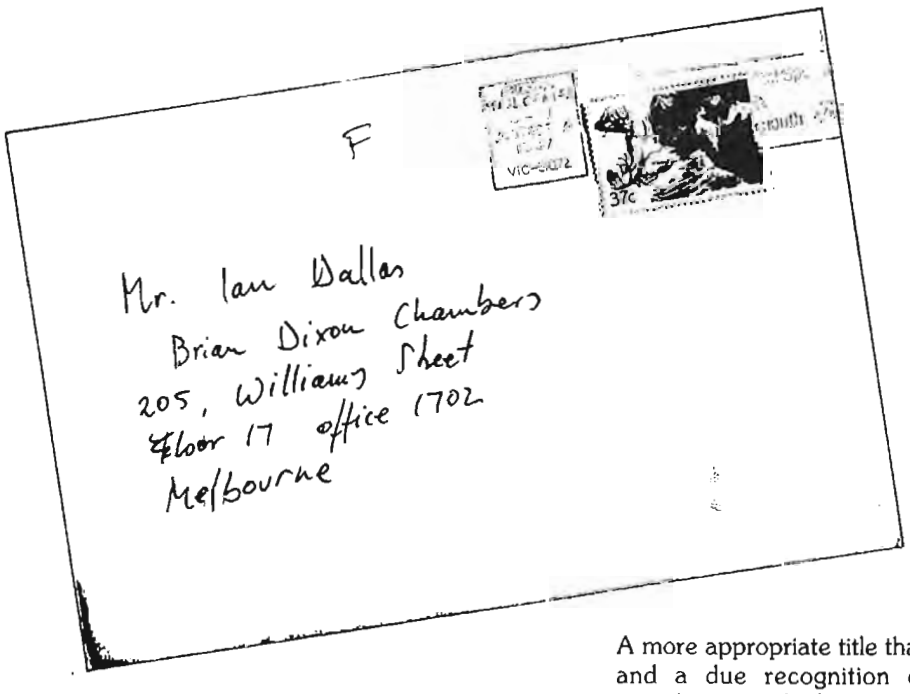
In a similar vein to Miller's highly successful "Annotated Trade Practices Act" comes McDonough's Annotated Take-Overs Code. The book refers to the Acquisition of Shares Code in its entirety, the Companies Code itself (insofar as the Code relates to prospectuses, securities and charges and offences for the breach of its provisions), the Acquisition of Shares Regulations, and the Fees Regulations.

The book briefly sets out the legislative scheme in which the Companies (Acquisition of Shares) Code has been enacted as well as detailing the Acts (up to number 6 of 1987) which have amended the various take-over Codes.

As for the annotations themselves, the book is brimming with authorities of Courts of all Australian States and Territories and of English Courts. The "creeping take-over", pari passu allotments, proportional bids, conditional offers and the like are fully explained in the context of decided cases. Very usefully, the policy currently adopted by the NCSC on relevant issues is also set out.

The book is tailored with eye-catching headings, bold print and a careful index. For those involved in any aspect of take-overs — whether for the raider, target or interested party — the book's 258 pages will provide immeasurable assistance.

Joshua Wilson



A more appropriate title than "Owen Dixon West", and a due recognition of Mr. Brian Dixon's contribution to the law.

REGULATED CREDIT — THE SALE ASPECT

by **A.J. Duggan,** Law Book Company, 1986; pps. 407 + xxxix; Price $59.50

The areas of law concerning the consumer have become, in recent years, increasingly complicated as a result of a plethora of legislative enactments by both Commonwealth and State parliaments.

This volume is the first of two whose objective is to examine the interaction of the old with the new law insofar as it regulates credit transactions in Australia. The first volume deals with the sale aspect and examines both product liability and credit law. The yet-to-be published second volume will deal with the credit and security aspects.

Sale of Goods and Implied Terms are covered generally, and the law applicable in each State is outlined.

Goods Leases and Hire Purchase Agreements are looked at, and reference is made to the various pieces of legislation regulating these, including the Victorian Credit Act 1984, Part IV of the Goods Act 1958 (Vic.), the Hire Purchase Act 1959 and the Motor Car Traders Act 1973. The relationship of both State and Commonwealth laws with the laws of other jurisdictions is also examined.

Contracts for Services are examined, as is Misrepresentation. The text also looks at the Fair Trading Act 1958, the Victorian equivalent of the Trade Practices Act 1974 (Cth). This is a wide-ranging piece of legislation which is not limited in its scope to corporations; it applies to conduct engaged in by "a person" in "trade or commerce".

Those situations referred to by the author as "Multi-party Transactions" (the usual case being where a customer buys goods from a dealer by means of credit provided by a third party or credit provider) are discussed at great length.

A number of policy issues are also examined. The most important of these is the overlap of different laws, each with its own constitutional limitations, which attempt to cover the same subject matter. The Swanson Committee Report warned of this danger in 1976; regrettably, as the author of this work points out, to date, "the Victorian Goods (Sales and Leases) Act 1981 (which inserted Part IV in the Goods Act 1958) represents the sole attempt to come to grips with the problem ... but as an exercise in rationalisation of laws, it is a disappointment ... the Victorian initiative calls to mind the Chinese adage about one hand clapping".

Accepting that the legislators have lost their way in what appears to have been a strenuous attempt to win over the votes of middle-class consumers, this work, although of a general nature, is a useful guide to the sale aspect of the Law of Regulated Credit. The need for such a guide can be seen when one takes cognizance of the fact that in Victoria alone a Hire Purchase Agreement may conceivably be subject to at least four sets of implied terms derived from State law, quite apart from the implied terms set out in Division 2 of Part V of the Trade Practices Act 1974 (Cth). Consumers who know their rights, or dealers in goods or services who know their obligations must, one supposes, be fairly thin on the ground; and legal advisers genuinely in a position to enlighten or advise them similarly few and far between. This book should go some way towards redressing the balance.

Kim Baker

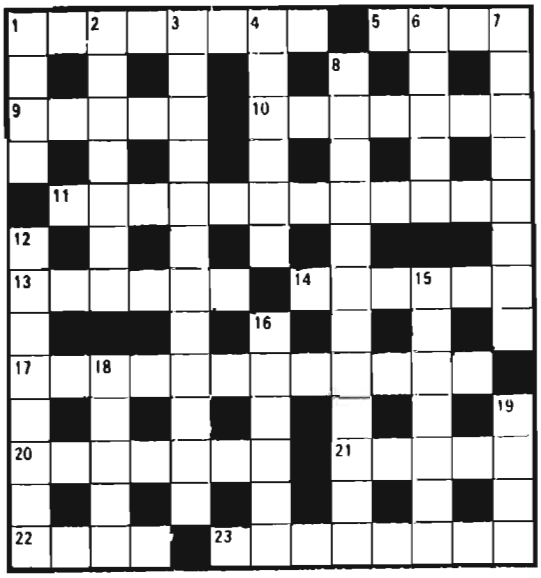
Captain's Cryptic

Across

1 Precis (8)
5 Shape (4)
9 Doych (5)
10 Yearly payment of money (7)
11 One who commissions (12)
13 Move to another place (6)
14 Norse bays (6)
17 Non oritur actio from this (2,5,5)
20 Sticklers for propriety (7)
21 Against the world at large (2,3)
22 Any and withered (4)
23 Orally defames (7)

Down

1 Court action (4)
2 Seeking directions from courts (7)
3 A buyer back (12)
4 Spare and thin (5)
6 Equatorial constellation (5)
7 The feminine of the head of municipality (8)
8 Overawing with fear (12)
12 Buys in preference to others (8)
15 Come again (7)
16 Showy, gaudy and cheap (6)
18 The general import of a document (5)
19 Little devils (4)



Competition No. 6

Much of the Spring 87 Bar News was taken up with the contributions, both erudite and otherwise, of DPP and Bar News Editorial Committee Member **John Coldrey** Q.C. We should at least be thankful he doesn't play cricket.

But unfortunately the last few lines of "Travels with His Honour" disappeared (see p.46). This occurrence could be due to malign fate, sheer editorial incompetence or a combination of both. But it's an ill wind that blows no good.

Our Competition No. 6 is: **Conclude John Coldrey's diary with an account of two days anywhere in Europe or the British Isles.**

Prize: A bottle of reasonably good wine from the Essoign Club.

Winner of Competition No. 5

Competition No. 5 was as follows:

> "You have been retained by the State Government as a consultant to advise on ways of reducing court backlogs without appointing more judges. Provide one brilliant idea, together with a suitably snappy title."

The winners were John Phillips Q.C. and Ken Hayne Q.C. with the following:

MEMORANDUM FOR LAW DEPARTMENT

Purpose: Elimination of Court Backlogs.

Short Title: Legl-Care

Executive Summary

All lawyers agree that every Court action has an element of risk attached. Because the outcome of each case is unpredictable, many litigants insist on submitting the case to judgment in Court. As a result, the list of cases awaiting trial in all Courts is intolerably long. This is a great waste of community resources. If the outcome of each case is predictable, all cases will settle and the backlog will be eliminated at a stroke.

Recommendation

Consistently with the Transport Accident and WorkCare initiatives, the government should move towards no fault liability in all civil cases, with a view to the introduction of general no fault liability in all cases, both civil and criminal ("Legl-Care").

Implementation

As a first step, risks should be eliminated from litigation. We now have many years of statistics that show the outcome of every action started in the Courts. Properly programmed, we can derive the probability of any action succeeding and the probable return to the plaintiff. Initially, the program might sensibly recognise fact variations, at least in broad classifications: Legl-Care, Statistically Programmed Integers at Trial, or LICSPIT. The probable result once determined should then be imposed on the litigants, a step which can be taken by a simple amendment to the Court (Community Values and Resources Beneficiation) Regulations, requiring the Courts to apply the statistical result unless there is a Ministerial certificate permitting deviation.

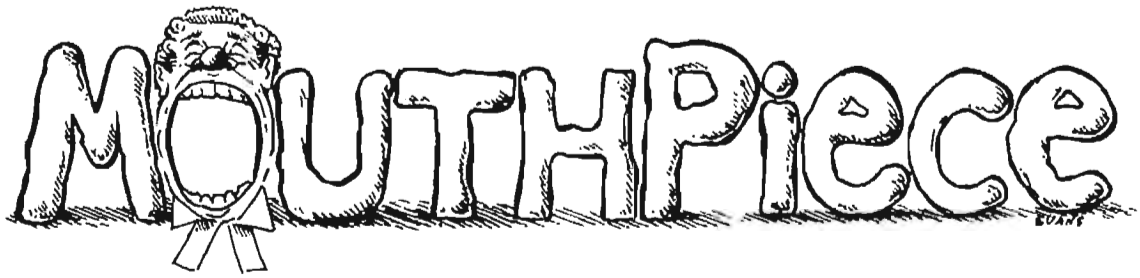
Of course much will depend upon the data base. In time, as the statistical norm is imposed on more and more cases, the need to recognise fact variation, even in broad classifications, will disappear. We can move to a new program: Statistically Translated Upshots, Free of Facts which Evidence Difference, or STUFFED. There is no reason in principle why the corporate raider who brings a take-over case should be treated differently from the plaintiff of disadvantaged ethnicity who brings a case for pain and suffering sustained in some motor accident. On the whole a macro approach is recommended rather than the socially divisive step of treating people differently simply because their claims are different.

Once the system is in place, it will be possible to move to a full Legl-Care system and —

(a) do away with trained judges and their costly staffs and pensions, substituting suitably caring computer professionals. In fact, this step could be taken now, because the only objection to be voiced will be from barristers and that can be easily dismissed as no more than a knee jerk reaction stemming from vested interest;

(b) move to a weekly payment system to all plaintiffs, based upon 85% of the statistically justified, probable result of the claim made; and

(c) move to criminal no fault liability in which persons arrested start immediately to serve an average sentence, after taking into account the statistical probability of escape and early release. If sentences are served in existing Court buildings, no longer needed for trails, that should satisfy community calls for "real" punishment of criminals.



1. Well, what do you think about the Palace Revolution?

2. You mean the "Pink Palace Revolution"?

1. The Tenants Reform ticket's win must have come as a bit of a shock.

2. Could teach Norm Gallagher a few tricks eh?

1. What's Bar News going to do now that it hasn't got Fab to lampoon any more?

2. It'll have to be "Champagne Charlie" I suppose.

1. Seriously though, apart from the apparent accommodation problems I thought Fab's interregnum was going well ...

2. And Champagne Charlie has a lot of headaches ahead.

1. Yeah, an electorate that voted with its hip pocket nerve is going to be a hard one to satisfy.

2. Especially when that same electorate failed to attend and vote at the various General Meetings that got us where we are today ...

1. ... but was happy to sit back and criticise and complain and put up their own allegedly better ideas.

2. So what can the new Bar Council do about accommodation? It's stuck with the Pink Palace.

1. At least they're moving to fill up the few vacant rooms. Perhaps they can make the lifts work and even the airconditioning.

2. A Bar building with lifts that work? That'd be like a rail system without strikes. But anyway the real problem is that a lot of people think the powers that be have failed to provide top of the market accommodation at acceptable rates.

1. But we are spending more than market rates — especially in the Pink Palace.

2. It may be that the financing of the Pink Palace is adding to our problems. But how is the new Bar Council going to get us out of arrangements that we are locked into until at least you and I retire?

1. And leave a substantial legacy for the Bar that follows us ... if the Government hasn't abolished it in the meantime.

2. The Bar Council will have to fix it, there are certainly high expectations.

1. Perhaps, too, they ought to turn their attentions to the income side of things.

2. Like ensuring that Sollies pay within a reasonable time.

1. At the very least they ought to ensure that Clerks get onto notorious bad payers — put them on a black list, no briefs accepted without the money up front.

2. Too many of the few bad ones are allowed to work their way through one list and then move onto the next and so on. They would soon smarten up their act if the axe fell heavily and quickly.

1. And what about the Legal Aid Commission!

2. Indeed! They're allowed to get away with sitting on accounts for years.

1. And it's no use writing to them, they don't even acknowledge letters.

2. And on top of things they unilaterally reduce fees even below their own recommended scales.

1. If the whim takes them, they mark down Short Defended Hearings in the Family Court to Pre Trials and then make you wait two years to be paid the lesser amount. Or contested Practice Court matters to uncontested.

2. Like Adjournments in Police Matters ... without warning one is stuck with two-thirds of bugger all and even that depreciates at the rate of over 15 per cent each year you wait to get it. It would be alright if it was our fault or our instructors' fault. If it isn't the fault of the prosecution not being ready it's just as likely the defendant was not ready because Legal Aid approval came through too late to get the case properly organised.

1. What irks too, is in Civil Matters when you get an order for all of your costs. The client still has to pay Legal Aid the full amount and the lawyers still get only 80 per cent. With the proposed changes in crash and bash it will be like doing adjournments of Police matters — eighty per cent of two thirds of scale and you can bet your boots the Legal Aid Commission will soon find a way to mark at less than scale.

2. Ummm what is eighty per cent of two thirds of two thirds?

1. Imagine what the refreshers would be like.

2. Well, I wish Champagne Charlie and his team the best of luck. They certainly have a lot to do.

1. Perhaps they could run another Bar Review ...

2. Or have a daily trifecta on which lift in each building functions correctly for the longest period of time ...

1. And a sweep on what time each day the airconditioning first stops in the Pink Palace.

2. We've got plenty of good ideas — why don't we stand next year?

1. We could start our own ticket.

Graham Devries

Unique Fabric Distributors Pty. Ltd. v Pattons Pty. Ltd.

Coram Marks J
5 October 1987

John Larkins Q.C. had been regaling the court with an anecdote about how he had once argued a similar point for three days before Judge Stafford of the County Court. That judge reserved his decision but died before handing down a decision. Larkins was granted a certificate under the Appeals Costs Fund Act.

Marks J: "I'd do my best to oblige but at the moment I'm feeling reasonably well".

R. v Cozzo & Ors.

Coram Judge Harris
15th Court County Court
18th September 1987

2.17 p.m.
Mr. Lovitt: "Your Honour, in view of the non-appearance by the Crown this afternoon, I feel I should inform you, sir, that my learned friends at this end of the Bar table agree that all of the lifts in this building are operating correctly and there was **no** crowd waiting in the foyer.

His Honour: Let us just wait for the moment.

2.21 p.m.
Mr. Fitzgerald Q.C. [slightly breathless]: We apologise, your Honour and feel we should inform the court that we arrived down below before the allotted time but the crowd in the foyer [general laughter in the court] and the problems with the lifts [more laughter] caused ... [the rest of the statement was drawned out by the noises pervading the court].

His Honour: That excuse has the advantage of validity if lacking somewhat in originality.

R. v Cozzo & Ors.

Coram Judge Harris
15th County Court
22nd September 1987

His Honour (ruling on a voire dire): I therefore rule that the evidence is admissible and I exercise my prejudice ... ah ... my discretion ... [laughter in court]

Voice from Bar Table: I hope your Honour won't mind my informing Bar News of what just fell from your Honour's lips.

His Honour: Don't go telling Bar News what I just said or you'll have me shutting up like a clam.

Another voice from Bar Table: That'll go in to.

R v Forsyth

Coram Murray J
4th September 1987

Upon resuming at 2.15 p.m.
(In the absence of the jury)

Mr. R. Perry: Your Honour, I am responsible for asking your Tipstaff to leave the jurors out. The reason I do that, sir, something has occurred which disturbs me immensely. It explains

something to me, some of the answers that the present witness gave. I am instructed that at the time he was being cross-examined, from the moment he was being cross-examined, there was a man in the gallery with a beard, grey beard, he is described as, with glasses, who had his legs crossed in a fashion — I can't do it with my leg — but he had his legs crossed in a fashion so that when this man found it difficult to answer a question, the man in the gallery would raise his leg and give a demonstration as I am now, brushing the chin with the palm of my hand. And it just wasn't once, but that was done on a number of occasions. Now, I am concerned that if there is tick-tacking going on, then something ought to be done about it.

His Honour: Certainly I agree, Mr. Perry. On the other hand, I have been watching the witness pretty closely and I observed that when three people came into the gallery, he looked up at them, but only momentarily, and I would have observed it if he continually looked up at the gallery. I think the man you were talking about was sitting over on the left. He had been here most of the morning.

Mr. Perry: Of course we don't know who is up there simply because we are not looking that way. At the moment I don't think there is any real problem, only that I may have got answers I may not have got had it not been for a signal. I am concerned it does not happen this afternoon.

His Honour: What do you say, Mr. Richter?

Mr. Richter: Your Honour, one of my instructors, Miss Hunt, just leaned over to me and said that the man who was being referred to is a barrister friend of hers who, I think she said, was waiting to take her to lunch. His name was Malcolm Park. He is a member of counsel, and she tells me just now that he probably won't be in this afternoon because he is in court. Now, if that ...

Mr. Perry: If it be the same person, I owe him — I thought terrible things about him, sir.

Mr. Richter: That is what I am instructed.

His Honour: I will keep my eyes open, Mr. Perry.

Mr. Perry: I am sorry, I didn't want to hold up the court.

His Honour: No, it is a very disturbing thing if true.

Mr. Richter: Does your Honour desire me to take the matter any further?

His Honour: No. Perhaps you might ask your instructor if the man she is talking about — was he sitting over on the left?

Mr. Richter: Yes, she is indicating on the left.

His Honour: In the back row by himself?

Mr. Richter: Yes. I will ask one other matter. I am told he has got no interest in this case at all — apart from our instructor.

His Honour: Bring in the jury.

(At 2.17 p.m. the jury returned into court.)

R v Rothwell & Ors.

Coram Judge Leckie
24th August 1987

D.A. Allen (for prisoner) Mr. Johnson (for Crown)

Mr. Allen: Just at the outset ... would you agree with me that prostitutes from time to time suffer injuries as a result of the way customers react?

Witness: Not the type of customers I have, they were gentlemen.

Mr. Allen: But — you have never suffered injuries yourself?

Witness: Not from my clients — I don't work anymore anyway, but the clients I had were businessmen — like yourself!

Mr. Allen: We have not met before have we?

Witness: You never had a beard did you?

Mr. Allen: I refuse to answer that question.

His Honour: On the usual grounds I take it?

Mr. Allen: On the usual grounds your Honour.

The Best of Legge's Law Lexicon

AMICUS CURIAE. A barrister who asks a County Court Judge for an adjournment at noon on Wednesday.

AUTHOR. A crown witness giving evidence of an unsworn statement.

BLASPHEMY. The denial or ridicule of the belief that counsel is employed by his clerk.

CONFESSION AND AVOIDANCE. A successful voir dire.

DANEGELD. A Scandinavian punishment for adultery.

DURESS. The assistance given by a judge in the compromise of a building dispute.

ELECTION. The 14 days at the end of September during which members of the Bar Council are kind to juniors.

ESSOIN, ESSOIGNE, ASSOIN, EXOINE. "On the first day in every term the Court sat to hear essoigns for such as did not appear by reason of pilgrimage, the King's service or other just excuse. By the skilful use of essoigns it was possible to stay out of Court for a considerable time." Buckner on Delay op.cit.

EXPERT WITNESS. A lay advocate.

FEOFFEES. Fees owed by a feoffing defaulter.

FULL COURT. A tribunal with jurisdiction to deal kindly with the eccentricities of its absent members.

GENERAL SESSIONS. A mythical court where judges were kind and considerate and the listing system worked efficiently.

GUILTY. The second rubber stamp owned by a Magistrate. See also "Date Stamp".

(H)AVYA. An oral question mark used in running down cases. 13 S.A.L.R. 242. In cross-examination the proper form is (H)AVNCHA: see also didja, dinja, y dincha.

HERETIC. A stake-holder.

HIJACK. The common law misdemeanour of familiarity towards the C.J.

IDENTIFICATION PARADE. A visual verbal.

IN TRANSITU. The closing address of counsel who has 3 briefs for the same day in different courts.

INTER VIVOS. The condition of a judge of the Supreme Court before he gets his knighthood.

JUDGE ADVOCATE. Indeed!

JUDICIAL NOTICE. The rule of law which holds that the obvious is obvious, e.g. that adultery cannot take place on the front seat of a lorry (at first instance) or, as the Lord Justices held, obviously adultery can take place on the front seat of a lorry. Yuill v Yuill [1945] 1 All ER 183, 186.

JUSTICE. Must not only be done but must be seen to be believed.

LAW REPORTS. Any collection of the delphic utterances. The two-faced oracles are moved to utterance by donning the vestments of the distant past and mounting a high altar in the specially constructed temple which is situated at the centre of all State and provincial capitals. The required state of mind is produced by meditating on the incantations of the acolytes (see "Lawyer").

LAWYER. An acolyte of the oracles devoted to representing that the Law Reports have some connection with reality. These sermons are known as "advice". He also purports to mediate between the laity and the oracles by putting their requests into the sacred language. For these catachneses he is rewarded by offerings known as "fees" (q.v.).

LEAVE TO DEFEND. The benediction pronounced by the Master at the end of the service known as Order 14.

LEGAL AID. A scheme which enables the poor to acquire the middle-class vice of ritual hatred.

LEGAL ETHICS. The moral state which enables a law person to argue with conviction against the unassailable proposition that she propounded with vehemence the day before.

LEGISLATURE. This mythical deity is supposed to have established the oracles so that its will might be made known to the laity. In classical mythology the divine purpose is often frustrated by the Draftsman.

LITIGANTS. They are chosen by lot to be sacrificed by the lawyers. Those found to be unfeed are offered up to summary judgment the others are mulct. A select few after many trials may even be admitted to the law reports.

MALICE. The state of mind of a victim who lingers for less than a year and a day.

McNAUGHTON'S RULE. The idea peculiar to lawyers that twelve reasonable men do not know a lunatic when they see one.

NO CASE. Evidence sufficient for a commital.

NOLUMUS LEGES ANGLIAE MUTARI. The motto of the Chief Justice's Law Reform Committee.

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

ORDER 14. A procedure in which a lying defendant always beats a lying plaintiff.

PARTNERSHIP DISPUTE. Litigious insanity. A partnership dispute between two highwaymen was dismissed with costs to be paid by counsel who signed the petition. The plaintiff and defendant were both hanged and the solicitor for the plaintiff was transported. Lindley 14th Edtn. 137 n.38.

PER INCURIAM. Vol. 1 of the CCR.

POOR LAW. Vol. 2 of the CCR.

QUIET ENJOYMENT. Venery between mutes.

QUO WARRANTO. Dog latin for "Who the hell are you?"

ROBES. A method of distinguishing the sheep from the shearer.

ROYAL COMMISSION. A mode of acquiring pelf by saving politicians from embarrassment.

SCINTILLA JURIS. The body of law applied in the running down jurisdiction.

SOLICITOR-GENERAL. The haven from which ex-Chairmen of the Bar Council never return.

SOLVENT. A politician who has been defamed.

TRUSTEE. A solicitor in Pentridge.

UNCLAIMED PROPERTY. A letter bomb which fails to go off.

UNDERTAKER. An entrepreneur who signs himself "Yours eventually".

VALUATION. A work of fiction constructed according to the Institute of Valuers logical method. This usually requires that during cross-examination the valuer will disappear up his own major premise.

VOIRE DIRE. A rehearsal in which counsel for the accused prepares police witnesses for their cross-examination before the jury.

Solution to Captain's Cryptic

1 C	O	2 M	P	3 R	E	4 S	S	■	5 F	6 O	R	7 M
A	■	O	■	E	■	P	■	8 I	■	R	■	A
9 S	A	T	E	D	■	10 A	N	N	U	I	T	Y
E	■	I	■	E	■	R	■	T	■	O	■	O
■	11 C	O	M	M	I	S	S	I	O	N	E	R
12 P	■	N	■	P	■	E	■	M	■	■	■	E
13 R	E	S	I	T	E	■	14 F	I	O	15 R	D	S
E	■	■	■	O	■	16 T	■	D	■	E	■	S
17 E	X	18 T	U	R	P	I	C	A	U	S	A	■
M	■	E	■	I	■	N	■	T	■	U	■	19 I
20 P	U	R	I	S	T	S	■	21 I	N	R	E	M
T	■	O	■	T	■	E	■	O	■	G	■	P
22 S	E	R	E	■	23 S	L	A	N	D	E	R	S