VICTORIAN BAR NEWS

No. 67
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SUMMER 1988

The New Silks

Giannarelli Re-visited
Michael McInerney

Practice Companies and Service Entities
David Bloom Q.C.

Rambo Litigation: Why Hardball Tactics Don't Work
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Who's Who on the 1988-89 Bar Council

Bar Clients' XVIII

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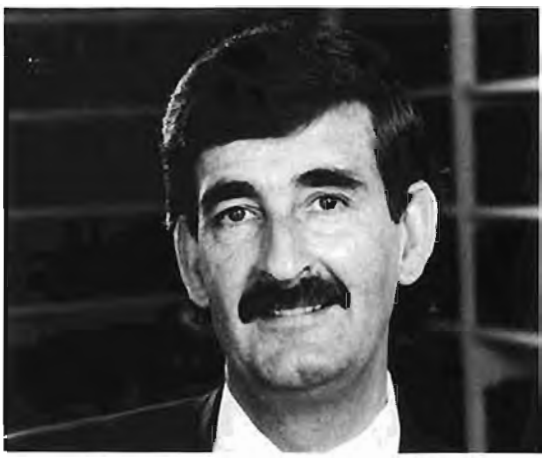

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The Silks' Tapestries

Court in the Act

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THE EDITORS' BACKSHEET

ECCLESIASTICAL JURISDICTION

THE NEW HIGH COURT DRESS INVOLVES NOT only the disappearance of the wig. The new robe is black, high necked and without any white collar, bands or jabot. On a recent sitting of the High Court in Melbourne, the following exchange was overheard:
Counsel A: Rather Jesuitical don't you think?
Counsel B: I would have thought Marist Brothers.

WE WERE WRONG

Like all the best publications with intellectual pretentions, Bar News has its fair share of misprints and clangers. But we could not match what must be one of the all time greats, recently quoted by Paul Johnson in the Spectator. A Massachussets paper published the following:
"Instead of being arrested, as we stated, for kicking his wife down a flight of stairs and hurling a lighted kerosene lamp after her, the Reverend James P. Willman died unmarried four years ago."

SUNSHINE STATE (CONT)

The recent New South Wales Bar News contains some excellent photos of their 1988 Bench and Bar dinner. It appears that public kissing, hugging and other signs of affection are much in vogue between members of the New South Wales Bar. The issue also contains a report of the unrepentant response of the Queensland Bar to criticisms of its restrictive practices (see also Bar News Spring 1988). At the ABA Convention the Queensland Bar delegates rendered the following version of "Please Fence Us In".

Oh! Give us briefs, lots of briefs up in Queensland where we tout,
Please fence us in.

Turn the heat on Mr. Street and keep the southern BARstards out,
Please fence us in.
Let us be by ourselves earning lots of fees,
Ignoring all the whingings of the southern Q.C.'s
Keep them out forever, and we ask you please
Please fence us in.

Just turn us loose
Let us plunder while you wonder underneath the Southern sky
With our great skill, we'll fill the bill and swell the till,
And we'll leave you high and dry,
We want to try in the High where our skills are tested,
Litigate and arbitrate 'til you're divested
We can't stand competition and we won't be pestered.
Please fence us in.

Just turn us loose
We'll operate in every State with enormous enterprise
Just take our word
In our cases in all places, we will cut you down to size
We want to state on your fate, we won't take debate,
We tell you now we never will reciprocate
Cross-vesting is distressing and may make a gate,
Please fence us in.

FROM THE LIBRARY

The Weekly Law Reports were never particularly light reading. Of recent times they seem to be largely made up of judicial fulminations against Mr. Peter Wright, hotly contested ecclesiastical disputes over permission for the use of brass candlesticks at St. Agatha's by the Marsh and rather eye-glazing stuff about value added tax.

What a change therefore to come across *Stephens* v. *Avery* [1988] 2 WLR 1280. The plaintiff claimed that The Mail on Sunday had breached an obligation of confidentiality by publishing details of a lesbian affair between herself and another woman who had been murdered by her husband on being discovered in a compromising position with the plaintiff.

The Mail on Sunday argued earnestly that it was against public policy to extend the protection of the law to confidential information concerning grossly immoral behaviour. Sir Nicolas Browne-Wilkinson VC noted that the plaintiff's conduct was "not so morally shocking as to prevent [The Mail on Sunday], a major national Sunday newspaper, from spreading the story all over its front and inside pages".

The defendants had relied on *Glyn* v. *Weston Feature Film Co* [1919] 1 Ch 261 where the famous actress Elinor Glyn lost a copyright claim because of the immoral nature of the work concerned. Elinor Glyn, it might be noted parenthetically, was often featured lightly clad and draped across the pelts of various endangered species, thus inspiring the lines

Would you like to sin
With Elinor Glyn
On a tiger skin?
Or would you prefer
To err
With her
On some other fur?

But we digress. Browne-Wilkinson VC dealt with the newspaper's argument as follows:

"I entirely accept the principle stated in that case, the principle being that a court of equity will not enforce copyright, and presumably also will not enforce a duty of confidence, relating to matters which have a grossly immoral tendency. But at the present day the difficulty is to identify what sexual conduct is to be treated as grossly immoral. In 1915 there was a code of sexual morals accepted by the overwhelming majority of society. A judge could therefore stigmatize certain sexual conduct as offending that moral code. But at the present day no such general code exists. There is no common view that sexual conduct of any kind between consenting adults is grossly immoral. I suspect the works of Elinor Glyn if published today would be widely regarded as, at the highest, very soft pornography."

Finally, we note that junior counsel for the plaintiff was one Vivienne Gay. Really.

GLEESON CJ

Bar News No. 66 noted the appointment of leading Sydney silk Murray Gleeson as Chief Justice of NSW. The most recent NSW Bar News published an interview with his Honour which included the following:

Q. What sort of a court can we expect to see you run?
A. Relaxed. Friendly. A cosy place in which a just solution to people's problems can be sorted out as the result of a quiet chat between Bench and Bar.

True it is that a footnote recorded a degree of scepticism on the part of the editor. We suggest nevertheless that this ideal might be worth consideration in some quarters in Victoria.

THE SILKS' TAPESTRIES

The hanging of the Silks' Tapestries bring to an end the great saga of the conception, financing, design and construction of Owen Dixon Chambers West. Former Bar News Editor *David Byrne* Q.C. concluded his massive contribution to this project by acting as secretary to the Silks' Tapestry Committee, a role which called on him to exercise the skills of salesman, accountant and bagman. He achieved a recovery rate among his colleagues at the Inner Bar which the Liquidators of Rothwells Ltd. might well envy.

The tapestries have already been the subject of much favourable comment, although the following was overheard:

Counsel A: I hear they cost a fortune. You could have got antique Persian rugs for a lot less.
Counsel B: True, but with an antique Persian rug you wouldn't get Hartog Berkeley.

CONTRIBUTIONS

The pages of Bar News, like the doors of the Ritz Hotel, are open to all. We welcome comments, complaints, praise or even protestations of neutrality about current issues — court delays, clerking, rents, accommodation, fees etc. etc. Also any items of travel, sport, history or geography with aspects which might interest some members of the Bar will be gratefully received. Obviously we cannot guarantee publication sight unseen, but readers may rest assured that our policy is to get material into Bar News, not keep it out. If you have in mind an idea for some substantial contribution, we would be very glad to discuss it in advance.

The Editors

CHAIRMAN'S MESSAGE

FOR THE SECOND YEAR IN SUCCESSION, THERE has been a marked change in the composition of the Bar Council. The elections have resulted in 10 new members of the Council. This year there was a record number of candidates (73) and a record turnout of voters (669). Despite a ticket, a list and numerous disclaimers, the electorate came up with its own collocation of members, which is a healthy sign in a Bar comprising some 1,100 members.

I personally would like to see tickets outlawed. I believe there should be only one factor guiding a member of the Bar Council, and that is, to do what is in the best interests of the Bar as a whole. There is no room for factions or playing politics. The members of the Council must work as a team, and I am confident that the present Council will do so. Because the Bar is growing so large, I think it might be appropriate that a list of all the candidates be published with a short biographical outline of each, and may be an expression of some view as to what he or she thinks the Bar Council should be doing; but no promises should be held out to the Bar. No member of the Council should be beholden to any promise made or to any group at the Bar.

To the retiring members of the last Council, may I thank them on behalf of the Bar for their considerable contributions to the running of the Bar over the past year. Our assistant Secretary, Paul Cosgrave, stood down after 3 years of dedicated service. We also thank him for his work on the Bar Council. The new assistant Secretary is Andrew McIntosh.

RELATIONS WITH THE GOVERNMENT

The Bar Council should not be political. It is not in the business of playing politics. During the past year on occasions relations between the Bar and the Government have become a little strained. The Attorney-General and I have both expressed an earnest desire to work together for the betterment of the administration of justice in this State. This is not to say that when appropriate, we should not take a tough stand and if necessary "go public".

The most pressing matter still is the number of Judges in the Supreme Court. This of course is not new. It has been a cause of concern ever since I came to the Bar in 1965. However it seems more acute today. The Delays in the Supreme Court are still unacceptable despite the efforts of a dedicated and hard-working judiciary. We have requested, yet again, that at least three more Judges should be appointed and their salaries increased substantially.

We are not receiving any response which would support any optimism that anything will be done. The simple fact is that there are quite excessive delays with resultant disadvantage to the litigant. The only solution is more Judges. This view is strongly supported by the Law Institute.

Judicial salaries have been questioned right across Australia. They are totally inadequate. Some Government will eventually take the lead and increase the salaries. What about it Mr. Attorney? If the best persons are refusing appointments, and if it is because of salaries, than a substantial increase will ensure they do not have any excuses in the future.

SOLICITORS' DEFAULT LIST

The implementation of a solicitors' default list caused some friction between the Bar and the Law Institute. The relations reached a point where certain threats were made by the Law Institute. Fortunately, things settled down, although there is still some discontent. In response to the solicitors' criticisms, the last Bar Council resolved that the scheme would be a pilot scheme for a period of three months until the end of October. A subcommittee has been set up to consider the scheme and the criticisms made of it and to report to the Bar Council. I personally take the view that the Bar Council is not in the business of collecting barristers' fees. We were given a power in 1891 to sue for our fees, a privilege not enjoyed in either England or New South Wales. In appropriate cases we should use it. On the other hand, I think there should be a default list scheme to be used as a last resort against the recalcitrant dilatory payer. I anticipate that when the scheme is revised and assuming the Bar Council resolves that we should have a scheme, we will discuss it with the Law Institute before resolving to put it into operation.

We have had discussions with the Executive of the Law Institute, and it has been pointed out that some fee vouchers are lost in the system or cannot be processed because of errors and lack of references. Each barrister is requested to use block letters in his fee book and make sure full references are given for each entry. It is also important that the clerks play their part with timely reminders. Because of differences in business practices in solicitors' offices, each clerk should send out a reminder each month in the form of a summary statement and an individual fee voucher

for each matter. Each List Committee should ensure that their clerks are doing this.

MEMBERS' VIEWS

I encourage members of the Bar to put ideas and suggestions to the Bar Council on any subject or topic. We want to know what the Bar is thinking, with particular reference as to what the Bar Council should be doing. We would welcome suggestions on any projects that should be undertaken and any services or facilities that should be provided for the members of the Bar. The Bar Council would welcome views on contingency fees. The Law Institute has issued a discussion paper on the question.

PROFESSIONAL CONDUCT

The Bar Council has resolved to look at the republication of our professional rules. A subcommittee has been formed. It is envisaged that we adopt a set of rulings which hopefully will set out clearly and concisely what we can do and what we cannot do in any given situation. The end result would be published in a loose leaf form.

GIANNARELLI

The decision of the High Court has upheld the Full Court's decision which re-affirmed the long standing common law rule that barristers are immune from suit for court work and all work which is so intimately connected with the conduct of the case in court that it can be fairly said to be a preliminary decision affecting the way the cause is to be conducted when it comes to the hearing. The reasoning of the Full Court and the majority of the High Court is compelling and barristers are encouraged to read the judgments. The level of competence at this Bar is high. The adversary system and the performance of our work in open court in the view of the public and under the watchful eye of the judiciary, ensures that the standard remains high. The marketplace makes certain that the incompetent are weeded out. I am sure the decison in *Giannarelli* will not alter the high standard of conduct which barristers display in this State. I do point out that we do not enjoy a complete immunity in the Supreme Court. A Judge may order a barrister to pay costs which have been incurred improperly or without reasonable cause or wasted by undue delay or negligence, or by any other misconduct or default. I refer to Order 63.23, and before you disagree with me, I suggest you look at Rule 63.23(7).

INSURANCE

I have written to our brokers requesting them to approach the underwriters seeking a refund of portion of the premium for the past two years which is attributable to what was called the "Giannarelli loading". On any view the premiums for the next year should be less than this year.

In conclusion, I wish all members of the Bar, the Clerks and their staff, and the staff of BCL and the Victorian Bar, a very merry Christmas and a happy, prosperous and above all healthy 1989.

E. W. Gillard

LAW COUNCIL REPORT

1989 CONVENTION

THREE EMINENT OVERSEAS JURISTS HAVE accepted invitations to speak at the 26th Australian Legal Convention in Sydney next August.

They are Britain's Lord Chancellor, Lord Mackay of Clashfern; Justice Anthony M Kennedy of the Supreme Court of the United States; and Judge Sir Gordon Slynn of the Court of Justice of the European Communities.

Those who attended the 24th Australian Legal Convention in Perth in 1987 will remember the major contribution made there by Lord Mackay, who shortly after his return to Britain was appointed Lord Chancellor.

SECRETARY-GENERAL

The Law Council has appointed Mr Peter Levy as its new Secretary-General. Mr Levy will succeed Mr Trevor Bennett when the latter retires on 15 December after two and a half years with the Law Council.

Peter Levy did his law training in South Africa and Australia, and comes to the Law Council from the Attorney-General's Department, where he was a Deputy Secretary.

IAN TEMBY QC

The Law Council and the ACT Law Society joined recently to pay tribute to the former Director of Public Prosecutions, Mr Ian Temby QC. Mr Temby, a former President of the Law Council, resigned from the office of DPP to take up the post of head of the new anti-corruption body in NSW.

GROUP SALARY PLAN

Following the successful introduction of a salary continuance plan for individual lawyers suffering illness or accident, a new Law Council-sponsored group plan is being introduced.

The plan administrator will be the Alexander Consulting Group and the underwriter will be Australian Casualty Company.

FEE SYSTEM REVIEW

The Law Council is examining proposals for a fundamental review of the system of charging for legal services. The announcement of this by President Denis Byrne has attracted considerable media interest, with most attention focusing on the fact that contingency fees are likely to be looked at as part of the review.

The Executive has approached several experts in

the field seeking views on how the review might be conducted. The objective is to thoroughly examine current methods of fixing the charges for legal services and then considering whether changes are needed or even a completely new approach.

HUMAN RIGHTS

The Law Council has invited each of its constitutent bodies to nominate a member of its council to liaise with the Law Council on matters relating to the work of Lawasia, which is deeply involved in human rights issues.

Lawasia's secretariat will move from Sydney to Perth in September next year, when David Geddes retires as Secretary-General and is succeeded by John Healy, of Perth. Retention of the secretariat in Australia was strongly supported by the Law Council, and the new secretariat will receive substantial assistance from the WA Law Society.

INTERNATIONAL LAW

Membership of the Law Council's relatively new International Law Section has reached 100 already, and the Section is very active. The fact that there were 13 nominations for the nine positions on the Section's executive is an indication of the high level of interest.

The Section will publish jointly with AUSTRADE a directory of Australian legal services. Law firms are now being invited to place entries in the directory, which will be circulated through AUSTRADE's offices around the world, as well as in Australia.

The Section publishes a regular bulletin for its members.

LEGAL AID REVIEW

There is to be a major review of Australia's legal aid system by the National Legal Aid Advisory Committee.

The Law Council will be making submissions to the review on behalf of the legal profession.

SUBMISSIONS UPDATE

In recent submissions to the Federal Government and other authorities the Law Council has said that:

Search warrants

The guidelines on the execution of search warrants on lawyers' premises should be made applicable to the execution of warrants on the premises of law societies and like bodies.

Law firms

The Government wherever possible should use Australian law firms with overseas offices when it has legal business to transact in other countries.

Matrimonial property

Legislation as proposed in ALRC Report No. 39 is not necessary, could create an undesirable climate of uncertainty, would not help the parties to resolve their disputes more amicably and less expensively and would not overcome 'value-laden assessments'. All property of either or both spouses, however and whenever acquired, should be available for division. A presumption of equal sharing is opposed but if there is to be a presumption it should apply only to a limited class of assets.

Child support

A formula is unable to do justice to all or even most cases as between parents and children. The formula fails to take adequate account of the fact that every case is different. While income is the single most important factor in assessing maintenance, a formula based entirely on income is too narrowly based. Each party should have the right to apply to the court for an assessment of maintenance. The first stage of the child support scheme should be allowed to operate for at least two years before the introduction of a formula is contemplated.

Cross vesting

The Rules of Court should provide for parties to be able to apply, in cases of difficulty or doubt, for directions as to how proceedings are to be instituted. The draft rule requiring a party to say if that party seeks to rely on evidentiary or procedural provisions from another jurisdiction should be deleted as this is more properly a matter to be raised on a summons for directions than as a matter of pleadings. Before a court remits proceedings to another court on its own motion, the parties should be notified of this intention and, if they wish, be heard before the order is made.

Computerised data discovery

The solution to the problem of including computerised data in the discovery process may be to amend the Rules of the Federal Court to provide that the court may make orders for the copying of any document or the copying, transcribing or production in a reasonably usable form of any material, data or information stored or recorded by mechanical or electronic means.

Customs law

A prompt and less expensive security formula should be devised to deal with situations where Customs demand substantial deposits of cash. The provisions of the Customs Act should be made more flexible to permit the free flow of cargo during disputes on entry of goods by substituting securities for physical detention. Proposed legislation should apply to the sale of an asset only if the Taxation Commissioner is reasonably satisifed that the purpose of the sale was to create the relevant interest charges for tax minimisation purposes; the legislation should apply only on and from the date it was published.

Industry assistance

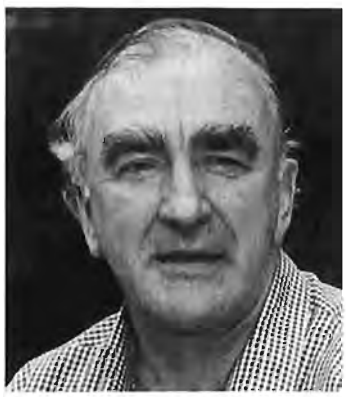
The proper forum for determining protection levels, particularly following disputes between local industry and importers and the litigation of such disputes, is either in the Parliament or, preferably, following an inquiry by the IAC and the provision of its expert advice to the Government; the convincing of two ministers that a duty rate change is necessary does not constitute a sufficient safeguard.

Family law legal aid scale

It is disgraceful that the scale has not been amended since 1986, and urgent remedial action should be taken. Under no circumstances should the current survey of family law practitioners on the matter be taken as a reason for deferring action.

Child sexual abuse
It should be an objective that access to knowledge of and the right to expect support from parents are rights of every child and that those rights should only be infringed when considerations of welfare, based on appropriate evidence at an appropriate level of proof, require those rights to be affected (from a lengthy submission by the Family Law Section to the Family Law Council).

COMMON LAW BAR ASSOCIATION REPORT



Jack Keenan, President, Common Law Bar Association.

AT ITS ANNUAL GENERAL MEETING ON 24TH August 1988 a new committee was elected comprising:

President: J. Keenan.
Secretary: T. Wodak.
Treasurer: C. Wren.
Committee: B. Dove Q.C., M. Shannon Q.C., H. Ball, J. Ruskin, M. Ruddle, R. Dyer.

Barry Dove Q.C. who had presided over the affairs of the Common Law Bar Association for three years did not offer for re-election as President. During the meeting, a motion of expressing the Association's gratitude and acknowledging the great contribution of Dove Q.C. as President was carried unanimously.

The Associaton has continued to devote time to considering ongoing problems with the listing of personal injury cases in both the Supreme Court and the County Court. A number of initiatives have been considered and recommendations made. The committee has also devoted some attention to various aspects of proceedings in the Accident Compensation Tribunal but the studies are incomplete at the time of this report.

The committee is currently considering some potential difficulties which have emerged with relation to the assessment of impairment as defined by s. 47 of the Transport Accident Act 1986. The obligation on the Transport Accident Commission to make such assessments commenced on 1st July 1988, and it is only since that time that the potential difficulty has become apparent.

Tom Wodak
Secretary

WELCOME

JUDGE LEWIS

FORTUNATELY FOR THE VICTORIAN LEGAL profession Judge Francis Bannatyne Lewis' maternal grandfather was a Liverpool solicitor and perhaps this fact managed to off-set the very strong influence of architects within his family.

Frank Lewis was born in London on 4th January 1935, his father having moved to England from Melbourne to further his architectual studies some years before. He remained in England until 1947 when his family returned to Melbourne and his father occupied the Chair of Architecture at Melbourne University.

Frank attended Melbourne Grammar School and entered Melbourne University in 1952 engaging in a Law/Arts course. His extra-curricular activities, centred

on Trinity College, did not prevent him from graduating in 1958. After completing his degree he obtained articles with Madden Butler Elder & Graham and returned to London after their completion.

Upon arrival in London in early 1960 Frank was able to fulfil an early childhood dream of going to sea when he took up residence in a converted lifeboat on the River Lea near the Tower Bridge. He has maintained this love of confined spaces as evidenced by his recent acquisition of a Fiat 500. He married on St. Georges day 1960 and the boat was the matrimonial home for two years. He felt secure in the converted lifeboat because the rats never left it. No doubt many things had already occurred in his life but the next two and a half years brought incredible experiences which demonstrated a remarkable ability to survive.

He was a supply teacher in London's East End for a year. Having a degree of any description was deemed sufficient to qualify him to teach any subject which included science, maths, history, geography and art. Teaching was rather secondary to self defence (his own) and protecting students from each other.

He felt a need to return to the law and accepted the highest paid position available, a mistake he was never to make again, in a four man solicitors office in London. The senior partner was 85 years old and after draining a bottle of whisky at his desk each morning, adjourned to the pub for a quiet afternoon. The next partner, on the letterhead for tax purposes, did not appear in the firm during the year as he was on temporary sabbatical in a lunatic asylum. The common law partner managed to be reported only three times during the year for dilatory conduct of his clients' proceedings. The conveyancing partner had recently been made a partner after a patient wait of 32 years.

The then three partners of Madden Butler Elder & Graham must have seemed very conservative when Frank returned to the firm in 1962.

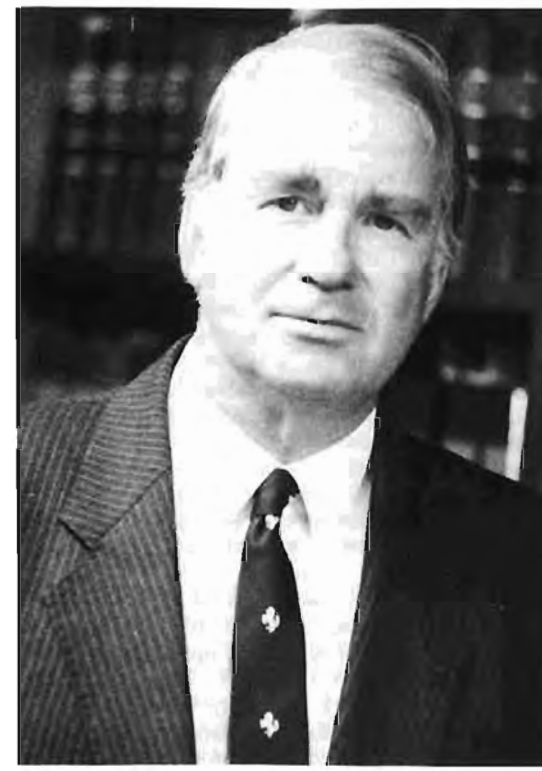
Not having sufficient funds to fly home, and being rather disillusioned with life at sea, the only sensible alternative was to purchase a very secondhand Land Rover and drive back to Australia through Greece, Turkey and Persia to Cochin in Southern India. Earlier acquired skills in the 4th/19th Prince of Wales's Light Horse proved invaluable over the next six months. He and his wife set out with 50 pounds and a tent and with great pecuniary care arrived at Cochin with five shillings remaining. A thoughtful uncle provided a Luger pistol which provided very useful in Persia where some very unprofessional robbers were dispersed after several shots were fired over their heads. A French cargo boat from Cochin to Melbourne completed a remarkable journey.

Frank was admitted to partnership at Madden Butler Elder & Graham in 1967. He practised initially in the Personal Injuries field and later in Commercial Litigation. In addition to coping with an extremely busy practice Frank became a member of the Law Institute Council in 1977 and made a major contribution serving on various committees including Litigation Lawyers, Courts Practice, Chief Justice's Law Reform and he was the Law Institute's representative on the Supreme Court Rules Committee for five years, during which time the Rules were re-written. He made a major contribution as a member of the Building Committee following the fire which destroyed the Law Institute building in 1978. He also served on the Solicitors' Disciplinary Tribunal.

Frank retired from partnership at Madden Butler Elder & Graham and in 1984 was appointed the first Master of the County Court, a position he held until his appointment as a Judge on 1st August 1988. He was appointed an Acting Judge of the County Court from October to December 1987. He demonstrated balance, common sense and expedition throughout his term as Master and made an invaluable contribution to chamber applications in establishing procedures which enabled him to cope with the significant increase in chamber business which occurred while he held that office.

He comes to the Bench with a full measure of application to the law, a remarkably broad background and balance that will ensure a constructive judicial career.

JUDGE ROSS



HIS HONOUR GREW UP IN WEST MELBOURNE AND attended the University High School with luminaries such as Dr. Alan Aylett, Neil Roberts, and others. He rightly retains considerable pride in his association with some colourful characters from that area, most of whom operated stalls at Victoria Market. He played

football with North Melbourne Football Club, and worked as a slaughterman and with the Health Department until he realised a long standing ambition to attend Melbourne University Law School.

He there demonstrated his colourful amiable personality, captained the Melbourne University Law School Football Team to victory in a team which included such celebrities as Bill Serong, David Mattei, Craig Porter, Brian Cash, Morton Browne and Mr. Justice Teague. He was able to pass his law course whilst constantly distracted by attendance at racecourses. He is now to be seen regularly at all Metropolitan Race Clubs as well as outlying country clubs but perhaps less frequently in the future. At one stage his Honour was able to advise as Junior Counsel to Dove, QC to recommend prosecutions of conspiracy arising out of the running of the Ararat Cup, his own horse, Rubiton, having won the Cup the year before.

He is a father of three children, one daughter being a successful model presently in Paris. He is justly proud of his children and receives much support from his wife, Alison.

His Honour is a singer of note, particularly of songs contemparaneous with his youth.

His Honour is a golfer of considerable talent and used to spend Friday afternoon with Judge Keon Cohen either at Royal Melbourne or Metropolitan, being a member at both courses, a fact which should be steadily borne in mind by Counsel appearing on Friday before him.

His Honour also has a great love of fishing Westernport Bay and is wont to have fresh fish cooked at a Chinese Restaurant in Springvale according to his taste.

Friday evenings are given to entertaining, after either golf or fishing, with French champagne and various crustaceans. These occasions sometimes extend to late at night when records of Pavarotti are turned on at full volume to ensure maximum enjoyment not only by his Honour but all guests and surrounding residents.

His Honour is to be seen frequently walking with his close friend Judge Colin McLeod of the Accident Compensation Tribunal from South Melbourne into Chambers early in the morning, conversing about matters of deep public interest with his Honour acting as Dr. Samuel Johnson and Judge McLeod his faithful Boswell.

His Honour had a great grasp of English and his addresses to the Jury in civil actions in recent times demonstrated him to be a great Jury advocate.

His clashes with Arthur Adams of Counsel on circuit at Geelong were legendary and the verbal interplay between these two Counsel in the Robing Room at Geelong prior to commencement of any proceedings "ought to have been televised" to quote from Judge Duggan at his welcome speech some years ago, and caused local Solicitors not involved in the List to attend with their articled clerks "just for the fun".

The Bar welcomes Judge Ross to the Bench of the County Court and hopes that he will enjoy a long and fruitful career on the Bench.

OBITUARY

GAY VANDERLEUR (VAN) TOLHURST

VAN TOLHURST WAS BORN ON 16TH SEPTEMBER 1932. He was educated at Geelong College and thereafter at the Melbourne University. He graduated LL.B. (Honours) in 1955. In February 1957 he signed the Bar Roll. He read with John Mornane. Master and pupil proved to be two of a kind. J.W.J had twelve readers during twenty-nine years of practice; Van, eleven during his twenty-four years.

Additionally, for some 20 years whilst at the Bar, Van lectured and tutored in contract at Melbourne University and in the Articled Clerks' Course conducted by the Council of Legal Education and also was an examiner in tort, contract, constitutional law and commercial law. The successful barrister very often tends to be somewhat self-centred in his or her pursuit of advancement at the Bar. Van throughout his very busy and successful years at the Bar gave generously of his time and of his wisdom to those who were learning the law and to those who were learning the craft of the barrister.

Van was not merely a busy and talented advocate, lawyer and mentor. He was both a devoted family man and a dedicated clubman, a dual role not easily, and certainly not commonly, achieved in this equal-opportunity world. At first the Yorick Club and later the Savage Club, his skills as raconteur and card player were honed to the highest standard.

In June 1981 when he was appointed to the County Court Bench (in place of John Mornane), he came to it as a truly, urbane, cultivated and civilised man. From the time he took his seat on the Bench until ill health forced him out of Court in February 1987, Van performed his judicial duties with nonchalant distinction. He was an exemplary judge. He had the confidence born of intellectual superiority and as a result discharged his judicial responsibilities with succinct ease. He had a remarkable gift of being able to charge juries in the longest and most complex trials, shortly and clearly. He revelled in the conduct of long trials which to many judges are so burdensome.

Additionally, and really more importantly, his judgment of human beings and of human affairs was a sure and certain one, tempered appropriately by his mature sense of compassion. Thus it was that in February 1987, with a long and distinguished judicial career apparently still before him, unhappily he was found to have cancer of the mouth and jaw. Despite extensive surgery and prolonged radio-therapy, all of which he bore with remarkable fortitude and stoicism — indeed with his usual air of nonchalant assurance — he finally succumbed on 2nd July 1988.

With his untimely death the County Court has lost an excellent Judge; the Bar has lost a firm friend and mentor. His loss is deeply felt.

G R. Waldron

GIANNARELLI REVISITED

Michael McInerney, Bar News special correspondent on the Giannarelli Case, reports on the final denouement.

IN THE 1986 SPRING EDITION OF BAR NEWS I WROTE an article on the decision of Marks J in *Giannarelli & Ors.* v. *Shulkes & Ors.*(1) The case, as was its destiny, finally reached the High Court when a decision was handed down on 13th October 1988. By a 4-3 majority, the High Court determined that a barrister in the State of Victoria is not liable for negligence for work performed on behalf of a client in court. The editors deemed it appropriate that I provide this further article in order to enlighten fellow members as to the reasons for their collective sigh of relief.

Giannarelli of course raised not only the vexed issue of barristers' immunity at common law. When the Legal Profession Practice Act 1891 introduced de jure fusion of the profession in Victoria it included provisions conferring on barristers a new right to sue for their fees and a new liability in negligence. Thus, alone of all common law jurisdictions, Victoria has since 1891 had legislation expressly dealing with the issue of barristers' negligence. The present provision is found in s.10 of the Legal Profession Practice Act 1958:

> 10. (1) Every barrister shall be entitled to maintain an action for and recover from the solicitor or client respectively by whom he has been employed his fees costs and charges for any professional work done by him.
>
> (2) Every barrister shall be liable for negligence as a barrister to the client on whose behalf he has been employed to the same extent as a solicitor was on the twenty-third day of November one thousand eight hundred and ninety-one liable to his client for negligence as a solicitor.

For about 95 years however, this provision remained untested — perhaps an oblique testimony to the skill and competence of the Victorian Bar!

In essence, Marks J decided on a preliminary question of law that as at 1891 a solicitor was liable in negligence for conduct on behalf of a client whether the same occurred in or out of court. He further decided that the legislation had the effect that barristers were put on the same footing as solicitors and were therefore liable in negligence for actions which they performed on behalf of the client in court. His Honour further went on to find that in Victoria barristers do not enjoy the immunity for which *Rondel* v. *Worsley*(2) and *Saif Ali* v. *Sidney Mitchell & Co.*(3) are authorities.(4)

In 1987 an appeal was heard by the Victorian Full Court comprising Young CJ and Crockett and Fullagar J.J.(5) In the course of the hearing of the appeal, the Full Court at one stage intimated that it considered the questions formulated by consent by the parties and determined by Marks J were not appropriate to be considered as preliminary questions of law since they raised mixed questions of fact and law. In particular, allegations of negligence concerning conferences and advices on evidence were said to raise factual disputes relevant to the issue whether the work was within the *Saif Ali* "intimate connection" test. The Full Court was minded to dispose of the appeal there and then and send the case back for a full trial. After some debate, however, and by consent, the plaintiffs filed a fresh Statement of Claim against the barrister appellants only (i.e not against the barrister defendants who had not appealed or against the solicitor defendants). This Statement of Claim was confined to allegations of "in court" negligence only. A fresh defence was delivered and new questions of law formulated, confined specifically to "in court" negligence. Thus, the Full Court's decision does not provide authority for the proposition that barristers' immunity in Victoria is co-existent with the common law immunity expounded in *Rondel* v. *Worsley*(2) and *Saif Ali*(3), i.e. an immunity extending to work in court *and* work within the "intimate connection" test. Indeed, on one view the Full Court's historical analysis (at pp. 721-726) of the 19th century cases involving solicitors' liability for negligence (relevant because the legislation made solicitor's liability as at 1891 the touchstone of the statutorily imposed liability of barristers) necessarily assumes that the statutory liability of barristers for negligence applies unless the work concerned can be said to be work "in court" in the most literal sense. Therefore, barristers in Victoria may be in a unique position; immune from liability for work "in court", but not for work "out of court", whether or not such work is intimately connected with work done "in court". Perhaps the message is that advice on evidence should be given orally across the bar table.

Because there had been as at 1891 no cases holding a solicitor liable for "in court negligence", the Full Court concluded that solicitors then held an immunity for "in court negligence" and that accordingly, the 1891 Act conferred the same immunity on barristers — or, rather, made the new barristers' liability for negligence subject to the same immunity. The Full Court apparently did not accept arguments advanced on behalf of the respondents based on the lack of any suggestion of solicitors' immunity in contemporary legal text books in existence in 1891 or indeed in any authorities prior to dicta in *Rondel* v. *Worsley*.(2) It was likewise argued, but implicitly by the Full Court, that none of the 19th century cases involved a submission that the solicitor defendant was immune (in the same way as a barrister was) and a rejection of that submission on the grounds that the allegedly negligent work done by the defendant solicitor in the particular case was not done "in court".

It was common ground before the Full Court that the amalgamation of the profession in 1891 was

designed to put barristers and solicitors on the same footing and that the words used in s.5 of the 1891 Act and specifically the words 'every barrister' where so appearing were to be taken to mean every barrister and solicitor acting as a barrister. An alternative argument, not dealt with by Full Court, was that the term "as a barrister" referred to a practitioner acting on retainer from a solicitor, whether for advocacy or other work.

The Full Court determined that it was the intention of Parliament as expressed in the second sentence of s.5 of the 1891 Act to make barristers liable for negligence to the same extent as solicitors were at that date. I do not believe that the Act in any way intended to remove the immunity then enjoyed by barristers and solicitors for in-court actions. When one peruses the Parliamentary debates, it is, in my view, clear that there was no evidence whatsoever that the legislature had in mind this more general question of removing the immunity.

The Full Court then went on to consider what was the common law position of barristers which in effect was to decide whether *Rondel* v. *Worsley*(2) represents the law in Victoria. The Full Court held that it was clearly in the public interest of Victoria that such immunity be upheld. The two aspects of public interest identified were that barristers should not be impeded in carrying out their activities in the court and further, that it was undesirable for continual re-litigation to take place. The views of the Full Court, and in particular the public policy considerations behind them, are best illustrated by the following two paragraphs from the judgement:

"The essential difference between a barrister's work in Court and that of a physician or engineer is that a barrister's task is to persuade an umpire (the Court) to give a decision in his client's favour in a dispute, perhaps of great complexity and difficulty. The adversary system is designed to ensure that there is presented to the mind of the Court, in the best possible light, everything that can properly be put for each of the competing views, so that the deciding mind of the Court is a fully informed mind. Under this system it is the duty of the barrister to put to the Court what he, from his learning, experience and skill, conceives to be the case for his client and he discharges this duty by putting the case as persuasively as he can, consistently always with honesty and fairness. He must thus bring to bear, in addition to knowledge of the law, an ability to persuade another mind or minds, and his judgement as to the best way in all the circumstances of effecting this persuasion. No physician diagnosing or treating a patient and no engineer designing a bridge is concerned to persuade another mind to provide a fully informed decision of a dispute or concern to do anything like it.

It is the resolution of a dispute between parties that the system of administration of justice in the Courts is designed to achieve, and it is a system designed to ensure that in a civilised community parties in dispute do not resort to undesirable means to resolve their dispute. Once the dispute is finally settled, whether at first instance or by an Appellate Tribunal, it is important that it should not be relitigated. The re-opening of disputes once settled by the Court has a number of evil consequences, one of them being the destruction of public confidence in the Courts of Law as resolvers of disputes. If public confidence were once shaken in the Courts of law as resolvers of disputes, people would obviously be tempted to resolve their disputes by means unacceptable in a civilised society."(5)

Michael McInerney

I should correct a comment that I made in my earlier article to the effect that the defence available under s.6 DD of the Royal Commissions Act 1906 (Cth.) had not been raised until T E F Hughes QC did so in the plaintiffs' appeal to the High Court. The point had been taken (by Mr. Hughes) in *R.* v. *Guiseppe Giannarelli* which was heard after the plaintiffs' unsuccessful appeal to the Court of Criminal Appeal but before their appeal to the High Court. The trial judge, Kaye J, ruled that the evidence was admissable on the basis of a number of authorities including *R.* v. *Winneke; Ex parte Gallagher.*(8)

In the High Court the majority was constituted by Mason CJ and Wilson, Brennan and Dawson JJ, the dissenters being the Deane, Toohey and Gaudron JJ.(9)

Of the majority, the Chief Justice's reasons are almost an exact reflection of the decision of the Full Court. The overwhelming reason for the retention of the immunity as determined by the Full Court and confirmed by the High Court was seen to be the public policy arguments. These matters are more particularly discussed in the decisions of Wilson and Dawson JJ.

It seemed to me that the decision of Dawson J was of greatest assistance in dealing with the very difficult task of balancing the need for integrity within a courtroom situation against the very heavy burden borne in justifying the privilege of immunity from suite for negligence. Dawson J. very sensibly saw no great inconsistency between a barrister's duty to his client

and duty to the court as it would obviously be a very rare instance where a failure to adhere to one's duty to the court would place the barrister in a position where he would be liable for negligence. His Honour's reasons also, in my view, put in appropriate perspective two of the other public policy concepts discussed in *Rondel*, i.e. the risk of a barrister practising preventive advocacy and the fact that a barrister cannot pick or choose his clients.

Of stronger weight was the matter of collateral attack upon judicial verdicts. In order to promote confidence in the court system, and to have a system whereby finality is achieved, his Honour argued that it was imperative that such verdicts are not open to collateral attack by way of negligence suits against the barristers involved. An example given related to criminal cases whereby it was suggested that if a client was entitled to subsequently sue for negligence in a case where a barrister may have failed to present one or other arguments, then such collateral proceedings must bring into doubt the justice of the original verdict. He was of the view that the fundamental basis for justification of that immunity was that in order for justice to operate, all those who are participants in the proceedings in a court must be able to speak and act freely, unimpeded by the prospect of civil process as a consequence of them having done so. His Honour, in regard to this aspect, goes on to say:

"In this respect the practise of the profession of an advocate differs from the practise of other professions. To err on the side of caution is not only practicable but ordinarily the best course with other professions. With an advocate, this may be fatal, not only to the interests of the client but also to the proper determination of the case."(10)

This rationale is very similar to the first paragraph of the Full Court judgement referred to above.

Brennan J appeared to base his judgement on the proposition that "barrister" in s.10(2) was a transitional provision and meant a barrister admitted prior to 1891 — an argument which, although advanced before Marks J, had been abandoned both in the Full Court and the High Court.

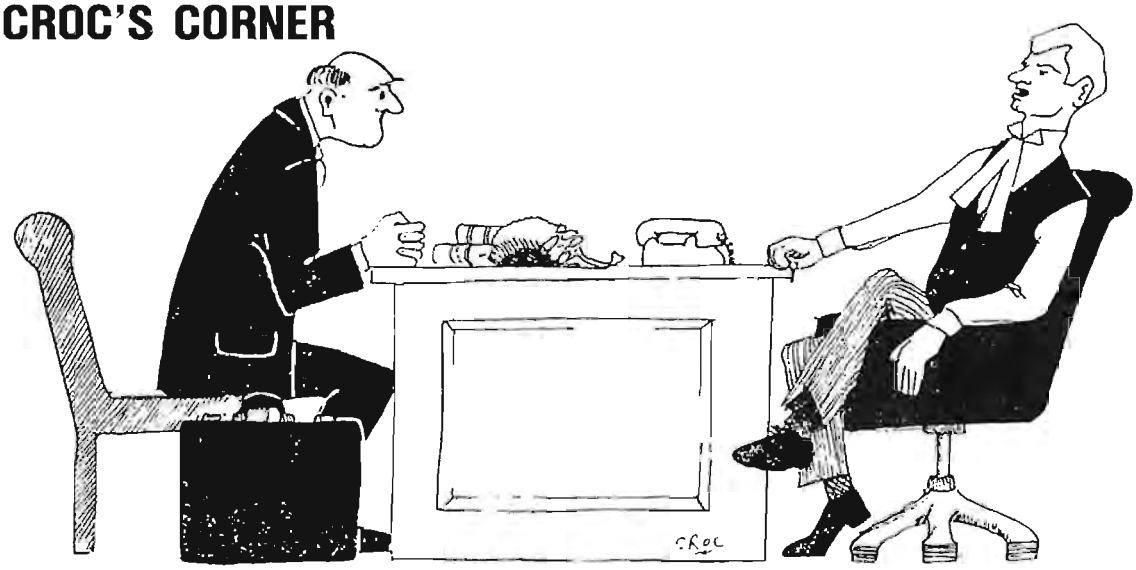
The minority were of the clear view that the Legal Profession Practice Act in 1891 did in fact eliminate the barristers' immunity from suit for negligence. They went on, however, to discuss the aspect of the common law. Deane J was of the view that there was no convincing justification for such immunity on the grounds of public policy. He felt such grounds did not outweigh or even balance the consequent public detriment involved in depriving the person . . . of all redress under common law for "in court" negligence, however gross and callous in its nature or devastating in its consequences.(11)

No doubt, members of the Bar could discuss for many hours the merits of the respective views as to the public policy basis of the now clearly established immunity. Like any verdict, however, such discussion will not alter it and perhaps our endeavours may be much better spent in having discussions with our insurance brokers with a view to effecting a like reduction in premium to the increase imposed after the original decision of Marks J.

References:

(1) Unreported 9th May, 1986.
(2) [1969] 1 A.C. 191.
(3) [1980] A.C. 198.
(4) See page 29 of unreported Judgement.
(5) [1988] V.R. 713, 278-729.
(6) See generally Parliamentary Debates 1891 Session — especially page 280-285.
(7) Unreported ruling 22nd June, 1983.
(8) [1982] 152 C.L.R. 211.
(9) Unreported 13th October, 1988 F.C. 88-047.
(10) Page 51 of unreported High Court Judgment.
(11) Page 44 of unreported High Court Judgment.

CROC'S CORNER



"To be honest, this case really is touch and go. It could make or break my career.

PRACTICE COMPANIES & SERVICE ENTITIES

At the Australian Bar Association Conference held in Townsville in July, David Bloom Q.C. discussed aspects of tax planning and incorporation for Barristers. His paper is published with the kind permission of NSW Bar News.

THE NATURE OF A BARRISTER'S PRACTICE DOES not permit of much tax planning — short of negatively geared investments, home investment (Capital Gains Tax Free) and Service companies or trusts, there is very little a barrister can do.

One of the greatest problems is the barrister himself. A barrister is typically a person who can afford the price of a good suit but not the time it takes to have it measured.

In Sydney, barristers wanting chambers in Wentworth or Selborne must purchase shares in Counsels Chambers Ltd. Apparently, in 1957 when Garfield Barwick led his fledgling group into Wentworth, shares relating to a single room cost 1,000 Pounds; a good young barrister could earn for a year 1,000 Pounds out of which he paid 100 Pounds in tax. Today, the same shares cost $200,000. A young barrister will be lucky to net, before tax, $50,000 and tax on that will be approximately $20,000. The shares purchased for $200,000 could not be valued at half that on an asset-backing basis.

Clearly, there is a very large element equivalent to goodwill. But it is not goodwill — which means that for Capital Gains Tax purposes, the Sydney barrister can't even take advantage of the reduction in Capital Gains Tax for which S.160ZZR provides on disposals of businesses under $1m.!

The young barrister in Sydney will thus try to make ends meet until he takes silk. Then — for a limited period in most cases — he will have a high income and pay high tax. Superannuation is his own responsibility and he will for that now get the "massive" deduction of $3,000 p.a. There is no averaging of incomes for barristers.

Incorporation, then, may be of some superficial interest. It will — at least for a limited time — provide tax benefits in the sense of a lower tax rate of 39% compared with the present highest personal rate of 49%. "Super" contributions can be made by the company at better than $3,000 p.a. tax deductible — although the contributions will now themselves be taxable at 15%; and there are the other new limitations to which Ian Gzell has made detailed reference in his paper.

Spouses and other relatives may be employed by the company without the possibility of the Commissioner using S.65 of the Income Tax Assessment Act, 1936 to reduce the deduction allowable to such amount as the Commissioner thinks reasonable; and in those places which permit incorporation — the Northern Territory and South Australia — spouses and other relatives can be shareholders.

Further, quarterly instalments of company tax are, in effect, paid in the year of income, not in advance. And in IT Ruling 25, the Commissioner has said that he will permit a practice company which satisfies his criteria to return on a cash basis, thus preserving the barrister's greatest single advantage.

That's the good news. However, for income tax purposes the benefits of incorporation are largely illusory. In the first place, unless the practice company represents the first vehicle whereby the barrister practices, the Commission may well be entitled to treat all its income as income of the practitioner. Certainly, he has said he will do so unless the following four criteria are satisfied:

1. there is nothing in State or Territory law *or professional rules* to prevent incorporation;
2. there are sound business or commercial reasons for incorporation;
3. there is no diversion of income to family members;
4. the only advantage for income tax purposes is access to greater superannuation benefits.

I have quoted these four criteria from a paper delivered by Mr. Mills, First Assistant Commissioner, on 16 June, 1988. It is worth examining these four propositions individually. But in doing so, it is necessary to warn practitioners that, in modern Australia, as Mr. Mills candidly admits, the taxpayer must satisfy three standards —

First — those imposed by the Statute;
Secondly — those imposed by the Courts;
Thirdly — those imposed by the Commissioner in indicating what he finds to be "acceptable".

He will indicate, in general terms, what he finds to be "acceptable" in "Rulings". These are so voluminous that C.C.H. now publishes them. You can have the service for a large fee.

Rulings Nos. 2 and following must be read subject to Ruling 1. That provides, in effect, that the Commissioner is not bound by anything in a Ruling.

But taxpayers who behave in a way which the Commissioner finds unacceptable, do so at their own peril!

To return to Mr. Mills' four categories — the *first* you will recall is only capable of being satisfied in South Australia and the Northern Territory — and

soon, perhaps, Victoria. The *second*, according to the Commissioner, can never be satisifed where family members can share in the income. This is because the income is personal service income, which is as inalienable as your left foot — at least for tax purposes.

He relies on the decisions of the High Court in *Gulland, Watson & Pincus v. F.C.T.* (1986) 160 C.L.R. 55. These were, of course, decisions on their own facts. But they make it sufficiently clear that a sole practitioner can *never* assume that he can share his pre-tax income with his family in such a way as to make it income of theirs for tax purposes.

They were, of course, cases involving trusts and not companies. But where the company tax rate is less than the individual rate, the same may apply i.e. it is, arguably, impossible to determine any commercial benefit aside from potential tax saving. (*cf.* Sir Anthony Mason's judgment in *Patcorp* 140 C.L.R. at 253). Where the company rate is, however, as high as the highest personal tax rate, as may soon turn out to again be the case, it is harder to see that tax avoidance is a motivation. The family's right as shareholders to receive franked dividends is a right to share in after-tax income — no different to their receipts from the sole trader after he has paid his tax.

That brings me to the third requisite. Here we are departing from the realm of Statute and case law to what the Commissioner finds "acceptable". Insofar as pre-tax income is able to be diverted to family members, this third requisite is but a variant of the second.

But where it is after-tax income we are talking about, there seems no propriety in the requisite at all. Yet it is far from clear that the Commissioner accepts this distinction. Further the Commissioner departs from settled case law and the Statute in failing to distinguish between cases where a practitioner starts up for the first time, with a practice company, and those where the existing practitioner incorporates.

The latter — and only the latter — are arguably within Part IVA on its terms. The former are not. The cases have always — in strong dicta — excluded the application of S.260 to new sources of income. But in IT Ruling 2330, the Commissioner says

"Until such time as it is shown by court decisions that the position is otherwise it is proposed to adopt the view that S.260 (and Part IVA) applies in cases of this nature (i.e. a professional who commences practice for the first time and is employed by a trust or company which provides his services)."

Mr. Mills, in his June paper, admits that "uncertainty exists in this area"; but expresses the — unsupported — view that "new sources of income are equally at risk of being caught by the provisions". In other words "caveat new barrister".

Mr. Mills' fourth criteria is that the only benefit for tax purposes should be that relating to superannuation.

In essence, the Commissioner is equating Practice companies with Administration companies. He will tolerate them as long as their only tax benefit is "super". But if, for instance, the Company provides a car for which it gets a deduction, and pays fringe benefits tax (at, as it happens, a lesser rate than income tax), the Commissioner will not allow it. In a draft ruling recently provided, the Commissioner says about this:

"5. The sole justification for accepting administration entities is to enable employee/partners access to section 23F superannuation benefits. This approach was accepted on the clear understanding that the remuneration that the administration entity would pay to an employee/partner would consist solely of a reasonable amount of salary, as defined in Taxation Ruling No. IT 2067. Thus, in accordance with that Ruling, the provision of cars and other fringe benefits are not to be taken into account in superannuation purposes. Accordingly, administration entities that provide cars and other fringe benefits to employee/partners are not acceptable within the arrangements previously accepted for income tax purposes . . .

8. It may be argued that such an arrangement for the provision of cars to employee/partners should be acceptable where the combined service/administration entity pays the fringe benefits tax liability. However, this would lead to the professional partnership obtaining an overall taxation benefit that was not intended. This is because the overall tax effect would be that, even though some fringe benefits tax might be paid, the professional partnership would obtain an advantage by being able to deduct the full cost of the administration and service charges — which would reflect the full cost of the provision of cars to employee/partners — notwithstanding that the cars may be used by the partners partly for private purposes.

9. Given that service entities providing services to professional practices have been accepted in the past on the basis that the partners are not employees of the service entity, and bearing in mind the limited justification for the acceptance of administration entities, combined service/administration entities are also not acceptable within the arrangements previously accepted for income tax purposes."

Once again, we are in the area of what is acceptable — not what the law i.e. Statute and case law permits. Ian Gzell has said enough about Administration companies. I will say no more about them.

But as to Practice companies, two more things remain to be noted:—

1. THE EFFECT OF IMPUTATION

It is clear that appropriate dividends paid by practice companies can be franked. Where they are, the dividend will, in effect, be tax free to the shareholder. But where the shareholder's tax rate is 49% and the company's rate is 39%, the benefits of the company's lower rate will effectively be lost; the imputation being to the extent of 39% only. However, it may be said that now that Division 7 is gone, there is no obligation to distribute. Hence the funds may be kept in the company. That brings me to the second aspect.

2. HOW DOES THE BARRISTER USE THE SURPLUS FUNDS OF THE COMPANY?

The company can acquire such assets as it thinks fit. But it cannot make loans to shareholders or associates or otherwise pay out moneys for their benefit. Such loans or other payments will, by S.108 of the Income Tax Assessment Act, 1936, be deemed to be dividends and will not be "frankable" (if such a word exists). In other words, the S.108 deemed dividend is assessable income of the recipient, whether a shareholder or not, and he gets the benefit of no franking rebate.

Monies can be paid by the service company to relatives for services; or indeed to Service companies or trusts. That brings me to the second topic in this paper, namely Service entities.

The Service company or trust is distinguished by the Commissioner from the Administration company on the basis that the Service company or trust does not provide the professional person's own services to him. Thus no question arises of fringe benefits for the professional person himself.

Since the decision in *Phillips' Case* 20 A.L.R. 607, the Service entity has achieved some respectability. Typically, it employs staff and owns capital assets such as land, plant and equipment, and hires those to the professional. That it may do so where the charges are comparable to arm's length charges is established by *Phillips' Case* and accepted by the Commissioner.

It is worth reading what Mr. Mills had to say about Service entities in his June paper:

"These are entities that provide various services to a professional firm. The services could include provision of office furniture and equipment, non-professional staff, share registry services etc. Indeed these were among the services provided by the service trust in the *Phillips' Case*, where the Federal Court held that the firm in question was entitled to a deduction under subsection 51(1) for the service fees — notwithstanding that the effect of the arrangements was to divert income from the partners of the firm to those interested in the trust (the latter generally being directly or indirectly, members of partners' families).

Crucial to this decision was the finding that the service fees charged were realistic and not in excess of commercial rates. It was also accepted that there were sound commercial (non-tax) reasons for the arrangements. So, where these elements are present, it can be expected that service entity arrangements would be accepted. Of course, as indicated in Taxation Ruling No. IT 276, if there were grossly excessive payments for the services provided, the presumption would arise that the payments were not wholly made for business purposes; to the extent that they were not, an income tax deduction would not be allowable. You might ask whether the Commissioner can deny a deduction where the parties agree to the level of payments, even if they are grossly excessive. Reliance for that sort of argument might be placed on the well known statement by the High Court in *Ronpibon Tin N.L.*, and affirmed in *Cecil Bros.*, that it 'is not for the Court or the Commissioner to say how much a taxpayer ought to spend in obtaining his income but only how much he has spent'. We do not, however, see that the statement has such a wide ambit.

In *Phillips' Case* itself, Fisher J. (who provided the main judgment of the Federal Court), after referring to *Ronpibon Tin N.L.*, and pointing out that the payments were commercially realistic, made the point referred to above and I quote:
'. . . if the expenditure was grossly excessive, it would raise the presumption that it was not wholly payable for the services and equipment provided, but was for some other purpose.'

What, you may ask, would make the expenditure grossly excessive? We in the Tax Office don't have a clear answer to that. A mark up on cost that produces a result that is comparable to an arm's length or market price is acceptable. But what if it is twice, six times or perhaps ten times the cost? Another threshold question that arises in such cases is whether the matter is to be determined under general principles that have been evolved over many years on the interpretation of section 51 — or whether the new general anti-avoidance provisions of Part IVA provide a more ready and workable solution to the problem.

The answer may not be very different under either approach. In recent times I think we have seen developments in the Courts specifically in the area of subsection 51(1)(i), e.g. a development that has involved the Courts moving away from accepting that the tax consequences of an arrangement will be determined solely by reference to the contractual agreement between two parties. That agreement will be a relevant factor, particularly where the parties are at arm's length, but there also appears to be a greater preparedness to look more closely at the commercial basis and the effect of, and the essential reason for, a transaction. To find this essential reason, a court may adopt a test of characterising the expenditure in question — is it predominantly incurred for earning assessable income or for other purposes?

In *Ure*, for example, the Federal Court looked at all the evidence surrounding the loan of money to see what the various purposes of the loan were. To the extent that it was for family or private purposes, interest on the loan was held to be non deductible.

More recently, Rogers J. seemed to recognise the judicial development taking place at least in relation to the second limb of subsection 51(1) when he stated: 'At present, the necessary degree of connection is commonly tested by application of the principles enunciated in the joint judgment in *Magna Alloys & Research Pty. Ltd. v. F.C. of T.* 80 ATC 4542 at p.4559: "The controlling factor is that, viewed objectively, the outgoing must, in the circumstances, be reasonably capable of being seen as desirable or appropriate from the point of view of the pursuit of the business ends of the business being carried on for the purpose of earning assessable income."'

The application of the test has been the subject of recent exposition by the Full Court of the Federal Court in *F.C. of T. v. Gwynvill Properties Pty. Limited* 86 ATC 4512. As was pointed out by Jackson J. (at

p.4525), the authorities recognise 'that there should be *some* expenditure incurred in the carrying on of the business in question' (emphasis added). Later in his judgment, his Honour pointed out that the Court was not required, indeed not entitled, to take into account that the same economic result might have been achieved for the taxpayer if a difficult procedure had been adopted. He then went on (at p.4526):
'Having said that, however, there seems no reason why the economic result achieved by the transactions may not be examined in order to cast some light on whether the outgoings by way of interest were capable of being regarded as being desirable or appropriate from the point of view of the business ends of the respondent's business as a property owner, developer, etc.' *Robinson v. F.C. of T.* 86 4784, 4794)

The message from these cases on section 51 that is worth recognising is that arrangements designed to 'achieve the greatest possible tax advantage', to use the words of Rogers J. in *Robinson's Case*, may not succeed under the general provisions, let alone under the anti-avoidance provisions, of the income tax law. Of course, section 260 and Part IVA have to be considered (the latter as a provision of last resort)."

It is clear enough from the judgments — particularly that of Fisher J. in *Phillips' Case* itself, that the payments must not be grossly excessive. But between "grossly excessive" and "normal commercial or arm's length" there seems to be a fair leeway. One thing is certain, however, namely that the Commissioner is not given power to reduce such deductions to such amounts as he thinks reasonable — *cf.* S.65.

S.260, of course, could not apply to a deduction properly available under S.51(1). That is the accepted result of the High Court's decision in *Cecil Bros.* (1964) 111 C.L.R. 430 — see the decision of the Full Federal Court in *Oakey Abbatoirs* 55 ALR 291 and, more recently *F.C. of T. v. Janmor Nominees Pty. Ltd.* 87 ATC 4813. This is, of course, subject to what the High Court may have to say in *John's Case* which was argued recently.

But, leaving aside for the moment the effect of Part IVA, it seems that unless the payment is so excessive as to make it impossible, objectively, to say that it is entirely for the service provided, it will be an allowable deduction — in full — under S.51(1).

Part IVA is certainly to be reckoned with in this context. There is no doubt that it, unlike S.260, applies to deductions. But for it to apply, it must appear that the taxpayer, objectively, had a dominant purpose of obtaining the tax benefit which is the deduction. Where the service for which the payment in question is made is an essential service, such a dominant purpose will, it is submitted, only be apparent where the payment is grossly excessive. In other words, the test is probably no different, in practical terms, from that applicable to S.51(1). I stress, however that both Part IVA and S.51(1) apply in terms to *part* of a deduction.

The great benefit of a Service entity, of course, is that it involves an acceptable sharing by family members in income. Thus, anyone can be a beneficiary under the Service trust, a shareholder in the Service company or an employee of either.

A question commonly asked at the moment is whether, having regard to the reduction in company tax rates to 39%, a company may take income under the Service trust. My own view is that if the company is an existing beneficiary, there is no impediment to its becoming presently entitled to trust income this year — a *fortiori* if it has received such income in the past.

But if it is specifically added for that purpose, the Commissioner may well argue that Part IVA applies and that the income derived by the company as a beneficiary is income diverted, in effect, from other beneficiaries.

Let me finish precisely as Mr. Mills finished his June paper, with a part of his paper with which I am — reluctantly — in full agreement:

"I suggest that the topic of income splitting for professional people is one that has taken more time and interest of tax practitioners over many years than any other tax topic. The position is far from clear and I am sure that there will be further developments in future cases. Whether it be for your own affairs or for your clients, I suggest that restraint be exercised in attempts to save tax.

"Part IVA has to operate in the real world. Recent commentators both here and in England have suggested that if a scheme or plan appears to offer tax savings that are too good to be true then the odds are that indeed, it *is* too good to be true."□

COMMONWEALTH LAW CONFERENCE

Auckland New Zealand 16-20 April 1990

OVER 100 SPEAKERS WILL ADDRESS BUSINESS sessions at the 1990 Commonwealth Law Conference to be held in Auckland, New Zealand, between 16 and 20 April 1990. Many distinguished members of the Commonwealth's legal community will attend.

The business programme will contain a wide range of topics of contemporary legal interest, including law reform, human rights issues, legal education, medico-legal problems, environmental questions, the role of the profesison, the rights of indigenous peoples, international commerce trade and dispute resolution.

A number of special interest meetings will coincide with the Conference, including a meeting of Commonwealth Law Ministers.

The Conference programme will also provide a diverse social and cultural programme, and delegates will have ample opportunity for sightseeing and recreation both in Auckland and throughout New Zealand.

Those wishing to receive further information about the Conference should contact the Executive Officer Anna Whitney.

THE SILK'S ROSETTE (CONT.)

Douglas Graham QC continues the Bar News investigation of this unique Victorian tradition

THE ROBES OF A QC IN VICTORIA (IN ADDITION to the wig, bands or jabot) consist of a silk gown, a black jacket of ordinary length or a more formal black tail coat and waistcoat. On the back of the silk gown many QCs wear a black silk rosette. This article records the results of another attempt to discover the origin of the practice of wearing the rosette.

The black tail coat and waistcoat are part of the traditional Court Dress (also known as Windsor Court Dress) worn at the Royal Court on certain formal occasions by the holders of many important offices. An essential part of that dress is the rosette which is fastened behind the coat collar and hangs at the back of the tail coat. It is interesting to note that this form of dress, complete with rosette but, of course, without the silk gown, is worn by the Usher of the Black Rod and the Sergeant-at Arms in the State and Federal Parliaments. The point to be noted is that the rosette belongs to the tail coat, not the silk gown.

A copy of a communication from the Lord Chamberlain's Office dated March 1930 provided to the writer by James Merralls QC confirms the foregoing but uses the term "wig bag" to describe the rosette.

An interesting but unsigned article entitled "Dress of Queen's Counsel" appeared in (1954) 28 ALJ 237 at the time when N.H. Bowen QC (now Sir Nigel Bowen CJ) was Editor. The article indicates that its author had consulted the Hon. Sir Albert Napier KCB, QC, the Permanent Secretary to the Lord Chancellor and Clerk of the Crown in Chancery, who had, in turn, communicated with Ede & Ravenscroft. In reliance upon those impeccable sources the article states: "What is commonly known as the 'wig bag' is sometimes known as the 'powder rosette'. The latter is the better, although not the usual, name. It was, apparently, originally worn to keep the powder from the wig getting on to the collar of the coat."

Whatever its proper name may be and whatever its function may have been, the rosette is not to be regarded as an integral part of a QC's attire nor, indeed, an adornment which QCs are exclusively entitled to wear. If the tail coat is not worn, the wearing of the rosette is somewhat incongruous.

Douglas Graham Q.C.

In an article on this subject in Bar News in 1979, Michael Kelly QC (now Judge Kelly) observed: "For some reason unknown, and no doubt buried in the history of this State, Queen's Counsel at the Victorian Bar have traditionally worn a rosette upon their Windsor Coats rather as though they had just attended a levee and had forgotten to take it off."

According to Sir Albert Napier in the ALJ article: "The wig bag or powder rosette is not worn when the gown is worn, but only when no gown is worn as, for example, at a Royal Court."

The Victorian practice of wearing a rosette with the silk gown thus appears to involve some disregard of courtly niceties, a degree of ignorance, perhaps an element of indolence, but most of all, a strong attachment to tradition.

Readers may draw their own conclusions concerning the supposed Irish connection.

COURT DRESS

M.E. King puts the case in favour of court dress — and Louis XIV

IT WAS OF GREAT INTEREST TO READ THE SHORT treatise of Dr. Opas concerning the origins of the silk's rosette, in the last issue of "Bar News" (Spring, 1988, p. 12). The author made use of the occasion, too, to generally examine the wearing of legal attire, and seemed to gently ridicule the same — particularly wigs — and to advocate their abandonment. Perhaps a countervailing viewpoint might be put forward.

'Contrary argument' would be too strong an expression, for the major contention here is that, really, reason and logic have little to do with the question. The issue of whether judges and barristers should continue to wear wigs and gowns resolves itself, as do so many like questions, to a matter of sentiment, one way or the other. Precisely the same conclusion is generally reached, for example, in the numerous debates about republicanism in this country. For every earnest argument put forward to conclusively demonstrate that Australia should become a republic, an equally rational argument can be advanced to illustrate exactly why the monarchy should be retained. However, it is not a question that allows of a clear, reasoned answer. There is no absolute, correct conclusion, waiting to be revealed by logical argument. It will always, ultimately, remain a matter of sentiment — of emotional attachment to one or other position.

So with court dress. Examinations of its origins are always of interest: but such studies can never show, to any degree, that it should be abandoned. Consequently, when Dr. Opas writes, "There seems no reason in logic to translate to Australia the wearing of a wig adopted to flatter a pompous and vain French King", one immediately feels that — because of course there is no reason to do so, but that really has nothing to do with the case — there is really a strong, unexpressed sentiment against the wearing of legal wigs lurking behind the writer's rather contrived 'logical' argument.

Several points can here be made. First, Louis XIV did not invent the wig. A certain style of wig became fashionable at his court and, since the fashions at the French court were fashionable everywhere in Europe, it is hardly surprising that a similar style became popular in England. Whilst the emotive adjectives "pompous and vain", as applied to a Frenchman, might seem only too apposite, to those acquainted with the history of the long reign of Louis XIV, they do, in truth, appear to be rather a drastically short-hand way of describing the character of one of the strongest and most successful of French monarchs. However, the real point is that all discussion of Louis XIV is a mere footnote to any discussion of the wearing of wigs by judges and barristers in Melbourne in 1988. The fact is that wigs did become fashionable in England — in the courts as elsewhere. There is a long and circuitous route from Versailles in the seventeenth century to court dress in Australia today — a route not only through centuries, but through countries, societies, fashions, abandonments and retentions: but that is precisely what creates tradition.

If one were to set out to invent a court costume, in a vacuum as it were, then the choice of the particular items of apparel now worn might well seem strange. Exactly why so many debaters of this issue place themselves in this vacuum, however, is a mystery. It is an entirely false position, and results in much remorseless, arid analysis of the apparent absurdity of each article of clothing which, together with so much else, easily succumbs to ridicule under such unfair treatment.

An argument in this matter based upon aspersions cast on the character of a French king becomes rather tenuous, to say the least. One might mock almost any item of clothing in a similar way. The reality is that the legal wig is now unusual (if not quite unique), but its origins are no more to be ridiculed for that.

Man is inventive, capricious and fond of experimentation and ornament. At least ever since the cavemen wore animal skins, clothing has been perhaps least of all things strictly utilitarian. Any concentration on the absolute need for wigs, robes, rosettes and so forth is equally beside the point. They were *never* strictly essential as clothing — but they are widely recognised in our society as part of the historical trappings of the courts and, according to one sentiment at least, (and that has been recently expressed by the Family Court), do in that context add dignity and authority to one of the most important functions of the Crown.

M.E. King

RAMBO LITIGATION: WHY HARDBALL TACTICS DON'T WORK

This article published in the American Bar Association Journal in March 1988 deals of course with the US scene but has a message some of us might ponder.

Robert N. Sayler

Hardball is taking the most difficult position for your opponent that your client will live with — and then doing what you say you will do. You never, ever back down.

— "Playing Hardball", ABA Journal, July 1987.

ABUSES IN THE LEGAL SYSTEM, G.K. CHESTERTON said, arose not because lawyers were wicked or stupid, but because they had "gotten used" to them.

A case in point is the conduct that parades under the banner of zealous advocacy. In the *Journal* article, proponents of hardball claimed that it was not just permissible, but obligatory for fulfilling an advocate's duty to serve his clients. Opponents denounced only the most egregious conduct. Caught in a definitional muddle, the discussion foundered, the two sides talking past each other.

Between spitball and slow-pitch softball exists an approach to trial advocacy warranting urgent attention, because it is pernicious and on the rise. Call it the Rambo Reflex or "hardball" lawyering — like pornography, you know it when you see it. It is characterized by:

☐ A mindset that litigation is war and that describes trial practice in military terms.

☐ A conviction that it is invariably in your interest to make life miserable for your opponent.

☐ A disdain for common courtesy and civility, assuming that they ill-befit the true warrior.

☐ A wondrous facility for manipulating facts and engaging in revisionist history.

☐ A hair-trigger willingness to fire off unnecessary motions and to use discovery for intimidation rather than fact-finding.

☐ An urge to put the trial lawyer on center stage rather than the client or his cause.

Unfortunately, entire firms adopt this as a signature and many lawyers perceive a mini-epidemic. Why? The perception is that it works. But there is utterly no support for that assumption, which usually rests on this fallacy: X wins some cases; he's an ornery cuss; therefore, he wins because he's ornery.

But judges regularly contend that the reverse is true. It defies all common experience to believe that mean-spiritedness is persuasive. Try to find some other field of endeavour — from politics to public relations — where this is the case.

Another justification for hardball is that it proves you love your clients, they love you and anything short of it compromises them. Gerry Spence has even cast the argument as a moral imperative, noting in "Playing Hardball" that lawyers who don't pull out all the stops in presenting their cases "don't love their clients".

No doubt a few clients feel more "loved" if their lawyer is Attila the Hun — some lawyers have been retained for just this reason. But just as many clients, weary of the shouting and the expense it brings, have come to doubt its effectiveness.

On another level, Monroe Freedman, a Hofstra University law professor, states in "Playing Hardball" that civility in litigation can be "a euphemism for the old boy network, for covering up for one another". The notion is that civilized conduct is for the monied, the boring, the timid, the conservative — but not for the creative and the free-spirited. This is bonkers. Civility is not, and never has been, synonymous with pin-striped suits and the well-heeled. Nor has it ever been anathema to all but corporate America.

And then there is the military model: Litigation is war and the warrior must use its weapons. The first characterization is bizarre — indeed, dead wrong — and the second is a non sequitur. Litigation is a means of dispute resolution that has been carefully crafted to be non-warlike. Whatever its resemblance to war — to the limited extent that it produces winners and losers — it is nonsense to assume it requires the use of martial arts.

Another myth is that the closest thing to pure justice is achieved by a contest of hardball litigators. Why on earth, one wonders, should this be so? Scholars are not convinced that adversarial litigation yields a more pure form of justice than other dispute resolution methods. And no one has ever constructed

a rationale for believing that the adversarial process is somehow purified by a shouting match. All that does is introduce into the decision-making process an important but extraneous element — the personalities of the lawyers and the manner in which they draw their blood.

And business pressures are cited, not as a justification, but as a reason for hardball. It is said that hardball keeps the meter running because it generates more controversy, longer depositions, more motions, and delays settlement. But long term it surely is questionable whether the inveterate hardball lawyer ends up with more work than others. And the price the profession and public pay for that approach is intolerable.

There are a number of other reasons to avoid hardball.

Hardball is bad advocacy. For one thing, it tends to be one-dimensional and, therefore, completely predictable. Because the hardball litigator's strategy is an open book, it is easy to set traps for him, goading him into a temper tantrum at depositions or before the jury or judge.

And the regular use of hardball tactics lessens the force of occasional stern trial tactics. The problem is that the full-time raver has no atom bomb left over to use if it is ever genuinely called for. And even when the hardball litigator forces himself out of his hardball style and attempts to introduce humor, warmth, graciousness or sweet reason, these tend to fall with a big thud. He's out of practice; it doesn't fit his personality.

Hardball also encourages costly retaliation, as one act of hostility breeds another, until someone cries uncle. The result is the three-day deposition that should have taken one day, a volley of motions when an oral stipulation would have sufficed. Obviously, the clients on both sides bear the cost.

Hardball litigators are too cavalier in their belief that they can turn their behavior on and off.

Even if it starts as an act, eventually it becomes habit — a bad one that interferes with one's objectivity and the ability to counsel dispassionately. Think back to the last time you came up against a particularly obstreperous opponent. More than likely, you did not emerge with an open mind and a willingness to make reasonable concessions.

The reason is that it locks lawyers into untenable positions and clouds their objectivity. That in turn colors one's analysis of the facts, one's case evaluation, and the ability to accept a settlement, even when it makes sense. The result is that bargaining centers on face-saving rather than economic realities.

In the long run, hardball litigation is bad for the lawyer. A steady diet of hardball litigation cannot be good for a lawyer's health and personal life. No one can prove this, although I am aware of a statement by the head of a New York litigation department that no partner in the firm's long history had ever lived past age 66, and that a large number had died in their 40s and 50s. Suffice it to say that 12 hours of bile a day somehow will take its toll.

Hardball is as likely to turn off as many clients as it attracts. Even if a client hires a lawyer because of his tough-guy reputation, he's unlikely to retain him after opposing counsel has humiliated him or the trial judge has berated him in open court or tagged him with sanctions. And no lawyer looks impressive to his client when he makes a phone call, saying: "I just got the decision and we lost, but, boy, did we leave that sucker a bloody pulp."

Hardball litigation tends to dry up those sources of business generated by word of mouth. Every time a trial lawyer handles a case, he is being judged by a multitude of colleagues. The impressions they form often bear decisively on future business prospects. All of them will be in a position to say, "I have dealt with so-and-so personally and I can vouch that he is a world-class jerk," and refer business accordingly.

Furthermore, the hardball litigator almost always fences himself out of a leadership role in large-scale multi-party litigation. Some co-counsel are likely to take a dim view of the hardball approach, and there is always the risk of offending the judge.

More than likely, opposing counsel will seek the conciliators. Freezing oneself out of a leadership role can be disastrous because the leaders invariably do more than plan the logistics of the trial — they also shape the themes, order and tone of the case.

Rambo also lives in real danger of disciplinary action. Rule 11, 28 U.S.C. § 1927, the Canons, the Model Rules, myriad court decisions and disciplinary rulings reach out increasingly to trip up the mean-spirited — sometimes at the cost of their ticket to practice.

Every month, more judges are thundering at counsel perceived to be hardballers, as did Illinois Circuit Court Judge Richard Curry, who wrote in a recent decision: "Zealous advocacy is the buzz word which is squeezing decency and civility out of the law profession. . . . Zealous advocacy is the modern-day plague which infects and weakens the truth-finding process and which makes a mockery of the lawyers' claim to officer of the court status." *Hanna v. American National Bank & Trust Co. of Chicago*, No. 87CH4561, (Cir. Ct., Cook County, Ill.).

Hardball detracts from the profession. Hardball behaviour sends a terrible message to the public about our profession; and there is increasing evidence that the public does not think very much of us because of it. A poll conducted by the ABA Commission on Professionalism detected that only 6 percent of corporate users of legal services rated "all or most" lawyers as deserving to be called "professionals". Only 7 percent saw professionalism increasing among lawyers, 68 percent said that professionalism had decreased over time and 55 percent of state and federal judges also said that professionalism is declining. (Report of the ABA Commission on Professionalism, 112 F.R.D. at 254.)

Hardball litigation is in fundamental tension with bedrock purposes of the profession. Former Chief Justice Burger said to the 1986 ALI Annual Meeting that, "The true function of our profession should be

to gain an acceptable result in the shortest possible time with the least amount of stress and at the lowest possible cost to the client."

Hardball litigation is not designed to promote speedy resolution, but more inclined to introduce delay; it is not calculated to reduce stress, but rather to enhance it; it pushes more in the direction of increasing the costs of dispute resolution than controlling them.

Furthermore, hardball tactics increase the burdens on judges by precipitating rounds of ancillary litigation regarding discovery disputes, motions for sanctions and the like.

And, to the extent that hardball tactics tend to harden positions, they increase the likelihood of discord on settlement, thereby adding to clogged dockets.

Solutions are elusive because it is entrenched that civilized litigation is an oxymoron. But the pattern can be changed and substantial efforts are well under way.

Judges are speaking out in opinions, in legal education programs and in stern lectures from the bench. A judge can control counsel behavior — including behavior outside his presence — by making it clear that obnoxious conduct will not succeed in court, by inviting motions on lawyer misconduct, by imposing sanctions and the like.

Bar associations and disciplinary bodies are beginning to draft codes of litigation practice and are imposing sanctions for egregious breaches of conduct.

Corporate counsel and their associations are drafting papers asking for fair play and common decency in the conduct of their business.

Law firms are developing statements that make the firm's professional obligations as officers of the court clear to clients.

We need to pay more attention to fair play and common decency in the training of advocates — in law schools, trial advocacy courses, bar programs and in-house training. We should honor — with judicial, bar association or other awards — litigation conduct that enriches the profession.

One last word about what is not being advocated. This is no plea for wimpiness — for cowering in the face of macho breastbeating, or for telling clients you will have to bow out if the going gets tough. Litigation remains an imperfect discipline in which shouting, dirty tricks and efforts at intimidation will occur no matter how intensive the attempt at reform. Any trial lawyer worth a hoot must learn how to deal with that and turn Rambo's rampages squarely back against him.

It is said that Custer told his troops in the midst of Little Big Horn: "Men, we've got them where we want them; now we can fire off in every direction." That's Rambo the litigator. And in his zeal to shoot off in every direction, he tends to hit his own foot.□

EARLIER DAYS AT THE BAR

An account by the late *Dr. E.G. Coppell, C.M.B., Q.C.*, first published in Bar News in September 1972

THE GREAT MAJORITY OF MEMBERS OF THE Victorian Bar were not born when I joined the Bar in 1922 and I thought it might be interesting to them to learn what the Bar was like in those days. The most striking difference, of course, is in the numbers of men practising at the Bar. I doubt if more than 80 were actively practising in 1922 though there were in addition a number who would now be described as non-practising members.

Of the total about half a dozen had taken silk. The smallness of the number of silks was a legacy of the depression which fell on the Bar after the collapse of the banks in the 1890s. Work fell off to an alarming extent and even the ablest men were unwilling to take silk. Thus among men appointed to the Bench the following were "stuff gownsmen" — Cussen, Starke, Schutt, Mann and later Lowe.

Corporate life was almost unknown. There was a "Committee of Counsel" elected annually which dealt with matters of ethics and very little else. There was an annual Bar Dinner at which new appointees to the Bench were guests.

This lack of corporate activity undoubtedly stemmed from the passing of the Legal Profession Practice Act 1891 which set out to abolish the distinction between barristers and solicitors. Notwithstanding the Act the Bar continued to accept briefs as before from established firms of solicitors. After a few years a Roll of Counsel was established and everyone wishing to join the Bar was required on signing the Roll to give an undertaking that he would practise exclusively as counsel. The existence of a separate Bar depended solely on those undertakings. It was not recognised by law until the Act of 1946 required an audit of solicitors' trust accounts. For the purpose of that Act "solicitor" did not include a member of the profession who practised exclusively as a barrister. This, at least implicitly, recognised the existence of a separate Bar. These legal obstacles to corporate action were reinforced by the notion that a barrister was an individualist and that the Bar was no more than a collection of individuals.

The leader of the Bar was Sir Edward Mitchell, K.C. who, from the inception of the High Court, had appeared in most of the early constitutional cases. He

was beginning to be overtaken by two young silks — Latham and Dixon — and his practice gradually fell away. He died in poverty. There were six Supreme Court Judges who rotated month by month between the various lists. There was one jury list, one non-jury cause list, one judge in the criminal court, one in divorce, one in Chambers and one on circuit. Motor cars were fewer and moved more slowly so that there were few Supreme Court actions for personal injuries. Divorce was a purely State matter and my impression is that the procedure was simpler than it now is under Federal Law.

There was only one Master who dealt exclusively with equity matters such as accounts and enquiries. The practice matters which are now handled by the Masters were all disposed of by the judge in Chambers. Since there was no miscellaneous list this included orders to review and originating summonses. As a result the Practice Court sometimes sat beyond the normal court hours.

There were six County Court Judges, one of whom — the father of the present Chief Justice — spent practically the whole of his time as Chairman of the Railways Classification Board. This was not the only "odd job" performed by County Court Judges. There was no Federal Bankruptcy Act — instead we had a Victorian Insolvency Act. Legal insolvency commenced when the Supreme Court judge in the Practice Court made absolute an order nisi for insolvency. This was always done on Thursday morning and we juniors received a fee of 3 guineas for formally moving the order absolute. Thereafter, all matters in the insolvency came before a County Court Judge assigned to this work — though only part time. Workers' Compensation Boards had not been invented and disputed claims came before the County Court.

Despite all these extraneous matters I do not recall that there was any undue delay in the hearing of civil cases in the County Court or criminal trials in what was then called the Court of General Sessions.

As might be expected, fees were much smaller in those days. I frequently went to courts of petty sessions for a fee of 3 guineas (plus 2/6d. for my clerk). Perhaps I should have said my normal fee was 3 guineas, for I do not wish to convey that I went to any court frequently. In my first month I had two petty sessions briefs — a total of 6 guineas for the month. In earning 400 guineas in my first year I was regarded as one of the more successful juniors.

County Court scale fees began with 2 guineas brief fee and 1 guinea for a conference if the amount claimed did not exceed 50 pounds. Speaking from recollection, I think the top County Court scale for claims up to 500 pounds was "11 & 2" — i.e. 11 guineas on the brief and 2 guineas for the conference.

In the Supreme Court briefs were not marked according to scale, but still fees were not high. It was said that you get an opinion from Weigall K.C., the outstanding leader of the equity bar, for 5 to 10 guineas. However, Weigall was more timid than other silks. A trial brief in the Supreme Court would seldom be marked more than 25 guineas.

Let us turn now from how the Bar lived to where it lived. The great majority by far were in Selbourne Chambers, that odd building erected in the mid 1880s by a company composed of existing members of the Bar. It ran from Bourke Street to Little Collins Street on part of the site upon which BHP is now erecting its head office.

In the southern half of the building there were two storeys of rooms on either side of a central passage but the northern half had a narrower frontage and there were two storeys of rooms on the east side only. There were basements at either end which contained wine cellars. I wonder what possessed the Bar of those days to include these!

By effluxion of time the original shareholders of the company had died and their shares had devolved on their executors who were not members of the Bar. The site was a valuable one and in 1922 the company decided to sell it by auction. This was a real threat to the Bar and its leading members decided that somehow the Bar must buy the building. A general meeting of the Bar promised support and my father, who knew something of city real estate, secured an option on behalf of undisclosed principals. The option was exercised before the date of the auction and this not only preserved the Bar's home, but doubtless saved a good deal of money also.

A new company was formed to own the building and this time special provision was made that on the death of a member his shares must be sold to existing members of the Bar. In this way control of the building by the Bar was ensured.

Outside Selbourne Chambers there were one or two small groups of barristers of whom the best known were Sir Edward Mitchell and Herring.

The Law Courts housed both the Supreme Court and the County Court. There was no High Court building and when the High Court came to Melbourne it sat in what was then called the 3rd Civil Court. This was the courtroom on the south western corner of the building. I do not know what arrangements were made for the High Court Judges.

In my first 10 years at the Bar the number of men practising greatly increased. This was in part due to the number of returned servicemen who completed their courses after World War I. Both State and Federal governments adopted a policy of preference to returned servicemen in the allocation of briefs, which was a great help to us beginners.

Each month appeals to General Sessions would be handed out in batches of three by the Crown. It was a gala day thus to earn 9 guineas for the 3 briefs. I received a number of junior briefs in taxation appeals in the High Court for the same reason. Apart from the money, this led to the erroneous belief that I was a specialist in income tax and from that I began to get briefs for taxpayers in due course.

Incidentally, in those days there was very little specialisation — there was just not enough work to justify it. However, a few juniors did become known as skilled in particular fields, as Arthur Dean did in patent cases and Russell Martin in tax cases.

NEW SILKS

The following members of the Victorian Bar were appointed Queen's Counsel on 29 November, 1988.

Name:	**Colin Leslie Lovitt**
Age:	43
Articles:	Slonim Velik & Emanuel
Admission:	1969
Signed Bar Roll:	1970
Master:	Fogarty J.
Area of Practice:	Crime (but I've asked Vincent J. to return my copy of Spry's book on "Equitable Remedies")
Readers:	L. Thompson, S. Miller, S. Grant
Reason for applying for Silk:	Old Age. It is however nice to think one is recognised in the right places for one's achievements.
Reaction on being appointed Queen's Counsel:	I'm honoured. (Others say it's about time).

Name:	**Robert Keith Kent**
Age:	43
Articles:	Wisewould Duncan Hanger
Admission:	1970
Signed Bar Roll:	1972
Master:	Judge Kelly
Area of Practice:	Criminal Law
Readers:	T. Sullivan, D. Sweeney, F. Guiciardo, A. Duley, J. Perlman, A. McKenna
Reason for applying for Silk:	(Do you have to print anything about that?) I do think there is room at the Criminal Bar for trial and appellate silks.
Reaction on being appointed Queen's Counsel:	I am pleased at the prospect of entering a new phase in my career.

Name:	**Ross McKenzie Robson**
Age:	42
Articles:	Mallesons
Admission:	1972
Signed Bar Roll:	1973
Master:	J. D. Meralls Q.C.
Area of Practice:	Commercial/Equity
Readers:	P. Richards, D. Collins, C. Maxwell, R. Garratt, A. McIntosh, P. Lithgow, W. Kozica, J. Wilson, J. Beach, C. Spence, S. Dewbury, B. Hess.
Reason for applying for Silk:	I am ready for it!
Reaction on being appointed Queen's Counsel:	Joy and pride.

Name:	**Peter Ross Hayes**
Age:	40
Articles:	Gillotts
Admission:	1973
Signed Bar Roll:	1973
Master:	Tadgell J.
Area of Practice:	Commercial
Readers:	S. O'Brien, P. Costello, G. Clarke, M. Hines, Dr. J. Scutt, N. Lucarelli, P. Anasatasiou, B. Ussher, K. Williams, G. Cullen, C. Serri.
Reason for applying for Silk:	Looking for a new challenge.
Reaction on being appointed Queen's Counsel:	Relief.

Name:	**Ross Campbell Macaw**
Age:	41
Articles:	Mallesons
Admission:	March 1972
Signed Bar Roll:	1985
Master:	Stephen Charles QC
Area of Practice:	Property, Commercial, Defamation, Trade Practices.
Readers:	N. Franzi, P. Freckleton, C. Spence, M. Sloss, G. McEwan, J. Longmead.
Reason for applying for Silk:	It was time for adventure! Otherwise I wouldn't like to say.
Reaction on being appointed Queen's Counsel:	Relief and pleasure.

Name:	**Geoffrey William Colman**
Age:	62
Articles:	Propsting Finlay Watchorn Baker & Solomon (Hobart)
Admission:	1948
Signed Bar Roll:	1950
Master:	H. Frederico (Senior)
Area of Practice:	Personal Injury, Negligence and Insurance Law
Readers:	D. Cross, R. Lewis, R. Alston, N. Roberts, C. Thomson
Reason for applying for Silk:	If I'd applied too much later it would have been too late. I've had a lot of adventure.
Reaction on being appointed Queen's Counsel:	Delighted and flattered.

Name:	**John Philip ("Joe") Dickson**
Age:	48
Articles:	Loel J. Caldwell Esq.
Admission:	1964
Signed Bar Roll:	1965
Master:	E. D. Lloyd Q.C.
Area of Practice:	Crime
Readers:	N/A
Reason for applying for Silk:	Do I have to answer this question? On a serious note, for the better appreciation by the Bar of the role of Crown Prosecutors.
Reaction on being appointed Queen's Counsel:	Bewildered and pleased.

Name:	**Nathan Abraham Moshinsky**
Age:	47
Articles:	Archer Shulman
Admission:	1964
Signed Bar Roll:	1965
Master:	Hartog Berkeley Q.C.
Area of Practice:	Commercial Law, Equity, Administrative Law, General Practice.
Readers:	L. Wengrow, E. Davis, M. Green, T. Munroe, J. Willis, R. Derham.
Reason for applying for Silk:	A chance to do more interesting cases.
Reaction on being appointed Queen's Counsel:	Elated. Very excited.

Name:	**David John Ross**
Age:	I don't give it.
Articles:	Allan Moore Esq.
Admission:	1967
Signed Bar Roll:	1967
Master:	Beech J.
Area of Practice:	Crime, Aboriginal Land Claims, Inquiries.
Readers:	R. Wild, B. Lindner, N. Bird, N. Webb, K. Armstrong
Reason for applying for Silk:	I'm not going to give you one!
Reaction on being appointed Queen's Counsel:	I feel a sense of humility particularly as there are some really great barristers at this Bar who are not Queen's Counsel.

SOME STATISTICS ON SILK (UPDATED)

	1982	1983	1984	1985	1986	1987	1988
Commercial	5	3	4	5	3	4	4
Common Law	1	3	2	2	2	—	1
Crime	1	2	3	1	3	1	4
Family Law	—	1	1	—	—	—	—
Industrial Law	—	—	—	—	—	1	—
Local Govt.	—	—	—	—	1	1	—
Patents	—	—	—	1	1	—	—
Politics	—	1	—	—	—	1	—
Average years since signing Bar Roll							
Bar Roll	16.5	17	18	17	15	16	20

1988-89 BAR COUNCIL

Name:	**E. W. (Bill) Gillard**
Signed Bar Roll:	June 1965
Q.C.:	1979 and subsequently in Tasmania and A.C.T.
Chambers:	18th Floor ODCW
Previous Bar Council Experience:	Member of Bar Council 1974-1980. 1982- Vice-Chairman 1986-87. Served on Law Reform Committee as member and Chairman, Applications Review Committee as member and Chairman, Proposals Committee as Chairman, and a member of the Executive 1983 to present. Victorian Bar's representative on the Law Council of Australia 1986-87. Member of Committee of ABA organising Conference in London and Dublin 1987. Victorian Bar's representative on Australian Bar Association 1988. Member of the Law Council of Australia's Media Committee.
Areas of Practice:	on Commercial, common law, defamation and commercial arbitration.
Interests Outside the Bar:	Cricket, jogging, travel, gardening and a long love affair with the Essendon Football Club. [Somewhat unrequited in recent times. Eds.]

Name:	**David Harper**
Signed Bar Roll:	1st October 1970
Q.C.:	1986
Chambers:	1st Floor ODCW
Previous Bar Council Experience:	Secretary 1980-82, Member 1982- Assistant Hon. Treasurer 1984-85. Hon. Treasurer 1985-88
Areas of Practice:	Commercial and admin. law and general.
Interests Outside the Bar:	Cricket, native flora, bee-keeping.

Name:	**Andrew John Kirkham**
Signed Bar Roll:	9th February 1967
Q.C.:	1983
Chambers:	5th Floor ODCE
Previous Bar Council Experience:	1987/88
Areas of Practice:	Crime, Common Law, Matrimonial.
Interests Outside the Bar:	R.A.A.F., Reading, Travelling, Gardening.

Name:	**Charles Francis**
Signed Bar Roll:	4th February 1949
Q.C.:	1975
Chambers:	11th Floor ODCE
Previous Bar Council Experience:	Chairman 1987-88. Law Reform Committee 1971-87. Representative on Australian Bar Association 1987- Representative on Law Foundation 1987- Representative on Victorian Council of Professions 1986-87.
Areas of Practice:	Personal injury, criminal law, general (inc. constititutional, commercial and building law).
Interests Outside the Bar:	R.A.A.F. (served 1942-45. Reserve 1946-83. Group Captain's Deputy Judge Advocate General). Writing (mainly history), Oil Painting, Music.

Name:	**John Spence Winneke**
Signed Bar Roll:	9th March 1962
Q.C.:	1976
Chambers:	10th Floor ODCE.
Previous Bar	
Council Experience:	Nil
Areas of Practice:	General
Interests Outside the Bar:	Golf

Name:	**Hartley Roland Hansen**
Signed Bar Roll:	9th February 1967
Q.C.:	1984 Victoria, 1985 Tasmania and A.C.T., 1986 N.S.W.
Chambers:	5th Floor ODCW
Previous Bar	Hon. Secretary 1973-1975
Council Experience:	Member 1980-1983.
Areas of Practice:	General commercial.
Interests Outside the Bar:	Golf, Tennis, Gardening, Theatre.

Name:	**Bernard ("Bonge") Bongiorno**
Signed Bar Roll:	1968
Q.C.:	1985
Chambers:	7th Floor ODCW
Previous Bar	
Council Experience:	1986-87
Areas of Practice:	Common Law, Commercial.
Interests Outside the Bar:	Tennis, Point Lonsdale, Driving children wherever they want to go.

Name:	**Ray Finkelstein**
Signed Bar Roll:	13th February 1975
Q.C.:	1986
Chambers:	27th Floor Aicken
Previous Bar	Assistant Hon. Secretary
Council Experience:	Secretary.
Areas of Practice:	Commercial Law, equity, company law.
Interests Outside the Bar:	Rock 'n Roll (Old), Cars (Old).

Name:	**David John Habersberger**
Signed Bar Roll:	22nd February 1973
Q.C.:	1987
Chambers:	14th Floor ODCW
Previous Bar	Assistant Honorary Secretary 1980-82.
Council Experience:	Honorary Secretary 1982-84. Member 1985-1988
Areas of Practice:	commercial and administrative law
Interests Outside the Bar:	Climbing hills and collecting firewood at Foster, Reading.

Name: **Chris Jessup**
Signed Bar Roll: 13th February 1975
Q.C.: 1987
Chambers: 12th Floor Latham
Previous Bar
Council Experience: Nil.
Areas of Practice: Industrial, administrative law, trade practices, commercial.
Interests Outside the Bar: Family, wine, swimming.

Name: **Robert Kent**
Signed Bar Roll: 17th February 1972
Q.C.: 1988
Chambers: 5th Floor ODCE
Previous Bar
Council Experience: 1987
Areas of Practice: Criminal Law.
Interests Outside the Bar: Skiing, cricket, football (Junior Coaching and Administration).

Name: **Michael Anthony Adams**
Signed Bar Roll: 10th April 1985
Chambers: 2nd Floor Four Courts.
Previous Bar
Council Experience: 1975-1984
Areas of Practice: Equity and Commercial.
Interests Outside the Bar: Country Pubs, holidays in Greece, Australian contemporary painters, gardening, cooking, horse riding.

Name: **Murray B. Kellam** *(not photographed)*
Signed Bar Roll: 8th December 1971
Chambers: 11th Floor ODCW
Previous Bar
Council Experience: 1982-1987
Areas of Practice: Common law.
Interests Outside the Bar: Boating, travel and family. (Not necessarily in that order.)

Name: **Susan Crennan** *(not photographed)*
Signed Bar Roll: 13th March 1980
Chambers: 17th Floor ODCW
Previous Bar
Council Experience: Nil.
Areas of Practice: Intellectual Property, commercial law and constitutional law.
Interests Outside the Bar: Reading, music, gardening, family.

Name: **W. H. (Bill) Morgan-Payler**
Signed Bar Roll: 29th September 1981 (Re-signed — first signed 1974)
Chambers: 7th Floor ODCW
Previous Bar
Council Experience: Nil
Areas of Practice: Criminal
Interests Outside the Bar: None since being elected to Bar Council. Previously Bushwalking, fishing and reading.

Name: **Michael Colbran**
Signed Bar Roll: 18th November 1982
Chambers: 12th Floor ODCW
Previous Bar Secretary Ethics Committee 1985-88
Council Experience: Law Reform Committee 1985-88
Areas of Practice: Commercial.
Interests Outside the Bar: Bushwalking, theatre, opera, wine, photography and holidays.

Name:	**Peter Elliot**
Signed Bar Roll:	December 1983
Chambers:	10th Floor Four Courts
Previous Bar	Bar Council, 1987-88.
Council Experience:	Executive 1988
Areas of Practice:	Crime, magistrates court, civil.
Interests Outside the Bar:	Golf, fishing, gardening.

Name:	**David Beach**
Signed Bar Roll:	1984
Chambers:	7th Floor ODCW
Previous Bar	
Council Experience:	1988
Areas of Practice:	Common law.
Interests Outside the Bar:	Music, tennis, water skiing.

Name:	**Greg Barns**
Signed Bar Roll:	1986
Chambers:	3rd Floor Equity
Previous Bar	Nil
Council Experience:	1987-88
Areas of Practice:	criminal law.
Interests Outside the Bar:	Politics, Melbourne Football Club, cricket.

Name:	**Andrew McIntosh**
Signed Bar Roll:	May 1985
Chambers:	16th Floor ODCW
Previous Bar	
Council Experience:	Secretary Young Barristers Committee
Areas of Practice:	Civil magistrates court and county court.
Interests Outside the Bar:	Sailing, rowing and skiing.

Name:	**Robin Brett**
Signed Bar Roll:	April 1979
Chambers:	17th Floor ODCW
Previous Bar	
Council Experience:	Secretary since 1986
Areas of Practice:	Commercial, equity, administrative law.
Interests Outside the Bar:	Films, books, music, jogging.

THE SILKS' TAPESTRIES

Hartog Berkeley Q.C., Murray Walker, Lady Delacombe, David Byrne Q.C. and Brian Shaw Q.C.

David Byrne QC relates the history of the splendid new addition to the foyer of Owen Dixon Chambers West.

DURING THE COURSE OF CONSTRUCTION OF THE Bar's new Lonsdale Street Chambers which became known as Owen Dixon Chambers West, Graeme Uren QC suggested to me that it might be a good idea for the Silks to donate to the Bar a major art work to decorate the foyer of the new building. We considered various options including a silk hanging which seemed a particularly appropriate work for the Silks to donate.

I took up the idea with Roger Poole of Bates Smart McCutcheon, the architect who designed our building. In due course, a committee was formed comprising Hartog Berkeley QC who, as Solicitor-General for the State of Victoria, is first in seniority of the Silks, a former Chairman of the Bar Council and an enthusiastic supporter of the Bar, Brian Shaw QC and Stephen Charles QC, both former Chairmen of the Bar Council enjoying great prestige and respect from the Bar, and myself. [Not entirely lacking in prestige and respect either. Eds] Roger Poole attended our meetings from time to time as required providing advice upon aesthetic and practical aspects of the project.

The first task was to excite enthusiasm among the Silks. This was done by holding a number of meetings at which was disclosed a positive attitude by the great majority of those attending. The Committee decided that the best method of ensuring that the large sum required for the project was available was to seek from all the Silks a commitment to contribute a sum up to $1,000 as and when called upon. The response to this approach was very encouraging. In the end the number of contributors who agreed to support the project was 86 out of the 100 or so Silks in practice in Victoria.

The Committee resolved that the appropriate form of the artwork was to be tapestry in wool, not silk, and that this should be woven by the Victorian Tapestry Workshop as the premier weaver in Australia. Sue Walker, the Director of the Workshop, was approached and she showed great enthusiasm for the work which, by then, had become a matched pair of tapestries to be hung high on the eastern and western walls of the Lonsdale Street Foyer.

The task of selecting the design was not an easy one. Three artists were requested to submit a sketch, Bea Maddock of Tasmania and, Sara Lindsay and Murray Walker, both of Melbourne. In the end we selected Murray Walker as the designer and he set about the task of capturing the spirit of the Bar and its activities. By May 1987 his designs were complete.

The weaving of the two tapestries proceeded simultaneously. It started in late 1987 and was completed in August 1988. The names of the weavers concerned are set out in the sign which was unveiled on 2nd November 1988, by Lady Delacombe, wife of a former Governor of Victoria. Lady Delacombe was a leader in the establishment of the Victorian Tapestry Workshop. The sign also contains the names of the 86 contributing Silks.

THE EASTERN TAPESTRY

This is intended to evoke the idea of barristers at work in Court. On the left is a copy of the illuminated Roll of Counsel held by the Supreme Court Prothonotary dating from the mid-nineteenth Century. The volume containing this Roll is shown on the table beside the illuminated border. The table itself and the book case behind it is part of the furniture of the Supreme Court Library. The crest above is, of course, the Royal Crest seen in the Courts. The picture in the centre is a water colour by Liardet, an artist who worked in Melbourne in its early years. The building is the first Supreme Court with barristers and others outside. Fashions have changed for the clothing of the people shown in this picture, but not, it seems, for barristers.

Moving to the right across the design, we see in the foreground a small mahogany table from the Banco Court with its Bible and water jug and glass for witnesses. Behind it is an open page of the modern Bar Roll kept by the Bar Council. This shows the number and name of the person who last signed at the time this part of the tapestry was woven. This is to fix the date of the work. Then to the extreme right of the design is a group of barristers on their way to Court. At the top and the bottom of this design and of the western tapestry is a pink border showing the pink string which traditionally binds briefs delivered to Counsel.

THE WESTERN TAPESTRY

The theme of this design is Barristers' Chambers. In its life of over one hundred years the most significant buildings in which the Bar kept Chambers were owned by the Bar. These are shown in the design, — first Selborne Chambers (the Chancery Lane elevation). This was the home of the Bar for some 80 years until it was demolished in 1961 or thereabouts. To its right we see Owen Dixon Chambers in William Street with the removalist trucks outside, showing the move into the new building in July 1961. The bookcase to the left of Selborne Chambers is identifiable as part of the new Owen Dixon Chambers West. The remainder of the design depicts aspects of life in Chambers including decorative items which the designer found in his wanderings through chambers. The small owlish figure is a doll presented to the Executive Officer of the Bar, Anna Whitney, by one of the groups of readers in appreciation of her work as Co-Ordinator of the Readers' Course. The briefs poking out of the windows of Owen Dixon Chambers are intended to show that the building is stuffed with briefs. Likewise the number of briefs on the bookcase at the left marks the prosperity of the Bar. Items which may be identifiable in the woven work include the roll of pink tape to the right of the owlish figure and on his left two copies of Sir Arthur Dean's familiar blue book, "A Multitude of Counsellors", the Bar history. The number of unsold copies of this work appearing in the annual balance sheet of the Bar Council has from time to time provoked mild amusement. While the face of the telephoning barrister cannot be identified in the tapestry, a careful examination of the finished work will permit an identification of the statue in the declamatory pose and of the Silk on the extreme right. The borders are made up of illuminations from the old Roll of Counsel with pink string at top and bottom.

David Byrne

CIVIL LITIGATION — THE LAW AND PRECEDENTS

Senior Master Mahony, Barton Stott Q.C., and John Emmerson Q.C.

Peter Heerey Q.C., Alex Chernov Q.C. and Mr. Justice Beach.

Jonathan Mott, and Roger Gillard Q.C.

OVER 190 MEMBERS OF THE BAR ARE ENGAGED, together with Victorian solicitors and academics, in the preparation of this work due for publication next year.

Currently covering 72 titles, from Account Stated to Workers Compensation, the work will contain authoritative statements of the law together with precedents for pleadings and other documents. Each title is prepared by specialists in the field.

The Editor is John Riordan and the Chief Consulting Editors are Mr. Justice Beach, Hon. B.L. Murray CBE, QC, Chief Judge Waldron, the President of the Law Institute, Mr. Jonathan Mott, and Professor Michael Crommelin from Melbourne University.

Recently a lunch was held at Seabrook Chambers to mark the establishment of the Academic Board, chaired by Professor Crommelin.

CAPITAL GAINS TAX ON SETTLEMENTS

NEIL FORSYTH AND PETER SEARLE HAVE RAISED the point in their defence that because of the existence of Section 160M(3)(b), being a "more specific" and "ordinary provision" of the legislation, Section 160M(7) does not apply to the settlement of a chose in action. Certainly, that argument has a lot of, dare I say it, sex appeal. However, like any object with just sex appeal, their argument is only attractive on a superficial level. There are 9 arguments that I desire to make in reply.

1. Given their assertions, it would have been desirable for Forsyth and Searle to have fully set out in their second article the unedited terms of Section 160M(3)(b). Section 160M(3) provides:—

"Without limiting the generality of sub-section (2), a change shall be taken to have occurred in the ownership of an asset by:—

a) . . .;

b) in the case of an asset being a debt, a chose in action or any other right, or an interest or right in or over property — the cancellation, release, discharge, satisfaction, surrender, forfeiture, expiry or abandonment, at law or in equity of the asset;

c) . . .;

d) . . .;".

2. Section 160M(3) is related to Section 160M(1) and it is Section 160M(1) which deems there to be a disposal of an asset where a "change has occurred in the ownership of an asset". Section 160M(1) is expressed to be "Subject to this Part". Therefore the words "subject to the other provisions of this Part" in Section 160M(7) by themselves take the matter no further in determining, if necessary, whether Section 160M(7) should be read subject to Section 160M(1) or vice versa.

3. It has been asserted that Section 160M(3)(b) is "more ordinary" than Section 160M(7). The event being considered in this context is the forfeiture or surrender of a cause of action. Both Section 160M(3)(b) and Section 160M(7) deal expressly with forfeiture and surrender. It is not clear to me why, when considering the forfeiture or surrender of a cause of action, Section 160M(3)(b) therefore is "more ordinary" in terms of a deemed disposal than Section 160M(7).

4. Sections 160M(1) and 160M(7) are *both* deeming provisions.

5. It has been asserted that Section 160M(3)(b) is a "more specific" provision than Section 160M(7). By reference to the full terms of Section 160M(3)(b) it seems clear that Section 160M(3)(b) is a less specific provision than Section 160M(7)(b)(i) which talks solely of "an asset being a right". Although Section 160M(3)(b) also specifically lists debts and choses in action, it is difficult to see how Section 160(M)(3)(b) thereby becomes "more specific" so that it in fact overrides Section 160M(7). I note that the very reference to "an asset being a right" derives from the definition of "asset" in Section 160A which includes, inter alia, ". . . a debt, a chose in action, any other right . . .", the very words which appear in Section 160M(3)(b).

6. Forsyth and Searle's argument is that if an asset falls under Section 160M(3)(b), where there is a forfeiture or surrender, it does not fall under Section 160M(7). However, Section 160M(3)(b) also refers to "any other right" and Section 160M(7) refers to "a right". If their view is correct, either one gives no meaning to the words "any other right" in Section 160M(3)(b) or no meaning to Section 160M(7)(b) insofar as the latter talks of forfeiture or surrender (See also the last sentence of point 5). Clearly, that could not be taken to have been Parliament's intention. If Parliament's intention was that there would be situations that would fall under both provisions, Messrs. Forsyth and Searle's argument loses its validity because it is predicated on saying that this cannot take place or that this was not intended.

7. Forsyth and Searle state that if Section 160M(3)(b) operates ". . . there is no room for Sub-section 160(7) (sic) to operate over again". They also state that a consequence of my argument would be "double counting" although they do not state of what. There are many provisions of the Income Tax Assessment Act ("the Act") which operate in relation to the same matter. For example, a receipt can properly fall under one or more provisions dealing with what is taken to be assessable income for the purposes of the Act. An expense can be an allowable deduction under both specific and general provisions of the Act. Nobody would suggest that the same expense can be deducted twice because of this overlap or that the same receipt must be counted twice because it properly falls under two or more provisions of the Act relating to what is taken to be assessable income. Further, I have yet to hear of anyone raising the argument that because, for example, an expense falls under Section 51(1) of the Act, "there is no room for the Act to operate over again" so that Sections 51 AA et seq do not apply to same or vice versa. There is clearly an overlap between Sections 160M(3)(b) and 160M(7) but the overlap is only in relation to what is taken to be a disposable. Other provisions of the Act deal with the assessability of the "gain" howsoever defined predicated on there being a disposal of an asset within the meaning of the Act whether under one or more of Sections 160M(3)(b) or 160M(7) or some other provision. There is only the one asset, the one transaction, the one amount of consideration received and therefore the one amount of tax paid. Both Sections 160M(3)(b) and 160M(7) deem there to be a disposal when a cause of action is forfeited or surrendered and Section 160M(7) goes on to state the consequences that has for the cost base. Section 160M(3)(b) deals with disposal only and not with the cost base. If Section 160M(3)(b) also dealt with cost base considerations, Messrs. Forsyth and Searle's argument would perhaps be correct but that provision does not deal with the same. In any event, point 6 prevails.

8. Accepting, for present purposes, that the Commissioner's view is what has been stated, that view or the incumbent of that office could change. It would

be prudent for taxpayers to structure their affairs on the basis that Section 160M(7) does or could apply.

9. It is interesting to note the change of language used by Forsyth and Searle in their latest article. Their original article talked of causes of action. They now specifically refer to choses in action to bring themselves within the language of Section 160M(3)(b) for the purposes of their argument. No doubt they would concede, irrespective of points 1 to 8 above, that to the extent that a cause of action is not a chose in action but still falls within the definition of "asset" within Section 160A, which Messrs. Forsyth and Searle construe very widely, my arguments in relation to Section 160M(7) would apply to such a cause of action. For the distinction between a cause of action and a chose in action — see *May* v. *Lane* (1894) 64 LJ QB 236, *Torkington* v. *Magee* [1902] 2 KB 427, *Federal Commissioner of Taxation* v. *Official Receiver* (1956) 95 CLR 300, *Loxton* v. *Moir* (1914) 18 CLR 360 and generally, Words and Phrases, legally defined (43rd. ed — Butterworths). Of course, if they accept my argument in relation to the definition of "asset", which they haven't done so to date, then this point cannot be validly made. Whichever way, their affections can't be directed in two conflicting directions.

Jonathan Beach

SIR HARTLEY WILLIAMS — A POSTSCRIPT

The Hon. Sir Richard Eggleston provides some background to the letter of Sir Hartley Williams — see Judicial Pique, Bar News No. 66, p. 38.

DEAR SIRS,

Your publication in the Spring issue of the letter written by Sir Hartley Williams on the appointment of Mr. Madden (as he then was) as Chief Justice of Victoria prompted my memory with regard to the circumstances in which it was written.

In my early years at the Bar Sir Hartley's son, Bertie, was a Judge's Associate, I think to Sir William Irvine. My cousin John Oldham was than a practising solicitor, but had served for a time as an Associate, and was told the details by Bertie.

It seems that the Attorney-General had asked Sir Hartley whether he would accept the Chief Justiceship, and Sir Hartley had agreed. It being then vacation, Sir Hartley retired with his family to the hills (I thought I was told Macedon, but it appears to have been Healesville). The family were told to expect the announcement, but were sworn to secrecy.

The days passed without any message being received, until Sir Hartley read in the Argus that Madden had been appointed. It seems that either Sir Hartley or his wife was thought to have insulted the wife of a Cabinet Minister at some function, and the Minister in question would not agree to the appointment at any price, with the result that the Cabinet appointed Madden instead.

It is not surprising that Williams was somewhat piqued by receiving the report in the Argus, and he must have written in the heat of the moment, as Madden was appointed, according to the Victorian Law Reports, on January 9th, 1983. That presumably was the date on which he was sworn in, the appointment having been announced a few days earlier.

According to the Australian Dictionary of Biography "the letter caused a sensation at the time, but in later years Williams spoke most warmly of Madden's work as Chief Justice."

Williams was knighted in 1894, and retired in 1903, after nearly 22 years' service. He retired to England and drew his pension of 1500 pounds a year until his death in 1929. This was an embarrassment to other judges, as there was a fixed appropriation for pensions, and until he ceased to draw his, there was not enough for other judges to be able to retire.

Some years ago, in India, I met a grand-daughter of his, and told her the story, saying that I did not know whether it was Williams or his wife who was supposed to have uttered the insult. She said "Oh, it would have been grandfather. Grandmother was a dear."

There is a reference to Sir Hartley in the capacity of trustee in *Re Eyre-Williams* [1923] 2 Ch.533.

Yours truly,

R. M. Eggleston

COURT IN THE ACT

Bar Christmas Show

THE BAR IN ASSOCIATION WITH TIN ALLEY players is presenting a legal pantomime entitled "Court in the Act" at St. Martins Theatre, 44 St. Martins Lane, South Yarra at 8 o'clock from Thursay 15th December until Friday 23rd December 1988; adults $16 children/student $10. Bookings phone 608 8062.

"Court in the Act" is not another Bar Revue, it is a Christmas legal pantomime. It combines the traditions of the Christmas pantomime with the law. The show blends together the familiar characters of pantomime with the type of legal character to be found on the Bench, at the Bar, and amongst our Solicitor cousins. Add a large dash of history and you have "Court in the Act". To go further would give the story away — so come along and bring the family.

The large cast includes a number of well known personalities. Simon Kemp Wilson has been on a strict diet in order to fit into his part and yet again romp across the stage. In the romantic leads are to be found Meryl Sexton and Colin Lovitt.

Colin is again playing the sensitive and emotional type of character he portrayed so well in the Centenary Bar Revue.

Douglas M. Salek in heavy disguise is also rumoured to be amongst the cast.

Court in the Act

presented by

The Victorian Bar

in association with

TIN ALLEY PLAYERS

15th - 23rd Dec 8pm at St Martins Theatre

44 St Martins lane Sth Yarra.

Adults $16 Children Students $10

Other members of the Bar in the cast include: Nicole Feeley, Kate Seekings, Tracy Vinga, Trevor McLean, Sebastion Greene, Tom Cantwell, Adam Dickens, Michael Pickering and many many more including some very talented folk from Tin Alley Players.

The show is directed by Solicitor Mark Williams fresh from his return from studying theatre in the august environs of Cambridge. We look forward to seeing you there.

The Bar None Hockey Team had a 'warm up' match against RMIT on Monday evening — 10th October. We lost the match 7-0 but all of us had a most enjoyable time.

Thank you RMIT for providing: a team; extra players for our team, namely — Paul Morris, Peter Manton, Richard Hubbard and Phil Coldwell (goalie — from half time); two experienced umpires — Michael Archer and Neale Hull and the V.H.A. for the Astroturf Stadium. Special thanks to Heather Blampied Ground Manageress.

Richard Brear

OPENING OF THE LEGAL YEAR; RELIGIOUS OBSERVANCES FOR THE LEGAL PROFESSION

THE SERVICES FOR THE OPENING OF THE LEGAL year in 1989 will be held on Tuesday, 31st January 1989 as follows:

St Paul's Cathedral, Corner Swanston Street and Flinders Street, Melbourne, at 10.00 a.m.

St Patrick's Cathedral, Albert Street, East Melbourne, at 9.00 a.m. (Red Mass)

St Eustathios' Cathedral, 221 Dorcas Street, South Melbourne at 9.15 a.m.

Temple Beth Israel, 76-82 Alma Road, St Kilda at 9.45 a.m.

All members of the legal profession, together with their staff, family, and friends are cordially invited to attend.

ARRANGEMENTS AT ST PAUL'S CATHEDRAL

The Procession will commence at 9.40 a.m., and will be in two parts, each led by a Verger and assisted by a Marshall. The order of procession within each part (from front to rear) will be:

Part 1:

Law Students; Law Clerks; Legal Executives; Solicitors; Crown Law Officers — Supreme and County Courts; Law Council of Australia; Law Institute Council; Members of Law Faculties; Barristers; Queen's Counsel.

Part 2:

Justices of the Peace; Stipendiary Magistrates; Judges' Associates; County Court Master; Supreme Court Masters; Members of the Commonwealth Administrative Appeals Tribunal; Members of the Administrative Appeals Tribunal of Victoria; Judges of the Accident Compensation Tribunal; County Court Judges; Solicitor-General of Victoria; Chief Judge of the County Court; Solicitor-General of the Commonwealth; Attorney-General of the Commonwealth; Federal Judges (other than the High Court); Lord Mayor; High Court Justices; Attorney-General of Victoria; Supreme Court Judges.

Those in Part 1 of the Procession should assemble in the Cathedral Close not later than 9.30 a.m. Those in Part 2 of the Procession should assemble in the ground floor corridor of the Chapter House not later than 9.30 a.m. Robing facilities will be available in the Chapter House.

The Sermon will be preached by Canon Albert McPherson, the Precentor, St Paul's Cathedral. The lessons will be read by the Chief Justice, the Chairman of the Bar Council, and the President of the Law Institute of Victoria.

ARRANGEMENTS AT ST PATRICK'S CATHEDRAL

Members of the profession are asked to assemble in the Cathedral grounds not later than 8.45 a.m. Robing facilities will be available in the Choir Sacristy.

ARRANGEMENTS AT ST EUSTATHIOS' CATHEDRAL

Members of the profession are asked to assemble in the Cathedral grounds not later than 9.00 a.m. Robing facilities will be available at the Manse at the rear of the car park.

ARRANGEMENTS AT TEMPLE BETH ISRAEL

Members of the profession are asked to assemble not later than 9.15 a.m. Robing facilities will be available.

PROCESSIONAL ORDER

The order of procession set out above for St Paul's Cathedral has been settled by the Chief Justice and should be followed at other venues.

COURT SITTINGS

The Law List will advertise the usual arrangements for the Supreme Court, County Court and other tribunals. Practitioners attending the Services who have matters before the City Court should notify the Clerk, who will arrange for them to be heard after 11.00 a.m. Similar arrangements may be possible with other Magistrates' Courts if the Clerks are notified in advance.

QUESTIONS

Any questions regarding the arrangements for the Services should be directed as follows: St Paul's Cathedral: Revd Albert McPherson, phone 650 3791 or Mr D. Wells, phone 619 0619. St Patrick's Cathedral: Father D.J. Hart, phone 662 2233 or Mr P.G. Hey, phone 603 6129. St Eustathios' Cathedral: Father Basil, phone 690 1595 or Miss E. Mitrakis, phone 690 2033. Temple Beth Israel: Mr T.G. Danos, phone 608 7692.

JUDICIAL STATISTICS CONSOLIDATED

Compiled by *Richard Brear*

HIGH COURT

No maximum number of Justices
Age for retirement 70 (appointees after July 1977)

	Age at 1.10.88	Date of Birth	Year of App'mt	Year of Ret'mt
Mason CJ	63	21.4.1925	1972	1995
Brennan J	60	22.5.1928	1981	1998
Wilson J	64	23.8.1922	1979	1992
Deane J	57	4.1.1931	1982	2001
Dawson J	53	12.12.1933	1982	2003
Toohey J	58	4.3.1930	1987	2000
Gaudron J	45	1943	1987	2013

FEDERAL COURT OF AUSTRALIA

(Judges of the Court resident and keeping chambers in Melbourne)
— No maximum of Judges
— Age for retirement 70 (appointees after July 1977)

	Age at 1.10.88	Date of Birth	Year of App'mt	Year of Ret'mt
C. A. Sweeney J (1963)*	73	27.4.1915	1977	—
Northrop J (1967)*	62	10.8.1925	1977	—
Keely J (1976)*	61	2.10.1925	1977	—
Woodward J	59	6.8.1928	1977	—
Jenkinson J	60	14.11.1927	1982	1997
P. Gray J	42	9.5.1946	1984	2016
D. Ryan J	47	3.6.1941	1986	2011

FAMILY COURT OF AUSTRALIA

(Judges of the Court resident and keeping chambers in Melbourne)
No maximum number of Judges
Ages for retirement 70 (appointees after July 1977)

	Age at 1.10.88	Date of Birth	Year of App'mt	Year of Ret'mt
Nicholson CJ	48	19.8.1938	1987	2008
Strauss J	67	3.9.1921	1976	—
Walsh J	63	31.12.1925	1977	—
Treyvaud J	54	8.7.1929	1977	1999
Frederico J	57	1.10.1931	1976	—
Hase J	56	22.8.1932	1976	—
T. R. Joske J	56	22.8.1932	1976	—
Fogarty J	55	9.6.1933	1976	—
A. A. Smithers J	54	14.4.1934	1977	—
J. Willzak	51	9.9.1937	1985	2007
J. Kay	43	21.4.1945	1986	2015
A. Graham	50	11.7.1938	1987	2008
A. Rowlands	51	26.9.1937	1988	2007

COUNTY COURT JUDGES

Judge	Age at 31.12.88	Date of Birth	Date of App'mt	Year of Ret'mt 72/70*
H. Odgen	72	27.12.1916	3. 5.1972	1988
E. Hewitt	71	4.11.1917	4. 8.1964	1989
J. Gorman	70	4. 1.1918	25. 1.1971	1990
C. Harris	70	26.11.1918	3. 3.1964	1990
N. Stabey	68	5. 9.1920	1. 6.1972	1992
S. Hogg	67	3. 5.1921	9. 9.1975	1993
L. Lazarus	66	20. 5.1922	10. 8.1976	1994
M. Ravech	66	6. 6.1922	14.10.1975	1994
T. Shillito	66	25.12.1922	17. 1.1967	1994
C. Villeneuve-Smith	65	16. 2.1923	12. 4.1983	1995
G. Just	64	4. 8.1924	10. 8.1965	1996
J. Campton	63	14. 3.1925	3. 5.1988	1995*
J. Howse	63	24. 4.1925	19. 1.1976	1997
B. McNab	63	2. 6.1925	31.10.1972	1997
G. Byrne	63	22.10.1925	1. 3.1972	1997
J. Bland	61	13. 8.1927	10.10.1978	1999
G. Spence	61	3. 8.1927	7.11.1973	1999
J. O'Shea	61	4. 4.1927	29. 4.1969	1999
E. Cullity	60	10. 2.1928	19. 7.1977	2000
A. Dixon	60	13.11.1928	4. 3.1980	2000
P. Mullaly	59	9. 7.1989	10. 4.1979	2001
P. Rendit	59	11. 6.1929	12. 7.1977	2001
G. Waldron	58	25.11.1930	3. 2.1982	3003
F. Walsh	57	1. 2.1931	10. 3.1982	2003
J. Read	57	22. 7.1931	31. 5.1977	2003
M. Kimm	56	7. 4.1932	3. 5.1988	2002*
T. Neesham	56	11. 5.1932	1. 8.1988	2004
N. Murdoch	56	29. 6.1932	6. 9.1979	2004
J. Meagher	55	2. 9.1933	6. 9.1988	2003*
F. Dyett	35	6. 4.1953	24.10.1978	2005
W. Kelly	54	14. 5.1934	12. 3.1980	2006
J. Howden	54	4. 9.1934	11. 3.1986	2006
F. Lewis	53	4. 1.1935	1. 6.1988	2006*
L. Ross	53	5. 5.1935	8.11.1988	2005*
L. Ostrowski	53	9. 9.1935	20. 9.1983	2007
J. Nixon	53	18. 7.1935	3. 3.1981	2007
G. Fricke	53	5.12.1935	31. 5.1983	2007
L. Hart	52	22.10.1936	19. 3.1985	2008
W. Fagan	51	5. 2.1937	14. 8.1984	2009
J. Hassett	51	17. 5.1937	15. 5.1984	2009
J. Hanlon	50	3.11.1938	12. 5.1986	2010
T. Smith	49	5. 8.1939	11. 7.1988	2009*
G. Crossley	48	21.10.1940	20. 3.1986	2012
D. Jones	47	19. 1.1941	28. 1.1986	2013
C. Keon-Cohen	47	22. 7.1941	2. 8.1988	2011*
J. Duggan	46	24. 8.1942	12.12.1984	2014
M. Higgins	44	28. 4.1944	3. 6.1988	2014*
M. Strong	41	15. 1.1947	6. 9.1988	2017

* Judges of the County Court appointed after 1.7.1986 are required to retire at 70 years of age.

In next issue: Supreme Court of Victoria Statistics.

BARRISTERS' CHILDREN'S CHRISTMAS PARTY

THIS YEAR THE CHILDREN'S CHRISTMAS PARTY will be held at the Botanical Gardens on Sunday 18th December at 12.30 o'clock.

Simon Wilson has kindly offered to repeat his excellent visits as Father Christmas, and games will be organised for the younger children.

This has always been a most enjoyable family occasion, with picnic lunches and rugs being brought by each family attending.

Those coming are asked to telephone, as soon as possible, either Spry's secretary on 8041, or Maclean's secretary on 8040, so that probable numbers can be ascertained.

For each child coming a present (preferably of less than $5.00 in value), with the child's full name set out clearly on it, should be left with either Spry's secretary (Room 611, ODC East) or Maclean's secretary (Room 130, ODC West) as soon as convenient, but not later than 5.00 p.m. on Friday 16th December.

Directions for the precise location of the party should be obtained from Spry's secretary or Maclean's secretary.

Ian Spry, Ray Finkelstein, Chris Jessup,
Robin Brett, Mark Derham, David Maclean,
Paul Santamaria.

VICTORIAN BAR CENTENARY PHOTOGRAPHS

Mounted, captioned copies of the historic photographs of members of the Bar are now available for purchase. The photographs may be ordered from the Administrative Offices of the Bar, 12th Floor, Owen Dixon Chambers, Extension 7111. The price is $55 per photograph.

BAR HOCKEY

A VALIANT COMBINATION OF EXPERIENCE AND enthusiasm, precision passing (often to the opposition) and sharp shooting almost led the Bar to victory over the Law Institute at the Astroturf on 13th October, 1988.

Almost, but not quite. A lead of 2-0 to the Bar during the first half was whittled away to 2-2 and the final score of 2-3 against us would seem to indicate that our problem once again is fitness, or lack of it.

However, there was no repeat of past years' drubbings at the hands of the solicitors which had previously led the Ethics Committee to investigate complaints of this new form of touting. No, instead, the Bar led from the front and made the solicitors do the catching up. Unfortunately, the practice of having solicitors run around doing the myriad of essential tasks in running a case, whilst the barristers "lead" from in front in court, gave the Institute team the experience to do such catching up as was necessary and they scored their winning goal with just minutes to the final whistle.

Our chances were greatly enhanced by the borrowing of Tony Melville from the Institute team, but rumour has it (as always) that the scorer of two of their three goals, including the winning one, has played his last game for the Institute and will take the field in our colours next year. Things are looking up!

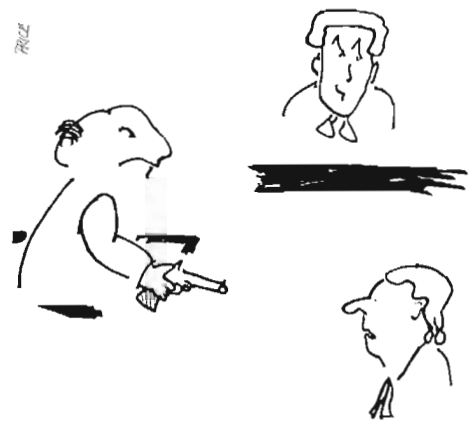
Speaking of looking up, one nasty incident which occurred at the end of the first half was an unusual but effective tackle from behind, on Sexton, by a solicitor whose plea in mitigation went along the lines "I have no grip on my shoes." The DPP, who had a vantage point on the field, was heard to say that — in his opinion "it looked not so much a bad tackle as an indecent assault."

The evening ended as usual with drinks at Naughton's Hotel where John Coldrey presented the "Scales of Justice" Cup to the Institute. He commented that in the past the Institute had been criticised for not fielding as many women as the Bar, despite the difference in numbers from which to recruit. He said that after he had been "dispossessed" of the ball for the tenth time by one or other of the women from the Institute, he wished he had not argued quite so forcibly for equal opportunity. Coldrey will henceforth be known as the *D-P DPP.

Bar team: Balfe, Coldrey, Wodak, Bryson, Brear, Tinney, Beach, Sexton, Dallas, Melville (a borrowed solicitor) and Irene (who happened to be Australian U-21 goalkeeper — where *did* she come from?) Lynch was in goals for the solicitors.

Thanks to Ganasan Narianasamy (of the Victorian Hockey Umpires Association) for umpiring again.

Meryl Sexton



"I now seek leave, your honour, to treat the witness as hostile."

THE BAR ALL STARS CLIENTS' 1ST XVIII TEAM

Being a team of top footballers who in one field of law or another have been clients of barristers.

Backs:
Buckley S. Morwood W. Jones

Half Backs:
Muir Dorotitch "Bluey" Sheldon

Centres:
S. McPherson Stewart Bolton

Half Forwards:
Buckenara Templeton Tuddenham

Forwards:
Moore Wade Foschini

Rucks:
Nicholls L. Matthews

Rover:
J. Krakouer

Interchange: Harding/Barassi
Coach: Simon Cooper
Runner: Clive Penman

VERBATIM

From Particulars in a counterclaim in a Professional Negligence action

(vii) Failing to advise the Defendant of the nuances of the proceedings in view of the fact that the Defendant was a Russian and Turkish person.

Paringa Mining v Exploration Co PLC v North Flinders Mines Limited

Coram: Mason CJ, Brennan and Gaudron JJ
Gray Q.C. (South Australian Silk, referring to an earlier stage in the proceedings): And then, Mr Justice Myers said . . . I mean Mr. Myers Q.C.
Mason CJ: He's certainly moving quickly.

Heerey Q.C.'s Chambers

26th October 1988

At the gathering at Heerey Q.C.'s Chambers to launch the Spring 1988 Bar News it was pointed out to Mr. Justice Vincent that his name appeared under the heading "Obituary" in the Table of Contents and that it appeared he had died and gone to Heaven. After a languid gaze around Chambers and the assembled throng, his Honour declared himself "much disappointed" with the afterlife.

On a Bourke Street tram

Chris Canavan Q.C.: It's been a hard morning but I'm looking forward to lunch.
Michael Adams: Where are you going to lunch?
Canavan: Just a lunch for Jerry Hall — I hope the food's good.

Jobon Nominees Pty. Ltd. v Commissioner of Land Tax

Coram Victorian AAT (Mr. Geoffrey Gibson) 12.5.88

In reaching those conclusions, I was not assisted by the reference to the Parliamentary Debates. The Act itself shows the customary leniency towards primary production. It is not surprising that some safeguards are applied to land alleged to be used for primary production in the metropolitan area, with a view to ensuring that corporate entities are in fact operated by and for farmers. But an acknowledgement of this purpose has not assisted me in trying to apply the relevant words to the facts as I have found them. That being so, I need not stay to consider what weight should be given to the following observation of the Leader of the Country Party:
"All honourable members recognize that land tax is unfair . . ."

Odco v BWIU

Coram Woodward J — 7.11.88

(A document put in evidence suggesting that one Chevalier had worked for the witness)
Ashley: (Cross-examining) Did you *know* Mr. Chevalier?
Costello: (Sotto voce) Could he sing?

LUNCH

I HAD JUST SPENT YET ANOTHER WEEK TRYING, generally unsuccessfully, to break through that barrier to getting a case on known as the County Court Jury Reserve List. However, at last I managed to escape from the claustrophobic confines and masonite marble pillars of our new Jury Courts to fresh air, sunshine, freedom and a Friday lunch at Golden Orchids restaurant.

Golden Orchids, which is located at the Spring Street end of Little Bourke Street, specialises in Malaysian cuisine. It is about a fifteen minute walk from Chambers taking into account a strategic stop at Crittendens' well stocked cellars to purchase the appropriate wines to accompany the meal. As some of the offerings at Golden Orchids can be fiery hot I recommend a robust white such as the Chateau Tahbilk Marsanne.

It must be admitted that the exterior of this restaurant is far from impressive, flanked as it is by a bottle shop on one side and a newsagency specialising in pornography on the other. Inside the eating area is small, cluttered, plain and usually crowded and noisy. Yet the simple but authentic Malaysian dishes are so good and reasonably priced that there is never any shortage of patrons prepared to put up with the bustle, clutter and din. I discovered this restaurant nearly twenty years ago after reading a Sam Orr article in the now defunct Nation Review. The food was good then and it has not changed.

We opened with a selection of pork, chicken and beef satays served on a sizzling hotplate. These were, as always, delicious and were complemented by a freshly made spicy peanut sauce and plain salad of cucumber and tomato wedges. The spring roll which followed was crisp and tasty. For our next course we settled for special fried rice and Singapore fried noodles which were both excellent. The fried noodles were particularly good. By the time we had polished off our last course of beef with black bean sauce the sharp edge had worn off our appetites. This meal cost about $17 a head with coffee and a tip.

This is not an eating place for those high fliers of the Bar who frequent exclusive and expensive Asian restaurants such as the FlowerDrum. It is very much the poor man's FlowerDrum. But for those souls that like hearty Asian food at reasonable prices Golden Orchids represents excellent value. The menu is quite extensive, the service quick and the management generally tolerate a prolonged luncheon session.

John Philbrick.

Golden Orchids, 126 Little Bourke Street, 663 1101.

LAWYERS BOOKSHELF

JUDGING THE WORLD

Address by His Excellency The Right Honourable Sir Ninian Stephen, Governor-General of the Commonwealth of Australia, on the occasion of the launching of the book "Judging the World: Law and Politics in the World's Leading Courts" in Melbourne on Tuesday, 15 November 1988

I DOUBT WHETHER AUSTRALIAN AUTHORSHIP OR publishing has seen before any so daring and ambitious a project as the creation of this book, "Judging the World", represents. Certainly nothing like it has ever been attempted before in the realm of legal authorship or publishing on this continent, and I know of no other in the English language with its wide sweep and all-embracing grasp of subject matter.

It plunges boldly into that most controversial and at the same time intensely relevant topic which lies at the heart of judging, the interface between law and politics. It explores the tension between a judge's ascertainment and application of existing law to the instant case and the law-making that all now recognize as inherent in the judicial process.

What is more, it does this not by dry dissertation but by the exciting and immensely demanding process of confronting judges world-wide with the problems that lie behind the outwardly serene facade of the justice systems of the world. These had long seemed impenetrable to the tape recorder and the questing author; but Garry Sturgess and Philip Chubb have wholly vanquished the defensive mechanisms that had effectively remained in place for generations.

As a result they have given to what should be an eager legal profession world-wide, to academics of a variety of disciplines and, one hopes, to a much wider lay audience, a fascinating insight into a whole range of judicial minds.

The remarkable thing about this book is that it does not confine itself either to one broad system of law, the common law courts familiar to us, nor even to national courts but ranges over the whole field of judicial work, covering seventeen major courts world-wide, interviewing judges from each of them and including, in addition to national courts, the international court at the Hague, the European Communities Court of Justice and two international courts of human rights, as well as the European Commission of Human Rights.

No debate about Bills of Rights, in what I think is the tricentennial year of England's original Bill of Rights, will henceforth be complete without some reference to what today's judges, given the task of making Bills of Rights work, say in this book about the concept and its implementation, in the same way it illuminates at first hand the functioning of international courts as the members of those courts see it. The same can be said for the whole question of judicial independence, of methods of judicial appointment and of judicial accountability. Every speaker on any of those subjects in the future is going to find whole goldmines full of quotations here, and the temptation to plagiarize will put even the most virtuous to the test.

All this makes the book sound heavy going and it is the very opposite of that. What is more, Butterworths has let its shrewd old corporate head go in terms of photographs and presentation. Chapter by chapter it in turn infuriates, intrigues and convinces, not necessarily in that order — and always it entertains.

To be chauvinist for a moment, its writing and its publication here in Australia — indeed the fact that the idea of it was conceived here, are splendid omens for the future development of jurisprudence, understood in its widest sense, in this country.

The authors modestly describe the book as a work of journalism, conceived as a journalistic exercise. What a wonderful world it would be if all journalism reached these heights. I proudly declare "Judging the World" duly launched.

JUDICIAL ETHICS IN AUSTRALIA

by The Hon. Mr. Justice Thomas, (pp. v-xxxii) 1-121, Index pp. 123-126. The Law Book Company Limited, 1988. RRP $25.00.

THIS BOOK IS AN EXPANDED VERSION OF A PAPER that was presented to the Supreme Court Judges' Conference at Darwin in 1987.

It is a very interesting book and reflects upon the industry and research performed by the author, who has relied heavily upon the American experience in this area. He has included an extremely thorough and useful Bibliography. In Appendix C he sets out the American Bar Association Code of Judicial Conduct.

In his final chapter His Honour sets out a number of conclusions commencing with:
"Judges are bound by an ethical system which calls for rigorous standards, sacrifices and disciplines"

The book is topical not only because of controversies that have arisen over recent years concerning certain members of the Judiciary, but also because his Honour discusses the remedies that society can afford to control its judicial officers.

He concludes that the American experience of control by an outside authority is undesirable, particularly in the Australian context. This is of

particular interest with regard to the passing of the *Judicial Officers' Act* 1986 (NSW). He finds the American experience alarming and warns that such bodies tend to be the forum for dissatisfied litigants and he finds support from statistics compiled by Wisconsin Commission between 1972 and 1975. Such a system threatens the separation of powers and creates within itself a blossoming bureaucracy.

His Honour deals with such topics as misconduct in office. Colourful examples are drawn both from the English and American Bench and of particular amusement are the antics of United States Judge Geiler, who adopted a painful approach to counsel appearing before him who asked too many questions.

His Honour also considers the vexed question of whether a Judge who has retired from the Bench ought to practise at the Bar and if so, in what manner. He asserts that the acceptance of judicial office is a lifetime commitment. Whilst it is not a condition of retirement, a Judge who retires remains under certain ethical restraints. He feels that subject to appropriate limitations of practice, a return to practise at the Bar is permissible. Employment or consultancy with a firm of solicitors remains, in his Honour's mind, a matter that deserves debate.

This is a book that is worthwhile reading because it debates important issues that involve Judges in relationship to their Bench, the Bar and to the community as a whole.

John V. Kaufman

AUSTRALIAN EVIDENCE: CASES AND COMMENTARY by P. Gillies, Butterworths, 1988 pp. i-xl, 1-732, RRP $65.00

IT MAY BE ARGUED THAT THE RULES OF EVIDENCE have assumed less significance for barristers in recent times. Certainly the proliferation of administrative or quasi-judicial tribunals and the use of arbitrators to resolve disputes has led to some relaxation in their application (see for instance s.35(1) of the Administrative Appeals Tribunal Act 1984 (Vic.) and s.72B of the Magistrates' Courts Act 1971).

It is then, perhaps, somewhat surprising that a large number of books dealing with the topic of evidence have recently been released. The third edition of Cross, Ligertwood's *Australian Evidence*, Brown on *Documentary Evidence in Australia* and Wells, *Evidence and Advocacy* have all hit the bookshelves in the last year or two. Now added to this list are the companion volumes written by Peter Gillies, *LAW OF EVIDENCE IN AUSTRALIA*, and *AUSTRALIAN EVIDENCE; Cases and Commentaries*, the former released last year and the latter in August of this year.

Mr. Gillies, a Senior Lecturer in Law at Macquarie University is as a prolific legal author as one could find. In the past few years he has been responsible for a number of major works particularly in the criminal law field. Despite this high workload, the standard of his contributions remains high.

This book combines the author's succinct statements of basic evidentiary law with illustrations by short excerpts from leading reports. The commentary is clear and accurate, although (no doubt out of necessity) at times a little superficial. The case excerpts are generally pertinent, and are drawn from a wide variety of jurisdictions, including a significant number of leading Victorian decisions *(Chee, Matthews and Ford, Alexander and Keeley* are examples). In addition, the excerpts are introduced by a sentence or two placing them in context, which means the extracted portion can be kept to a minimum.

The author largely follows the format and breakdown of topics used in his substantive text. In addition, he makes useful cross-references at the end of each chapter to relevant chapters in Cross, Ligertwood and Heydon, *Evidence Cases and Materials.* There are also frequent references to the excellent ALRC report on Evidence (which is probably as comprehensive and valuable a reference as any of the recent texts).

Some criticisms — mainly minor ones. First, one could question the omission of reference to certain leading High Court decisions which would have been available to the author at the time of writing (for instance *Williams* v. *R* (1986) 60 ALJR 636, dealing with police questioning and confession evidence). Secondly, and this criticism is no doubt more properly directed to the publisher, the law is current as at March 1987, yet the book was not released until some 17 months later. Decisions such as *Waterford* v. *Commonwealth* (1987) 61 ALJR 350 dealing with legal professional privilege, although now over twelve months old, are not included. In the modern, computerised world of publishing it is perhaps surprising that publication takes so long.

Likewise, a reasonable number of typographical or editing oversights are inevitable and acceptable, but annoying when they take the form of the confusing misquotation of the opinion of the Privy Council in *Subramanian* v. *Public Prosecutor* [1956] 1 WLR 965 contained on page 291 of the book. Finally, one would have thought it a relatively simple task to include the reverse citation of cases in the index.

Despite the comment contained in the opening sentence of this review, mastery of the laws of evidence remains a fundamental objective for all barristers. This book has much to recommend it, and should assist in that task.

CAS

UNDERSTANDING CRIME AND CRIMINAL JUSTICE Edited by M. Findlay and R. Hogg Pages i to viii, 1 to 335, index 337 to 349. 1988. Australia: The Law Book Company Limited

LAW AND ORDER IS AN ISSUE OF INCREASING concern in Australian communities. Elections in

Victoria and New South Wales in which "law and order" has been an issue, pressure from police for increased powers, the Fitzgerald enquiry in Queensland and publicity of higher crime rates have brought crime and criminal justice increasingly to the public's attention.

In *Understanding Crime and Criminal Justice* the editors, Mark Findlay and Russell Hogg, have produced a collection of essays dealing with crime and criminology. In their introduction they note that they "welcome the intrusion of political and social theory upon criminological territory and hope that this volume contributes in some small way to the deepening of this process". Conversely, it is to be hoped that those participants in the law and order debate can draw from the insights obtained by those whose academic background is in criminology.

The work comprises fifteen separate chapters, each chapter being authored by one or more different contributors. The contributors are predominately academics from Australia and overseas, however amongst the contributors are practising lawyers, a psychologist, and managers and advisers to bodies directly involved in law and order issues.

The book has chapters devoted to several of the "new" areas of criminology such as domestic violence, sexual assault on children and white collar crime.

Two chapters deal specifically with heroin and illicit drugs, and a further three chapters deal with police and policing, in particular police accountability in our community.

Four chapters deal with sentencing of offenders, including one chapter titled "Women in Prison; Task Force Reform". This chapter deals particularly with issues raised by the New South Wales Women in Prison Task Force established by the Wran government in 1984.

In addition, there are chapters dealing with juvenile imprisonment and sentencing options, topics of interest in light of the on-going review of sentencing and penalties in Victoria.

The editors are to be commended for providing a list of references annexed to each chapter, thus enabling the reader to research or follow up an area of particular interest.

It is hoped the essays in this book will be read by those whose interest in criminology has been stimulated by the current law and order debate as knowledge of the issues raised by this book will raise the general level of that debate. In addition, this book with its collection of essays provides some thought provoking material for the professional criminologist or student of criminology.

PLACES OF JUDGMENT, NEW SOUTH WALES

by Terry Naughton, Law Book Company Ltd., 120 pp, RRP $75

TERRY NAUGHTON PRACTISES AT THE NEW SOUTH Wales Bar. He became interested in photography in 1975 and has exhibited at the S.H. Ervin Gallery of the National Trust of Australia in Sydney, the Art Gallery of New South Wales and the High Court of Australia. These photographs were exhibited at the S.H. Ervin Gallery in 1983. They were taken between 1975 and 1983, for the most part on trips which he took with his family.

John Bennett, who was elected as the President of the Royal Australia Historical Society in 1985 and is himself a distinguished legal historian, has provided a very interesting introduction to the collection. By tracing the evolution of courthouses in New South Wales, he has set the buildings in an historical context which adds considerably to the impact of the photographs. Notes on the architects have also been included.

This book is aesthetically pleasing, not only in terms of the buildings which are its subject, but also because of the technical skills which the photographer has brought to their depiction. He has captured the sense of dignity which many of the courthouses impart, which was central to the role they played in representing the institution of justice in a new country. At the same time, he has presented the variation in their style and scale which reflected their diverse geographical and social situations. The attention to detail allows one to appreciate the superb fittings which enhance the interiors.

This is a book which will capture the interest of those who can appreciate good photography. It will also be of importance to those who enjoy Australiana.

John V. Kaufman

THE NEW PLANNING SYSTEM IN VICTORIA

Julia Bruce, The Law Book Company Ltd. 1988, 390 pages, RRP $59.50.

WITH THE COMING INTO EFFECT OF THE Planning and Environment Act 1987 on 16th February 1988 there was an urgent need for a comprehensive text dealing with the new legislative scheme introduced by the Act and associated legislation.

The author has, with admirable speed, produced a work which will meet the requirements of lawyers and other specialists working in the planning area.

The book introduces the new systems governing land use, planning and development in Victoria and the people involved in them. It looks at the general framework of the law within which the new legislation operates and answers some of the difficult questions and explores areas of doubt raised by the legislation. It also examines the new jurisdictions of the Administrative Appeals Tribunal (and the statutory scheme of the new planning legislation.

The book is written in a precise but readable style. The author has had many years' experience with planning law. She was formerly the chairwoman of the Law Institute of Victoria Town Planning Sub-

Committee and her work exudes the well-founded confidence in the subject matter that comes from her combination of expertise and experience.

The book is de rigueur for planning lawyers and is the logical starting point for anyone in Victoria with a question relating to planning law or practice arising out of the provisions of the Act and the relevant case law. For space reasons the book does not cover the appeals procedures in detail; these have been dealt with, albeit at a more superficial level, in my AAT (Planning Division) Statutory Procedures Manual, (Leo Cussen Institute).

Timothy S. Falkiner

DOCUMENTARY EVIDENCE IN AUSTRALIA by R.A. Brown, Law Book Company Ltd 1988 pp V-lii, 1-354, Index 355-373 Foreword by Rt. Hon. Sir Harry Gibbs.

THE RIGHT HONOURABLE SIR HARRY GIBBS NOTES in his Foreword to *Documentary Evidence in Australia* that:

". . . technological change has led to a great increase in the number and variety of documents used in connexion with business, commercial and legal transactions.

". . . As an obvious consequence, the law of evidence, in its application to documents, has assumed an increasing practical importance, particularly in civil, but also in criminal cases."

Professor Brown in his Preface states that his work is intended to be ". . . principally of value to the advocate . . ." and indeed he has admirably fulfilled this aim.

The book is based around the New South Wales *Evidence Act* (1898) however the author has ". . . tried to cover every Australian jurisdiction in as much detail as the case law allows, and to draw appropriate parallels between similar rules in the various States and Territories."

To this end the Table of Statutes comprehensively indexes relevant statutes and sections of statutes in each Australian jurisdiction to the text and a "Comparative Table of Documentary Evidence Sections" has been incorporated to enable the reader to cross tabulate sections of various Evidence Acts in each State, Territory and the United Kingdom to each other.

Admissibility and use of business records, Bankers books and books of account and computer-produced documents are comprehensively covered for all Australian jurisdictions.

Of general relevance are the chapters dealing with getting documents into evidence, including by way of subpoena, and the use of and cross-examination about documents once they are in evidence.

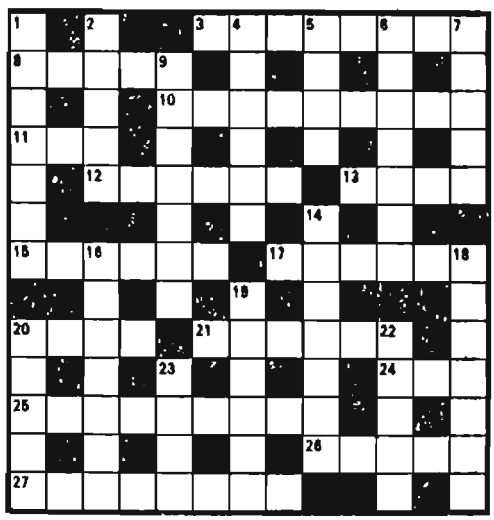
Finally, there is a chapter devoted to Reform Proposals principally arising out of the Australian Law Reform Commission Interim Report No. 26 on Evidence.

The law is stated as at 1st December 1987, however the author is to be commended for including in his Preface a full discussion of the High Court's decision in *Butera v DPP* (1987) 62 ALJR 7, a case dealing with the admissibility of written translations of tape recordings of foreign language conversations.

This work is recommended to all those concerned with the conduct of litigation in our courts. It provides both theoretical and practical guidance and is sure to find a niche on many bookshelves.

P. W. Lithgow

CAPTAIN'S CRYPTIC No. 64



ACROSS
3. Allegation of fatal defect in pleading (8)
8. A court (5)
10. Latest Supreme Court appointment (8, 1)
11. Spasm (3)
12. Inseverable, as a contract (6)
13. Port out, starboard home (4)
15. Beware, you (6)
17. Mercantile agent (6)
20. New County Court judge (4)
21. Traffic by exchange of goods (6)
24. Lengthen (3)
25. For whom the agent acts (9)
26. Rescues (5)
27. Clean (8)

DOWN
1. Tenure by knight's service (7)
2 Third element of contract (5)
4 Survive (6)
5. Receptacles for ashes (4)
6 Order exclusion as of evidence (4, 3)
7. Indian prince (5)
9 Removal from office (7)
14. Agreements to keep up prices (7)
16 Strong emotion (7)
18. Discharging of right of action (7)
19. Hinder the picnic basket (6)
20 Contravenes Crimes Act s.45 (5)
22 A steward c.f. the sheriff (5)
23. Sing jazz without words (4)

MOUTHPIECE

Moonee Ponds Magistrates Court, a few years into the future. It is a Friday.

9.00am Notwithstanding that it is a Clearway until 9.15am, all of the parking outside of the Court is filled by the private vehicles of Council employees who appear to retain their immunity from visitations by local Parking Inspectors.

10.00am The Magistrate enters No 1 Court to begin the Mention List. There are 127 Defendants all of whom have been charged with traffic offences. He begins to press a series of buttons on the keyboard of his computer terminal, he presses more keys, his brow becomes furrowed and he begins to show signs of considerable consternation. He leans over the Bench and begins a conversation, in low tones, with his Bench Clerk.

"Do you remember my Password?"

"I never knew it, what have you tried?"

"I know it's a date; I tried my birthday and it wished me happy birthday; I tried my date of appointment and it came back with 'so what!'"

"Try the Chief's Birthday"

More keys are pressed and the agitation increases.

"I tried the Chief's birthday and it told me to go to buggery."

"Why don't you try Mr Beak's".

"What's that?"

"I thought everyone knew '6 months'."

Resort is again made to the keys.

"The computer hoped I was enjoying my well earned retirement. Perhaps we had better adjourn."

10.22am The Court is temporarily adjourned.

10.37am The Court is re-opened. More keys are pressed and the Magistrate leans back with a look of self satisfaction. He then leans forward to the Bench Clerk.

"It was my wedding date. I always forget it. I thought it would be a safe Password. We better get started."

The Clerk calls matter number 43; the Prosecutor relies on the Sworn Statement which indicates a speed of 118 in a 60kph zone; no priors are alleged; the Plea is made by a local Solicitor:

"If Your Worship pleases my client is aged 22 years . . . no priors . . . it was his father's 6 cylinder car and he wasn't used to it . . . he did not realise his speed . . . no interference . . . I have known the family . . . he is a fine lad . . . I am sure that he will not reoffend again . . ."

10.42am There is much pressing of keys and a studied examination of the screen and after a few minutes the Defendant is addressed:

"I have listened closely to what Mr Collins has said on your behalf and have taken into account the matters put on your behalf. However, I am of the opinion that excessive speed is a major contributor to road accidents especially by drivers in your age group. You also needlessly contributed to the Greenhouse effect. Your licence will be suspended for 8 weeks, you are fined $250 and ordered to pay statutory Court Costs of $75."

10.45am Number 78 is called on and another local Solicitor appears for the young speedster who also has no priors alleged.

"If Your Worship pleases my client is aged 24 . . . no priors . . . comes from a fine family well known to me . . . it wasn't his car . . . he did not realise that he was doing 117kph . ... I am sure that he will not reoffend."

10.52am More pressing of keys and close attention is again paid to the screen and the Defendant is informed:

"I have listened closely to what Mr Antonio has said on your behalf . . . Your licence will be suspended for 8 weeks, you are fined $250 plus Statutory Court costs of $75."

11.29am. After a few more pleas from local Solicitors the first of three Defendants represented by an advocate, who is neither a Barrister nor the holder of a Practising Certificate, is called. The Plea:

"If Your Worship pleases my client is aged 21 years of age and the holder of a full licence . . . She is very proud of her driving record . . . Your Worship would know that I would not ask for anything that is unreasonable . . . her ageing sick mother relies heavily upon her to drive her to and from the doctor . . . she has a good job . . . she strikes me as a fine member of the community . . . I urge Your Worship to consider a Bond . . ."

11.31am The keys are pressed and the screen studied with some intensity.

"Miss Theodore, I have listened carefully to what Mr McGuane has said on your behalf and have decided to accede to his request for a Bond. However, I have no discretion with respect to your licence, I have to suspend it and I have to take account of your speed . . . Your will be placed on a $500 good behaviour bond . . . $250 to the Court Fund . . . licence suspended 8 weeks . . ."

11.38am Following a similar plea from Mr McGuane his second client "scores" similarly.

11.45am Mr McGuane's third plea is almost identical to his other two. There is a longer delay whilst the Magistrate studies his screen and then:

"The Computer informs me Mr McGuane that your quota of Bonds for this year has been used up. I am unable to grant your clients any bonds unless and until there are Bonds breached that were given to clients of yours earlier this year. To make matters worse it appears that I have used up *my* quota of Bonds for this week as well as Mr Peter's quota which the computer automatically allocated to me as he never uses his allowance . . . Fined $250 plus Court Costs of $75 . . . licence suspended 8 weeks . . . I can't give

you a stay of six hours to return your Company Car . . . I appreciate that Mr McGuane assured you of no suspension notwithstanding your 128 in a built up area . . . I am sympathetic to your position but there is no facility in the Computer to allow such a stay. Perhaps you ought to appeal my decision and I can give you permission to drive pending the hearing of the appeal. All you have to do is abandon your appeal tomorrow morning . . ."

12.15pm Matter no 1 is called and a Barrister with an exclusive Magistrates' Courts Plea practice announces his appearance.

"Yes Mr Jameson."

"If Your Worship pleases my client is not present in Court and he has instructed me to apologise for his non-attendance. He is by his grandmother's deathbed. I am happy with the Sworn Statement . . . Plea precedent number 5."

"Sentence precedent number 1987609/250/75/8" . . .

12.55pm "I will be adjourning for lunch shortly. The computer tells me that there are a large number still to come who were doing between 50 and 60kph in excess of the speed limit; have no prior convictions; and are aged less than 25 years. You may have gathered what our tariff is. Let the Clerk know before lunch if you have reasons to put to us why you should receive something other than that tariff."

2.18pm "Those 40 of you who fit into the category mentioned just before lunch and who do not wish to make further submissions will be fined $250 plus $75 Court Costs and your licences will be suspended for 8 weeks from today. Righto the rest of you . . ."

2.33pm A Defendant appearing in person on his fourth .05, his second driving whilst disqualified, his second dangerous driving and so on and having been sentenced to 4 months imprisonment, various fines and an effective licence disqualification of five years tells the Magistrate this he intends to appeal the sentences. This intention is keyed into the computer.

"My computer advises me that it has discussed your appeal with the Computers of each of the County Court judges sitting in Appeals this month and they have rejected your appeal. They did however take up your appeal with the Court of Criminal Appeal's computer which also rejected your appeal. Take the prisoner away."

3.25pm "It is unfortunate that you did not think of that at the time. Fined $275 plus $75 Court costs and your licence is suspended for 8 weeks".

4.15pm "I have no doubt that using one hand to hold a mobile telephone to your ear whilst the car is in motion is a serious form of careless driving. I do take account of your good driving record to date, your plea of guilty and the other matters put by Counsel. On this occasion we will not interfere with your licence . . ."

5.59pm "Mr Prosecutor my Computer advises me that you will only be allowed to prosecute a maximum of 31 briefs on Monday. It has been advised by the Police Board's computer that at your present rate of success you would have to be promoted to Sergeant if you took on more briefs than that. Unfortunately, there are no vacancies for Sergeant in the Prosecutions Division and the Police Board computer does not wish to promote you, at this stage, to the single Senior Sergeant's vacancy or any of the 15 Inspector vacancies in the Division. Both computers wish you to know that they are extremely impressed with the ease and flair with which you prosecute the Mentions list matters."

6.00pm The Court is empty apart from the Prosecutor who is busily trying to stuff 127 briefs into his standard issue brown bag, prosecutors, traffic Courts for the use of; the Bench clerk who is busily trying to stuff his fist into his mouth to stifle his yawns and the Magistrate who is trying to sign off.

"I tried my usual 'A good day's work' and the computer replied 'boring'. What do you suggest?"

"How about 'another day another dollar'?"

"Tried that. The reply was 'how droll' "

"It sometimes likes a bit of encouragement. We find that a 'well done' usually works."

"I just keyed in 'you were great' and it replied 'yes wasn't I, thanks for your assistance' and switched off. Wouldn't it be a lot easier for everyone if you just fed in the precedent pleas straight after the sworn statement and the priors. We could even send out a set of plea precedents with the Alternate Procedure Summons and get the Defendants to pick the one they like most or better still get the Informant to choose the plea precedent he considers most appropriate to the Defendant in question."

"We tried to run that idea past the Bar and the Law Institute."

"What was the basis of their opposition. That it would do their members out of money for jam?"

"Not really. They expressed support in principle for any solution which was cheap and aimed at reducing the Court delays — they considered that three years wait for traffic mentions was a bit long — but saw practical difficulties with Copyright."

"Copyright?!"

"They thought that there would be thousands of claimants for copyright to each of the plea precedents."

"Now that you mention it I suppose there is a certain sameness about pleas. No doubt my role is to add variety by judicious and imaginative use of my sentencing options. After all I am not subject to any real constraints apart from the maxima set by Parliament."

"Yes sir. Goodnight sir."

MOVEMENT AT THE BAR

MEMBERS WHO HAVE SIGNED THE ROLL SINCE JULY 1987

Name	Master	Clerk
John A. TIMBS (NSW)		
Stephen L. DEWBERRY	R. McK. Robson	F
John A. RIBBANDS	P. N. Rose	W
Virginia FRENKEL	A. R. Lewis/ J. Ramsden	R
Gary A. GLOVER	C. Heliotis/ N. Ackman	F
Penelope J. TREYVAUD	S. M. Fookes	D
Lee A. CROSS	R. Perry/ G. Moore	S
Anastasios MOISIDIS	D. K. Reynolds	P
John L. TRAPP	L. Lasry	W
Harold J. LANGMEAD	G. Ritter/ R. MacCaw	W
David J. WHITFORD	N. Magee	P
Paul RIGGALL	G. McD. Harris	M
Arthur J. ROBINSON	L. Bryant	H
Mark J. CAMPBELL	R. J. Johnston	W
Ewe Min LYE	M. Cashmore	F
Michelle L. QUIGLEY	A. G. Southall/ J. Karkar	F
Peter F. J. CONDLIFFE	D. Maguire	M
Nicole M. FEELEY	I. Sutherland/ B. Bourke	H
Maria A. E. SCHWARTZ	V. Morfuni	P
Graeme F. HELLYER	G. R. Anderson	S
John PULS	P. Dunn	W
Robert T. BARRY	G. Hicks	R
Neville J. KENYON	A. M. North	R
Graham D. FRIEDMAN	C. Gunst	B
Mark J. ROCHFORD	G. Taylor	B
Christopher D. HOWSE	D. Salek/ M. Strong	M
Rodney I. E. WILLCOX	B. G. Walmsley	M
Thomas K. HASSARD	M. O'Dwyer	R
Samuel R. HORGAN	W. Martin	F
Richard W. McGARVIE	S. W. Kaye	H
Lisa A. HANNAN	M. Tovey	D
Suzan J. COX	D. Hore-Lacy	R
Savas J. MIRIKLIS	A. Garantziotis	P
John GINNANE	H. Mason	P
Anthony J. LAVERY	G. Thomas	W
Andrew R. McKENNA	R. K. Kent	M
Peter J. PASCOE	J. Burnside	B
Brian SCHEID	P. Murley	P
Katharine M. WILLIAMS	P. R. Hayes	H
Paul P. BRAVENDER-COYLE	R. Cook	M
Grant R. ATKINSON	J. Ramsden/ C. Rosen	D
Mordecai BROMBERG	R. Pushon/ M. Hickey	R
Michael D. HENNESSY	M. Kellam/ R. Osborne	B
Anthony R. MANAGH	D. H. McLennan	R
Michael T. RUSH (re-signed)		D
Peter R. ARDEN (NSW)		
Alexander B. SHAND (NSW)		
Janine GARNER (re-signed)		R
Georgina GRIGORIOU	P. B. Murdoch	S
Paul MENZIES (NSW)		
Maurice GELBERT (NSW)		
Barry J. HESS (re-signed)		R
Donald G. HILL (NSW)		
Robert A. CAMERON (SA)		
Duncan L. ALLEN (re-signed)		P
Edward WAJSBREM (re-signed)		W
Clifford R. EINSTEIN (NSW)		
Michael G. RUDGE (NSW)		
Lloyd D. S. WADDY (NSW)		
George M. THOMAS (NSW)		
Richard D. COGSWELL (NSW)		
Anthony J. L. BANNON (NSW)		
Thomas A. GRAY (SA)		
Dermot E. J. RYAN (NSW)		
Arthur R. EMMETT (NSW)		
Ben J. SALMON (ACT)		
Martin L. D. EINFELD (NSW)		
Paul WEBB (NSW)		
Julie A. DODDS (Academic)		W

MEMBERS WHOSE NAMES HAVE BEEN REMOVED FROM THE ROLL OF COUNSEL SINCE MARCH 1988

P. V. BATROS (WA)
J. R. CLEWORTH (NSW)
THE HON.
MR. JUSTICE EMERY
B. J. DOYLE
P. J. DUFFY
R. FRAZZETTO
T. S. HARRIS (NSW)
L. R. LETHLEAN
A. R. MANAGH
K. J. QUINLAN
P. W. RIGGIO
L. R. SCHIFTAN Q.C.
M. T. SMITH
G. TRIGGS
D. WILLIAMS

MEMBERS WHO HAVE BEEN GIVEN LEAVE OF ABSENCE

J. A. DEE
J. S. GLOVER
J. P. HENNESSY
P. HOGAN
S. KENNY
A. R. MANAGH
S. C. McLAUGHLIN
P. H. MOLONEY
T. SEPHTON
F. STEWART

MEMBERS WHOSE NAMES HAVE BEEN TRANSFERRED

MASTER G. S. BRETT (to Division C Part II [Retired Holders of Public Office Other Than Judicial Office])
J. R. GUY (to Division C, Part III [Retired Counsel])
H. J. HARBER (to Division B Part VI [Magistrates and Full Time Members of Statutory Tribunals])
LECKIE, His Honour Judge (to Division C, Part 1 [Retired Judges])
R. MILLER (to Division A Part I [Victorian Practising Counsel])
B. M. MURRAY, The Honourable Mr. Justice (to Division C, Part 1 [Retired Judges])
J. MYERS (to Division B Part VI [Magistrates and Full Time Members of Statutory Tribunals])
I. D. TEMBY Q.C. (to Division B Part VIII [other Official Appointments])
T. TOPHAM (to Division C, Part III [Retired Counsel])
J. WAJCMAN (to Division B Part VI [Magistrates & Full Time Members of Statutory Tribunals])
M. S. WEINBERG Q.C. (to Division B Part IV [Solicitors-General and Directors of Public Prosecutions])

OBITUARY

HIS HONOUR JUDGE TOLHURST (2/7/88)
J. H. NANKIVELL (14/7/88)
E. D. LLOYD Q.C. (5/8/88)
SIR REGINALD SHOLL (7/8/88)
T. TOPHAM (14/9/88)
R. L. GILBERT (2/10/88)

BAR NEWS PERSONALITY OF THE QUARTER

Ron Clark caught former Bar Council Chairman *Charles Francis* Q.C. about to set off on a perilous mission.