

THE JOURNAL OF THE NSW BAR ASSOCIATION | AUTUMN 2012

# barnews

**Advocacy, legal practice and truth**

The rise and fall of the king of torts

Community participation in criminal justice

Mason's miscellany

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# barnews

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## ISSN 0817-0002

Views expressed by contributors to *Bar News* are not necessarily those of the New South Wales Bar Association. Contributions are welcome and should be addressed to the editor, Jeremy Stoljar SC.

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## EDITOR'S NOTE



The first issue of *Bar News* for the year and there are two new columns.

Keith Mason QC's column is called *Mason's miscellany*. As the name suggests, it collects the arcane and the amusing, the anecdotal and the obscure. This first column looks at Australian legal dynasties.

Julian Burnside QC has contributed another new column, this one called *The Last Word*. The column trawls for interesting words that have fallen out of service. This issue the word is: Bloviating.

Other features of this issue include the Opening of Law Term Address, in which the chief justice discusses the crisis of confidence in the criminal justice system, and how that crisis might be addressed.

Geoff Watson SC recounts the remarkable career of Richard Scruggs, one of America's most flamboyant and determined – not to mention wealthy – plaintiffs'

lawyers, known as the king of torts, who found himself occupying a different role in the legal system after he was convicted of attempting to bribe a judge.

David Ash considers the important question of whether, and if so to what extent, courts are engaged in the pursuit of truth.

Ben Katekar reports on advocacy training in Stellenbosch. Mark Friedgut asks whether recent changes to the Barristers' Rules have been more significant than may have been thought. John Bryson QC recalls chambers in Phillip Street in the post war years.

Tony Cunneen presents the second part of his series on barristers who fought in the war. One of those featured in Cunneen's piece is the late Cliff Papayanni, who joined the RAF in 1942 and flew 36 combat missions. Cliff Papayanni's obituary is also included in this issue.

Bullfry appears on a special leave application, in a case involving a mouse and Simba the cat. Bullfry was one of the few applicants successful in obtaining a grant of special leave but, as one of the bench remarked: "There was no need to bring Simba into court Mr Bullfry, and he may be returned once my associate has fed him".

We also reproduce a long forgotten judgment from 1973, delivered by Cross DCJ – another lawyer who served his country with distinction; he flew Spitfires during the war,

and was badly wounded in action – which culminates in the imposition of a 20 cent fine.

As the judgment reveals, Cross had a remarkable facility with prose. He also had a lacerating wit: he reputedly once remarked that one of his brother judges was so full of modesty and humility that in his sparsely furnished chambers he kept only a mirror and a throne.

If any readers have in some drawer at the back of the desk any other old and long forgotten unreported judgments that may be worthy of publication, please send them in.

Lastly, a look back. Andrew Bell SC retired as editor of *Bar News* at the end of last year. He was editor for six years. He was only the third to occupy the role, following Ruth McColl SC (1985–2000) and Justin Gleeson SC (2000–2005).

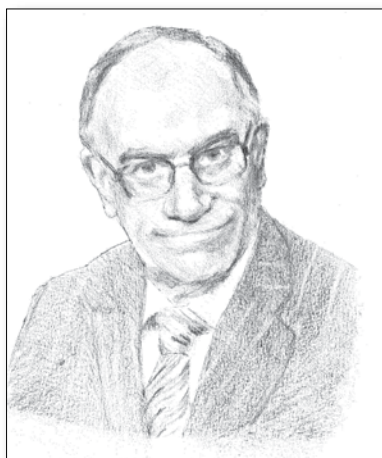
Andrew oversaw many important developments during his highly successful period as editor. He converted the journal into a triannual rather than biannual publication. He also introduced editions on particular themes, his special issues on expert evidence and criminal law were of particular note.

All involved in *Bar News*, and the bar generally, thank Andrew for his fine work on the journal.

**Jeremy Stoljar SC**  
Editor

## Commenting without fear or favour

By Bernard Coles QC



It is one of the Bar Association's principal aims to promote the administration of justice and the rule of law. Although our views may not always be popular among politicians and certain media commentators, I cannot overstate the importance of the association's role in publicly explaining and advocating key legal principles in the face of partisan debate.

The Bar Association places great importance on bringing its

members' views to the attention of government, through both formal submissions and the direct lobbying of ministers, members of parliament and others.

Last year the Bar Association made over 60 written submissions to government, parliamentary committees and law reform commissions. Recent major projects have ranged from detailed submissions to the Standing Committee on Law and Justice in the context of its reference on the Consolidation of Tribunals in New South Wales, to the NSW Law Reform Commission's Inquiry into Bail Laws.

The Bar Association took a firm public stand against comments made by the premier, the Hon Barry O'Farrell MP, in the context of the government's decision to refer the conduct of Magistrate Pat O'Shane to the Judicial Commission earlier this year. Although the association of course acknowledged that it was

the prerogative of the government to refer issues involving judicial officers to the Judicial Commission, it did note the need for restraint on the part of political leaders when they comment on the functioning of our courts.

The premier had issued a statement to the effect that police and ambulance officers should have the support of the court system when assault charges are laid. The Bar Association's public response by way of a media release of 7 February urged the government to exercise caution in its public statements concerning judicial officers, noting that the courts exist to determine matters on the evidence before them without fear or favour, not to support any particular group within society.

The Bar Association's comments were widely reported and attracted a great deal of attention on talkback radio. In this context I would like to thank Senior Vice-President

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Phillip Boulten SC, for his efforts in explaining the association's position in numerous radio and print media interviews.

The Bar Association also wrote to the attorney to express its deep concerns relating to the *Crimes (Criminal Organisations Control) Bill 2012* and *Crimes Amendment (Consorting and Organised Crime) Bill 2012*, both of which were introduced into the New South Wales Parliament in February. The association considered that both bills constituted an unnecessary and unwarranted infringement on rights of association, communication and the right to procedural fairness. A copy of the association's submission is available on the website for interested members.

*Last year the Bar Association made over 60 written submissions to government, parliamentary committees and law reform commissions.*



### **Bar Association joins ACICA**

Members would be aware of the increasing focus of the association upon promoting the bar as a source of expertise in alternative dispute resolution. Over the past year or two the ADR Committee and association staff have worked intensively to establish BarADR, our service to provide access to our accredited arbitrators, expert determiners and mediators at any time in a dispute whether or not litigation has commenced.

Late last year the Bar Council resolved that the association become a corporate member of the Australian Centre for International Commercial Arbitration (ACICA). In March the federal government appointed ACICA in March 2011 as the sole default appointing

authority to perform the arbitrator appointment functions under the International Commercial Arbitration Act, that is, to appoint arbitrators to international arbitrations in Australia where the parties have not agreed on an appointment procedure or the procedure fails.

A significant percentage of international commercial disputes, including disputes arising in relation to insurance, financial arrangements, infrastructure and development, trade disputes and other cross-border disputes, are determined by arbitration rather than judicial proceedings.

The booming economies in the Asia-Pacific area are likely to create a significant demand for cross-border commercial dispute resolution.

By joining ACICA, the New South Wales Bar is placing itself in the best position to participate in the provision of legal services in relation to those disputes, a circumstance that can only be of benefit to our members.

### **Strategy session**

The Bar Council commenced the new year with an all-day strategy session held on Saturday, 4 February in the Common Room.

The day was conducted with relative informality, and gave all bar councillors the opportunity to contribute their ideas on broad issues of strategic direction away from the time constraints inherent in the council's usual meeting schedule. Many constructive suggestions were made and agreed to be pursued, and the outcomes of the discussions will shape much of





the council's activity during 2012.

Topics discussed included services for members, the Bar Association's role in public debate on issues affecting the administration of justice, diversity at the bar, governance and practice development. The question of possible changes to the senior counsel selection protocol was referred to a future meeting of the Bar Council.

The Bar Association's committees play an important role in the development of the Bar Council's policy positions, and I would encourage all of you to participate in our committee processes, which provide members with a forum to raise issues of concern and an opportunity to involve themselves in the development of the association's law reform policies.

At the time of writing, the association's programme of regional CPD Conferences is in full swing. As in previous years, members of the Executive including myself will be in attendance, along with the executive director. These events provide the perfect opportunity for members of local bars to fulfill all their CPD requirements for 2011-12, and also provide an excellent opportunity for members to raise issues of concern.



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## Visit to the Gallipoli Mosque, Auburn

On Thursday, 9 February 2012, Attorney General Greg Smith SC MP, Chief Justice Tom Bathurst, members of the judiciary and representatives of Bar Council marked the opening of Law Term by attending an Islamic ceremony at the Auburn Gallipoli Mosque.



The service included a tour of the mosque, conducted by Mr Mehmet Ozalp, president of the Islamic Sciences and Research Academy (ISRA). This was followed by an Arabic recitation from the Qur'an – Surah Rahman (Chapter 55), verses 1 to 30 – as well as short speeches and a prayer.



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## Advocacy, legal practice and truth

By David Ash

Have our parliaments or courts ever *expressly* identified the pursuit of truth as being a court's criterion for being? Or have they preferred either to stay mum or to identify another criterion? My thesis is that almost 200 years ago the New South Wales legislature framed the courts' role in terms of the administration of justice, and that this has since remained the central express criterion.

If a person thinks they will enjoy being an advocate or senses something of its calling, there are as many jobs as the definition allows. If they wish to take the particular advocacy job called 'barrister' in New South Wales in 2012, they will be an officer of the state, in particular, an officer of the Supreme Court of New South Wales. That office is a price they pay for the privilege granted by that court to a person to appear as advocate.

It is in this context that one asks, what are the other prices such a person has to pay? If I can say to myself 'Putting another's case strikes me as an intellectually satisfying way to make a living', what additional things do I have to accept if I can also say to myself 'A particularly satisfying way would be by getting a licence from this Supreme Court thing'? And is one of those additional things the acceptance of a requirement to seek and to confine oneself to seeking some workable and identifiable ideal of truth?

Legal practice, if I may be forgiven for saying so, involves the practice of law. What is law?

The first of the OEDs many definitions is also the most succinct. Law is a rule of conduct imposed by authority. The definition caters on the one hand for an unstoppable authority called the jungle and an immovable rule of conduct called brute strength, and on the other for the more flexible niceties of sovereignty and liberty that we are pleased to call civilisation.

Yet the definition does not of itself provide any obvious or even necessary role for someone offering themselves up as 'practitioner'. The job of 'authority' is already taken: see the definition. Yes, the definition contemplates persons needed to identify conduct, to articulate rules, and to ensure maintenance and execution. But no, not even maintenance gets to an idea of practice. Not without more.

Our aspiring legal practitioner is not yet even contingent. He<sup>1</sup> is inchoate. Is there any other definition of law which can give hope?



In fact, there is a definition. We live in a polity. If all else fails, go to its Constitution. Covering clause 5 has a heading called 'Operation of the Constitution and laws':

This Act, and all laws made by the Parliament of the Commonwealth under the Constitution, shall be binding on the courts, judges, and people of every state and of every part of the Commonwealth, notwithstanding anything in the laws of any state; and the laws of the Commonwealth shall be in force on all British ships, the Queen's ships of war excepted, whose first port of clearance and whose port of destination are in the Commonwealth.

Leaving aside the necessary circularity involved when one authority uses one instrument both to give up its ability to enforce rules and to constitute a new authority, we can at least infer that our polity has an authority called the Parliament of the Commonwealth which makes rules.

Nothing in this offers any necessary role for the putative practitioner. There is nothing in the mere making of rules which requires anything but obedience from the objects.

However, we are getting closer. The objects go beyond the people. That is, the authority is marking out for obedience more than the mere people of a particular area. The authority making this particular law makes obedience the duty not only of the people, but also of things called 'courts' and 'judges'.

If we can distract ourselves with the comfort of loose positivism and hindsight (and what could make a common lawyer more comfortable?), we can spare ourselves further reference to dictionaries, as 'courts'

and 'judges' – as may also be inferred from the covering clause – were terms already used and recognised by each of those colonies which were to become the referred-to states.

In New South Wales, these terms were used in the 1823 Charter of Justice. The Charter's particular significance for advocates who have chosen to and have been accepted for practice by the Supreme Court of New South Wales becomes immediately obvious. On 13 October 1823 (a Monday), George IV said:

It was enacted that it should be lawful for us our heirs or successors by Charters or Letters Patent under the Great Seal of our United Kingdom of Great Britain and Ireland to erect and establish Courts of Judicature in New South Wales and Van Diemens Land respectively which should be styled 'The Supreme Court of New South Wales' and 'The Supreme Court of Van Diemens Land' and that each of such Courts respectively should be holden by our Judge or Chief Justice and should have such Ministerial or other Officers as should be necessary for the administration of Justice in the said Courts respectively and for the execution of the Judgments Decrees Orders and Process thereof...

For the constitutional historian, there is a thing of profound importance, the fact that it is the enactment of parliament which creates the lawfulness of the monarch's own act.

For the person interested in the definition of law, there is something of equally profound importance. It is not so much the absence of a definition but the presence of a statement in substitution. These courts – clearly part of the state apparatus – are to be held by judges and should have such other support staff as should be 'necessary for the administration of Justice' in them and necessary for execution of its decisions.

That cannot be understood as anything but the authority doing two things.

First, the authority is suggesting that it regards the administration of justice as *a* - if not *the* - criterion for administering law. Secondly, the authority is stating its preparation to delegate not only the administration of law but also the enforcement of that administration to the courts. An interesting call in itself, but it is only the first that we are interested in for now.

As to the first, we are not surprised that there was no

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definition of law as such. For what authority would be stupid enough to define its power to make rules? At this stage we can say:

- That there was an authority (a parliament and a monarch).
- That it imposed rules of conduct (laws).
- That it created courts and judges.

An authority's ability to impose rules of conduct has no relevant nexus with that same authority's ability to create something out of nothing. However, with some grace and understanding on the part of the reader, common sense if you will (and a promise that no further reference will be made to a dictionary, for now), we are able to get something along the lines of a thesis or a proposition:

- The parliament and the monarch created courts and judges for a purpose.
- That purpose was something to do with the maintenance of the laws.
- The criterion which the parliament and monarch chose was the necessity of the administration of justice.

Neither the logician nor the historian can be fully satisfied with this proposition. Apart from anything else, it makes no attempt to grapple with the (pre-) existence of common or judge made law, something which already was and remains a curious beast, both penumbral to and central to our idea of what actually comprises the sovereign holding the power to impose and to create. And as for Chapter III courts...

However, I am not talking to logicians or to historians. I am talking to legal practitioners.

I said earlier that my idea of practising law could not be founded in people capable merely of identifying the conduct to which rules were directed, or merely articulating the rules, or merely maintaining them. And if the proposition stops at maintenance, then a practitioner is not necessary. The next step is crucial. The criterion for maintenance of the laws is not a somewhat tautological administration of them – for what is administration but maintenance – but a new yardstick itself to be administered, that of justice.

We shall look a little more at justice in a moment, and explore whether it can be administered with or without reference to truth.

What we can say is that if our authority – our lawmaker – is in the business of using its time and money to acknowledge something called justice and to acknowledge, importantly, that it is ripe to be administered, then we who as yet have no role in law, no legal practice to practise, might be wondering whether our lawmaker has gone further. Has it merely acknowledged a criterion or has it specified a scope for its application? Has the monarch and the parliament said 'We create courts and judges to maintain our laws. We leave it to whatever we have created to determine the process of maintenance, to involve or to not involve other people as it sees fit?' In fact, the authority goes on to say:

AND WE DO hereby authorize and empower the said Supreme Court of New South Wales to approve admit and enrol such and so many persons having been admitted Barristers at Law or Advocates in Great Britain . . . to appear and plead and act for the Suitors of the said Court

The significance for those who wanted to practise law – and for those who wanted to be advocates – is both apparent and cannot be understated. Here was an authority with the power (and, probably, duty) to impose laws and to provide for their maintenance.

From the language, and from our knowledge of the pre-existing system of the authority's home base, we have a fairly clear idea of what the position was. Building on the thesis:

- There was an authority.
- It imposed rules of conduct (laws).
- It created courts and judges.
- It created courts and judges for a purpose.
- That purpose was something to do with the maintenance of the laws.
- The subjects of the authority and of its laws interested in calling upon those laws for their benefit could be a suitor, that is, they could sue someone before a court or a judge.
- If there was a law and if there was someone capable of being sued (that is, if the court was seised with jurisdiction), then the court was required to maintain the law.
- A person who wanted to be an advocate could obtain from the created delegate a revocable licence.

- That licence could extend to the business of appearing, pleading or acting for a suitor before the created delegate.
- And the criterion which the parliament and monarch chose to impose was the necessity of the administration of justice.

What is significant is the necessary intercourse between the administration of justice and the business of appearing, pleading or acting for a suitor. One informs the other, and so we have our authority's imprimatur for what is called the legal practitioner.

So in 1823 the (then) relevant legislature makes a law which is itself a regulatory mechanism for the administration of other laws, and by 1900, the same (still) relevant legislature incorporates or at least acknowledges that regulatory mechanism.

That mechanism had as a linchpin a criterion which – explicitly – acknowledged the administration of justice but not – explicitly – the pursuit of truth.

Has the current legislature changed the position? In particular, does the administration of justice continue as an explicit criterion or has the legislature expressly amended or substituted that criterion?

The starting point is the 1970 Supreme Court Act. Its long title reads:

An Act to provide for the concurrent administration of law and equity in the Supreme Court; to amend and consolidate the law with respect to the administration of justice and the procedure and practice of the Supreme Court; to repeal the Common Law Procedure Act 1899 , the Equity Act 1901 and certain other Acts; to amend the

Partnership Act 1892 and certain other Acts; and for purposes connected therewith.

A rule 'to amend and consolidate the law with respect to the administration of justice' may be read as an intention by the authority to amend and consolidate its particular rule for the maintenance of its rules, with a continuing criterion of the administration of justice.

Later, the *Civil Procedure Act 2005* would introduce three key ideas. They are found in Part 6 ('Case management and interlocutory matters') Division 1 ('Guiding principles'). They are section 56 ('Overriding purpose'); section 57 ('Objects of case management'); and section 58 ('Court to follow dictates of justice').

The basic proposition is in section 56(1):

The overriding purpose of this Act and of rules of court, in their application to a civil dispute or civil proceedings, is to facilitate the just, quick and cheap resolution of the real issues in the dispute or proceedings.

At first glance, the Act has provided a substituting criterion. No longer is the maintenance of our laws by judges, courts and legal practitioners determined within the necessity of the administration of justice. There is now a facilitation of the just, quick and cheap resolution of the real issues.

Yet the administration of justice is still there. It is merely that the bifurcated administration and justice has yielded to a triform of justice, quickness and cheapness. The unified necessity remains, merely more urgent than it was. Moreover, the legislature is content to stress that justice is the first among equals. Why else the injunction

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comprising section 58? Justice pops up elsewhere too. Section 71(b) provides that court business may be conducted in the absence of the public ‘if the presence of the public would defeat the ends of justice’. Whether ‘dictates’ and ‘ends’ are getting a tad Machiavellian for my liking is not to the point; justice gets more stress than quickness or cheapness in the new trinity.

In short, justice is still to be pursued, but what of truth?

Truth is not mentioned in the Act. Does an acknowledgement of something called ‘the real issues’ take a step towards it? Ultimately, no. If the pursuit of truth already existed in our system, then it was already a – or *the* – real issue, and section 56(1) without more does not seem to advance the position.

And so the question, did the criterion for the maintenance of our law, the criterion of the administration of justice, carry with it a fellow traveller called the pursuit of truth? Must the former contain the latter? Must the former not merely contain the latter as an element but have it as its own basal criterion?

Sir Daryl Dawson has said:<sup>2</sup>

A trial does not involve the pursuit of truth by any means. The adversary system is the means adopted and the judge’s role in that system is to hold the balance between the contending parties without himself taking part in their disputations. It is not an inquisitorial role in which he seeks himself to remedy the deficiencies in the case on either side. When a party’s case is deficient, the ordinary consequence is that it does not succeed. If a prosecution does succeed at trial when it ought not to and there is a miscarriage of justice as a result, that is a matter to be corrected on appeal. It is no part of the function of the trial judge to prevent it by donning the mantle of prosecution or defence counsel.

Sir Daryl acknowledges that a trial involves the pursuit of truth but not that pursuit by any means. Is he to be understood as saying that a trial *is* solely the pursuit of truth albeit not an unconstrained pursuit? To my mind, no.

The constrained role of the judge is but one area where the law impedes the pursuit of truth, whether the pursuit be the whole of a judge’s task or whether it be part of the criterion pronounced in 1823 or in 2005. In the 2011 Sir Maurice Byers lecture, Spigelman CJ identified many more.

The title for the lecture was ‘Truth and the Law’. In it,

the then chief justice said:

The common law adversarial system of legal procedure is not, in terms, directed to the establishment of truth. There are three views about the relationship between truth and the adversarial system. They are:

1. The adversarial system is not concerned with truth, but with ‘procedural truth’ or ‘legal truth’, as distinct from substantive fact.
2. The adversarial system is the most effective mechanism for the discovery of truth by the application of the Socratic dialogue.
3. The adversarial system seeks truth, but that search is qualified when the pursuit of truth conflicts with other values.

...

I have become a supporter of the third position. It should now be accepted that the task of fact finding for the courts is to identify the truth, subject to the principles of a fair trial and to specific rules of law and discretions designed to protect other public values which, on occasions, are entitled to recognition in a way which constrains the fact finding process.

#### The Significance of Truth Seeking

The recognition that the principal purpose of legal proceedings is to identify the true factual circumstances of any matter in dispute is of fundamental significance for the administration of justice and the maintenance of public confidence in that system. If this recognition constitutes a modification of the adversary system, it is a modification that should be made. The search for truth is a fundamental cultural value which, at least in Western civilisation, is a necessary component of social cohesion and of progress. The law must reflect that fundamental value and do so at the core of its processes.

The public will never accept that ‘justice’ can be attained by a forensic game. The public require a system dedicated to the search for truth, subject only to the fairness of the process and consistency with other public values.

...

The pursuit of justice cannot allow itself to be deceived. It may be constrained by other public values or by natural human failings, but it cannot allow itself to be deceived.

I quote distinct parts from a lengthy paper traversing a wide range of questions. I trust I do justice and serve truth.

With that qualification, the thesis I have proceeded on falls within the first view. The then chief justice referred to a number of distinguished jurists who assert to the effect that justice is sufficient and that there is no role for an independent pursuit of truth. There is no point in repeating them.

I do disagree with the weight given by the then chief justice to the public's role in the process, in three respects.

The first respect is that I infer an assertion that the public require a system where, if truth, fairness and other public values are equal, truth is first amongst equals. I think the more likely position is that a large portion of the public is suspicious of a system dedicated to searching for anything, let alone truth, and less suspicious of a system which stops short of saying that it does.

The second respect in which I disagree is the proposition that the adversarial system should yield to the identification of truth. Just as the rule of law must not

be the rule of lawyers, so the very wide enjoyment of the privilege to retain an advocate must not be allowed to cloud the fact that our system is not an adversarial system of advocates who happen to represent clients, but a system in which the adversaries are the clients themselves. This is the system the state has permitted. I am wary of a suggestion that the 'public' have an interest in this private combat beyond the criterion already assigned.

The final is the proposition that the public will never accept that justice can be attained by a forensic game. Judges intone this from time to time, and have intoned this more since the advent of case management. The gist is that the idea of a 'game' is too impure for the forensic world.

This underestimates the public's belief in the value of and its reliance on 'the game' in both ancient and modern times. The public may have many gripes about the game, gripes which are sometimes justified. But those gripes are formed by a love of the game and not a contempt for it.

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Is it wrong or right for a barrister to say to a client 'If you proceed to suit, you are engaging in a game with special rules, with a very limited range of outcomes, and with a very wide range of risk'? Should a barrister be saying instead 'Don't worry if others regard this as a game. We're here for the Pursuit of Truth.' And if the client says 'I'm here for a game and I want you to win', is the brief to be returned? (The last question is conditional upon the client not already having bolted.)

I think the public being told by the forensic forum that justice is being administered with their best interests at heart invites the obvious response. The public takes a collective view: 'I hear at the pub that you're all a bunch of leeches. I don't give a toss, but for God's sake just make sure if I'm caught up in the game, you use every rule in my favour and don't let the other side get away with anything.'

R C Teece QC was the first president of the Bar Association. He was active in the Anglican church (a legacy being the Red Book case) and a brother to Linda Littlejohn, a feminist of world standing.<sup>3</sup> Teece had also been Lecturer in Legal Ethics and sometime Dean of the Faculty at the University of Sydney. In 1949, Teece and Professor W N Harrison wrote *Law and Conduct of the Legal Profession in New South Wales*.<sup>4</sup> The authors say:

Now it is clear that unless justice is to be perverted the assistance given to the Court by barristers and solicitors must at least be given honestly, and no be such as is calculated to deceive the Court or hamper it in its task. The present system rests on the assumption that under it justice can be obtained although the Court receives no assistance except from the agents of the opposing parties. But the assumption is valid only if practitioners are honest; and if they ceased to be honest some other system would have to be substituted for it. Ordinarily, of course, it might be expected that any effort made by the legal representatives of one side to deceive or hamper the Court would be frustrated by the efforts of those on the other side. Nevertheless, if deceit or sharp practice were condoned, there would be many cases in which it would be successful even against a vigilant opposition, nor would a regular competition in deceit, or an attempt by both sides to cloud the issues, be best calculated to assist the Court arriving at the truth of a matter. Furthermore, the knowledge and skill of the opposing lawyers will often be unequal. And so the present system does not automatically lead to the best results. There must be an honest attempt on both sides to assist the Court.

Nevertheless, the principal function of a barrister or solicitor is to aid his client and present his client's case in the most favourable light to the Court. This limits his duty to the Court. His main function is to do the best he can to help his client, not the best he can to help the Court. He may in a particular case be of the opinion that the adversary has a just cause, but he is under no general duty to admit allegations or disclose information in order that justice may be done. If a party cannot prove his case no doubt that is unfortunate for him, and justice may fail; but the law does not strain human nature to the extent of making it the other party's duty to help his adversary out of difficulties. In this respect the lawyer acting for a party is in the same position as his client. It is not his business to pass judgment on the merits of a case. It his duty to help his client, and indeed it would be contrary to his duty to help the opponent (even though the Court were thereby helped) by making admissions or giving information where there was no duty laid on his client to do so. Thus in *In re Cooke* (5 TLR 407) Lord Esher, by way of illustration, said that a barrister or solicitor was not bound to inform the adversary of a witness who would help the adversary, but on the contrary would be betraying his client if he did so. He must be honest, just as the client must be honest. He must not deceive the Court, but neither should his client. If his client owes a duty to the Court, he should see that the client carries out that duty or refuse to act for him. But beyond this, with rare exceptions, he is not required to go.

The justification of this principle is that if within the bounds of honesty and fair dealing the legal representatives on each side devote their best energies to bringing before the Court all that can be said for their side and against the other side, the work of informing and assisting the Court will, on the whole, be done more thoroughly than it would be by officials unstimulated by personal interest and the spur of competition. It is indeed recognised that if a party with a just cause were left entirely unaided in procuring the evidence to make out his case, justice would often fail, and so provision is made to assist him. Thus he can compel the adversary to disclose the existence of relevant documents and to produce them for inspection; and in some jurisdictions he can compel the adversary to answer interrogatories and so get admissions or information without which he might be unable to prove his case. In this case the other party is under a duty to give the required information honestly, and a correlative duty, mentioned above, is imposed on his legal adviser. But the judgment of experience is that to go further than this in imposing on a litigant or on his legal advisers a positive duty to help the Court would not on the whole materially assist the administration of justice. Thus with certain exceptions, particularly those

just mentioned, there is no positive duty to assist the Court adversely to the interests of the client. On the other hand there is of course the very strict negative duty to refrain from obstructing the administration of justice by deceiving the Court, or abusing its processes, or by dishonest means hampering the adversary in the conduct of his own case.

If Teece had been confronted by a judge who said in frustration 'We are not here for a game, but for the pursuit of truth', what can we suppose he might have replied? We can suppose that he would have answered with two things in mind. First, what he had written, as set out above. Secondly, a person taking someone's money to persuade is not there to piss off the person being persuaded. I suspect Teece would have (1) sat dumb on the first point; (2) avoided the second by saying that he was there to put his client's case honestly; and (3) moved rapidly on to some other matter. And so it was and should ever be.

When launching the lecture series which spawned *Rediscovering Rhetoric*,<sup>5</sup> the then president of the Bar Association reflected on the dark side to the art. And there is a dark side. But its existence and its possibilities are part of human nature, capable only of control and not of prohibition.

Aristotle opened Book 1 chapter 3 of his own *Rhetoric* with the sentence 'Rhetoric falls into three divisions, determined by the three classes of listeners to speeches.' (That the determinant is the listener and not the speaker is both self-evident and something too many advocates in all forums insist on forgetting.) The three divisions are political rhetoric, forensic rhetoric, and the ceremonial oratory of display.

Aristotle moves on in the same chapter to say that the political orator is concerned with establishing the good or the harm of a particular cause of action, 'and all other points... he brings in as subsidiary and relative to this one'. The forensic orator aims 'at establishing the justice or injustice of some action, and they too bring in all other points as subsidiary and relative to this one'. I think a given law – which in our system is forged upon political rhetoric and is tested with forensic rhetoric – is capable of serving the same two aims. Is a law, politically, aimed at something good or bad? Does the law, forensically, result in justice or injustice? Truth, whatever it is, may be relevant to or even determine what is good or just, but that is all.

None of which is to suggest that truth has no role. Our forensic system works on the proposition that the ascertainment of facts is a process which assists in the determination of justice in the given case. If that is so, then to qualify the ascertainment by an adjectival 'true' should be regarded as no more (and certainly no less) than a useful combination of the 'added bonus' of tautology and a shorthand term for the means of ascertainment.

Whether William of Ockham (or Ockham) ever put what he is said to have put is a matter of debate. The current state of play appears to be that the law of parsimony was first attributed to his razor by Sir William Hamilton in 1852. Hamilton was called to the bar but preferred his life to be an academic rather than practical celebration of Aristotle. He described what may have been razored as follows:

The law of Parsimony, which forbids, without necessity, the multiplication of entities, powers, principles, or causes; above all, the postulation of an unknown force, where a known impotence can account for the effect.

For almost two hundred years, the authority called New South Wales has expressly stated a criterion for the forensic forum. It is the necessity of the administration of justice. Its potential for impotence is known by political and forensic practitioners and by a public and clients, the constituencies they respectively serve. However, I am not sure whether the potentiality is capable of a cure, and I think we should be wary of postulating an unknown force in substitution. To make the pursuit of truth *explicit* in our forensic forum may be possible, but has not in general been thought necessary. Even before applying the razor, we should make sure that we will be happy with the face that results.

#### Endnotes

1. I say 'he' for balance. The etymological birth of 'law' was Late Old English (c1000) *lagu* strong feminine. It may be arguable that it is the patriarchal structure of Greece and Rome alone which requires the frustratingly impure acknowledgement that 'As *law* is the usual English rendering of Latin *lex*, and to some extent of Latin *jus*, and of Greek *νόμος*, its development of senses has been in some degree affected by the uses of these words.'
2. *Whitehorn v R* [1983] HCA 42; (1983) 152 CLR 657 (8 November 1983), [33]. See also the court's approving reference in *R v Apostilides* [1984] HCA 38; (1984) 154 CLR 563 (19 June 1984), [15].
3. [www.womenaustralia.info/biogs/AWE3090b.htm](http://www.womenaustralia.info/biogs/AWE3090b.htm), accessed 20 Mar 2012.
4. The Law Book Co of Australasia.
5. Gleeson & Higgins (ed) (Federation Press, 2008).



## A distinction without difference or a difference of distinction?

Mark Friedgut compares Rule 39 of the new New South Wales Barristers' Rules and Rule 17 of the old rules.

The new New South Wales Barristers' Rules came into effect on 8 August 2011. They are apparently the result of extensive public and professional consultation, and were approved by the Bar Council to reflect the uniform National Rules of Conduct prepared by the Australian Bar Association.

The purpose of this note is to raise the question whether the new rule 39, which replaces the old rule 17, has introduced any change of substance in relation to the obligations of a barrister to his or her clients.

Old rule 17 provided that:

A barrister must seek to assist the client to understand the issues in the case and the client's possible rights and obligations, *if the barrister is instructed to give advice on any such matter*, sufficiently to permit the client to give proper instructions, particularly in connection with any compromise of the case. [Emphasis added].

That rule, therefore, made it clear that the barrister's *obligation* ('must seek') to assist the client to understand the issues in the case and the client's possible rights and obligations, was only engaged 'if the barrister is instructed to give advice on any such matter'.

New rule 39, however, simply provides that:

A barrister must seek to assist the client to understand the issues in the case and the client's possible rights and obligations, sufficiently to permit the client to give proper instructions, including instructions in connection with any compromise of the case.

Thus, the question is whether the peremptory obligation in new rule 39 is absolute and unconditional - unlike the obligation in old rule 17.

In other words, does the obligation to 'seek to assist the client to understand the issues in the case and the client's possible rights and obligations, sufficiently to permit the client to give proper instructions, including instructions in connection with any compromise of the case' arise in all cases in which a barrister is briefed - irrespective of whether the barrister is 'instructed to give advice on any such matter' - or is the obligation dependant - like it was in the old rule 17 - upon the barrister being instructed to give advice on any such matter?

If the former construction is the correct one, then it would appear to follow that the new rule has introduced a fundamental change in relation to

barristers' obligations to their clients - a change which may create serious practical problems for barristers.

It is not uncommon for a barrister to be briefed to perform a very specific and limited function, or to advise upon a discrete and limited issue, in circumstances where the barrister has no direct contact whatsoever with the client. In those circumstances, it may in some instances simply not be possible for the barrister to comply (or to know whether or not he or she has properly complied) with the obligations imposed by rule 39.

Indeed, the limited nature of the brief to the barrister may be such (for example where a barrister is briefed on a very discrete issue) that the barrister him or herself may not be aware of all the issues in the case and all the client's *possible* rights and obligations.

Furthermore, in circumstances where the barrister has no contact with the client, there may not be any reasonable method available to the barrister to ensure that the peremptory obligations imposed by Rule 39 are complied with.<sup>1</sup>

*... the question is whether the peremptory obligation in new rule 39 is absolute and unconditional - unlike the obligation in old rule 17.*

Moreover, is it not likely that in many cases rule 39 will be paternalistic and unnecessary? Suppose, for example, that the barrister is briefed by a competent, experienced and diligent instructing solicitor: Is the barrister still required, in the light of the words of Rule 39 ('must seek') to assist the client to understand the issues in the case and the client's possible rights and obligations, notwithstanding the fact that the barrister *assumes* (but obviously cannot be sure) that the instructing solicitor has assisted the client to understand the issues and the client's possible rights and obligations, and notwithstanding the fact that the barrister has not been briefed to advise?

Is a barrister not entitled to assume (in the absence of evidence to the contrary) that all instructing solicitors, who are duly admitted legal practitioners who are officers of the court, are competent and diligent? Is the barrister, in the light of rule 39, *required* to second-guess his or her instructing solicitors, even when not briefed to advise?

What are the obligations of junior counsel who is briefed on a discrete and limited issue in a case in which other counsel – including senior counsel – have already been briefed? Is the junior counsel still obliged to comply with Rule 39 although he or she *assumes* (but cannot be sure) that the other counsel in the case have already sought to assist the client to understand the issues in the case, and the client’s possible rights and obligations?

*Is there a risk that in future rule 39 may form the basis of a cause of action against a barrister by a disgruntled client?*

In the light of rule 39 is a barrister is still permitted to accept a brief to perform a discrete and limited task – or must he or she insist upon being fully briefed so as to be enabled to assist the client to understand the issues in the case and the client’s possible rights and obligations? And is the barrister permitted then to charge (and, if so, on what basis) for such advice that was neither sought nor required?

Is there a risk that in future rule 39 may form the basis of a cause of action against a barrister by a disgruntled client in circumstances where the barrister, who may have received a very limited brief, performed his or

her duties with diligence and skill, and without any negligence whatsoever, apart from the fact that he or she failed to insist upon a more detailed brief so as to be enabled to comply fully with rule 39? In other words, is there a risk that a client will allege that the barrister (who may never have had any contact with the client and who received a very limited and specific brief) ought to have taken further steps to assist the client to understand the issues in the case and the client’s possible rights and obligations, notwithstanding the fact that in the specific circumstances of the case it may well not have been possible or reasonable for the barrister to have done so?

These questions arise out of (what is assumed to be) the deliberate removal of the words ‘if the barrister is instructed to give advice on any such matter’. Has the removal of those words created serious – albeit perhaps [?] unintended – consequences, or has it simply created some uncertainty?

#### Endnotes

1. Obviously principles of agency may be of application where counsel provides the advice to the instructing solicitor. However, in circumstances where the instructing solicitor has not sought advice from counsel, and may not wish to obtain such advice, the barrister will simply not know whether the advice has or has not been passed on to the client. Nor will he or she know whether or not it has been fully and accurately conveyed.



### Expert evidence

*Amaca Pty Limited (Under NSW Administered Winding Up) v Booth; Amaba Pty Limited (Under NSW Administered Winding Up) v Booth* [2011] HCA 53

The importance of these decisions derives from what the majority of the High Court (French CJ, and by joint judgment Gummow, Hayne and Crennan JJ) observed about the use of expert medical and epidemiological evidence in determining issues of causation. They will also reverberate in the Dust Diseases Tribunal of New South Wales (tribunal) given that a holding at first instance for the purposes of s 25B of the *Dust Diseases Tribunal Act 1989* (NSW) ('Act') was left undisturbed:<sup>1</sup> namely, that all exposures to chrysotile asbestos, other than trivial or de minimis exposure, occurring in a latency period of between 25 and 56 years, materially contribute to the cause of mesothelioma.<sup>2</sup>

The first respondent John Booth was diagnosed with malignant pleural mesothelioma in 2008. Beyond exposure to asbestos which exists as part of the 'background' that pervades urban environments, Mr Booth had the following exposures: twice briefly as a child while helping his father with home renovations; for approximately 20 minutes when loading bags of asbestos onto a truck; and, during his 27 years of employment as an automotive mechanic. That work included hammering rivets through, drilling holes in and grinding chrysotile asbestos brake linings.

#### First instance

In 2008 Mr Booth commenced proceedings in the Tribunal against the appellants, Amaca Pty Ltd (Amaca) and Amaba Pty Ltd (Amaba), which together had manufactured the majority of the linings he worked on. The primary judge found that exposure to asbestos dust liberated from brake linings manufactured by Amaca and Amaba 'materially contributed to Mr Booth's contraction of mesothelioma.'<sup>3</sup>

#### Appeals

The Court of Appeal of the Supreme Court of New South Wales dismissed statutory appeals brought under the Act, and summonses seeking orders in the nature of certiorari, brought by Amaca and Amaba.<sup>4</sup> Gummow, Hayne and Heydon JJ made orders granting Amaca and Amaba special leave to appeal limited, in effect, to the question of the sufficiency of the evidence, taken as a whole, to support the above finding made by the primary judge.

#### French CJ

The primary judge accepted that the effect of asbestos

exposure on the development of mesothelioma was cumulative.<sup>5</sup> French CJ discussed the expert evidence Curtis DCJ based that finding upon, including Professor Henderson's observation that it is: 'almost universally accepted that all asbestos exposure, both recalled and unrecalled, will contribute causally towards the ultimate development of a mesothelioma.'<sup>6</sup> Importantly, in coming to his view that epidemiological studies had demonstrated conclusively that chrysotile has the capacity to induce malignant mesothelioma, Professor Henderson applied the 'Bradford Hill criteria'.<sup>7</sup> Those criteria, French CJ noted, have the character of circumstantial evidence of a cause and effect relationship.<sup>8</sup>

Amaca and Amaba relied in the Tribunal upon 19 epidemiological studies supportive of the proposition that automotive mechanics are not at a greater risk of developing mesothelioma. Dealing with this conflict in the evidence, the judge at first instance made a negative finding in relation to the epidemiological evidence specific to automotive mechanics, in the words of French CJ: 'finding that the epidemiological evidence did not displace the inference of factual causation which was open on the basis of Mr Booth's history and the medical evidence relating to the cumulative effects of exposure to asbestos.'<sup>9</sup> The analysis undertaken by French CJ confirmed that (as was done at first instance), both the expert medical evidence and expert epidemiological evidence led in the case needed to be considered before any finding on causation could be made.<sup>10</sup>

French CJ held that a finding that a defendant's conduct has increased the risk of injury must rest upon more than a mere statistical correlation, it requires a causal connection (although there may be others). His Honour continued:

As demonstrated by medical evidence in this case and in particular by Professor Henderson's evidence, a causal connection may be inferred by somebody expert in the relevant field considering the nature and incidents of the correlation. ... Where the existence of a causal connection is accepted it can support an inference, in the particular case, when injury has eventuated, that the defendant's conduct was a cause of the injury. Professor Henderson offered that inference of specific causation by reference to Mr Booth's exposure to the products of both Amaca and Amaba.<sup>11</sup>

In response to the appellants' challenges, at first instance and on appeal, to the cumulative effect theory based on the fact that it may subsequently be disproven, French CJ made clear that: 'Whether or not medical science in the future vindicates or undermines that theory, is not to the point.'<sup>12</sup> In conclusion, French CJ held that the primary judge's interpretation of the expert evidence and his conclusions from it, were open as a matter of law.<sup>13</sup>

### Joint judgment

Gummow, Hayne and Crennan JJ held that in a case involving multiple conjunctive causal factors it is sufficient that the plaintiff prove that the negligence of the defendant 'caused or materially contributed to the injury.'<sup>14</sup> In regard to the submission that the cumulative effect theory ought to be rejected because it may subsequently be disproven, their Honours agreed with French CJ, also making the following additional point:

This advancing state of knowledge may be reflected in the evidence given from one case to the next. What is taken, in one case, to be a proposition of law derived from the attribution of legal liability, or its absence, may require consideration of the particular state of the evidence from which the court reduced a question of causation to the relevant standard of legal certainty.<sup>15</sup>

As to the use of the expert evidence, their Honours' analysis shows that while admissible and relevant, the weight to be given to epidemiological evidence of risk will vary from case to case, depending upon the circumstances. In any event, it must be weighed against other expert evidence in coming to a conclusion about causation.<sup>16</sup> Ultimately, their Honours reached the same conclusion as the Chief Justice, finding that: 'It was open to the primary judge to decide that he was 'not persuaded that the epidemiological evidence specific to automotive mechanics is adverse to the submission that causation has been proved in this particular case'.<sup>17</sup>

### Heydon J

His Honour, in dissent, began by intimating that legislative intervention may be called for given the dire and ongoing consequences of exposure to asbestos for the community. Further, Heydon J noted that judicial changes to the law of causation in this area in other jurisdictions have not been followed in Australia.<sup>18</sup> His

Honour then engaged in a detailed analysis of the expert evidence before the Tribunal, including drawing out several instances where 'risk' and 'cause' had been conflated by Mr Booth's experts. As to Professor Henderson's evidence, for example, His Honour came to the view that even if a great increase in risk can lead to a conclusion that mesothelioma will follow, it does not follow that all exposures materially contribute to mesothelioma. As such, in Heydon J's opinion, Professor Henderson's evidence did not support the view that all exposures to chrysotile asbestos materially contribute to mesothelioma.<sup>19</sup> His Honour came to a similar view with regard to the evidence of the other experts and also noted that there was evidence in this case that the 'but for' test was not satisfied.<sup>20</sup> Heydon J held that each appeal should be allowed.<sup>21</sup>

### Endnotes

1. Section 25B relevantly provides that, without leave of the Tribunal, 'issues of a general nature' determined by the Tribunal may not be relitigated or reargued in other Tribunal proceedings, whether or not the proceedings are between the same parties; in deciding to grant leave, the Tribunal is to have regard to the availability of new evidence, whether or not previously available.
2. [2010] NSWDDT 8 at [62].
3. [2010] NSWDDT 8 at [172].
4. [2010] NSWCA 344 at [6]; (2011) Aust Torts Reports ¶82-079 at 64,603 [6].
5. [2010] NSWDDT 8 at [47] – [62].
6. [2011] HCA 53 at [20].
7. Namely: strength of association; consistency in the observed association; specificity of the association; temporality; biological gradient; plausibility; coherence; experiment; and analogy. See [2011] HCA 53 at [44].
8. [2011] HCA 53 at [44].
9. [2011] HCA 53 at [23].
10. [2011] HCA 53 at [46], [49], [51], [53].
11. [2011] HCA 53 at [49].
12. [2011] HCA 53 at [51].
13. [2011] HCA 53 at [51].
14. [2011] HCA 53 at [70]; their Honours quoting Lord Watson from *Wakelin v London and South Western Railway Co* (1886) 12 App Cas 41 at 47.
15. [2011] HCA 53 at [72].
16. [2011] HCA 53 at [86], [87], [88], [89].
17. [2011] HCA 53 at [90], [91].
18. [2011] HCA 53 at [93]. It was accepted in the UK cases of *Fairchild v Glenhaven Funeral Services Ltd* [2002] 1 WLR 1052 and *Barker v Corus UK Ltd* [2006] 2 AC 572 that ignorance about the biological cause of the disease rendered it impossible for a claimant to prove causation according to the conventional 'but for' test and this caused injustice to claimants. See [81], [82], [83] per Gummow, Hayne and Crennan JJ.
19. [2011] HCA 53 at [122], [123].
20. [2011] HCA 53 at [139], [149].
21. [2011] HCA 53 at [150].

### Bias and abuse of process

*Michael Wilson & Partners Limited v Robert Nicholls and Ors* (2011) 282 ALR 685; 86 ALJR 14; [2011] HCA 48

In *Michael Wilson & Partners Limited v Robert Nicholls and Ors* (2011) 282 ALR 685; 86 ALJR 14; [2011] HCA 48, the High Court held that the appellant's institution of proceedings in the Supreme Court of New South Wales did not constitute an abuse of process, even though the claims made by the appellant in those proceedings were substantially the same as claims made by it in an arbitration involving other parties. The High Court also held that the trial judge was correct in refusing to disqualify himself from hearing the Supreme Court proceedings, notwithstanding that the trial judge had heard several *ex parte* interlocutory applications before the trial without notice to the respondents.

#### Background

The appellant, MWP, operated a business consultancy and law firm from offices located in Kazakhstan. In January 2002, John Emmott joined MWP as, in effect, a partner. In 2004 and 2005, two further individuals, Robert Nicholls and David Slater (respondents to the appeal) were employed as lawyers by MWP.

By the end of 2006, Mr Emmott, Mr Nicholls and Mr Slater had left MWP. Following their departure, MWP alleged that they had conspired together to divert clients and business opportunities away from MWP for their own benefit with the assistance of various companies with which they were associated.

MWP sought relief in several different jurisdictions. In August 2006, MWP commenced an arbitration in London against Mr Emmott in accordance with an arbitration clause contained in an agreement between Mr Emmott and MWP. The central allegation made by MWP was that Mr Emmott breached fiduciary duties he owed to MWP. Later, in October 2006, MWP instituted proceedings against Mr Nicholls and Mr Slater in the Supreme Court of New South Wales in which MWP claimed that Mr Nicholls and Mr Slater had knowingly assisted Mr Emmott's breach of fiduciary duty. Mr Emmott was not a party to the Supreme Court proceedings.

Following the commencement of the Supreme Court proceedings, MWP obtained freezing orders against Mr Nicholls and Mr Slater. Both were required to file affidavits disclosing the nature and extent of their assets. Later, in 2007 and 2008, MWP made a number of applications to Einstein J for permission to use the affidavits in related foreign proceedings. Each of

the applications made by MWP was heard in closed court and a confidentiality regime imposed, which relieved MWP of the need to disclose to Mr Nicholls and Mr Slater the fact that the applications had been made. The confidentiality regime was lifted in June 2008. Shortly after, Mr Nicholls and Mr Slater made successive applications to Einstein J to disqualify himself from hearing the proceedings further. All were refused.

*According to Basten JA, there was an abuse of process because the Supreme Court proceedings operated as a form of collateral attack upon the arbitrator's finding ...*

MWP succeeded at trial before Einstein J.<sup>1</sup> Einstein J found that Mr Nicholls and Mr Slater had knowingly participated in breaches of fiduciary duty by Mr Emmott. Equitable compensation was awarded. On 14 December 2009, Mr Nicholls and Mr Slater appealed to the New South Wales Court of Appeal. On 22 February 2010, the London arbitrators published an interim award, finding that although Mr Emmott had breached the fiduciary duties he owed to MWP, MWP was not entitled to any relief.

#### The Court of Appeal decision

Allowing Mr Nicholls and Mr Slater's appeal,<sup>2</sup> the Court of Appeal (Basten JA, Young JA and Lindgren AJA) held that Einstein J should have disqualified himself from hearing the matter. The Court of Appeal also allowed Mr Nicholls and Mr Slater's appeal on the basis that the proceedings brought by MWP were an abuse of process. According to Basten JA, there was an abuse of process because the Supreme Court proceedings operated as a form of collateral attack upon the arbitrator's finding against MWP (notwithstanding that the arbitral award was published *after* Einstein J had delivered judgment). Lindgren AJA, on the other hand, suggested that the alleged abuse would arise out of any attempt on the part of MWP to recover against Mr Nicholls and Mr Slater in the face of the arbitral award. This was so, according to Lindgren AJA, because the liability of Mr Nicholls and Mr Slater to MWP for knowingly assisting Mr Emmott in the breach of his fiduciary duties was limited by the nature and extent of the relief sought and obtained by MWP in the arbitration of its claim against Mr Emmott.

### **The High Court's decision**

The High Court allowed MWP's appeal. It held that the Court of Appeal erred in finding that Einstein J should have disqualified himself and that the institution of the Supreme Court proceedings, and the prosecution of those proceedings to judgment, constituted an abuse of process.

### **No apprehended bias**

The High Court held that Einstein J was correct in refusing to disqualify himself. According to the plurality (Gummow AC; Hayne, Crennan and Bell JJ), with whom Heydon J generally agreed, the fact that Einstein J made several ex parte orders and established a confidentiality regime did not found a reasonable apprehension of prejudgment of the issues to be fought at trial. In none of the applications did Einstein J decide any issue that was to be fought at trial. Nor was Einstein J required to determine any issues of credibility in relation to any witness. The fact that Einstein J *may* have fallen into error in the way his Honour dealt with the interlocutory applications was not sufficient to found a reasonable apprehension of bias.

### **Giving up the right to complain?**

The plurality noted that Mr Nicholls and Mr Slater did not seek leave to appeal against the refusal by Einstein J of their application that he disqualify himself. Although it was unnecessary to consider the issue (given the finding of no reasonable apprehension of bias), the plurality concluded that in most cases where a party does not seek to challenge a judge's refusal to disqualify himself or herself by seeking leave to appeal, that party should be held to have given up the point. Whether a party will be able to make a complaint at a later stage about the supposed apprehension of bias turns upon whether that party's failure to seek leave to appeal immediately was reasonable. Furthermore, their Honours pointed out that, provided the judge who refuses to disqualify himself or herself makes orders effecting the decision (or indeed makes any other subsequent case management order), leave to appeal can be sought against those orders on the basis that they should not have been made.

### **Abuse of process**

The High Court held that the appellant's institution

of the Supreme Court proceedings did not constitute an abuse of process, even though the claims made by the appellant in the Supreme Court proceedings were substantially the same as claims made by it in the London arbitration.

In dealing with the issue of whether the Supreme Court proceedings constituted an abuse of process, the plurality (with whom Heydon J agreed) made a number of preliminary observations. The first related to the timing of the arbitral award. The plurality pointed out that the suggestion that the Supreme Court proceedings operated as a collateral attack on the arbitrator's findings wrongly assumed that the making of the arbitral award occurred before judgment was given in the Supreme Court proceedings. Secondly, any risk of double recovery on MWP's part that may have arisen from the institution of the Supreme Court proceedings was not relevant to the determination of whether the Supreme Court proceedings constituted an abuse of process.

According to the plurality, the argument that the Supreme Court proceedings constituted an abuse of process was fundamentally flawed in that it wrongly assumed that that extent of Mr Nicholls and Mr Slater's liability to MWP under the second limb of the rule in *Barnes v Addy*<sup>3</sup> was confined by the extent of Mr Emmott's liability (as defaulting fiduciary) to MWP. However, as the plurality made clear, although a finding that an individual has knowingly assisted in another's breach of fiduciary duty depends upon a finding of breach of fiduciary duty by that other person, 'the relief that is awarded against a defaulting fiduciary and a knowing assistant will not necessarily coincide in either nature or quantum'.<sup>4</sup> As their Honours stated:

It follows that neither the nature nor the extent of any liability of the respondents to MWP for knowingly assisting Mr Emmott in a breach or breaches of his fiduciary obligations depends upon the nature or extent of the relief that MWP obtained in the arbitration against Mr Emmott.<sup>5</sup>

It followed from the fact that MWP's claim in the NSW Proceedings was not limited in the way suggested by the Court of Appeal that the rule in *Reichel v Magrath*<sup>6</sup> had no application in the circumstances. Put simply, MWP was not attempting to litigate a case which had already been disposed of in earlier proceedings.

Although it was not necessary to determine the issue,

the plurality suggested that, had the arbitrators found that Mr Emmott had not breached the fiduciary duties he owed to MWP, MWP would not have been estopped from asserting to the contrary in proceedings against Mr Nicholls and Mr Slater (who were not parties to the arbitration). However, the broader issue of whether *Reichel* abuse of process may in any circumstance operate to prevent a party to an arbitral award from advancing a contrary case in separate curial proceedings against a third party was left for consideration on another occasion.

By Martin Smith

## The 'end' of spousal privilege at common law

*Australian Crime Commission v Louise Stoddart* [2011] HCA 47

The High Court upheld an appeal by the Australian Crime Commission (ACC) against the decision of the full court of the Federal Court of Australia, which had granted a declaration that the *Australian Crime Commission Act 2002* (Cth) (Act) had not abrogated the common law privilege against spousal incrimination. By majority, it was found that the common law does not, and has never, recognised a privilege against spousal incrimination.

### The facts

Mrs Stoddart appeared pursuant to a summons under s 28(1) of the Act issued by Mr Boulton, an examiner, to give evidence of 'federally relevant criminal activity' involving named corporations and persons including Mrs Stoddart's husband.

Under Section 30(2)(b) of the Act, a person appearing as a witness before an examiner shall not refuse or fail to answer a question that he or she is required to answer by the examiner. Failure to answer questions as required is an offence punishable on conviction by penalties including imprisonment not exceeding 5 years (s 30(6)).

After being sworn in, Mrs Stoddart claimed the privilege against self-incrimination pursuant to s 30(4) and (5) of the Act. Mr Boulton extended to her what he termed a 'blanket immunity'. In the course of questioning, counsel for Mrs Stoddart objected to a

### Endnotes

1. *Michael Wilson and Partners Ltd v Nicholls* [2009] NSWSC 1033; *Michael Wilson and Partners Ltd v Nicholls* [2009] NSWSC 1377.
2. *Nicholls v Michael Wilson & Partners Ltd* [2010] NSWCA 222; (2010) 243 FLR 177.
3. (1874) LR9ChApp 244; (1874) 43 LJ Ch 513; (1874) 30 LT 4; (1874) 22 WR 505.
4. At [106] per Gummow ACJ; Hayne, Crennan and Bell JJ.
5. At [107] per Gummow ACJ; Hayne, Crennan and Bell JJ.
6. (1889) 14 App Cas 665.

question and claimed privilege 'on the basis of spousal incrimination'. The matter was adjourned in order to determine the validity of the objection.

### Litigation following adjournment of proceedings before the examiner

Mrs Stoddart commenced proceedings in the Federal Court, seeking an injunction restraining the examiner from asking her questions relating to her husband, as well as a declaration that the common law privilege or immunity against spousal incrimination had not been abrogated by the Act.

The application was dismissed in the Federal Court by his Honour Justice Reeves in October 2009.<sup>1</sup> On appeal to the full court of the Federal Court, Mrs Stoddart's appeal was allowed and she was granted declaratory relief, the full court holding by a majority that the common law privilege against spousal incrimination existed and that the Act had not abrogated that privilege.<sup>2</sup>

On appeal to the High Court, the ACC submitted, firstly, that the full court erred in following recent decisions of the Queensland Court of Appeal and the Full Federal Court<sup>3</sup> by recognising a distinct common law privilege against spousal incrimination, and secondly (and alternatively), that s 30 of the Act abrogates the privilege against spousal incrimination if it otherwise exists under common law.

## The decision

The High Court, by majority, allowed the appeal and found that the privilege against spousal incrimination does not exist at common law. In view of this finding, it was unnecessary to deal with the second ground.

French CJ and Gummow J noted that the question was confined to the existence of a particular privilege, and not to a question of the competence or compellability of a witness. Their Honours sought to clarify that distinction 'in view of some looseness of expression apparent in some authorities'.

French CJ and Gummow J referred to the decisions of Lord Diplock in *In re Westinghouse Uranium Contract*<sup>4</sup>, McHugh J in *Environment Protection Authority v Caltex Refining Co Pty Ltd*<sup>5</sup> and Lord Reid in *Rumping v Director of Public Prosecutions*<sup>6</sup>, as authority for the proposition that the privilege against self-incrimination is restricted to the incrimination of the person claiming it and not anyone else. Moreover, the apparent common law exception respecting rejection of evidence by the spouse of the accused rested upon a distinct principle, namely, lack of competence to testify.

Examining early cases on the subject, their Honours held that in the great majority of those cases, evidence from a person against his or her spouse was excluded on grounds of competency and compellability. In particular, their Honours agreed with the analysis by Kiefel J, as first instance judge in *S v Boulton*<sup>7</sup> that in *R v Inhabitants of All Saints, Worcester*<sup>8</sup> and subsequent cases, the issue of 'compellability' applied many years before by Bayley J in *All Saints* was to be construed in accordance with the ordinary sense of the word and did not give rise to a separate doctrine of spousal privilege.

Crennan, Kiefel and Bell JJ adopted a view similar to French CJ and Gummow J, analysing the distinction between competence, compellability and privilege and finding that 'the cases and historical materials do not provide a sufficient basis for a conclusion that the claimed privilege exists'. In particular, although it may be the case that Bayley J in *All Saints* 'had something like a privilege in mind', Crennan, Kiefel and Bell JJ determined that it was not clear and that Bayley J had more likely considered an exercise of the court's power to compel a spouse to give evidence. Their Honours noted the observation of Justice Oliver Wendell Holmes concerning the creation of legal doctrine:

And this statement is often modified more than once by new decisions before the abstracted general rule takes its final shape. A well settled legal doctrine embodies the work of many minds, and has been tested in form as well as substance by trained critics whose practical interest it is to resist it at every step.

Crennan, Kiefel and Bell JJ held that no new developments had occurred to warrant the creation of a privilege at common law. At most, the authorities may permit a spouse to seek a ruling from the court that he or she could not be compelled to give evidence that might incriminate the other spouse.

*Examining early cases on the subject, their Honours held that in the great majority of those cases, evidence from a person against his or her spouse was excluded on grounds of competency and compellability.*

Justice Heydon dissented, quoting from Griffith CJ in *Riddle v The King*: 'the law is always certain although no one may know what it is.'<sup>9</sup> His Honour then produced a highly detailed analysis of the early cases and found that the discussion by Bayley J in *R v Inhabitants of All Saints* as to whether a spouse could be 'compelled' to answer was, on the facts of the case and by process of elimination from the words used in that decision, actually a determination as to whether spousal privilege could be claimed. His Honour tracked through the jurisprudence subsequent to Bayley J's judgment and stated that although there is not a 'vast quantity of authority' in the field of spousal privilege, authority favouring its existence was nonetheless present and that no support could be found rejecting Bayley J's positive determination as to the existence of such a privilege. Moreover, his Honour held that spousal privilege existed as a rule of substantive law, not merely a rule of evidence. Heydon J concluded:

the submissions of the appellant entail an assumption that the body of legal writing from 1817 to 1980 surveyed above represents a massive deception of the reading public – judiciary, practitioners and students – stemming from a general self-delusion on the part of nearly 70 writers and editors over nearly two centuries. With respect to the appellant's position, it is not possible to accept that assumption.



### Conclusion

The analysis in *ACC v Stoddart* demonstrates a significant divergence of opinion between the majority and Heydon J as to the effect of the historical authorities.

Nonetheless, it was held that Mrs Stoddart was a competent witness to be examined under the Act and was compelled by the provisions of the Act to give evidence. No privilege of the kind claimed could be raised in answer to that obligation. In allowing the appeal by majority, the High Court determined that a privilege against spousal incrimination does not exist at common law, and indeed has never existed.

### Endnotes

1. *Stoddart v Boulton* [2009] FCA 1108.
2. *Stoddart v Boulton* [2010] FCAFC 89.
3. *Callanan v B* [2005] 1 Qd R 348; *S v Boulton* (2006) 151 FCR 364.
4. [1978] AC 547 at 637–638.
5. (1993) 178 CLR 477 at 549.
6. [1964] AC 814 at 834; [1962] 3 All ER 256 at 259.
7. *S v Boulton* [2005] FCA 821; (2005) 155 A Crim R 152.
8. [1817] EngR 404; (1817) 6 M & S 194 [105 ER 1215].
9. [1911] HCA 33.

By Nicholas Broadbent

## Verbatim

*Lipman Pty Ltd v Emergency Services Superannuation Board* [2011] NSWCA 163 per Allsop P:

[11] Before concluding, I wish to make some remarks about the conduct of the appeal. The arguments prepared by counsel were short and, if I may respectfully say, efficiently presented. The appeal in substance has taken slightly under an hour. That efficiency is no doubt the product of the work not only of counsel but skilled solicitors. The remarks that follow should not detract from this recognition. Four volumes of paper have been prepared, photocopied and given to the court. It is difficult to understand how more than one volume was ever needed. The contract is a large one being a building contract and it could be perhaps said that the argument might range over other clauses; but a significant body of material was unnecessary and should always have been viewed as unnecessary.

[12] I recognise immediately that there are circumstances where it is cheaper to copy than to expend time working out what is a marginally smaller bundle. That really is not this case. The cost of commercial litigation is an ever present problem and unless the profession, at all times, views things such as photocopying in a mean and parsimonious way, subject to my earlier remarks about the costs of reducing the material, the costs of litigation will forever increase.

[13] Neither client, in my view, unless it gave specific instructions for the preparation of all four bundles

contrary to advice, should have to pay for the totality of this material. In my opinion, to a significant degree, it was wasteful. I would leave it to the solicitors, however, and their clients to work out an appropriate arrangement subject to the orders for costs that I would make.

[14] Secondly, the appeal was set down for half a day. I am not going to be critical in relation to the parties about that, but the reality is that if these commercial parties, through their expert advisers, had undertaken communication with the Registrar on the basis that this was a matter which would be dealt with in under two hours, an earlier hearing date could well have been given. The Construction and Commercial Lists and the Court of Appeal provide a service to the Australian and international commercial communities of real efficiency, but that service requires practitioners at all times to play their part in that efficiency. If a case is in short compass, it should be so prepared and the Registrar given a precise and accurate summary and a request made for a short hearing after another half-day case as if it were a leave application. Leave applications in the ordinary course are listed for hearing within one to two months.

[15] I make one other comment. I was intending to make an order requiring in terms the provision of these reasons to the clients. Given the explanations that have been made, I will leave it to the good sense of the solicitors but I would expect the clients to be apprised of the terms of the judgment insofar as it refers to both the substance of the matter and the conduct of the appeal.

# Proportionate liability

*Mitchell Morgan Nominees Pty Limited v Vella* [2011] NSWSCA 390

Who is a concurrent wrongdoer under the proportionate liability provisions of the *Civil Liability Act 2002*? If an installer of sprinklers negligently fails to fireproof a building, can it name the arsonist as a concurrent wrongdoer if he is sued for negligence when the building burns to the ground? What about the insurance broker who fails to renew an insurance policy – when the bank is robbed and the policy does not respond, can the broker name the thief in proceedings against him for negligence?

From the broad definition of ‘concurrent wrongdoer’ it appeared that any person responsible for the claimant’s loss could be held responsible – the arsonist or the thief. But by holding that the acts or omissions must be in respect to the same loss or damage, the Court of Appeal in *Mitchell Morgan Nominees Pty Ltd & Anor v Vella & Ors* [2011] NSWSCA 390 has narrowed the category of persons who may be liable as a concurrent wrongdoer.

## At trial

In late January 2006, Mitchell Morgan lent money to a person it thought was Mr Vella, a motorcycle enthusiast. Pursuant to this transaction, Mitchell Morgan retained Hunt & Hunt to draft a mortgage that would secure the loan. There turned out to be a fraud and when Mitchell Morgan came to rely on the registered mortgage as security, because of the fraud, it was found to secure nothing.

Hunt & Hunt was found to have negligently drawn the mortgage that led to Mitchell Morgan losing its money, but the solicitors named the two fraudsters as concurrent wrongdoers and the trial judge, in finding that they were concurrent wrongdoers, held Hunt & Hunt was only 12.5% responsible for the loss. The remaining 82.5% of Mitchell Morgan’s loss was to be met by fraudsters who had long since vanished.

Mitchell Morgan appealed the trial judge’s finding that the fraudsters were concurrent wrongdoers within the meaning given to that term under s 34(2) of the *Civil Liability Act*.

## The definition of concurrent wrongdoer

Pursuant to s 34(2) of the Act, a concurrent wrongdoer is ‘a person who is one of two or more persons whose acts or omissions (or act or omission) cause,

independently of each other or jointly, the damage or loss that is the subject of the claim’.

Giles JA gave reasons in relation to the concurrent wrongdoing provisions with which the other four judges agreed. His Honour determined that the question to be asked to find a concurrent wrongdoer is not whether the fraudsters were concurrent wrongdoers in relation to the apportionment claim but rather whether the primary wrongdoer was a concurrent wrongdoer in relation to the claim.

The focus of his Honour’s analysis was whether the damage or loss for which each of the persons were responsible could be any act causative of the loss, or had to be the same loss or damage as that which was the subject of the primary claim.

The same issue was considered by Nettle JA in the Victorian Court of Appeal case of *St George v Quinerts Pty Ltd*<sup>1</sup> dealing with the Victorian equivalent of the proportionate liability provisions in Part IVAA of the *Wrongs Act 1958* (Vic). In that case Nettle JA concluded that the concurrent wrongdoer’s ‘loss or damage’ must mean the same loss or damage.

Nettle JA reasoned in that case that, despite the word ‘same’ not being found in the definition of concurrent wrongdoer, because the purpose of the proportionate liability provisions was to abolish joint and several liability between tortfeasors, it must correspond to the contribution provisions and those provisions refer to the acts or omissions being ‘in respect of the same loss or damage’.

Rather than expressly adopting the Victorian Court of Appeal’s decision (that being the reason a bench of 5 had been constituted in *Vella*), Giles JA undertook the same analysis with respect to the New South Wales contribution provisions found in s 5(1)(c) of the *Law Reform (Miscellaneous Provisions) Act 1946* (NSW). His Honour came to the same conclusion as Nettle JA that the words ‘in respect of the same loss or damage’ must be imported into the definition of concurrent wrongdoing in s 34(2) of the Act to be conceptually consistent with the contribution provisions.

## In respect of the same loss or damage – the economic interest test

So did the fraudsters cause the same loss or damage as the solicitors?

Because the wording of s 34(2) of the Act is conceptually the same as the *Law Reform (Miscellaneous Provisions) Act 1946* contribution provisions, his Honour found assistance from contribution cases in NSW, England and Alberta where the issue was whether the tortfeasors were liable in respect of the same loss or damage.

*It may be possible to say that NSW now has an 'economic interest' test that did not hitherto exist in establishing sameness of loss or damage for the purposes of apportionment legislation.*

Giles JA decided that the first step in the process is to identify precisely the loss that the plaintiff suffered. In *Vella* where the claim was for economic loss, this requires establishing what the loss of economic interest was. Having previously noted the distinction between damage and damages, Giles JA found that identification of the loss of economic interest should not be done at a general level of being financially worse off. That would be to merge damage with damages. His Honour held that the economic interest lost by Mitchell Morgan as a result of the acts or omissions by Hunt & Hunt was the benefit of a security for the money paid out.

It was not the same damage because nothing the fraudsters did or did not do prevented the solicitors from drafting a proper mortgage.

It may be possible to say that NSW now has an 'economic interest' test that did not hitherto exist in establishing sameness of loss or damage for the purposes of apportionment legislation. Certainly, as Giles JA acknowledges, none of the authorities surveyed describe it as such, despite coming to the same point.

Campbell JA added to the analysis by warning against the use of a 'mutual discharge test' used by Sir Richard Scott VC in *Howkins & Harrison v Tyler* (namely, that the question of whether the same loss was caused by the acts of multiple wrongdoers be answered by whether payment by one wrongdoer to the plaintiff would satisfy or reduce the liability of the other wrongdoer and vice versa).<sup>2</sup> His Honour said the test by itself 'has the potential to mislead.'

It seems that prior to the importation of the words 'in respect of the same' into the definition of concurrent

wrongdoer, it would be possible for the negligent insurance broker or fire-proofer to name as concurrent wrongdoers the arsonist or thief despite the primary wrongdoers being tasked to prevent the very harm which occurred as a result of their negligence.

Now, the primary wrongdoer seeking to use the proportionate liability provisions must establish that the named concurrent wrongdoer's acts or omissions caused the loss of the same economic interest as that caused by the primary wrongdoer.

Both the Victorian and NSW Court of Appeals used the corresponding contribution provisions in state legislation to interpret the definition. It remains to be seen whether the definition of concurrent wrongdoer in the *Competition and Consumer Act 2010* (Cth), which traces its conception to the same Law Reform Commission recommendations but does not have a corresponding contribution provision, will adopt the same wider definition.

### Responsibility

While not being required to decide the point, because Hunt & Hunt was not a concurrent wrongdoer, Bathurst CJ and Giles JA gave some consideration to what an appropriate level of responsibility would be had the fraudsters and the solicitor had been liable for the same loss or damage.

Giles JA thought the trial judge's original tariff of 12.5 per cent against Hunt & Hunt to be appropriate. The Chief Justice did not appear as certain, noting that it should not be assumed that in every circumstance an intentional wrongdoer will greatly exceed the negligent wrongdoer.

By David Parish

### Endnotes

1. [2009] VSCA 245; (2009) 25 VR 666.
2. [2001] Lloyds Rep PN1.

# Anshun estoppel

*CG Maloney Pty Limited v Noon* [2011] NSWCA 397

In determining an appeal against the dismissal of proceedings for reasons including the existence of an estoppel based on *Port of Melbourne Authority v Anshun Pty Ltd*<sup>1</sup>, the New South Wales Court of Appeal clarified what evidence will be relevant on an Anshun application, confirmed that the decision to find such an estoppel is not a discretionary one, and outlined an approach to determining whether an intermediate appellate court should decide an issue that is not necessary for its decision. The Court of Appeal also commented on how sections 56-61 of the *Civil Procedure Act 2005* (NSW) bear upon the application of the Anshun test.

## Facts

In 1996, CG Maloney Pty Limited (CGM) sold a home unit at Bondi to Mr and Mrs Noon. The sale contract included a number of special conditions, including a form of 'buy-back' provision exercisable by option.

In 2006, CGM and a subsidiary, Bondi Beach Astra Village Pty Limited (Astra), brought proceedings in the Supreme Court against Mr Noon, seeking relief including a declaration that there existed a specifically enforceable agreement between CGM and Astra, or one of them, and Mr Noon for the buy-back of the unit for a consideration equal to the price at which Mr Noon and his then late wife had purchased it in 1996, and specific performance of that agreement. Alternatively, they sought an order that Mr Noon was estopped from denying the existence of that agreement, and a further alternative order that Mr Noon pay damages or equitable compensation.

Mr Noon died in 2007, and the action continued to be defended by his executors.

Smart AJ found that CGM's and Astra's claims in contract succeeded, made a declaration that there was a specifically enforceable agreement between CGM and Mr Noon and ordered specific performance of that agreement.<sup>2</sup> His Honour found it unnecessary to consider the causes of action based on conventional estoppel and equitable promissory estoppel. Mr Noon's executors appealed and the Court of Appeal overturned the decision, ordering that the orders of Smart AJ be set aside and the proceedings be dismissed. That judgment was delivered on 19 August 2010.<sup>3</sup>

On 22 December 2010, CGM commenced a further

proceeding against Mr Noon's executors. CGM sought declaratory and injunctive relief founded upon the buy-back provision. CGM's contention in the 2010 proceedings was that the provision gave it a contractual right to have Mr Noon's executors act in accordance with its terms, thereby affording a third party (Astra) the opportunity of exercising the buy-back option.

At first instance, Rein J dismissed the proceedings for three substantial reasons, one of which included the fact that the claims were precluded from being brought by the High Court's decision in Anshun.<sup>4</sup> In a separate judgment, his Honour also ordered CGM to pay the executors' costs of the estopped 2010 proceeding on an indemnity basis.<sup>5</sup> CGM appealed those decisions.

## Decision

The Court of Appeal (Campbell JA, Handley AJA and Tobias AJA agreeing) unanimously dismissed the appeal, with the principal judgment being delivered by Campbell JA, and Handley AJA giving some brief supplementary reasons.

Campbell JA observed (at [61]) that the test for Anshun estoppel was (quoting from the High Court in the Anshun decision) whether the matter sought to be relied upon in the second action 'was so relevant to the subject matter of the first action that it would have been unreasonable not to rely on it.' His Honour also noted (at [62]) a recent observation of Allsop P in *Champerslife Pty Ltd v Manojlovski*<sup>6</sup>, that the application of this test involves 'a value judgment to be made referable to the proper conduct of modern litigation'.

Although it was not necessary for his Honour to do so, (at [87]) Campbell JA explicitly recorded his agreement with the following passage from the judgment of Rein J, pertaining to what constitutes 'unreasonable' conduct by a litigant:

In recent times there has been an increased awareness of the importance of efficiency and proper use of court resources in the manner in which litigation is conducted, not only by the courts themselves (see *Aon Risk Services Australia Ltd v Australian National University* [2009] HCA 27 (2009) 239 CLR 175 at [96]-[102] per Gummow, Hayne, Crennan, Kiefel and Bell JJ and [133]-[134] per Heydon J) but by the legislature as well (see ss 56-61 of the *Civil Procedure Act 2005* (NSW) and *Dennis v Australian Broadcasting Corporation* [2008] NSWCA 37 per Spigelman CJ at [28]-[29], with whom Basten and Campbell JJA

concluded at [34] and [35]). The need for parties to bring before the court all of the matters relevant to their dispute is a requirement long ago recognised in *Henderson v Henderson* (1843) 3 Hare 100 67 ER 313 and reiterated in Anshun, and is an important part of the orderly and fair administration of justice.

One of CGM's grounds of appeal was that Rein J had erred in admitting and having regard to the written submissions of counsel for CGM in the earlier proceedings. This ground relied upon a statement made by Handley JA in *Champerslife*, that in determining whether an Anshun estoppel should be ordered, the relevant evidence was restricted to the pleadings and the reasons for judgment in the earlier proceeding.

That submission was also made to the primary judge. Rein J held that Handley JA's statement, read in context, was not intended to be so restrictive of the evidence admissible on an Anshun estoppel. The Court of Appeal agreed. Campbell JA said (at [68]) that the evidence relevant to an Anshun estoppel is wider than the evidence relevant to the existence of *res judicata* or issue estoppel (both of which are founded on the judgment in the earlier proceedings), and the court would be permitted to receive the submissions of counsel when considering whether an Anshun estoppel existed. Indeed, his Honour held that any facts that bear upon the reasonableness of the manner in which the litigation is conducted are relevant. Handley AJA, in his separate reasons, said (at [156]) that in *Champerslife* he should not have said that the admissible evidence is limited to the pleadings and reasons for judgment.

A submission was made by Mr Noon's executors that the decision of Rein J was a discretionary one, that could only be upset in accordance with the principles in *House v The King* (1936) 55 CLR 499. That submission was rejected. Campbell JA held (at [70]) that Anshun estoppel depended on the application of legal standards – namely, relevance and unreasonableness. While each of those legal standards involves evaluation and judgment, they do not involve the exercise of a discretion. It followed that the applicable standard for appellate review was not that in *House v The King* but that laid down in *Warren v Coombes*.<sup>7</sup>

On the question of whether an Anshun estoppel should have been found, CGM submitted that the 2006 proceedings sought an order for specific performance and the 2010 proceedings sought an injunction.

Campbell JA held (at [84]) that this involved too narrow an identification of the subject matter of the litigation. His Honour continued:

Both then, and now, CGM sought an order of the court, based in its equitable jurisdiction, that would compel the [executors] to perform [the buy-back] clause.

Campbell JA concluded (at [92]) that the primary judge rightly decided that the 2010 proceedings were barred by reason of an Anshun estoppel.

His Honour then noted (at [93]) that *Kuru v State of New South Wales*<sup>8</sup> required that the court consider whether it is desirable to go on and decide other questions raised on the appeal. His Honour recorded (at [100]-[101]) the reasons for and against the view that an intermediate appellate court should decide issues that are not necessary to its decision. The reasons for doing so are to minimise cost and delay in the event of a successful High Court appeal. The reasons against included that adding to the court's workload would delay judgments and the disposition of other matters; and that deciding unnecessary issues may result in the delivery of more obiter dicta, leading to prolongation of argument in later cases.

Campbell JA observed (at [102]) that both the reasons for and against are concerned to avoid:

... consequences that are detrimental to the administration of justice, [and] the court's task is to decide, concerning any particular case, which course is less detrimental.

Campbell JA regarded the other questions presented by this appeal as involving some complexity and concluded that those questions should not be decided.

By Mark Newton

### Endnotes

1. See *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589.
2. *Bondi Beach Astra Retirement Village Pty Ltd v Noon* [2009] NSWSC 461.
3. *Noon v Bondi Beach Astra Retirement Village Pty Ltd* [2010] NSWCA 202.
4. *CG Maloney Pty Ltd v Noon* [2011] NSWSC 242.
5. *CG Maloney Pty Ltd v Noon* [2011] NSWSC 256.
6. [2010] NSWCA 33 (2010) 75 NSWLR 245 at [3].
7. (1979) 142 CLR 531.
8. [2008] HCA 26 (2008) 236 CLR 1 at [12].

# Omissions and the Criminal Code

*Commonwealth DPP v Poniatowska* (2011) 282 ALR 200; (2011) 85 ALJR 1243; [2011] HCA 43

It is common for the decisions of courts to be reversed by the legislature after they have been delivered. It is less common for this to take place even before they have been delivered. Yet the legislature has got its retaliation in first in relation to this appeal.<sup>1</sup>

The enactment of section 66A of the *Social Security (Administration) Act 1999* (Cth) has rendered the majority decision of the High Court in *Poniatowska* of academic interest only. Notwithstanding that, the case is an important addition to the body of law concerning statutory interpretation, particularly in the context of offences under the *Criminal Code Act 1995* (Cth).

## Issue

The High Court's decision examined the elements of the offence of 'obtaining financial advantage', pursuant to section 135.2(1) of the Code.

Section 135.2(1) relevantly provides as follows:

- A person is guilty of an offence if:
- the person engages in conduct; and
  - as a result of that conduct, the person obtains a financial advantage for himself or herself from another person; and
  - (ab) the person knows or believes that he or she is not eligible to receive that financial advantage; and
  - (b) the other person is a Commonwealth entity.

Given that section 4.1 of the Code defines 'engage in conduct' as both 'do an act' or 'omit to perform an act', the issue in the High Court was whether the omission to perform an act that a person is *not under a legal obligation to perform* may be a physical element of the offence in section 135.2(1).

A majority of the High Court (French CJ, Gummow, Kiefel and Bell JJ) answered that question in the negative, holding that criminal liability does not attach to an omission, save the omission of an act that a person is under a legal obligation to perform.

## Background

The CDPP alleged that between 30 August 2005 and 30 May 2007, Ms Poniatowska failed to report employment income to Centrelink. Specifically, Poniatowska did not declare 17 payments received in connection with her previous employment, totalling

\$71,502. She subsequently received payments of the Parenting Payment Single (PPS) benefit from Centrelink to which she was either not entitled or only partially entitled, totalling \$20,162.58.

Poniatowska pleaded guilty before the Magistrate's Court of South Australia to 17 counts of obtaining financial advantage contrary to section 135.2(1) of the Code. She was convicted and on each charge sentenced to a 21 month suspended sentence.

She unsuccessfully appealed against the severity of the sentence to a single judge of the Supreme Court of South Australia. She appealed the order of the single judge to the full court of the Supreme Court of South Australia and filed a notice of appeal against conviction.

*The CDPP contended that there was no support in the Code for the conclusion that an omission to perform an act is a physical element of an offence only when a legal obligation to perform the act can be identified.*

The full court allowed the appeal and set aside Poniatowska's convictions.<sup>2</sup> Drawing on general law principles, the majority held that the omission to perform an act will only found liability under section 135.2(1) of the Code if it is the omission of an act that the person was under a duty to perform. The majority rejected the CDPP's argument that the obligation not to obtain a benefit was created by section 135.2(1) itself, finding that the omission is not identified in such a way that creates a duty to perform an act.

## Proceedings in the High Court

On appeal to the High Court, the CDPP complained that the majority of the full court erroneously took the common law as the starting point for their analysis and repeated the argument made below that where, as in the case of section 135.2(1), the law creating the offence provides that the offence may be committed by the omission to perform an act, no question of identifying a correlative obligation to do the act arises. The CDPP contended that there was no support in the Code for the conclusion that an omission to perform an act is a physical element of an offence only when a

legal obligation to perform the act can be identified.

The majority of the High Court endorsed the findings of the full court and held that criminal liability does not attach to an omission unless there is a legal obligation to perform an act. That common law principle, it was said, found expression in section 4.3 of the Code which essentially states that an omission to perform *an act* can only be a physical element if (a) the law creating the offence makes it so or (b) the law creating the offence impliedly provides that the offence is committed by an omission to perform an act that by law there is a duty to perform.

*The majority of the High Court endorsed the findings of the full court and held that criminal liability does not attach to an omission unless there is a legal obligation to perform an act.*

At paragraph [35] the majority opined:

If the law creating the offence does not criminalise the failure to do a thing and if that failure is not the breach of a duty imposed by the law, it is difficult to characterise the fact that a person does not do the thing as the omission of an act.

The CDPP maintained that the gravamen of the offence created by section 135.2(1) was the intentional failure to do something, which caused someone to receive the financial advantage.

However, the majority found that such analysis conflated the elements of conduct and the result of conduct, without identifying a *specific* omission to act. When pressed, the CDPP was unable to specify the act alleged to have been omitted and could not go beyond a nebulous assertion that Poniatowska failed to advise Centrelink of a payment of a commission received by her while she was in receipt of a PPS benefit. Hence, on the CDPP's analysis, the intentional omission of *any* act

that resulted in a financial advantage being conferred on a person could be a physical element of section 135.2(1) of the Code. But such an inexact proposition meant that section 135.2(1) did not make the omission of *an act* a physical element of the offence within the meaning of section 4.3(a) of the Code. Put another way, section 135.2(1) did not proscribe the omission of any *specified* act. On that basis, the CDPP's argument could not be sustained and the majority disposed of the appeal.

In a dissenting judgment, Heydon J endorsed the finding of the minority judge in the full court of the Supreme Court of South Australia. There Sulan J concluded that the intention of the legislature in enacting section 135.2(1) of the Code was to address the very issue identified by the majority. Accordingly His Honour held that section 135.2(1) did not require the court to look to a duty of disclosure beyond that provided in the section.

### Conclusion

But for the actions of the legislature, the majority's findings would have had far reaching consequences, potentially calling into question a significant number of social security fraud cases.

The enactment of section 66A of the *Social Security (Administration) Act* on 23 June 2011 creates a stand-alone obligation for a person to inform Centrelink of events or changes in circumstances that might affect the person's social security payments and, crucially for the government, commenced retrospectively on 20 March 2000. That provision creates the legal obligation sufficient to create a physical element under s 4.3(b) for the purposes of s 135.2(a).

**By Samuel Pararajasingham**

### Endnotes

1. Heydon J (dissenting) in *Commonwealth Director of Public Prosecutions v Poniatowska* (2011) 282 ALR 200 at 212.
2. *Poniatowska v Director of Public Prosecutions (Cth)* (2010) 107 SASR 578.

# Restitution, illegality and assignment

*Equuscorp Pty Ltd v Haxton; Equuscorp Pty Ltd v Bassat; Equuscorp Pty Ltd v Cunningham's Warehouse Sales Pty Ltd* [2012] HCA 7 (8 March 2012)

## Background

The respondents in the appeals were investors in agribusiness schemes. The schemes were structured so that the investors' contribution to the management of the agricultural enterprise was tax deductible against their non-farming income. When the investors were offered an interest in the schemes, a valid prospectus had not been issued in contravention of the relevant Companies Code, so that the schemes were illegal and the loan agreements unenforceable.

Each investor funded their investment by way of a loan from Rural Finance Pty Ltd (Rural), the directors of which were the promoters of the schemes. The loan agreements were secured by charges against the investors' interest in the farms and contained non-recourse provisions such that they were (subject to initial upfront payments) repayable from the proceeds of the farm business.

The agribusinesses were not successful. The investors failed to make initial payments to Rural. Before the scheme collapsed, Rural and other members of the scheme in turn granted charges to Equuscorp Pty Ltd (Equuscorp) to secure further loans to the scheme.

Equuscorp then purchased the loan agreements between Rural and the investors, and commenced proceedings against the investors seeking recovery of the loan amounts in reliance on a deed of assignment of the benefit of the loan agreements. In defence of the proceedings, the investors contended that:

- the loan agreements were unenforceable for illegality;
- restitution of the loan sums was not an available remedy because, where the loans contained non-recourse provisions, each investor had not been enriched except to the extent of receiving any tax benefits from the schemes, and thereby in all the circumstances it would not be unjust for the investors to retain the loan balances; and
- the causes of action in restitution were not assignable and in any event had not been assigned on a proper construction of the deed.

In the Victorian Supreme Court Byrne J held that the loan agreements were unenforceable, the causes of action in restitution were properly assigned to Equuscorp, but that restitution should not be ordered where the loan

agreements contained a non-recourse provision.<sup>1</sup>

The Victorian Court of Appeal held that the restitution claims were assignable, found that the causes of action in restitution were not properly assigned, and agreed that in any event restitution should not be ordered.<sup>2</sup>

Equuscorp appealed to the High Court. The primary question determined in the High Court was whether restitution was available as a consequence of the illegality. By Notice of Contention the investors contended that the restitution claims were not assignable.<sup>3</sup>

## Illegality and its consequences

Equuscorp relied on failure of consideration as the basis for its claim for restitution of moneys had and received. Its argument depended on the unenforceability of the loan agreements as a consequence of what it accepted was the illegality of the schemes of which they were a part. The state of affairs on which Rural entered into the loan agreements, namely that the investors' obligations to repay the loan sums were enforceable, was removed by the illegality.

The majority (French CJ, Crennan and Kiefel JJ; Gummow and Bell JJ) observed that failure of consideration may provide a vitiating factor founding a claim for unjust enrichment in cases of illegality. Their Honours held that the relevant consideration in illegality cases does not depend on whether the illegality gave rise to a total failure of consideration,<sup>4</sup> but rather whether an order for restitution is consistent with the policy of the common law in making an agreement unenforceable for furtherance of an illegal purpose.<sup>5</sup> French CJ, Crennan and Kiefel JJ held:<sup>6</sup>

The outcome of a restitutionary claim for benefits received under a contract which is unenforceable for illegality, will depend upon whether it would be unjust for the recipient of a benefit under the contract to retain that benefit. There is no one-size-fits-all answer to the question of recoverability. As with the question of recoverability under a contract affected by illegality the outcome of the claim will depend upon the scope and purpose of the relevant statute. The central policy consideration at stake, as this Court said in *Miller*,<sup>7</sup> is the coherence of the law. In that context it will be relevant that the statutory purpose is protective of a class of persons from whom the claimant seeks recovery. Also relevant will be the position of the claimant and whether it is an innocent party or involved in the illegality.



Their Honours considered three intermediate appellate decisions in which restitution was granted in relation to sums paid under loan agreements rendered unenforceable for the same reasons as in the present case,<sup>8</sup> and doubted the conclusion in those cases that restitution was available because there was nothing in the Companies Code prohibition that suggested an intention to exclude restitutionary relief.<sup>9</sup> In the present case, the absence of an express preclusion of relief did not prevent an implied preclusion in appropriate cases. Conversely, Gummow and Bell JJ observed that contractual and restitutionary issues did not run together, so that when a contract failed for illegality, it did not automatically follow that restitution would be denied.<sup>10</sup>

According to the majority, the approach to claims for restitution by reason of illegality following *Miller v Miller*<sup>11</sup> was two-staged: first, the court asks the question whether the legislative purpose or policy of the statute giving rise to the illegality would be frustrated if an agreement made to further the illegality was enforceable; and second, the court asks the same question in relation to whether it would be unjust for the recipient to retain the benefit of an illegal contract.<sup>12</sup> All of the members of the court accepted that the answer to the first question did not necessarily give the answer to the second.

The majority held that restitution was not available in the circumstances of this case. The involvement of Rural in the illegal schemes meant that the failure of consideration was a consequence of the lender's participation in furthering their illegal purpose, so that Rural could not, consistently with the policy of the Companies Code, have the right to recover the money.<sup>13</sup>

Gummow and Bell JJ added that to deny restitution in the present case served a further policy object in that it let the benefit fall on the investors, being the class of persons that the Companies Code provisions were intended to protect.<sup>14</sup>

Heydon J dissented. That dissent was based on two propositions:

- that the policy or purpose of the prohibitive statute must be determined by reference to the words used in the statute, the focus of the inquiry being the seriousness of the illegality resulting from the

statute and whether the sanctions imposed in relation to it are proportionate to that seriousness;<sup>15</sup> and

- that legislation is not to be construed as cutting down or destroying property rights without clear words.<sup>16</sup>

Applying those propositions, Heydon J considered that the Companies Code did not prevent Rural from recovering the loans sums by way of restitution, because it neither expressly nor impliedly provided for such a consequence, and a construction that gave rise to such an implication would deprive Rural of its property rights in this respect. The consequences of contravention of the Companies Code provisions, namely criminal sanctions and unenforceability of the loan agreements, were sufficiently proportionate to the breach so that it was not consistent with the policy of the statute to preclude restitutionary relief.<sup>17</sup> His Honour then went on to determine that it was in the circumstances just for restitution to be granted in the present case.<sup>18</sup>

### **Were the claims for restitution assignable and were they assigned?**

French CJ, Crennan and Kiefel JJ then went on to consider whether, had Rural possessed the right to claim restitution for money had and received, that claim would be assignable. The analysis turned on whether a claim in unjust enrichment was a "bare right of action" incapable of assignment, and whether the assignment can be supported by a legitimate commercial interest in the claim.<sup>19</sup>

Their Honours held that in the present case, where the unjust factor involved the failure of contractual rights, taking assignment of those contractual rights involves a legitimate commercial interest in acquiring the accompanying restitutionary rights, should the contract be unenforceable. Accordingly, while difficulties in recovering monies on the unjust enrichment claims were acknowledged, the claims were held to be assignable.<sup>20</sup>

However, their Honours rejected Equuscorp's submission that the Deed of Assignment had effectively assigned the restitutionary claims, because on the proper construction of the Deed when read with s 199 of the *Property Law Act 1974* (Qld),<sup>21</sup> all that was assigned was the contractual rights under the loan agreements and

the remedies available to enforce them. That did not include claims in unjust enrichment available because the contractual rights had failed.<sup>22</sup>

Gummow, Heydon and Bell JJ agreed that the restitutionary claims were capable of assignment, because Equuscorp had a genuine interest in the claims arising out of its charge over the assets of Rural.<sup>23</sup>

However, their Honours considered that the restitutionary claims had been assigned, holding that the words “other remedies” in the Deed of Assignment were apt to engage actions for money had and received arising out of the failure of the loan agreements. Their Honours observed that value was given for the entirety of the available remedies arising from the loan agreements, such that Equuscorp took title to the choses in action when they accrued at the time that the investors pleaded illegality as a defence.<sup>24</sup>

### Observations

Three observations may be made in relation to the High Court’s decision in *Equuscorp*.

First, the approach adopted by all of the members of the court highlights that, in cases in which illegality provides both the unjust factor<sup>25</sup> giving rise to an entitlement to restitution, and a potential defence to an order for restitution, the proper construction of the legislation and the purpose of that legislation is central to the determination of whether restitution should be ordered. It is by no means certain, until the statute and its purpose is investigated, that restitution will follow where a contract is unenforceable for illegality.

Second, when enquiring into the effect of illegality on the availability for restitutionary relief, it is difficult to avoid notions of fault. Each of the members of the court considered to varying extents the relative fault of the investors and Rural when determining whether it was unjust to order restitution. Fault, and especially whether the parties are *in pari delicto*,<sup>26</sup> is not a generally accepted basis for refusing or granting restitutionary relief. Rather, the court proceeds by recognition of established exceptions to illegality, such as whether a party is a member of a class the legislation is intended to protect.<sup>27</sup> There is a risk, in considering the final limb of the unjust enrichment enquiry in illegality cases, of letting fault creep in through the back door.

Third, the court split equally on the reasons why the

restitution claims were assignable. Leaving aside whether the reasoning of Gummow, Heydon and Bell JJ might be more logically supportable than that of the balance of the court, it is clear that further consideration by the court will be required to determine whether ‘stand alone’ claims for restitution, namely those concerning payments not associated with a pre-existing relationship or property right, are assignable.

### Endnotes

1. *Equuscorp Pty Ltd v Bassat* (2007) 216 FLR 1 at 26-30, 33, 37-39.
2. *Haxton v Equuscorp Pty Ltd* (2010) 265 ALR 336 at 356-385, 386-397 per Dodds-Streton JA, Ashley JA and Neave JA agreeing at 338-340.
3. The respondents also contended that the claim for restitution could not be made when the primary liability to repay the money under the loan agreement was statute barred under s 14(1)(a) of the *Limitation Act 1969* (NSW).
4. See also at [136]-[137] per Heydon J.
5. French CJ, Crennan and Kiefel JJ at [33]; Gummow and Bell JJ at [103], [112], observing in the latter paragraph that the concept of total failure of consideration applies only where the substratum of the relationship is removed “without attributable blame” (*Muschinski v Dodds* (1985) 160 CLR 583 at 620 per Deane J).
6. At [34].
7. *Miller v Miller* (2011) 242 CLR 446 at 454 [15].
8. *Hurst v Vestcorp Ltd* (1988) 12 NSWLR 394; *Australian Breeders Co-operative Society Ltd v Jones* (1997) 150 ALR 488; *Amadio Pty Ltd v Henderson* (1998) 81 FCR 149.
9. At [40]-[44], see also [95]-[96] per Gummow and Bell JJ.
10. At [101]-[102].
11. Above, n vii.
12. At [33] per French CJ, Crennan and Kiefel JJ, [96], [100] per Gummow and Bell JJ.
13. At [45], Gummow and Bell JJ agreeing at [111].
14. At [108]-[109], see also French, Crennan and Kiefel JJ at [45].
15. At [122].
16. At [120]-[121].
17. At [127]-[133].
18. At [134]-[149].
19. *Trendtex Trading Corporation v Credit Suisse* [1982] AC 679.
20. At [53].
21. Queensland law being the proper law of the asset sale agreement and held to govern the assignment, see [70] per Gummow and Bell JJ.
22. At [64].
23. At [53] per Gummow and Bell JJ, [156] per Heydon J.
24. At [75]-[76] per Gummow and Bell JJ, [160] per Heydon J.
25. The unjust factor in this case was failure of consideration, but illegality was the reason for that failure.
26. See [45] per French CJ, Crennan and Kiefel JJ.
27. See *Fitzgerald v FJ Leonhardt Pty Ltd* (1997) 189 CLR 215 at 229 per Gummow and McHugh JJ; *Nelson v Nelson* (1995) 184 CLR 538 at 604-605, 613 per McHugh J; W Swadling ‘The role of illegality in the English law of unjust enrichment’ in D Johnston & R Zimmerman (eds) *Unjustified Enrichment: Key issues in Comparative Perspective* CUP, Cambridge, 2002, 289 at 302.

# Surveillance and reasonable expectations of privacy

*United States v Jones* 565 US (2012)

The Fourth Amendment provides that the 'right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated'. The 5-4 decision in *US v Jones* is the latest occasion on which the US Supreme Court has considered the implications of the 18<sup>th</sup> century text for the warrantless use by law enforcement officials of modern surveillance technology.

### The facts

In 2005 a warrant was obtained to install a GPS tracking device on a Jeep Grand Cherokee used by Jones, who was suspected of participating in a conspiracy to traffic drugs.

The warrant authorised installation of the device in the District of Columbia within 10 days. As it happened, the device was installed on the 11<sup>th</sup> day and outside the District.

The voluminous location data generated over a four-week period by the device was admitted at trial to link Jones with the alleged conspirators' stash house.

The question for the Supreme Court was whether the warrantless use of the GPS device violated the Fourth Amendment, thus requiring the whole of the GPS evidence to have been suppressed at trial.

### Fourth Amendment jurisprudence

The text of the Fourth Amendment reflects the context in which it was drafted: a late 18<sup>th</sup> century world in which the sanctity of a man's *property* as opposed to *privacy* was the interest considered to require protection from governmental interference.

Until the latter half of the 20<sup>th</sup> century, Fourth Amendment jurisprudence was tied to common law trespass, the implication being that the Fourth could only be engaged where there was usurpation of a person's property (at a minimum requiring physical interference).<sup>1</sup>

*Katz v US* 389 US 347 at 351 (1967) marked a point of departure from that exclusively property-based approach, decoupling the protection of the Fourth Amendment from a requirement for physical intrusion on constitutionally protected spaces. In *Katz*, the attachment of an eavesdropping device to a public telephone booth violated a person's 'reasonable

expectation of privacy' (at 360). The Fourth Amendment was now understood to protect 'people, not places'.

### The decision

All members of the court were of the opinion that the GPS data in the present case was obtained in breach of the Fourth Amendment. The Justices split on the reason the Fourth was engaged.

For the majority, the conduct amounted to a physical intrusion of constitutionally protected property. By itself, that intrusion was sufficient to attract the Fourth (the *trespassory* analysis).

For the minority, the Fourth was not engaged because of trespassory analysis, but rather because the conduct violated a person's reasonable expectations of privacy (the *Katz* analysis).

### The opinion of the court

The majority opinion, delivered by Scalia J, held that the installation and use of the GPS device involved the government physically occupying private property for the purpose of obtaining information. It thereby constituted a constitutional 'search'. As the conduct 'would have been considered a "search" within the meaning of the Fourth Amendment when it was adopted' (at 4), it was conduct to which the Fourth continued to attach: '[a]t bottom, we must "assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted" (at 5, citing *Kyllo v US* at 34).

In the majority's opinion, whether the Fourth applies to any particular conduct calls for a two-stage inquiry. The first question is directed to a trespassory analysis, namely whether an unlawful physical intrusion of constitutionally protected property has occurred. If there is a trespass in that sense (as the majority found there was here), the Fourth Amendment is engaged and the inquiry is at an end. Only if there is no physical intrusion does the occasion for the application of the *Katz* formulation arise.

### The minority opinion

Justice Alito, with whom Ginsburg, Breyer and Kagan JJ joined, delivered a concurring opinion which agreed that the Fourth Amendment continues to preserve that

degree of privacy against government that existed when it was adopted (at 3), but disagreed with the majority as to whether trespassory analysis had any utility on the present facts, or (perhaps) at all for any case involving modern surveillance technology.

The minority considered it 'highly artificial' to characterise the attachment or use (singly or combined) of the GPS device as a 'search' on the basis of trespassory analysis (at 2).

On the minority's analysis, whether the warrantless surveillance violated the Fourth depended only upon the application of the *Katz* reasonable-expectation-of-privacy formulation, reasoning that:

...the use of longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy. For such offenses, society's expectation has been that law enforcement agents and others would not – and indeed, in the main, simply could not – secretly monitor and catalogue every single movement of an individual's car for a very long period (at 13).

### Implications

In the wake of the decision in *US v Jones*, the general counsel of the FBI announced that the ruling had prompted the agency to turn off around 3,000 tracking devices.<sup>2</sup>

However, modern surveillance technology and methods increasingly do not require any physical interference with property in order to generate data of use to law enforcement authorities. For example, a case currently before the New Jersey Supreme Court involves the use of location information by police that was obtained from a defendant's cell phone provider.<sup>3</sup>

Given the technical basis on which the majority decided *US v Jones*, the opinion of the minority is likely to be of greater significance.

However, the minority's analysis may confuse more than enlighten. The passage extracted above raises at least the following difficulties.

First, what is meant by the qualification 'most offenses'? For example, is it suggested that for some offenses – perhaps terrorism related – society's expectation of law enforcement officers is that they would and could undertake extensive monitoring of a suspect? The minority simply gestures at a distinction with no

analysis of its substance nor its rationale.

Second, what factors guide the assessment of what might be considered a permissible period of tracking before the surveillance becomes a 'search' for the purposes of the Fourth? The minority indicated that 'the line was surely crossed before the 4-week mark' (at 13) but refused to elaborate not only on when precisely the line was crossed, but even what considerations would guide the assessment.

Third, as to what might be 'reasonable' expectations of privacy, the minority acknowledges that the test 'rests on the assumption that this hypothetical reasonable person has a well-developed and stable set of privacy expectations' (a fiction at best) and further states that 'technology can change those expectations' (at 10). Again, the rationale for the assessment of reasonableness is lacking: the minority appears to equate reasonableness with what a reasonable person knows is technologically possible, not the considerations which may inform an assessment of reasonable use of technology.

Fourth and finally, given that constitutionally-protected privacy has been decoupled from *property* considerations, what is the continuing relevance of the *secrecy* of the information to the availability of the Fourth Amendment?<sup>4</sup> Put another way, in what circumstances is it relevant that the person under surveillance has disclosed to a third person the information which is also tracked without a warrant by law-enforcement authorities? It is an issue of increasing significance in the digital age. The minority's opinion is utterly silent on the topic, despite the finding that public information (for example, information concerning a person's presence on public streets), may nonetheless attract constitutional protection.

### The concurring opinion of Sotomayor J

In her concurring opinion, Sotomayor J joined with the court's opinion as delivered by Scalia J. However her Honour also commented on considerations relevant to the application of the *Katz* formulation where there is not also an intrusion on property.

There is in the concurrence of Sotomayor J what is absent from that of the minority, namely, an attempt to explain the theoretical considerations that ought to guide an assessment of what might be considered

'reasonable expectations of privacy'. Sotomayor J roots those considerations in the democratic foundations that underpin the relationship between citizen and government (at 4), specifically the extent to which people:

reasonably expect that their movements will be recorded and aggregated in a manner that enables the government to ascertain, more or less at will, their political and religious beliefs, sexual habits and so on (at 4);

and consider it appropriate

to entrust to the Executive, in the absence of any oversight from a coordinate branch, a tool so amenable to misuse, especially in light of the Fourth Amendment's goal to curb arbitrary exercises of police power to and prevent 'a too permeating police surveillance' (at 4).

### Conclusion

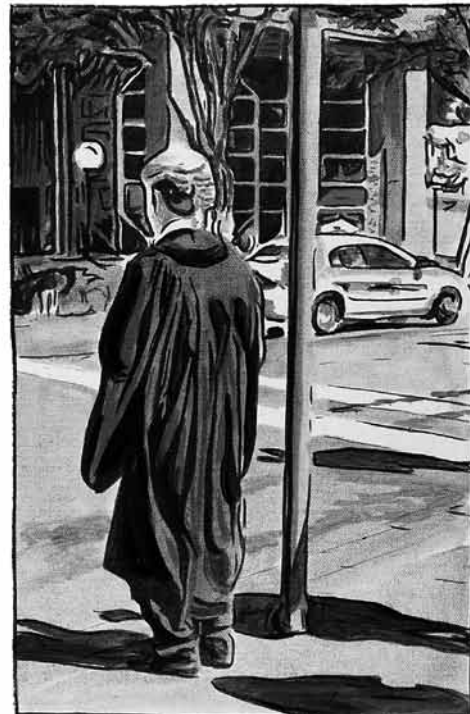
If the points made by Sotomayor J are indeed guiding principles for the courts when undertaking a *Katz* analysis, they do not bode well for the admissibility of data collected from the warrantless use of a gamut of modern surveillance technologies or methods, especially if privacy is decoupled from a requirement of secrecy for the purposes of the Fourth Amendment.

However, the guidance remains that of a single Justice alone. The question of the greatest practical importance concerning the Fourth Amendment, namely what considerations govern the assessment of what is a reasonable expectation of privacy, awaits yet another case.

By Fiona Roughley

### Endnotes

1. *Kyllo v US* 533 US 27 at 31 (2001).
2. Julia Angwin, 'FBI turns off thousands of GPS devices after Supreme Court ruling', *The Wall Street Journal* (25 February 2012).
3. *State of New Jersey v Earls* (Docket No. 68,765; Appeal No. A-53-11).
4. A point raised in the concurring opinion of Sotomayor J at 5-6.



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## The rise and fall of the king of torts

By Geoff Watson SC

American plaintiffs' lawyers are a very special breed. This is the story of one of the most special – the man they called the King of Torts, 'Dickie' Scruggs. From nothing in the early 1980s, Scruggs was a billionaire by the time he was gaoled in 2008 for attempting to bribe judges.

Richard Furlow Scruggs was born in 1946 and raised by a single mother in a small, rough working class town of Pascagoula, on the Gulf coast in Mississippi. The only local business of note was a shipyard which had been busy during the war, but declining ever after.

Scruggs was a promising student and enrolled at the venerable University of Mississippi – 'Ole Miss' as it is known. It seems that everybody in this story went to Ole Miss.<sup>1</sup>

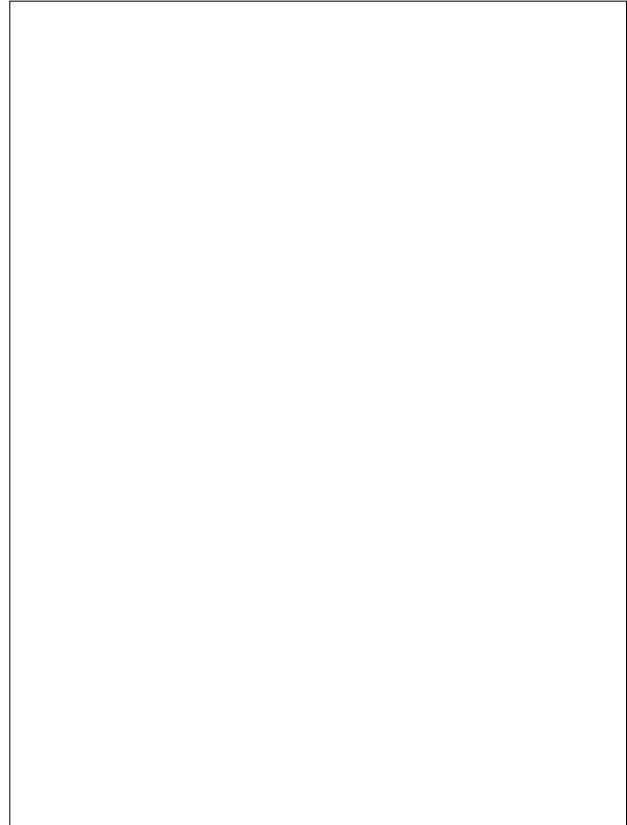
After college Scruggs joined the Navy and served with distinction as a pilot. He then returned to Ole Miss and took a law degree. He worked for an establishment firm in the capital, Jackson. He was restless and went to the senior partner to request a raise. He was terminated on the spot.

This was 1980. Scruggs was recently married and had no capital. He travelled back to his old home of Pascagoula, and set up a one man law shop in unpromising circumstances.

But, as mentioned above, Pascagoula had been the home to a naval shipyard during the war. Asbestos had been widely used insulating the warships. Locals were exhibiting asbestos-related diseases (or, at least, symptoms which were not inconsistent with asbestos exposure). Scruggs sought to take advantage of this, and set up a free medical consultation service, enlisting a large number of clients for suits against the relevant asbestos companies.

This is where evidence of Dickie Scruggs' genius for the business deal emerged.

Scruggs issued his claims in the friendly state jurisdiction; previous claims had been commenced in the more clinical federal courts. Then, because individual damages suits were costly to run, Scruggs figured out a way to bring hundreds of suits together in representative actions, so that particular common issues could be resolved. In the face of this asbestos companies capitulated, agreeing to mass settlements. Scruggs, rewarded on a contingency basis, made tens



Richard 'Dickie' Scruggs is shown April 19, 2006, at his office in Moss Point, Mississippi. AP Photo/Nicole LaCour Young.

of millions of dollars in only a few years. From nothing in 1980, Scruggs soon owned a Lear jet, a beachfront mansion, drove a Bentley and sailed a magnificent yacht.

With this kind of money Scruggs was able to wield a lot of power in Mississippi. Part of this power came from his political connections, which he sought to improve and entrench. Scruggs was nominally associated with the Democratic Party (most plaintiffs' lawyers are), but he had the wisdom and connections to work both sides. His brother-in-law was Senator Trent Lott, the leader of the Republican Party in the Senate and a very powerful figure in conservative politics. Lott was especially helpful as, for a while, he was the chairman of the powerful Senate Committee controlling federal judicial appointments.

As a trial lawyer Scruggs knew that access to practical power lay in the hands of the judges. State judges in Mississippi are elected. Scruggs set about using his money and influence to make certain that the

appropriate judges were elected. Scruggs called these 'magic jurisdictions'. These were places where his clients could recover surprisingly favourable results. Manipulating judicial appointments and judicial outcomes like this in Australia would be called criminal corruption; in Mississippi you boast about it. Scruggs said this at a public forum in 2002:

What I call the 'magic jurisdiction' ... [is] where the judiciary is elected with verdict money ... it's almost impossible to get a fair trial if you're a defendant in some of these places. ... The cases are not won in the courtroom. They're won on the back roads long before the case goes to trial. Any lawyer fresh out of law school can walk out in there and win the case, so it doesn't matter what the evidence or law is.

To get the right kind of judges elected, Scruggs and others combined to donate significant sums to the election campaign of judges who were understood to be sympathetic to plaintiffs' claims. This sets up a circle: the same judge could expect to receive more funding for re-election having demonstrated appropriate sympathies.

*Scruggs knew that access to practical power lay in the hands of the judges. State judges in Mississippi are elected. Scruggs set about using his money and influence to make certain that the appropriate judges were elected.*

Eventually restrictions were placed upon the amounts of money which could be donated to a judge's election campaign. Scruggs and another prominent multi-millionaire plaintiffs' lawyer, Paul Minor, were able to get around restrictions by guaranteeing personal loans for judicial officers. These were so-called 'balloon notes', where a sum was advanced to the judge for a fixed term on the surety of the lawyer, and the interest was only payable at the end of a six or 12 month term. Scruggs and Minor would make the lump sum interest payments when due. The loan was then renewed. If Scruggs or Minor did not make the payment, the judge would be immediately liable for the lot. The practical effect that this might have in focussing a judge's mind while making a difficult decision is obvious. Minor was charged, convicted and sentenced to 11 years gaol. Some judges were removed and gaoled. Scruggs,

whose role was no different to that of Minor, was never charged. Many have said that the differential treatment was due to Scruggs enjoying better political connections on the conservative side.

These were great times for Mississippi trial lawyers. Tens and hundreds of millions of dollars were made through a series of mass tort suits, including more asbestos cases, class actions over medical treatments drugs, motor accidents and medical malpractice suits. Enormous awards of exemplary damages were commonplace. Scruggs even worked out a way to make money out of government work. He went to the attorney-general, Mike Moore – also Pascagoula born and bred, and Scruggs' good friend and classmate from Ole Miss – with an idea that Scruggs be appointed a 'specialist assistant attorney-general', and that Scruggs would prosecute damages suits in the name of Mississippi against the asbestos companies. Scruggs was to be rewarded with a 25 per cent contingency fee plus a reimbursement of his expenses. In no time at all Scruggs was able to secure settlements of tens of millions of dollars.

This relationship with government became Scruggs' template for milking Big Tobacco.

Suits against Big Tobacco in the early 1990s had failed, largely upon the basis that the injury had come about through the claimants' choice to smoke. Two small time Mississippi lawyers, Mike and Pauline Lewis, came up with an idea: the State of Mississippi had nothing to do with the individuals' choice to smoke, yet was liable for huge sums for the treatment and care of those struck ill by tobacco-related illnesses – why shouldn't Mississippi sue Big Tobacco? The idea was taken to Attorney-General Moore, who liked it, and referred it to his old mate, Dickie Scruggs.

Scruggs saw the potential. He put together a small team of trial lawyers who would pursue the action for Mississippi in Mississippi. In some ways the lawyers were more like entrepreneurs investing risk capital. A suit was commenced. Selection of the appropriate forum was obviously important. This was the largest legal action in Mississippi history, crushing in detail, and raising complex tort and commercial issues. It was only natural then that Scruggs and Moore decided to issue the claim in the one-man jurisdiction of their Ole Miss classmate, Judge William Myers, sitting in the Chancery Court in Pascagoula. The Chancery Court



Mississippi Attorney General Michael Moore, second from right, gestures while talking to reporters in Washington Wednesday June 18, 1997 after meeting with tobacco company negotiators. AP Photo/Greg Gibson.

did not deal with commercial cases or torts, and Judge Myers usually dealt with divorce cases. When Attorney-General Moore was asked about this choice he responded: 'Well, I say that we made sure that we were going to have a fair playing field. When the tobacco industry came to Mississippi, and they saw that we filed the law suit in my home town ... they knew that they had a challenge on their hands.' I am sure that is right.

*Dickie Scruggs' share of the fees has been estimated at \$1 billion.*

Scruggs and his cohort then struck gold when a disaffected scientist employed by Brown and Williamson, Jeffrey Wigand, came forward with information. Scruggs put Wigand on his payroll and Wigand supplied 1,500 pages of confidential documents which belonged to his former employer. He also offered to give damning oral evidence contradicting Big Tobacco's statements that it was unaware that nicotine was addictive.

Of course there was great controversy about the entitlement to use Wigand's documents or oral testimony. Brown and Williamson claimed confidentiality via a contract with Wigand executed

in Kentucky. Despite injunctions in place in Kentucky, Judge Myers favoured the arguments made by Scruggs and Moore and permitted the documents to be used and Wigand to be deposed.

Once Wigand's evidence was out it did not matter whether it was admissible or even whether it was accurate. (If you like, you can see a semi-accurate account in the movie – *The Insider*. Russell Crowe plays Jeffrey Wigand and Scruggs – who wanted to appear as himself – is played by Colm Feore.) Sensational publicity was generated, and Scruggs became a national figure.

The Mississippi law suit grew as other states joined in the suit. All of sudden the claim was worth hundreds of billions of dollars.

In the end there was a mass settlement in which the tobacco companies agreed to pay \$368 billion. There were ancillary terms which remain controversial. The lawyers' fees were crazy. The *Seattle Times* estimated total fees were \$14.7 billion<sup>2</sup>. Dickie Scruggs' share of the fees has been estimated at \$1 billion.

That is not all – this was the time when hundreds of millions of dollars were made by lawyers in the relatively impoverished but potentially 'magic' State of



Mississippi. When Hurricane Katrina hit, Scruggs set up a legal group designed to take on the big insurance companies. His method was familiar: he was able to acquire evidence from 'insiders' – in this case, two sisters who had worked for State Farm Insurance and who said that claims were denied upon evidence doctored to show that the damage was due to wind (for which there was no coverage) as opposed to rain (for which there was coverage). Although it was more difficult this time, Scruggs and his group were able to obtain a variety of favourable rulings which facilitated mass settlements and massive fees.

Scruggs lived up to his billionaire status. He owned several mansions. He owned two jets. He owned four fully-manned ocean-going luxury yachts, which he located at various glamorous parts of the world. He tired of the law, and set his sights on an ambassadorship to Ecuador. He took Spanish lessons and purchased a third jet, a 16 seat Gulfstream, which had the capacity to fly from Mississippi to Ecuador without refuelling. He donated \$50 million to Ole Miss. He was generous, but he could afford to be. Times were good.

So how did the lawyers respond to their windfall? Like you would expect they would: access to this much money only intensified their greed. It was just like some crummy plot in a Hollywood movie – at first the treasure-seekers hunt cooperatively for the treasure, but when they find it they turn on each other.

This was the beginning of Scruggs' decline.

Scruggs had a history of dudding his co-venturers, and was involved in litigation with many former partners over the division of fees. Of these many claims, three become significant – separate suits by Alwyn Luckey Jr, 'Bobs' Wilson, and 'Johnny' Jones. Luckey's claim related to asbestos payouts; Wilson's related to tobacco; Jones' claim was for Hurricane Katrina money. Although Scruggs could have paid out the money owed without flinching, he decided as a matter of Southern pride to fight them hard, and retained what seemed to be a small army of lawyers, taking every possible point.

Eventually, after years of delay, Alwyn Luckey's suit came to trial. In fact, it was a straightforward claim – Luckey had owned a share of the business. The trial judge, Judge Jerry Davis, found that Luckey was entitled to nearly \$18 million. A sum like that was easily affordable to Scruggs, but being ordered to pay it was a terrible

blow to his ego. Judge Davis was widely respected as fair, reasonable and incorruptible – and the lesson Scruggs seems to have taken away from the litigation was that he would never again make the mistake of having his proceedings determined by a judge who was fair, reasonable and uncorrupted.

So in the proceedings brought by Johnny Jones, Scruggs sought to influence a decision to be made by the presiding judge, Judge Henry Lackey. Scruggs organised for one young lawyer, Tim Balducci, who was friendly with Lackey, to approach the judge in chambers seeking favourable consideration. Lackey was appalled, stunned, but said nothing to Balducci; he contacted the FBI. Lackey agreed to allow his phone to be taped, and to wear a wire during future meetings with Balducci. Over time Balducci paid Lackey \$30,000 – all reimbursed by Scruggs. After one taped meeting where Balducci offered Lackey another \$10,000, the

*... the lesson Scruggs seems to have taken away from the litigation was that he would never again make the mistake of having his proceedings determined by a judge who was fair, reasonable and uncorrupted.*

FBI stepped in, arrested Balducci and showed him the evidence already collected. Balducci rolled-over and agreed to wear a wire during his conversations with Scruggs and other members of the Scruggs firm.

The tapes made by Balducci of his conversation with Scruggs and his two partners, Sid Backstrom and his son Zach Scruggs, clearly proved the conspiracy. But Scruggs and his partners denied any wrongdoing and retained top-level defence lawyers. The defence was comprehensive. At first they said they did not do it. When the tapes emerged they claimed entrapment. They also said it was 'prosecutorial abuse'.

Balducci then added to Scruggs' woes – he volunteered evidence to the FBI of another attempt by Scruggs to influence a judge. The story was that the claim brought by Bobs Wilson had proceeded along to the point where it was referred to a 'special master'. The special master reported to the court that Scruggs owed Wilson \$5 million. However, the special master's report had to be considered before being adopted

by the court. The judge considering the report was Judge 'Bobby' DeLaughter<sup>3</sup>. It was well known that DeLaughter wanted a federal appointment, so Scruggs' organised intermediaries to tell DeLaughter that he might be favourably considered, and during this same time that the special master's report was under review, DeLaughter received a telephone call from Scruggs' brother-in-law, Senator Lott, enquiring whether he would be interested in a federal appointment. In those circumstances it was unsurprising that Judge DeLaughter began to recognise the strengths in Scruggs' arguments; he rejected the special master's report and dismissed Jones' claim altogether. The FBI charged Scruggs, DeLaughter and several others with further offences.

Other witnesses began to crumble and agreed to give evidence against Scruggs. DeLaughter eventually confessed. It was all over: Scruggs and his partners succumbed and entered guilty pleas. Scruggs was sentenced to five years for attempting to bribe Judge Lackey and a further five years for attempting to influence Judge DeLaughter. His partner Sid

*If ever you wanted a good argument against electing judicial officers, the nonsense that goes on in Mississippi is enough.*

Backstrom was sentenced to 28 months and Zach Scruggs to 14 months. Many of the others involved received sentences, usually for about two years. Bobby DeLaughter was removed as a judge and sentenced to 18 months gaol.

What came out of all of this? At a personal level, Scruggs has been able to retain most of his fortune (although many of his former partners are still attempting to recover their share of the treasure). Zach Scruggs maintains that he is innocent and only pleaded guilty for fear of the reputation of the judge as a heavy sentencer. He wants his conviction set aside. Several judges were removed and several lawyers have been struck off. In some cases their fortunes had already been made, and they retired as wealthy men.

At a more general level there has been a massive change to Mississippi's 'magic jurisdictions'. The big business and insurance companies fought back, and provided massive funding for conservative judicial candidates.

They succeeded. The backlash was so severe that in a four-year period the Mississippi Court of Appeals overturned 88 per cent of jury verdicts favourable to plaintiffs but overturned no decisions favourable to defendants. If ever you wanted a good argument against electing judicial officers, the nonsense that goes on in Mississippi is enough.

Finally, the settlement struck with Big Tobacco. Although it involved a very large payment of money there were, as I said, some controversial terms.<sup>4</sup> These included protecting the major tobacco companies from class actions. Some analysts suggest this has only made Big Tobacco even more powerful by concentrating industry control within the hands of a few large companies, at the expense of smaller companies, and creating a cartel. And although the damages sound large, they are not really: the damages are being paid out of an increased price of cigarettes – so current and future smokers will slowly pay for the settlement, puff by puff. The evidence is that the damages have not been spent wisely; there have been no massive anti-smoking campaigns and no substantial reduction in smoking rates. My personal favourite is that one of the states used some of the damages to up-grade and enlarge its tobacco handling and storage infrastructure.

#### Endnotes

1. If this story starts to read like a John Grisham novel, bear in mind that Grisham and Scruggs were Ole Miss classmates, and Grisham started life as a 'trial lawyer' in Mississippi.
2. This idea of retaining private law firms to do the work of the state spread around America. Many of the state attorneys-general retained law firms or individuals with whom they had close relations. Maryland retained Peter Angelos, the owner of the Baltimore Orioles, and he recovered \$1 billion in fees. That is one means of improving the local baseball team. The Kansas attorney-general retained her former law firm. Texas politicians retained five law firms who were also their major political donors, and, who, between them recovered \$3.3 billion in fees.
3. Bobby DeLaughter was a celebrity in his own right. He was an assistant DA who revived the prosecution of the white supremacist, Byron De La Beckwith, for the murder of the civil rights campaigner, Medgar Evers. There is a movie 'Ghosts of Mississippi'. DeLaughter was played by Alec Baldwin.
4. The terms of settlement were, naturally, complex. Given the federal issues which arose they required approval by Congress. Many commentators foresaw that the terms of settlement were inadequate to stem tobacco use and related diseases. Congress stalled. But because there were billions in fees swinging on the settlement, the plaintiffs' lawyers retained dozens of lobbyists to urge members of Congress to approve the terms of settlement. The lobbying succeeded and the settlement was approved.

## Advocacy training and the rule of law in southern Africa

By Ben Katekar

Amongst the difficult cases, the impossible deadlines and the non-paying clients, it is easy to wonder why we do this job.

The Advanced Advocacy Training Course conducted by the South African Bar in Stellenbosch, near Cape Town, in January this year reminded me of the critical importance of an independent bar in a functional society.

### The Stellenbosch advanced advocacy course

The Stellenbosch course is similar to the Australian Bar Association course pioneered by Phil Greenwood SC, run every January. Both were inspired by the course run at Keble College, Oxford each year by the South Eastern Circuit, which has been held each year for the last 18 years.

My partner, Lucy Cornell, and I attended the Stellenbosch course in January 2012 as coaches. Lucy was voice and performance coach, and I was an advocacy coach. This course is the second time it has been run, the first being last year. Already, it has become (in the words of the chairman of the General Council of the South African Bar), the 'jewel in the crown' of advocacy training in that country.

The course was attended by participants from South Africa, Zimbabwe, Namibia and Malawi. Members of the faculty were from South Africa, England, Pakistan and Australia. The Australian contingent comprised Justice David Boddice of the Queensland Supreme Court, and us. Lucy and I were walking among giants.

Some of the leading jurists and advocates in South Africa attended it. Justice Dikgang Moseneke, deputy chief justice of the Constitutional Court, attended on Friday to observe. He gave the keynote speech at the final dinner. When I was coaching that Friday, Justice Moseneke walked into the room, unannounced. He had a quiet, majestic aura. Everyone in the room spontaneously stood to attention (except, of course, for me, who had no idea who he was).

### Justices Kriegler and Cameron

Justice Johann Kriegler attended all week as a coach. Justice Kriegler is now retired. He was one of the original members of the Constitutional Court. He is a legendary figure. His participation as a coach at the



Ben Katekar and Lucy Cornell at Stellenbosch.

course was the South African equivalent of Sir William Deane being a coach at the Australian course.

Justice Edwin Cameron was there on Wednesday to observe. Justice Cameron sits on the Constitutional Court. He is another legendary figure. I soon found out why. At 4.30pm, everyone assembled to hear him speak. The next 20 minutes were spine-tingling. He stood amongst us and reminded everyone of the central role which the independent bar plays in South Africa. That it stands for the maintenance of human rights.

He gave an example. He told us that he is gay. Under the equality provisions contained in the Bill of Rights (Chapter 2 of the South African Constitution), protection against discrimination on the basis of your sexual orientation is expressly enshrined. This was the result of a tenacious campaign to ensure that the Bill of Rights recognised that discrimination on the basis of sexual orientation was unacceptable. The wisdom and the courage of the bar made that possible.

He gave another example. In the 1980s, South Africa was suffering an AIDS epidemic. The president of South Africa at that time, President Mbeki, did not believe that the resources of the country should be spent on the drugs that were available. President Mbeki was apparently sceptical of them. Justice Cameron, together with his colleagues, fought for change, and achieved it. The drugs were effective and the AIDS epidemic was brought under control.

Justice Cameron then told us that he has HIV. Because

of the change in policy wrought by the bar, the drugs have enabled him to continue to make an enormous contribution to his country.

Justice Cameron reminded us that the bar is an integral part of the judicial arm of government. In South Africa, it has a voice. In that country (as in many others), the independence of the judiciary, and the bar, is constantly under political attack – sometimes subtle, sometimes not so subtle. Despite those attacks, the rule of law in South Africa remains strong. That is a direct product of the courage and independence of the members of the bar and the judiciary in that country.

His Honour urged the assembled barristers: do not lose sight of the place you have in our society. Remember the sacred responsibility you bear.

### **Edwin Glasgow QC**

As if that wasn't enough, Edwin Glasgow QC spoke next. Edwin is from the English Bar. He is at the forefront of advocacy training throughout the Commonwealth. He is an extraordinary and gifted man, who has energetically injected his expertise into English, Australian and South African advocacy training.

Edwin was asked to speak about the role of ethics in the practice of advocacy. The participants were spending the following day doing ethics exercises.

Edwin told us, in the colourful way that only he can, that a functional bar requires four things of its members: integrity, courage, competence and independence.

Edwin explained the importance of each of these elements, by describing the direct attack on the rule of law in Zimbabwe. He told us how the future of the rule of law in Zimbabwe – and the fabric of its society – rested directly on the courage of the small number of people who have shown the resilience to remain members of the bar in that country.

The people of Zimbabwe – as in any country – expect barristers to be competent. They expect them to be independent, and to have integrity, and courage. Without each of these elements, the public's confidence in the institution evaporates. This prospect is all too stark in Zimbabwe, where the bar has been reduced to a tiny rump. The remarkable courage of the small remaining band of barristers in Zimbabwe is keeping



L to R: Zimbabwean barristers Trust and Thembi, Justice Dikgang Moseneke and Tino Bere.

the institution alive in that country. The future of the rule of law in Zimbabwe is dependent on them.

Two of the members of the Zimbabwe Bar were participants at the course: Trust and Thembi. I had the privilege of meeting them, and teaching them. They are wonderful, talented and amazing young men.

### **Tino Bere**

Tinoziva Bere is the president of the Zimbabwe Law Society. He attended on Friday to observe. Meeting him was also a great privilege. He spoke at the final dinner. He told us of the attack on the rule of law in his country. There, it is cheaper to pay off a policeman, so he won't charge you, than the cost of hiring a lawyer to defend you. If you are an attorney, and your client is being held at the police station, you struggle to be given access to your client. Lawyers have been harassed, denied access to their clients, threatened, arrested on false allegations and even tortured for defending victims. It is hard to practise criminal law, and particularly hard to defend victims of state repression or selective prosecution.

Mr Bere also told us that from 1999 judges who dared to give decisions which conflicted with the wishes of the government were physically threatened and hunted out of office. Such was the threat to their personal safety, and that of their family, that they were forced to resign. In Zimbabwe, the bench and the bar have thus disintegrated. Leading talent has disappeared. Under



Lucy Cornell and Tino Bere.

Tino Bere's leadership, the Zimbabwe Law Society is supporting efforts to rebuild, train and resource the new bench, and the bar.

### **Advanced advocacy training in Australia, England and South Africa**

I have been a student at two of the courses run by the Australian Bar Association (ABA), and in 2011 attended the Keble College course as a student. I was on the teaching faculty at the ABA course in Melbourne this year. Lucy has taught at each of the five courses run by the ABA. She also taught at Keble College in 2011, plus with me at Stellenbosch. These courses are invariably attended by barristers of varying levels of experience, but who have one thing in common: a desire to learn. Lucy and I observed profound changes in many of the students at Stellenbosch. All students expanded their learning and substantially improved their performance. We see the same at all the ABA courses.

When I was at Keble College, I had breakfast with Lord Justice Munby, of the English Court of Appeal. I asked him why he was teaching at the course. He said that in the 18 years in which the Keble course has been running, he has seen an enormous improvement in the standard of advocacy before him. The Keble College course is widely regarded as being a big part of that improvement. That is why he teaches at it whenever he can.

The South African Bar, and the bar in each of its neighbouring countries, hopes for the same out of Stellenbosch. I have no doubt it will be achieved, particularly if those who run the course continue to display the same passion for it. Tim Bruinders SC, of the South African Bar, led this course impeccably. Me aside, Tim assembled a faculty of amazing experience, ability and generosity. Phil Greenwood SC does the same at the ABA course.

At his speech at the final dinner at Stellenbosch, Tino Bere said that the South African Bar was leading the way in the region. The South African Bar promotes human rights, the independence of the judiciary, and the development of skills. He said that the bar in each of the countries in the region need to 'hold hands', for their collective survival.

Before the dinner, Lucy and I were talking to Tino Bere. Lucy asked him what it was which led him to risk his life, in the face of violence and threats of violence, and to fight so insistently. Surely there would be a safer way for him to live and work in his country. Tino looked away, turned back, and said 'Purpose'.

### **Lucky, and great**

In Australia, the rule of law is paramount. We have an independent and talented judiciary and bar. We have an executive which is held to account by the courts and tribunals, and which is policed by bodies such as the Independent Commission Against Corruption, the Police Integrity Commission, and ombudsmen. We are truly a lucky country, and a great country.

We also have available to us, as barristers, a wealth of resources to improve our skills (such as the ABA Advanced Advocacy Course), and thereby make more of a contribution through the practice of our profession.

The week in Stellenbosch gave me an insight into the struggle for the rule of law in South Africa and the countries that surround it. Those countries may not be so lucky, but thanks to the people of the kind we had the privilege to meet in Stellenbosch, they are great countries.

It reminded me of the importance of what I do.

# Community participation in criminal justice

The Opening of Law Term Address was delivered by Chief Justice T F Bathurst in Sydney on 30 January 2012.

This is my first address at the Law Society's Opening of Law Term Dinner, and I have prepared it with some trepidation. Many people think that as barristers speak for a living, public speaking must come naturally. In my case, nothing could be further from the truth. I managed to go nearly the whole of my 30-year barristerial career without having to deliver a speech or even speak uninterrupted for more than 5 or 10 minutes. Appearing in court was never about delivering a prepared address; it was about trying to squeeze an argument into the precious seconds between interruptions from the bench. That is why, despite all of the totally unjustified flattery that surrounded my appointment, I was never described as a good, or even average, orator. Perhaps one of the reasons for this was that I participated in very few jury trials, a subject about which I wish to say something this evening.

In preparing this address, therefore, it seemed only fitting to review the 13 such opening addresses made to this forum by my predecessor, Jim Spigelman; a man who did much to propagate the perception that lawmen and women are gifted public speakers. I reviewed his speeches seeking inspiration and guidance. However, as I read from one year's to the next (in a published book of his Opening of Law Term Speeches, no less) any hope that I might successfully continue the tradition of outstanding oratory vanished completely. At that point, I briefly contemplated simply reading you one of Jim's speeches from the book, and hoping no one would notice. (After all, judges are nothing if not fastidious plagiarists.)

However, fortunately for me, if not for you, there is a matter that has caused me increasing concern this past year, and so I will use this opportunity to draw attention to it, and leave Jim's copyright well alone.

I have been custodian of the Supreme Court of New South Wales for eight short months. This time has been filled with a wealth of new experiences and challenges. Of particular impression upon me has been my time sitting in the Court of Criminal Appeal. I have come to greatly respect the fundamental role the wider community plays in our criminal justice system.

Members of the lay community participate in criminal justice as a matter of course: as witnesses, complainants, accused and remanded. But in these roles they act as individuals. Their experiences and actions are not reflections of the collective social consciousness.

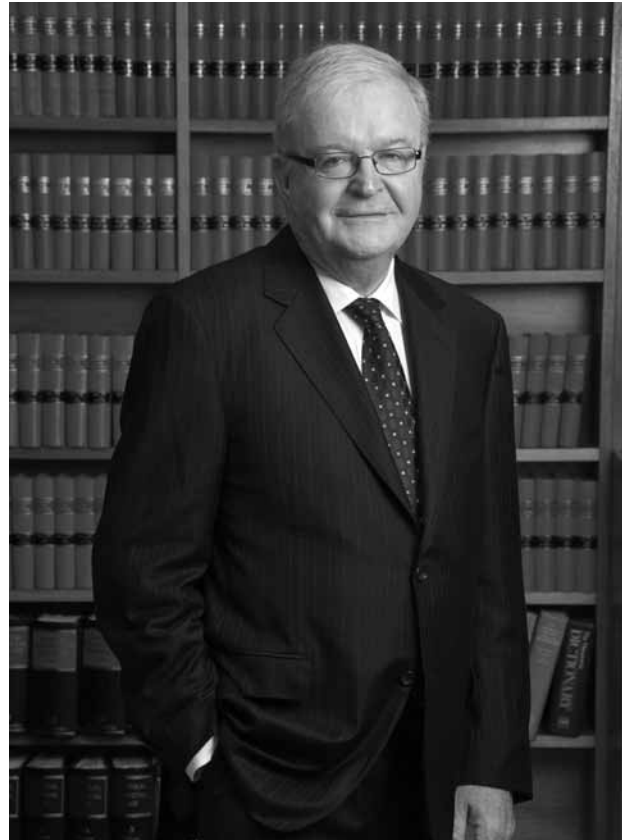


Photo: Courtesy of the Supreme Court of NSW.

When I speak of the community as a participant in the criminal justice system, therefore, I am referring to two roles in particular. First, to the active role of the jury – to assemble as a tribunal of 12 and pronounce judgment as a unanimous or near unanimous whole, on an individual accused of breaching our legal codes. Second, I refer to the passive role the community plays as an observer of the legal system, whose trust is essential to its legitimacy.

My concern is that the criminal justice system is currently experiencing a crisis of confidence.<sup>1</sup> Community trust in the criminal justice system is eroding. Much of this distrust is fuelled by misinformation that is propagated by sections of the media who prefer to inflame rather than inform, and by politics that encourages fear mongering rather than educated debate.

Instead of complaining about media bias and political propaganda – which, my predecessor reminded me, will achieve about as much as complaining about the weather – tonight I want to draw attention to the essential role that the community plays in our criminal justice system, and to the responsibility that we as a

legal community have to support it.

In an international survey of public confidence in national criminal justice systems, Australia ranked 27<sup>th</sup>... of 36 countries.<sup>2</sup> Only 35 per cent of us have confidence in our criminal justice system. And while nearly three quarters of us trust in the police, less than one third trust in the courts. Our confidence has also steadily declined over the last 15 years.<sup>3</sup>

We are not alone in these low numbers. The people of Estonia, Croatia, Russia and Slovakia all report a similar lack of confidence in their criminal justice systems. However in the jurisdictions we are used to being compared with, such as the United Kingdom, Canada and Ireland, public confidence is much higher. At least 50 per cent of people in those countries have a high level of trust in their criminal justice systems. It may provide some consolation, if not a great deal, that we at least outrank the United States.<sup>4</sup>

Surveys show that most people in New South Wales trust that the rights of the accused are respected, that the accused are treated fairly, and that we effectively bring wrongdoers to justice.<sup>5</sup> Why then is there so little confidence in the criminal justice system as a whole? *It is because of a misguided perception that the legal community is soft on crime and out of touch with community expectations.*

I say 'misguided' perception for a number of reasons.

First, public perceptions of crime rates are highly skewed. Most people believe that property crime has increased in recent years. In fact, it has decreased. Almost everyone grossly overestimates the amount of crime that involves violence or threats of violence, and equally underestimates the conviction rate for violent crimes.<sup>6</sup>

Second, surveys have demonstrated that sixty-six per cent of people in New South Wales believe sentences are too lenient.<sup>7</sup> However, most people tend to think of extreme examples of serious crimes, like rape, murder and armed robbery, when questioned about sentencing in general terms.<sup>8</sup> When members of the public are given detailed information about a specific crime and the background of the offender, a completely different trend emerges.

A groundbreaking 2010 study used jurors to investigate what informed members of the public really think

about sentences.<sup>9</sup> Before their trials, jurors were asked about sentencing in general terms, and most said they thought sentences were too lenient. However, after sitting through the trial and sentencing submissions, they were asked to give an appropriate sentence for the offender. Most gave more lenient sentences than the judge, and 90 per cent thought the judge's sentence was within a fair range. The study shows that when people are given the facts, most think judges get it right.

*The people of Estonia, Croatia, Russia and Slovakia all report a similar lack of confidence in their criminal justice systems.*

A third reason I say public perceptions are misguided, is that it is not at all correct to say that judges are out of touch with the expectations of the wider community. While I do not claim to be on the cutting edge of popular culture (I do not tweet, blog, krump, or LOL. For those of you who do not know what I am referring to by krump, look it up on youtube. It will cause you to LOL. You all know that means laugh out loud.), I can say that there are few people as in touch with the realities faced by victims, accused and convicted as are the judges of the criminal courts. They are in the thick of it every single day. And most juries agree when asked at the end of their trial, that the judge presiding over it seemed in touch with community expectations.<sup>10</sup>

So public perceptions are wrong. Or at least, they change dramatically when ignorance is replaced with information. But is this really a problem? As long as policy makers are guided by sound research and experience, and judges continue to exercise independent decision making, why does it matter that sections of the media propagate paranoia about crime rates, and make short shrift of the truth to sell a story? It matters because of the fundamental tenet that justice needs not only to be done, but also to be seen to be done. This is not just for the sake of the frail judicial ego, but is necessary to maintaining the rule of law.

The intangible quality that gives the rule of law security in some nations, and none in others, has to do with community trust and expectations. The rule of law is one of six World Governance Indicators used to measure the quality of a country's governance. It is

defined as 'the extent to which agents have confidence in and abide by the rules of society, and in particular the quality of contract enforcement, the police, and the courts, as well as the likelihood of crime and violence'.<sup>11</sup> Therefore, public confidence in our courts and criminal justice system is not only necessary to the maintenance of the rule of law, but to the quality and perception of our governance structures.

In the popular consciousness, criminal justice often represents the entire legal system. Faith in it is likely to be determinative of faith in the whole. People will not strike bargains or trade if they fear their commercial rights will not be upheld. They will not invest in development and infrastructure if they worry their property rights will be easily violated. Therefore, while the rule of law and sound governance are the foundations of a free and stable society, they are also essential to a prosperous one.

Perception matters. So how can we improve it?

It is unsurprising that those who have the least amount of confidence in our system, also have the least information about it. They are the most likely to overestimate crime rates and underestimate conviction rates. They are also the most likely to draw their information from sources like talkback radio. Those who have more accurate knowledge, on the other hand, have the most confidence in the criminal justice system, and tend to draw their information from broadsheet newspapers, government publications, and educational institutions.<sup>12</sup> It turns out that the only group whose confidence in the system doesn't increase with knowledge, is the elderly. Apparently a certain amount of crotchiness just comes with age.

For the majority, at least, increased confidence will come from better information. There is little we can do about talkback radio and tabloid journalists trading on the demand for shock and scandal, but there are things we can do as members of the legal community to improve the public's knowledge.

First, we can participate in the debates about crime and sentencing reform that occur at all levels of society. The Law Reform Commission is currently reviewing the Crimes (Sentencing and Procedure) Act. Many in this room have participated in the reform process, and this is to be commended. However, we should not

forget that the discussions occurring in classrooms, on editorials and blogs, and even over talkback radio, are just as important in shaping public opinion and confidence in our justice system. Reasonable minds will differ as to the reforms we need, but we will remain true to our profession by participating in these debates and ensuring they are kept informed and accurate.

*It is unsurprising that those who have the least amount confidence in our system, also have the least information about it.*

Second, those working in government and policy should continue the open and transparent dissemination of information, making it as accessible and relevant to the broader community as possible. We have outstanding information services in New South Wales. The Bureau of Crime and Sentencing Statistics and the Judicial Information Research System are but two. Services like the Department of Attorney General & Justice's Lawlink and LawAccess are also invaluable. We should support and advance these services in every way.

Third, judges and those who work in criminal court administration should strive to use plain and accessible language, particularly in judgments and remarks on sentence.

Finally, a very great deal may also be done through the jury.

Juries are an essential part of our participatory democracy and of the trust the wider community places not only in the criminal justice system, but also in the ability of the legal system generally to protect each individual's rights, family and property. Just as the judge and court in a jury trial act as ambassadors for the whole of the justice system, so each juror becomes an ambassador for the courts within the community.

Approximately two hundred thousand people had some interaction with the NSW jury system last year, by being placed on the jury roll, summoned for service, or empanelled.<sup>13</sup> Studies show that confidence levels are higher in people who have had recent contact with the courts or justice departments, and highest in those who have actually participated in court processes or hearings as jury members. The experience of sitting



on a jury has been shown to improve an individual's confidence in the criminal justice system significantly, and almost universally.<sup>14</sup>

The jury is so ancient a form of tribunal that even Blackstone, writing in 1769, referred to its use as originating in 'time out of mind.' He said that although its use was 'greatly impaired and shaken by the introduction of the Norman trial by battle... [it was] always so highly esteemed and valued by the people, that no conquest, no change of government, could ever prevail to abolish it.'<sup>15</sup> Yet today, New South Wales has no grand jury, very few civil juries, no trial by jury for summary offences, and a criminal offender may opt-out of trial by jury in favour of a judge alone trial. The sky has not fallen.

But we are at a precipice. Over centuries of debate and reform, of 'inroads and trifles,' some are now proposing what was for Blackstone the final, unthinkable machination. In his words: 'the utter disuse of juries in questions of the most momentous concern.' The jury, so long taken for granted in the public imagination of 'the law', is entirely foreign to the majority of legal practitioners, and some find it of such little relevance to modern jurisprudence that they call for its abolition all together.

Speaking in 2010, Lord Justice Moses of the Court of Appeal of England and Wales bemoaned that discussions about juries are often conducted on so high a plane of principle that they inevitably degenerate into cliché.<sup>16</sup> If you are against juries, he says, you quote Professor Glanville Williams' 'exposure of the superstitious reverence attached to trial by jury', while 'if you are in favour [of them] you recite Lord Devlin... or Blackstone [on] the glory of the English Law.' Clearly I am not one to break with that particular tradition.

Nevertheless, Lord Justice Moses' address made the valid point that 'there is little to add to the debate as to the desirability of juries' when conducted on such higher planes of principle, because most of what can be said, has been said already.

We know why juries are good: they represent a check on state prosecutorial powers and maintain public trust and confidence in the administration of justice. We know why they are bad: they can be costly, are highly secretive and sometimes produce what appear to be unreasonable verdicts. However, just as the good

is no reason to remain uncritical or to not strive for improvement, so the bad is no reason to throw the proverbial baby out with the bathwater.

Jury trials represent only three per cent of all criminal trials in New South Wales. This is largely because they are not available in Local Courts, which hear ninety-six per cent of all criminal trials.<sup>17</sup> However, they remain the primary method of trial in the Supreme and District Courts, where the most serious offences are tried. Of all defended criminal hearings in the Supreme and District Courts in 2009 and 2010, at least ninety-two per cent were by jury.<sup>18</sup> More importantly, the jury both represents the collective social consciousness, and is alive within it.

It is the only mechanism by which non-members of the legal profession actively participate in the administration of justice. The importance of that participation cannot be overstated. Whatever faults the system may have, it provides reassurance to the victims of crime, the accused and to the community generally that factual issues surrounding the guilt or innocence of an accused will be judged by a panel of people randomly selected, and not perceived to be isolated from the types of factual issues commonly involved in a jury trial. The abolition of jury trials would have at least the potential to further isolate and thus alienate the community from the operation of the legal system and further erode community trust in the system.

Thus, and in keeping with Lord Justice Moses' plea for level-headed, earth-bound debate, let us make the conversation about ways and means of *helping* the jury system to achieve its purpose; to enhance democratic participation and community trust in the criminal justice system.

It is important in considering this issue to have regard to what are commonly perceived to be the flaws in the system. As I said earlier, jury trials are seen to be costly. To this it might be added that jury trials are time-consuming compared to trials by judge alone, at least if the time it takes the judge to write their judgment is not taken into account.

However, what this should tell us is that it is necessary to put in place procedures which ensure that jury trials, along with other forms of litigation, focus on the real issues in dispute. An accused is entitled to have the case against him or her proved beyond reasonable doubt,

and to put the prosecution to proof on any matter that is likely to be in dispute. This does not mean, however, that representatives of the accused acting responsibly should not assist, by admission or otherwise, in ensuring time is not spent over matters which will plainly not end up in issue. The legislature, the courts and the profession I know are seeking to devise mechanisms to ensure that this does not occur.

The second complaint commonly made is the secretive nature of the process. This is an integral part of the system. As best as I can perceive there does not seem to be a perception, at least in the community, that the relatively secret nature of the process is such a disadvantage to warrant its abolition. The important issue for the profession is to do what it can to ensure that juries are supplied with as much assistance as possible to reach the right result. If the profession is transparently seeking to achieve this end, concern held by the public as to the secretive nature of the process will be allayed.

The third concern is that the increasing complexity of jury trials makes it impossible or extremely difficult for the jury system to function effectively. This is not a criticism of the capacity of jurors but rather a consequence of the difficulty of explaining to a jury and having a jury understand in a limited period of time complex factual issues including those involving technical, financial and scientific matters. It is suggested that judges who have greater exposure to these issues and a greater ability to ask questions to clarify matters of evidence and perhaps more time to contemplate the evidence, are more likely to achieve the correct result.

There is force in these concerns but it seems to me that our focus should be on ways to improve the jury process. Recent Australian studies suggest a number of ways of doing this. They are intended to both enhance juror experience and increase the reliability of jury verdicts.

First, the nature and role of witness examination should be explained at the outset of the trial. Jurors report not treating lay witness examination as evidence on which they can base their decision. This is because the 'CSI' effect has left many jurors with the impression that only sources like DNA and expert reports count as real 'evidence'. The result is that they place too much emphasis on what they see as 'hard evidence', and too little on witness examination.<sup>19</sup>

Second, jurors in complex trials could be asked in the final minutes of the sitting day whether they require clarification or explanation of any expert evidence or other evidence of a technical, financial or scientific nature. Generally speaking this should not be necessary but in exceptional cases it may be a useful tool to ensure juries understand the evidence led.<sup>20</sup> It is no different to what judges commonly do in non-jury trials.

Third, another area that has received considerable scrutiny is whether judges should assist jurors with the meaning of 'beyond a reasonable doubt.' Australia is one of the few jurisdictions in which judges almost never define this expression, yet it is one of the most common sources of juror confusion and complaint. English, Canadian and New Zealand courts all allow trial judges to assist juror understanding of 'beyond reasonable doubt'.<sup>21</sup> Law Reform Commissions in other Australian states have recommended adopting a similar approach, and the New South Wales Law Reform Commission consultation paper on jury directions raises the issue squarely. This is a conversation worth having.

Fourth, greater assistance may be given with jury deliberations. Written jury directions are already encouraged in New South Wales, and about seventy per cent of trial judges make use of them.<sup>22</sup> However, step-directions, issue tables and decision trees are now used in overseas jurisdictions, where they have been received favourably.<sup>23</sup> Studies with mock trials in Australia show that such aids significantly improve juror comprehension of legal directions.<sup>24</sup> Great care must be taken to ensure that such aids do not unduly influence juror decision-making, but any processes that increase juror comprehension should be encouraged.

The manner of jury trial in force at the time of Blackstone, or even, for that matter, Professor Glanville Williams or Lord Devlin, is not necessarily appropriate today. Jurors should have the benefit, to the extent possible, of technological or other materials which would assist them in their determination. We should not underestimate the ability of jurors to use these aids, or be unduly fearful that they will be misused.

Finally, returning to the issue of sentencing, the simple gesture of inviting jurors to stay and watch sentencing proceedings has been shown to significantly improve jurors' experience and trust in the criminal justice system.<sup>25</sup> Many jurors report that it validates their

experience, and the 'justness' of the verdict they reached. This will often be impossible when sentencing occurs at a later time, but to the extent it can be achieved, it is desirable.

Many other suggestions of ways to improve the jury process and confidence in the criminal justice system have been made, and should be investigated. I suggest that the proposals most likely to succeed are those that trust in *people* - in the members of the community and the jury - to be intelligent, diligent and fair. It is our responsibility to improve their chances by enlivening debate, and insuring that the information we distribute is accurate, relevant and accessible. Otherwise, we have little right to expect trust in a system that excludes the voice of the community it is meant to represent and protect.

It has been an honour to address you tonight. The Law Society of New South Wales has always been dedicated to reform, education and community engagement. I am sure you will continue to be a credit to our state and profession in the 2012 Law Term.

## Endnotes

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## Doing their bit: barristers in the Second World War

This is the second of a two-part series by Tony Cunneen. The first appeared in the Summer 2011–2012 edition of *Bar News*. The whole work is an ongoing project by the author for the Francis Forbes Society for Australian Legal History. Comments and further material are welcome. Please contact the author at [acunneen@bigpond.net.au](mailto:acunneen@bigpond.net.au)

### Barristers in the Royal Australian Air Force

Many barristers enlisted in the RAAF. The usual pattern was to enlist in Sydney then have basic training, often in Bradfield Park Camp at the end of Fiddens Wharf Road, Killara, before transferring to other areas in Australia. Men destined for the European Theatre usually travelled via Canada where they had further training in the Empire Air Training Scheme before moving to Great Britain for their operational duties. Others travelled across the United States of America to Europe.

One of the early enlistments was Alan Ritchie<sup>1</sup> who joined Bomber Command as a navigator/bomb aimer. He was awarded the Distinguished Flying Medal for having brought his damaged Wellington bomber home to base after all the other crew had been injured.

On 1 March 1943 Ritchie was lucky to survive a mission to Berlin when the Lancaster in the Pathfinder Squadron he was in as crew was hit by incendiary bombs dropped from the plane above. Ritchie worked with the pilot to bring the plummeting aircraft under control then navigate out of the German flak flying at a level of between 25 and 40 metres in height. It was an extraordinary escape with Ritchie lying in the nose of the aircraft shouting instructions back up to the pilot.

Ritchie later returned to Australia after a 74-hour flight via Montreal, Ottawa, San Francisco, Hawaii and Canton Island in the Lancaster Q for Queenie on promotional tour for war loans. Ritchie visited the law school and was something of a hero at the time. At one stage the Lancaster was flown under the Sydney Harbour Bridge and low over the city in what was known as a 'beat up'. The tour ended on 26 October 1943 when the plane crashed at Evans Head after a wind shift. All the crew survived.

Tom Hughes enlisted in the RAAF in 1942 while a first year law student. He was one who went through recruit training at Bradfield Park Camp. Tom survived the dangerous training regimes of being a pilot and navigator and was soon training men barely younger than he. Tom Hughes was one of those men whose later talent in his profession became obvious in his service life.



Cliff Papayanni (lower left) in RAF 101 Squadron. Photo: courtesy of the Papayanni family.

At the end of 1943 Tom Hughes was posted to 10 Squadron flying Sunderland flying boats out of Mountbatten Airbase on Plymouth Sound. It was a front line posting. Hughes service included hunting for submarines, which was certainly hazardous. The German submarines were armed with 20 mm cannon which could be lethal if they hit the lumbering Sunderlands.<sup>2</sup> At the time, the squadron was under the command of a solicitor from Wollongong on the South Coast, Squadron Leader Philip Goodrich Adams.

Cliff Papayanni<sup>3</sup> enlisted in April 1942. He trained as a pilot and after the required hours of flying around the Victorian countryside in Wirraways was about to appear on his wings' parade at Uranquinty when a bout of measles interrupted. He was forced to wait until the next parade and in the interim, much to his chagrin, a change in government policy meant that he was no longer needed as a pilot at that stage. He thus went overseas as a wireless air gunner.<sup>4</sup>

Cliff survived 39 missions as a special operator in the RAF's 101 Squadron, stationed at Ludford Magna in Lincolnshire, as part of No 1 Group Bomber Command. From there, he flew in a Blenheim bomber in operation *Channel Stop*, attacking German landing craft designed to close the Strait of Dover, and thereby helping to prevent a German invasion of England.

At the beginning of 1943 and as a result of heavy losses of aircrews and aeroplanes, the RAF started developing a top secret radio jamming system known as Airborne Cigar or ABC. Papayanni had learnt German at school

and became a special operator, listening into German communications and jamming the signals, from on board Lancaster bombers.

SOs, as they were called, were isolated in an unheated part of the aircraft, where temperatures sank to minus 50 degrees. They posed as German radio controllers to spread disinformation, but breaking radio silence made the aircraft especially vulnerable to tracking by enemy fighters. As a result, 101 Squadron lost 75 per cent of its aircrews and more aircraft than any other squadron. Not only that, SOs were subject to torture for information if captured. Many lives were saved when 101 Squadron's SOs fooled the Germans into thinking the D-Day landings were to be at the Pas-de-Calais. During the war, Papayanni also played cricket for the Australian Services side.<sup>5</sup>

On 16 June 1944, Cliff was lucky to survive a crash at Woodbridge airfield in Suffolk. He completed his service as a flight lieutenant. He was one of many men who did not want to revisit the memories of his years in service.

Flying Officer Clifford O'Riordan<sup>6</sup> had attended St Ignatius College, Riverview and then studied law at Sydney University. He joined 460 Squadron as a gunner in August 1942. He flew in Lancaster bombers on many operations over Europe. He later described one epic journey on 13 April 1943, seeing 'travel poster' views of the Alps as they flew south east to bomb the docks at Spezia in Italy. After eight hours in the air they were 'hopelessly lost' on their return journey. They eventually flew home 'across Spain and up the Bay of Biscay'. They were in the air for over eleven hours and lucky to get back. In the understated nature of the time he simply wrote in his diary that it was a 'shaky do'. After landing he caught the midnight train to London and went on a 'pub crawl'.<sup>7</sup>

Occasionally young barristers enlisted together, as happened with Colin Kennedy and Ronald Stephens. Both enlisted together on 20 June 1942, soon after their admission to the bar. Before posting overseas Kennedy was Stephens' best man at his wedding at the end of the year. Kennedy left soon after, following the familiar route to San Francisco then across to New York and through various training camps in New South Wales then overseas for further training in England.

Stephens went via Canada and sent his family photos taken in Ottawa. He was happy to meet up with any fellow barristers and was pleased to spend time with Ted Perrignon,<sup>8</sup> also in Canada on his way to England. Canada was a regular stopping off point for trainee aircrew as part of the Empire Air Training Scheme. Others to pass through there included Ken Torrington<sup>9</sup> who was an instructor and also a shuttle pilot.

Another shuttle pilot to cover the globe was HR (Rodney) Hudson<sup>10</sup> who made 13 trips between Canada and Great Britain as well as others to South Africa and virtually every country in South America.<sup>11</sup>

Canada was an intense experience. Torrington wrote from a frigid Winnipeg that he hoped to warm up by getting into a refrigerator but he was better served than fellow barrister Pilot Officer Wallace Hutchinson who was in a hut in Iceland gazing at glaciers, high mountains and 'artistic little villages where the islanders paint their houses white with red or green roofs'.<sup>12</sup>

Training could be tough in Canada. Ted Perrignon<sup>13</sup> described his bomber course as 'living in a weirdly unreal world of sextants, spherical triangles, air-plots, ungodly projections etc. seasoned with a few mundane things such as stoppages of a browning gun, aircraft signals and current events'. He went on to serve as a junior flight lieutenant, bomb-aimer, in RAAF Halifax 462 Squadron (heavy bombers). He was stationed at Driffield, Yorkshire and flew over Germany with Bomber Command, heading the Allied advance into Europe. His unit often flew 'decoy', separating from the main bomber force over Germany, exiting 'window' (a metallic substance designed to confuse German radar), convincing German fighters that their plane was the main bomber force, and drawing fire<sup>14</sup>. Finishing his tour and entitled to return home, he volunteered for a second tour.<sup>15</sup>

Ross Pearson<sup>16</sup> enlisted in October 1942 after completing one year of law. He recalls appreciatively the way Margaret Dalrymple-Hay sent him material to continue his studies while he was overseas.<sup>17</sup> He trained at Number 2 Wireless Air Gunnery School (WAGS) at Parkes in 'very hot and soporific' summer temperatures which invariably sent the young students to sleep during the interminable radio theory lectures.<sup>18</sup> After



Cliff Papayanni practising at Lords. Photo: courtesy of the Papayanni family.

training he was transferred to England and tried to continue his studies through London University, 'but saw little point in studying for the future' once he was into his tour of duty. 'The end of the tour was such a far off eventuality. Even if one survived one tour – what then?' Ross always thought he would survive but there were 'always moments of apprehension when one saw and heard the flak or saw an aircraft going down in flames with no chutes coming out.'<sup>19</sup>

Ronald Stephens's friend Colin Kennedy followed the same path through Canada and arrived in England as a fighter pilot in September 1943. Stephens settled into life in England with 13 Operational Training Unit and while with them was tragically killed in an aircraft accident. The loss in training is an example of the type of hazards faced by men alluded to in the 2005 *Bar News* article on the career of Tom Hughes in which it was noted that that 'the danger of Tom's (and others') early training work should never be overlooked.'<sup>20</sup>

Stephens had only just visited an English family in Oxford for his leave and they attended his funeral and wrote to his parents of 'his cheerful ways and good temper'. Another barrister to lose his life in training was Ralf B Cassidy who died at Mallala Base with 6 Service Flying Training School in 2 November 1942.

Not all the accidents were in the air. Lieutenant John Mortimer Phillips lost his life accidentally in Sydney – apparently while running to catch a tram to go to General Macarthur's Headquarters on 18 May 1942. David Lewis<sup>21</sup> served in the Middle East, Syria and Palestine, only to lose his arm in a training accident in Queensland in 1943.

Serving in Bomber Command in Europe was particularly dangerous in 1942. Flying Officer Douglas John Richards was an observer in a Hudson Bomber of 59 Squadron which left North Coates Airfield in Lincolnshire to attack an enemy convoy off the Frisian Islands. Nothing was heard of the plane again. Richards' body was found and he is buried near Oldenburg in Germany.<sup>22</sup>

Another barrister to lose his life in Europe was Robert George Ashley Brathwaite who disappeared in action with 150 Squadron RAF flying out of RAF Base Lossiemouth to operations over Germany on 26 June 1942, aged 27.<sup>23</sup> He was found to have crashed at Terschelling Island (part of the Frisian Island group) while flying as an observer in a Wellington aircraft after

having been attacked by a German night fighter.<sup>24</sup> The others in the crew were Canadian and British. For a time he was posted as 'missing' and his mother in Killara hoped he would be located as a prisoner of war, but his death was confirmed by a survivor. Mrs Brathwaite had lost her other son, Peter, in Syria in 1941. She had applied to have George returned to Australia from Canada during training there to avoid risking his life, but she was unsuccessful. Brathwaite had been lucky to survive an earlier incident when, in heavy sleet, his Wellington had overshot the flarepath runway at Elgin Aerodrome and on going round again had struck trees on the surrounding hills. Brathwaite had been the associate to Mr Justice Street before enlistment.

Many others survived hazardous tours of duty, including Howard Purnell<sup>25</sup> who flew Mosquitoes with 464 Squadron. The squadron history records Purnell as having been one of the first non-Russian servicemen to enter Hitler's bunker at the end of the war after bribing the Russian guards. At the time he was with members of his squadron wandering about the ruins of Berlin.<sup>26</sup>

Young George Buckworth was serving with the RAF in 75 Squadron when he was shot down over Belgium in 1942. He was awarded the Croix de Guerre for evading capture with the aid of the local Resistance and then not revealing information concerning them. He was a POW for 22 months and was awarded a Mention in Dispatches for helping other prisoners survive a long forced march in the dead of winter. Remarkably he escaped back to England and flew again with Bomber Command. In April 1945 he returned to Australia in a flight of Dakota DC3s.<sup>27</sup>

If operational crew survived the hazards of flying they could enjoy the hospitality of at least two of the schemes which helped them find comfortable rest and recreation. Ross Pearson remembered fondly his time in the country estate of an English barrister who hosted him as part of the Lady Frances Ryder Scheme. Pearson recalls that airmen on leave could put their names down at the reception house in Brighton for that scheme as well as the Nuffield Scheme, which allowed him to spend a week in a very expensive hotel which he could not have afforded otherwise. When Flight Sergeant Pearson was enjoying the hospitality of the establishment at Nuffield's expense he was approached by a group of senior American officers who asked what a man of such comparatively low rank was doing in

such an upmarket place. Pearson took great pleasure in replying breezily that 'on a sergeant's pay in the Australian Air force you could do anything'.<sup>28</sup>

The relentless activity of men and machines both pushed to their limits, often in close proximity to live ammunition, meant that accidents were a constant threat to life. Bruce Panton Macfarlan<sup>29</sup> was disappointed not to be assigned an operational role with the RAAF, but his service still had its hazards. He was lucky to survive a crash in a Catalina Flying Boat which attempted to land in rough weather at Townsville on 7 September 1943 after flying from Merauke. The plane sank in only a few metres of water. Unfortunately the water pressure was sufficient to detonate the anti submarine depth charges carried onboard. Thirteen men were killed. Wing Commander MacFarlan was one of six men to survive.

### **Barristers in New Guinea**

Many barristers served in New Guinea including Colin Begg<sup>30</sup>; Allen Eastman; Denys Needham<sup>31</sup>; Jack Fitzpatrick; William Ash; James (Ted) O'Toole<sup>32</sup>; Laurie O'Sullivan<sup>33</sup>; and John Flood Nagle.<sup>34</sup> It is difficult to do justice to the wide range of experiences in this one article. Hopefully further research will uncover more material.

The men in New Guinea were nicknamed the 'yellowing throng' or the 'yellow horde' in the *Legal Digest* because the Atabrin they took for malaria had that effect upon them. John Flood Nagle was a parachutist and despite his high activity managed to see a number of lawyers, including Brian Westgarth. Nagle's hospitality was legendary and he wrote of his fondness for life at the Sydney Bar with 'memories of pubs and courts and coffee houses, white paper and pink ribbon, and Phillip Street lying lazy in the sun'.<sup>35</sup>

Laurie O'Sullivan survived the hazards of bombing and tropical diseases and showed 'his strength and decency of character' during his war service. He refused promotion and 'stood up for his fellow lower ranks'. At one time he allowed a 'weakened Japanese prisoner' to 'wander back into Allied rear area for surrender, rather than face the danger of wounding or death whilst held closer to the Australian forward positions'.<sup>36</sup>

There were many experiences of note in New Guinea. A young Alan Renouf survived a serious head wound

while serving in what was known amongst some members of the legal fraternity as 'Hell's Own Country.' Typically the *Legal Digest* reported the incident in a light hearted manner: 'All he remembers of being knocked out was a thought passing through his mind, 'I'm dead and this is heaven'' - which brought a candid friend's obvious comment, 'optimistic cow aren't you.'<sup>37</sup> While wounded he applied to join Dr Evatt's newly established Diplomatic Cadet scheme, and thus commenced a long career in the Department of Foreign Affairs.<sup>38</sup> Another war veteran solicitor to become a diplomat under the scheme was Lloyd Tilbury.

Des Ward travelled to New Guinea after having joined a Victorian artillery unit, the 4<sup>th</sup> Field Regiment comprising 24 guns. Des' official role in the 4<sup>th</sup> Field Regiment was the gun position officer. He had a variety of duties, including supervising the men as they sweated and strained trying to haul the heavy artillery pieces into position. While the artillery was involved in many actions, much of their time was spent manhandling the heavy short or long barrelled field guns up and over roads which they often had to construct themselves. It was brutally hard work and the men were often stripped to their waists in the thick heat and humidity of the tropics.

Des can well remember the hard work of it all. In collaboration with the senior officers in the unit he often had the duty to choose the gun position then supervise the digging in of the artillery pieces. Des has many photos of his unit in these activities. It is a rare collection as personal photographs were banned on operations, but as he was the official photographer for the unit he was able to collect some graphically illustrative images of men hauling the guns into position as well as others of Dakota DC3 aircraft, transfers ashore by landing craft, and the various tent lines and campsites. He had a very active war like so many of his contemporaries at the bar.

In battles, Des acted as a forward observer, directing the fall of shot onto enemy positions. This role kept him in close operational duties with the front line of infantry. Sometimes he could be within metres of the enemy. He recalled 'one particular group just over a stream. They were dug in with wood over the top.' Des had to call the information by radio back to the guns. Usually the procedure was to let the first shell go

beyond the target then 'walk' them back on top of the Japanese.

It was a gruesome business – the aim of the operation was to kill the enemy. Not all the hazards were from the Japanese. On one occasion a shell fell short and landed only a few metres from Des. He said that: 'Luckily it landed in the soft mud of a river bank and penetrated before it exploded. I was covered in mud – then sent a fairly strongly worded message back to the gun layer to be more careful.'<sup>39</sup>

Many men remained distinctive characters despite their absence from the Sydney Bar during the war, their activities the subject of gossip in the *Legal Digest*. Tony Larkins<sup>40</sup> managed to maintain his reputation for sartorial style even in the jungle in New Guinea. His hospitality to fellow lawyers was much reported and appreciated. He cut a dignified figure, complete with a martial moustache and on occasion a silver topped cane and horse hair fly swot, in the Legal Corps on the island. Many other barristers including David Hunter<sup>41</sup> served in the Legal Corps in New Guinea.

Eventually illness forced Larkins out of New Guinea. Sickness bedeviled the military careers of many others. James Edwin O'Toole<sup>42</sup>, Russell le Gay Brereton<sup>43</sup>, Robert (Bob) Hope<sup>44</sup> and Victor Windeyer were just a few who were stricken by some of the many illnesses which prevailed in the war zones. Their rehabilitation usually saw them back in Sydney where they would visit the Phillip Street environs and attend some of the war related functions.

William Ash returned from service in the Middle East and went to New Guinea where he remained under the overall command of Victor Windeyer in the 2/13<sup>th</sup> Battalion. Ash was transferred to Milne Bay and took part in the seaborne attack at Finschaffien in early October 1943. Ash led a platoon in a hard slog of a battle, with the Japanese putting up a dogged resistance despite their debilitated situation. Ash also took on a legal role in his unit and wrote to the *Legal Digest* that 'jungle juice cases and censorship troubles (were) the bread and butter of legal practice in the tropics'.<sup>45</sup>

Harry Bell<sup>46</sup>, freshly graduated from Newington College in Stanmore in Sydney wanted to join the AIF. He was contacted by Margaret Dalrymple-Hay of the Sydney Law School to say that there were four places reserved in the faculty for 1944 if he wanted to have

one of them. He declined the offer and volunteered for the Cavalry Commandos, eventually joining the 2/9 Commando Squadron.<sup>47</sup> He served for a time with fellow law student and later barrister and solicitor, Neil Newton.<sup>48</sup> There were four members of the bar in the Commandos. In addition to Harry Bell and Neil Newton were David Hicks in 2/5 Commando and Harry Emery in 2/4 Commando.<sup>49</sup>

Harry Bell went to Aitape in 1944 and later made a landing virtually unopposed at Dove Bay. Amongst the items he carried ashore with him was Victor Windeyer's book on Legal History, ready to use any spare moments to continue his study. Victor Windeyer was quite moved when he learnt of this. Bell's unit was put ashore by the 43 Water Transport Squadron. The Adjutant for this unit was fellow barrister Nigel Bowen<sup>50</sup>, and one of the corporals was a young Ninian Stephen.<sup>51</sup> Stephen was promoted to lieutenant in the field. 43 Water Transport Squadron was a unique unit, nicknamed 'Mitchell's Maniacs'. Nigel Bowen provided a calming influence on his somewhat foolhardy commander, GD Mitchell, and was involved in a number of operations in 1945.<sup>52</sup>

Barristers saw action throughout the South West Pacific Theatre. Some were in the RAAF. Gough Whitlam was called into service in June 1942. Whitlam served as a navigator and was stationed for much of the war at Gove, on the eastern Arnhem Land coast of the Northern Territory. His squadron protected convoys off northern Australia, and later moved further north to undertake bombing raids on enemy supply camps in the islands and the Philippines. By the end of the war Whitlam was navigator on the only Empire aircraft assigned to the RAAF Pacific Echelon at General Douglas MacArthur's headquarters at Leyte and Manila, flying members of MacArthur's staff between the Philippines and Australia.<sup>53</sup>

In October 1943 Flying Officer Michael Helsham<sup>54</sup> was serving with No 2 Squadron. At that time the North-Western Area squadrons continued to support the New Guinea offensive by destroying as much of the enemy strength as possible in the Netherlands East Indies. The Hudsons of No 2 Squadron and Mitchells of No 18 Squadron continued nightly attacks on Koepang, Lautem, Fuiloro, Langgoer, and other targets.<sup>55</sup> It was an extremely busy and hazardous time.

On 11 October Helsham's Hudson bomber was badly damaged by anti-aircraft fire in the raid on Langgoer.



The controls and wireless of the aircraft were shot away and the plane spiralled out of control. Helsham regained control and then piloted the plane back over 640 kilometres of open sea and crash landed at base. He was awarded the DFC for action. He survived to become judge advocate general of the RAAF.<sup>56</sup>

Another barrister to fight in the RAAF against the Japanese was John Richard Parkinson.<sup>57</sup> He lost his life in an aircraft accident at Fenton airfield in the Northern Territory on 2 February 1945. The Liberator bomber in which he was bombardier was returning from a 12 hour raid against Japanese shipping in cyclonic weather when it ran out of fuel near its base. He was trapped in the plane when it crashed and burned.<sup>58</sup>

Reginald Joseph Marr<sup>59</sup> had a more fortunate experience of war against the Japanese. He was awarded the Distinguished Flying Cross for his 'skill and courage on many difficult missions' and was especially recognised for his courageous effort as captain of a Catalina Flying Boat which rescued the downed crew of an Australian Beaufighter in the Timor Sea.<sup>60</sup>

Hazardous duty in the RAAF took barristers across the globe. Jean Mullin (nee Malor) was directly touched by the grief of the war as some of the young men who she knew from her student days lost their lives, but especially when her brother the barrister Ronald Malor<sup>61</sup> was killed on operational duty with 70 Squadron while on a bombing raid over Bulgaria on 12 June 1944. This was around the same time as the great D-Day Landings. Tom Hughes was on patrol duty flying over the English Channel and the Bay of Biscay searching for U-Boats. After the landings Tom's unit flew close to the French Coast to undertake 'photographic reconnaissance as German forces withdrew from southwestern France'. The work took them close to heavy flak around Belle Isle, St Nazaire and Lorient.<sup>62</sup>

Joseph Coen, another graduate of Sydney's Riverview College, went ashore with the British Army at Normandy on 11 June 1944, five days after D-Day. Coen had survived the evacuation from Dunkirk. He went ashore with the Royal Artillery on 11 June 1944 (known as D Plus 5 Day). He wrote to his old school of the crowds of ships and wrecks sticking up out of the water, the dangers of alighting from a landing craft into deep water and how 'floundering, cursing, panting with the strain, the men staggered into the sand, where military police and beachmasters got them going on a road laid

down with sections of steel mesh.' He travelled inland quickly past graves marked with rough wooden crosses to avoid the German artillery towards Ouistreham and settling into a trench to the sound of 'the rattling of Bren guns' and 'the occasional luminous glare of the Verey light.'<sup>63</sup> He was later wounded in action and survived the war.

### 1945 Burma and Balikpapan

The Westgarth family had a tragic experience of war. Mervyn Westgarth had died of meningitis while serving with the 12 Light Horse in the Middle East in the First World War. His brother Dudley had three sons. Donald Dudley, a Sydney solicitor, was shot down and killed while flying a Thunderbolt fighter over Burma on Anzac Day 1945. His brother Captain Brian Westgarth had been admitted to the bar before sailing to the Middle East with the Seventh Division. He returned safely, then was sent into the Pacific campaign and was killed at Balikpapan on July 5 1945. He had been a well known member of the legal community, regularly contributing to the *Legal Digest*. Their brother John Dudley Westgarth was a captain in the Australian Tank Corps. They were very much a military family with their cousins David, Winston and Donald all serving in the armed forces in the Second World War.

Also on Balikpapan was a young law student who later joined the bar, Lyones (Peter) Walcott. He was the brigade major for 21<sup>st</sup> Brigade and was involved in a great deal of military activity with his commanding General Ivan Dougherty. Amongst other duties Walcott was involved in the occupation of Macassar after the Japanese surrender. He was awarded the MBE for meritorious service in Balikpapan and Morotai. Also serving in Borneo was barrister Donald F Kelly.<sup>64</sup> He was awarded the MBE for his meritorious service in the campaign. Conditions in Morotai could be very unpleasant and barrister Phil Opas wrote of his time in Morotai that 'it was a hot-box of sweat and mud; of dust and humidity; of excitement and boredom; of loneliness and frustration'.<sup>65</sup>

### Barristers on the Home Front

Serving in the armed forces was not necessarily a disadvantage for a man's reputation in the long run, but in the short term it could take him out of the immediate political or legal processes which wove

through the circles of power and opportunity in the centre of Sydney. Many lawyers were fearful that their time away from the profession could adversely affect their careers. The attorney general during the war was the Sydney barrister Clarence Martin. According to his entry in the *Australian Dictionary of Biography*:

Hoping to strengthen his political credentials, Martin was commissioned in the Militia in March 1942 and transferred to the Australian Imperial Force on 15 July. In 1943-44 he was staff captain at Port Moresby Base. As a field co-ordinator (1944-45) on the staff of the quartermaster general, Land Headquarters, Melbourne, he rose to temporary major and travelled around the South-West Pacific Area. He was placed on the Reserve of Officers on 18 October 1945. His war service, however, isolated him from politics, even though he had not resigned his portfolio.<sup>66</sup>

Martin was a leader in trying to ensure preference for servicemen in the allocation of briefs during the war. He was instrumental in having serving barristers and solicitors identified with dagger symbols next to their names in the *Law Almanacs* so people could engage them. The most senior politician to have been a member of the New South Wales Bar during the war was Herbert Vere Evatt.<sup>67</sup> His career is well documented in other publications. During the war he was a very capable diplomat. He was a leading force in the establishment of the United Nations in 1945 and was president of its General Assembly 1948 - 1949. His later appointment to be Chief Justice of the Supreme Court of New South Wales in 1960 was marred by failing health and capacity.

The Law School attempted to help men maintain their studies while still serving in the armed forces. Major Ray Reynolds<sup>68</sup> wrote that he was helping so many men in his unit, the 56<sup>th</sup> Anti Aircraft Regiment, studying for their legal exams that he called himself the 'Honorary Dean of the North Queensland Law School'.<sup>69</sup>

Law students were encouraged to continue their studies while on active service and the Secretary of the school, Dalrymple-Hay, went to great pains to send out the necessary notes and exams for people to continue their work. As noted earlier, Harry Bell carried Victor Windeyer's book of Legal History Lectures on his back wrapped in his gas cape. He made summaries and summaries of it, then did specimen exam papers which he sent back to the Law School to be marked by Dr

David Benjafield.

Victor Windeyer held great sway over people, not only because of his rank. He wrote regularly to the legal community of the university and was the subject of regular sightings and gossip. Despite the great efforts of his command, he too kept at his studies and in 1945 was awarded the degree of Master of Arts, based on a thesis he had started before the war but managed to finish during active service with the AIF.<sup>70</sup> Victor Windeyer was a remarkably capable officer, described as 'a versatile, thinking brigade commander of the highest quality' who gave precise, clear orders and ensured everyone in his command knew what was happening.<sup>71</sup>

As with the First World War many members of the bar became active supporters for the various Comforts Funds and Red Cross activities. HTE Holt joined the committee of the Welfare Service of the Australian Red Cross Society (NSW Division) in 1944 and the Handcrafts Committee, an important role which entailed assisting wounded servicemen regain some form of occupational activity. He stayed with the society until 1970 and received the honorary life membership medal. Coincidentally the honorary director of Red Cross Branches in New South Wales during the war was Lady Owen, the widow of Sir Langer William Meade Loftus Owen, who had become a judge after a very active involvement in the First World War, in which he with his first wife May established the Red Cross Missing and Wounded Enquiry Bureau in the state.

During the war, Sydney barristers, Eric Miller KC and WJ Dignam assisted Mr Justice Lowe at the royal commission into the 'Brisbane Line' in the Victorian Supreme Court. There were some other notable cases, one of which was the extraordinary case of William Dobell's portrait of Joshua Smith which was pursued so enthusiastically by (Sir) Garfield Barwick. The matter attracted a lot of press coverage and at one stage Richard Kirby had been briefed to appear for Dobell. Kirby was appointed to the bench before the case was complete. Garfield Barwick, appointed KC during the war, also successfully challenged the validity of the National Security Regulations during the conflict.<sup>72</sup>

There were all manner of legal issues to be resolved during the war. One Dr Eduard Korten, a LLB from the University of Vienna and a barrister and solicitor of many years experience in Austria was refused a certificate

of fitness by the Barristers' Admission Board on the grounds that he was an enemy alien. He was eligible to be admitted in 1944 when he was also able to be naturalized but he wanted to have his period of service shortened.<sup>73</sup> He was represented by Harold Snelling, with Clive Teece and Else Mitchell representing the Bar Association. Korten was eventually admitted on 10 March 1944.

There were some discomforts for those who were at home. The shortage of sleeping cars on trains meant that the High Court bench had to keep an all night vigil when travelling interstate. 'There were mornings too, when Jean Mullin and WJ Baldock sway(ed) from the same tram strap while bunches of judges like grapes of wrath, hand from handrails meditating darkly that 'the weakest kind of fruit drops earliest to the ground'.'<sup>74</sup> The shortage of Articled Clerks also caused much consternation for those in the law.

One home military unit which attracted a range of barristers was the Directorate of Research in Melbourne. It was in this unit that barrister John Kerr 'made (a) spectacular rise'.<sup>75</sup> Other barristers to serve in the unit included Bill Perrignon (who also served in a Flash Spotting unit). One other interesting member of note was Professor Julius Stone of the Sydney University Law School.

There were a great range of committees to absorb the energy of barristers, the Family Welfare Committee of Legacy, the Stevedoring Commission, the Aliens' Tribunal, the Hirings Assessment Tribunal and the War Damage Commission. WJ Bradley KC was the commissioner of Quotas and Shipping.

### Legal section

It was only natural that barristers would find themselves involved in many court cases in the military during the war. Some barristers used their legal skills as law officers. (Sir) James Kenneth Manning was one who saw legal service, in his case with 9 Operational Group of the RAAF. Many others acted in legal capacities either as members of the armed services or in associated roles.

The legal section of the army absorbed the professional skills of a variety of men including Edward St John. One Sydney barrister, John Bowie Wilson KBE VD became the judge advocate general. He was involved in a variety of military cases, but it was his appearance in

the royal commission into the escape from Singapore of Lieutenant General Gordon Bennett which put him firmly in the public gaze. Bennett's escape was viewed as illegal by Wilson and he stated so under cross examination from Bennett's counsel, another Sydney barrister, Brian Clancy KC. Counsel assisting the commission was WR Dovey KC, also of the Sydney Bar.<sup>76</sup> Bennett's escape from Singapore was one of the most controversial cases in the war and continues to excite strong comment until the present day.

It could be of great use having a barrister in a unit. Some were used in courts of enquiry, but Clifford O'Riordan in RAAF in the Europe was valued because he was useful in acting as defence counsel and getting the defendants off the charges. It made him a very popular figure with his fellow airmen. In one court martial he defended a fellow airman called 'Blue'.

In O'Riordan's words 'They laid it on thick for Blue, but the country police were just a piece of cake in cross examination and to (his) surprise and delight (they) got away on every charge'. His reward seems to have been a celebration later in the hotel at Scunthorpe with Blue. O'Riordan became most popular as he acted as the defending officer in most of the courts-martial in the Group and 'had the record of getting the majority of his clients off'. His comrades mistakenly believed he was a KC in Sydney, and no doubt his skill in court made him look such a counsel, but it was not the case. He had significant court room experience from his days at the bar, including defending an accused murderer. O'Riordan had appeared against the crown prosecutor, Tom Crawford KC in the case in November 1940, one of his last cases before enlistment in January 1941. O'Riordan's loss in action 29/30 July 1943 caused great grief in his unit. He was very popular and had started compiling a history of his unit when he was lost in a raid over Hamburg.

John Lincoln<sup>77</sup> had been in Geneva at the start of the war and was eventually to join the Oxfordshire and Buckinghamshire Brigade. He continued to study for the bar and 'signed the roll for admission as a barrister in a basement of Lincoln's Inn during a bombing raid in 1944'.<sup>78</sup> His war led him through a variety of hazardous postings in the Mediterranean then to India to analyse Japanese wireless communications before going to Singapore in 1946 as deputy assistant judge-advocate in a court-martial of seven Indian soldiers charged

with mutiny and murder. 'He also had the onerous duty of overseeing the hangings of some Japanese war criminals in Changi jail.'<sup>79</sup>

### **End of the war**

The end of the war was witnessed by many lawyers in many parts of the world. Colin Kennedy, was a pilot in an impressive fly over of Tempest Fighter Aircraft at the German surrender in Denmark.<sup>80</sup> (Sir) Laurence Street arrived in Tokyo Bay on board *HMAS Ipswich* a few days before the Japanese surrender to MacArthur on 2 September 1945. Phil Opas was at the surrender ceremony at Morotai and wrote of the tension as 'two Japanese barges flying a white flag of truce arrived from the Halmaheras escorted to Morotai harbour by American P.T. boats and Lieutenant General Ishii surrendered his force of 40,000 troops'. He was also at the surrender ceremony where General Teshima tendered his sword in token of surrender to General Blamey on behalf of 126,500 troops. The event made quite an impression on him.<sup>81</sup> Harry Bell was at the surrender of General Adachi at Cape Moen. Tom Hughes was on duty patrolling the Channel Islands on VE Day 'rounding up German vessels caught off shore at the surrender'.<sup>82</sup>

After peace was declared, Des Ward was transferred to Allied Intelligence Bureau and worked on a revision of the laws of New Guinea and Papua. At the time he was based at Middle Head with a young Lieutenant Colonel John Kerr also based in the same camp preparing patrol officers to go into New Guinea after the war. Harry Bell was left in Rabaul for a time but managed to complete his course and sat his exams in Legal History while he was on the island in 1946.

### **War Crimes Tribunal**

After the war there were a number of Inquiries and Tribunals which absorbed the skills and energy of many barristers. Some men such as Adrian Curlewis returned from the scarifying experience of being a prisoner of war on the Burma Thailand Railway to start investigating such issues as the treatment of refugees on ships.

It was only natural that lawyers would find themselves involved in the various investigations and trials concerning War Crimes – particularly involving the Japanese. (Sir) Richard Kirby was appointed in late 1945 a member of the Australian War Crimes Commission

established to investigate claims of Japanese atrocities against Australian troops. He travelled to Ceylon where he impressed Lord Mountbatten and avoided the tendency to exact excessive retribution from the Japanese. Other barristers involved in the War Crimes Tribunals included: Thomas Mackay, John Brennan<sup>83</sup>, M Desmond Healy<sup>84</sup>, John Williams<sup>85</sup> and Ken Wybrow.

Wybrow, who had served in New Guinea, the Solomon Islands and Borneo told his children many stories of the cases that came before the War Crimes Tribunal and how he respected the Japanese soldiers for their devotion to Japan and their loyalty to commanding officers. He learnt the Japanese language and maintained contact with a few Japanese after the war.<sup>86</sup>

The Queensland High Court Justice, Sir William Webb, was one of the most significant jurists in the war crimes tribunals as they gradually evolved from being politically motivated attempts to punish the enemy into a more balanced, legal examination of evidence with properly briefed counsel doing their best to defend their clients.

Not all the investigations involved the enemy. In early 1946, Captain John Joseph (Mangrove) Murphy, a former Patrol Officer and Coast watcher on New Britain was tried by Court Martial for 'having 'treacherously given intelligence to the Japanese' and for giving more than simply his name rank and serial number in interrogation. He was defended at the court martial by his cousin, the Sydney KC, Eric Miller and David Hunter.<sup>87</sup>

### **Post War generation**

The end of the war marked the beginning of a period of great expansion and prosperity for the bar. At first Sydney University was suddenly straining to take the influx of new students. Lecture halls strained to meet the demand and Wallace Lecture Theatre was built to accommodate the large numbers. The law school also greatly expanded in size with some 1100 students enrolled there in the years immediately after the war, compared to 650 in 1953.

There was a surge of newly energised veterans ready to take on new causes, and cases, and there was plenty of work to keep them busy.<sup>88</sup> Immigration brought a rapidly expanding urban population to New South Wales. There were increases in all manner of areas where a barrister could be briefed: industrial relations, workers'

compensation, personal injury all expanded.

There was a sense amongst older barristers of a new generation taking over.<sup>89</sup> Sir Adrian Curlewis was appointed a judge of the District Court on 1 September 1948, barely three years after being released from captivity. Alfred Rainbow was even quicker. He was appointed a compensation judge in 1945 while he was still on military service.

After the war barristers tried to pick up their roles. Men who had been in the services were interviewed by vocations guidance officers as they were demobilised and some were advised to pursue law as a profession. Such advice was based in part on their results in the early IQ tests which were then administered. Occasionally this led men into the profession who had not entertained the idea previously. Kevin Holland reportedly had his job held open for him at the bank while he served, but on the advice of the vocations officer he chose law. He went on to become a judge of the Supreme Court.<sup>90</sup>

Other ways men were set up in the law was that the city council leased out a building on the corner of 150 Phillip Street and Martin Place exclusively for the use of barristers who were returned soldiers. It was colloquially known as 'Diggers' Inn' by the legal fraternity, and 'Diggers' Dugout' in the press. Some legal firms such as Abbott, Tout, Creer & Wilkinson only briefed ex-servicemen as did the Legal Service Bureau. There were a number of people who believed that 'the claims of men who served their country (should be) paramount when it was a question of filling jobs'.<sup>91</sup>

Aspiring lawyers could be educated under the Commonwealth Reconstruction Training Scheme (CRTS), which paid their university fees and gave them a weekly allowance of three pounds five shillings for single men or five pounds ten shillings for married men. This lasted for three years then they were given loans with generous interest and repayment schedules. The CRTS men were at least three years older and brought with them a wealth of experience. Professor Brian Fletcher, a young undergraduate at the university at the time, recalls the distinctive nature of the men of the CRTS, who were older, clearly bonded to each other, and especially keen to make up for lost time in their studies.<sup>92</sup> Many would become the leaders of a greatly expanded bar after the war.

### Conclusion

The Second World War was a watershed for the New South Wales Bar. Life for barristers would change irrevocably after the conflict. A new generation would move into the law and their actions would shape the character of the bar and the judiciary for the following fifty years. There was plenty of work straight after the war, although there was a drastic shortage of chambers. The police courts were working at full capacity.

There was a lot of landlord and tenant work available. One issue involved that of protected tenants who held onto the abodes which had been let out during the war by soldiers and others whose lives had been dislocated by the conflict, but who subsequently wanted them back.<sup>93</sup>

In addition there were jury trials for motor vehicle accidents, increasing cases from an expanded immigrant population, divorce proceedings and worker's compensation to provide briefs. In the words of his Honour Harry Bell, it was a 'good time at the bar' and the 'weary weary wait' for a position described by the former Chief Justice Sir William Cullen, was no more.<sup>94</sup> Bright men, and increasingly women could rapidly become successful, prosperous barristers.

The early 1950s was a time of an expanding but still a close knit community of around 230 barristers. Within six months of admission a newcomer would know most of the others. It was natural that so many energetic and committed men would find their way onto the judiciary. They were hard workers and the high proportion of judges from the 1960s onwards who were ex-servicemen suggests that overseas experience was a positive factor in the selection process.

Many barristers and lawyers lost loved ones in the war. Richard Latham, the son of Sir John Latham, was KIA in the RAF. Teece KC had the endless worry of his son Normand a prisoner of war in Germany. His daughter Elizabeth was awarded 'Mention in Despatches' for her work in the WAAFs. She was not the only woman associated with the law in service. Pat Long Innes the daughter of Justice Long Innes served in the Merchant Navy for three years as a purser. Alfred Rainbow's brother James lost his life in an aircraft accident near Penrith in New South Wales. Sydney Henry Francis Windeyer, solicitor and brother of Brigadier Victor Windeyer, was killed in action in Egypt in October 1941.

Within a few years there was one of the most significant High Court cases of the century and B B Riley, who had only recently been appearing in the thick humid atmosphere of tented war crimes tribunals, and Bruce Macfarlan, who had been lucky to survive a plane crash in Townsville, were in that much more rarified atmosphere. Men's lives went on and for some their professional and personal achievements and setbacks may have overshadowed their war experiences.

But as the curtain is drawn on the post war generation and the biographies are written for many judges and barristers, there should be some acknowledgement that their actions during the Second World War helped to define the man which each became.

Many men could not be mentioned in detail in this brief account. (Sir) Gordon (Skull) Wallace<sup>95</sup> was one of the few KCs to serve in the armed forces. He served in Australia and New Guinea as assistant adjutant and quarter master general. A young Lionel Bowen<sup>96</sup> trained as an artilleryman then health reasons meant he worked as a medical orderly in Sydney Hospital. The war still touched him through the grief of the loss of his close childhood friend in the RAAF.<sup>97</sup> The Legal Corps took up a number of barristers and used them in a range of areas. Barrister and Major John Lyons was in the Corps and was the Liaison Officer to the US Forces. Gordon Samuels<sup>98</sup> served with the 96<sup>th</sup> (Royal Devon Yeomanry) Field Regiment Royal Artillery in Northern Ireland and Burma from 1942 to 1946.

After the war barristers continued their connection to their old comrades in arms. Harry Bell became patron of the Commando Association. Harry can recall travelling in to an Anzac Day march on the train from Turrumurra with Sir Iven Mackay and Sir Victor Windeyer, both of whom were displaying the long row of medals they had earned in various conflicts. Leycester Meares would play a generous host in his Chambers each Anzac Day to the men from his old Signals Section.<sup>99</sup> There were many other such associations. Now the generation of people who lived through the Depression, the Second World War and post war reconstruction are nearly all gone.

### **Lest we forget**

A visitor who walks up the stairs which spiral towards the dome of the Old Supreme Court in King Street will see two small brass plaques at the top. They seem

to exist almost as an afterthought on the edge of the corridor. People have walked by them for years and in the strange world of things hiding in full view have failed to see them, or failed to take notice of the names and significance of what is recorded there. These are the Honour Rolls of solicitors and barristers who lost their lives in World War Two. They are modest in comparison to the looming stone monolith on the ground floor which lists the names of all those members of the legal profession who served in the First World War. If all the lawyers and law students who served in the Second World War were listed then the memorial to them would trace the elegant curve of the staircase and line the wall, a bronze tapestry from the floor to the top of the dome. The plaque on the right reads:

### **IN MEMORY OF THE MEMBERS OF THE BAR OF NEW SOUTH WALES WHO DIED ON SERVICE IN THE WAR 1939 – 1945**

Brathwaite, RGA  
Cassidy, RB  
Green, RNR  
Keegan, RW  
Lynch, JP  
Malor, RL  
O'Riordan, CT  
Parkinson, JR  
Phillips, JMK  
Richards, DJ  
Sievey, RT  
Stephens, RF  
Turner, RWN  
Vincent, TG  
Walker, CK  
Westgarth, BD  
Woodhill, PJ  
Wright, GL

## Endnotes

1. Later registrar in divorce, NSW Supreme Court.
2. In one of the ironies of war, a German submarine commander at the time was Ewald Euchtriz. He had been Tom Hughes' school captain at St Ignatius College, Riverview in 1938. Euchtriz had naively visited Germany in 1939 and been conscripted into the German Navy where he fought out the entire war. Information courtesy James Rodgers of St Ignatius College, Riverview.
3. Admitted 1960.
4. I am indebted to Basil Papayanni, interviewed 26 February 2012, for details concerning Cliff. Material in this article comes from the Papyanni family and the obituary on Cliff, 'War hero who fought hard for what he believed in' by Richard Jones in the *Sydney Morning Herald*, 21 February 2012, p 18. I also acknowledge the assistance of Nicole Lenoir-Jordan (nee Papayanni) and Harriet Veitch, obituaries editor at the *Sydney Morning Herald*, in compiling this article.
5. Richard Jones, obituary for Cliff Papayanni.
6. Admitted 1933.
7. C T O'Riordan's Diary Extracts. In Herington *Air Power Over Europe 1944 – 45*, 498.
8. Later Founding judge of the Environment Court, QC.
9. Later judge (District Court) chairman of Quarter Sessions.
10. Admitted to the bar 8 March 1946.
11. *Legal Digest* No 12, 31 December 1943, 8.
12. 'Air' *Legal Digest* No 9, 31 March 1943, 9.
13. 'On the Air – England' in *Legal Digest*, No 13, 31.
14. Email from Richard Perrignon 23 March 2010.
15. Email from Peter McEwan SC 26 August 2010.
16. Later had a long career with the Australian Broadcasting Commission.
17. Ross A Pearson. Interview with the author, 23 April 2011.
18. Ross A Pearson *Australians at War in the Air* Kangaroo Press, 1995, 25 – 26.
19. Pearson 1995, 99.
20. *Bar News* 2005, 689.
21. Later judge (District Court) chairman of Quarter Sessions.
22. 'RAAF personnel serving on attachment in Royal Air Force squadrons' [http://www.awm.gov.au/catalogue/research\\_centre/pdf/rc09125z004\\_1.pdf](http://www.awm.gov.au/catalogue/research_centre/pdf/rc09125z004_1.pdf)
23. His body was eventually found and identified by dental records in 1948. His brother was KIA in Syria in June 1941.
24. Details of the extensive search for his remains and the long series of enquires made by his mother can be found in his service records available on the Website of the National Archives of Australia on <http://recordsearch.naa.gov.au/scripts/Imagine.asp>
25. Later appointed public defender, QC. I am indebted to judge Joe Moore who alerted me to information concerning Howard Purnell.
26. The Calgary Mosquito Society website, Memories of Jack Rayner. <http://www.calgarymosquitosociety.com/feature07/feature07.htm>
27. Nicholas Buckworth & Harriet Veitch 'War Hero, POW, lawyer, spook and businessman' *Sydney Morning Herald* 21 November 2009. The author acknowledges the great help of the Buckworth family and Harriet Veitch in the research.
28. Ross Pearson, telephone interview with the author 20 May 2011.
29. Later a judge of the Supreme Court and Admiralty judge.
30. Later judge (Supreme Court) QC.
31. Later judge (Supreme Court, Equity Division) president NSW Bar Association, QC. He also served at Balikpapan with the 2/5<sup>th</sup> Artillery Regiment.
32. Later crown prosecutor.
33. Practised in both NSW and the ACT. I am indebted to Christopher Ryan for his help with information concerning Laurie O'Sullivan.
34. Admitted 1938.
35. *Legal Digest* No.16,31 December 1944, 6.
36. Christopher Ryan 'Laurie O'Sullivan' in *Bar Bulletin* The Australian Capital Territory Bar Association, September 2010. Courtesy Christopher Ryan.
37. *Legal Digest* No 9, 31 March 1943, 7.
38. Alan Renouf was one of only twelve successful applicants out of over 1500 who applied.
39. Author Interview with Des Ward December 2010.
40. Later judge (Supreme Court) QC.
41. Admitted 1923.
42. Admitted to the bar in 1931 and served in New Guinea. Details supplied by his daughter judge Margaret O'Toole in correspondence with the author in October November 2010.
43. Served Middle East, New Guinea, Borneo, judge advocate War Crimes Tribunal on Labuan. Later a judge of the Supreme Court.
44. Later judge (Supreme Court) judge of appeal, QC.
45. 'Gossip in the Forces' *Legal Digest* No 17, 1 March 1945, 5.
46. Hubert H (Harry) Bell. Later District Court judge, chairman of Quarter Sessions and acting Supreme Court judge.
47. Interview by the author with judge Harry Bell 6 February 2011
48. Judge (District Court).
49. David Hicks, Harry Bell & Neil Newton became District Court judges in New South Wales. Harry Emery of the Victorian Bar, became a justice in the Family Court of Australia. Details from Harry Bell, telephone interview 2 April 2011.
50. Later Sir Nigel Bowen judge (Supreme Court) chief judge in Equity, inaugural chief justice Federal Court, president NSW Bar Association, QC.
51. Later Sir Ninian Stephen KG AK GCMG KBE QC 20<sup>th</sup> governor-general of Australia and a justice in the High Court of Australia
52. Robert Macklin, 'Afterword' in GD Mitchell *Backs to The Wall*, Allen & Unwin, 2007, 319 – 333.
53. National Archives of Australia Australian Prime Ministers <http://primeministers.naa.gov.au/primeministers/whitlam/before-office.aspx> .
54. Later a judge of the Supreme Court, chief judge in Equity and additional judge of appeal judge advocate general of the RAAF, QC.
55. TEF Hughes AO QC, Address Supreme Court judges' Dinner 2 February 2006. Available online at [http://www.lawlink.nsw.gov.au/lawlink/supreme\\_court/ll\\_sc.nsf/pages/SCO\\_tefhughes020206](http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/pages/SCO_tefhughes020206)
56. *Air War Against Japan*, 117.
57. My thanks to Harry Bell for his help with this information.
58. Was the assistant conveyancer at the Public Trust Office. Listed as a non-practising barrister.
59. 'Crash of a Liberator' <http://www.ozatwar.com/nt29.htm>
60. Deputy senior crown prosecutor (appeals) solicitor general of NSW, QC .
61. I am indebted to Peter Dwyer for his assistance in these details. Further information is from the War Record of Marr at the Australian War Memorial and 'Vale Reg Marr' in *Stop Press*, December 1999, 8.
62. Admitted 1935.
63. 'Tom Hughes: Legion D'Honneur' *Bar News* of Winter 2005, 70. Quoted with permission of the author.
64. JV Coen 'Invasion of Normandy' Our Alma Mater Riverview College December 1944.
65. Later crown prosecutor.
66. Phil H N Opas (later Air Commodore) private paper concerning his eyewitness account of the surrender. August 2006. Opas was admitted to the NSW Bar in 1949 and practised mainly in Victoria. He was counsel for Ronald Ryan, the last man executed by hanging in Australia.
67. Paul White, 'Martin , Clarence Edward' *Australian Dictionary of*

Biography Online Edition.

68. HV Evatt was an iconic Labor politician who was variously a High Court judge, minister for foreign affairs, Commonwealth attorney-general, president of the United Nations General Assembly, chief justice of New South Wales, QC, KStJ.
69. Raymond Reynolds admitted to the Bar 1938 later judge (Supreme Court) judge of appeal, chairman Law Reform Commission.
70. 'Army – Home Front' *Legal Digest* No 12, 31 December 1943, 3.
71. 'Wrote Thesis for Degree While Fighting With AIF' *Sydney Morning Herald* 4 September 1945, 4.
72. John Coates, *Bravery Above Blunder* Oxford University Press 1999, 104–105. Coates describes the many actions commanded by Windeyer in New Guinea and his admiration for his subject reaches out from the pages.
73. Justice JP Slaterry, *Address*, 2007, 3.
74. I am indebted to former Justice Slaterry for his assistance with this case.
75. 'Vigilant Benches and Hanging Judges', *Legal Digest* No 15, 30 September 1944, 1.
76. 'Home Chat in the Army' *Legal Digest* No. 14, 30 June 1944, 3.
77. The royal commissioner was a South Australian judge, Sir George Ligertwood, and he found that Bennett's escape had not been legal. It was a controversial finding which followed Wilson's opinion. Wilson was made a KC in 1946 but died a year later. He was succeeded as judge advocate by Justice William B Simpson.
78. Later an acting justice of the Supreme Court of NSW, District Court judge, mayor of North Sydney and deputy chancellor of Macquarie University.
79. Marilyn Dodkin 'John Lincoln 1916 – 2011 A founder of Macquarie University', obituary the *Sydney Morning Herald* 2 January 2012 p 18.
80. Marilyn Dodkin John Lincoln obituary p 18.
81. I am indebted to Felicity Kennedy for details concerning her late husband Colin. Details conveyed in a letter to the author 9 February 2011. She had met Colin while he was serving in England and she was adjutant at the 13 Operational Training Unit where he was located.
82. Phil Opas 2006.
83. 'Tom Hughes: Legion D'Honneur', 71.
84. Later judge (District Court) chairman of Quarter Sessions resident magistrate in Fiji. Acting Justice of the Supreme Court of Papua New Guinea.
85. Later judge (District Court) chairman of Quarter Sessions QC.
86. Later judge Workers Compensation Commission, QC. The film *Blood Oath* is based on his experiences.
87. Email with the author from Ken Wybrow, son, 22 August 2010.
88. Phillip Selth, *The Trials of John Joseph (Mangrove) Murphy (1914 – 1997)*, Sydney 13 May 2010, 1.
89. Harry Bell noted the preference for servicemen after the war.
90. I am indebted to Babbette Smith, former chief executive of the Bar Association and daughter of his Honour Bruce Macfarlan for her memories of the people from the post war period. Information given in a number of emails on 20 & 21 November 2010.
91. Harry Bell supplied this information.
92. *Legal Digest* 30 September 1942 No 7, 2.
93. Professor Brian Fletcher. Conversations with the author, Sydney 2010
94. I am indebted to His Honour Harry Bell for his generous sharing of memories of the years immediately after the war in a series of conversations in October 2010. His Honour also very generously edited drafts for the Honour Roll and supplied many useful details and much encouragement.
95. Dalrymple-Hay 22.
96. Later judge (Supreme Court) First president Court of Appeal acting chief justice Supreme Court, KC co-author (with Sir Percy Spender) of *Company Law and Practice*, and (with J Mcl Young) *Australian Company Law and Practice*.
97. Later Commonwealth attorney-general, deputy prime minister.
98. Email from Anthony Bowen, 24 March 2003.
99. Judge (Court of Appeal) governor of New South Wales, chancellor of UNSW president NSW Bar Association AC QC.
100. Details from telephone interview with Harry Bell, 2 April 2011.



# Before Wentworth Chambers

By John P Bryson QC



Wentworth Chambers was completed and opened in 1958, early in the wave of modern office buildings when construction revived in the late 1950s. The present Selborne Chambers was completed about 1964. I remember the streetscape before then.

About 1964 the Commonwealth, driven by Barwick QC the federal attorney-general, acquired many buildings in King Street, where the present Supreme and Federal Courts building was built much later. For about a decade these buildings stood empty and derelict while the Commonwealth and state governments ruminated Barwick's project. The first of these, with a frontage to King Street, was the Queen's Club at the Macquarie Street corner, purpose-built late in the nineteenth century as a splendid club for wealthy and fashionable ladies. In the basement was Reynaud's Restaurant, in the 1950s one of the few restaurants in the City, and very pleasant too. The Queen's Club became barristers' chambers for a year or two to accommodate barristers from Old Selborne while the present Selborne Chambers was built. Then there

was a straggle of rundown shops to the Phillip Street corner; these included a pharmacy and a shop which sold stationery at the front and a wide array of firearms at the back. The lady who sold me pencils and writing books there was of a nervous disposition, and I was told by Michael Helsham that she suffered a lot because her husband spent a lot of time in jail. The corner shop was Maurice's Dry Cleaners, and the upper floor of the shop was Oxford Chambers, entered from a door in Phillip Street, occupied by Rae Else-Mitchell and sometimes by his readers. I never went into it.

Next was Denman Chambers, purpose-built as chambers about 1882 by Judge Josephson, a District Court judge who had considerable landholdings in and around Phillip Street. In its time no doubt Denman Chambers was very suitable, and in the 1950s it was fully occupied, indeed quite crowded. It was a substantial stone-built structure, but the central timber core including the staircase was becoming decrepit; as one walked up the stairs they creaked in response to one's weight. All these buildings were eventually replaced



by the present Law Courts Building.

The next building north of Denman was Dr Fiaschi's house. He had been a well-known and popular figure in Sydney early in the twentieth century, a fashionable doctor who served with the Australian Army in Europe in the Great War. The Porcellino in front of Sydney Hospital in Macquarie Street was one of his projects, realised long after his death. In 1954 and 1955 Dr Fiaschi's house was occupied by the state crown solicitor and other offices and there may have been a few barristers' chambers there. North of Dr Fiaschi's house there were one or two terrace houses I knew little about, with bar chambers and solicitors' offices. These became the site of Wentworth Chambers.

The next building to the north was Selborne Chambers, purpose-built for barristers' chambers late in the nineteenth century. Selborne was well-designed with chambers on a grand scale and central space for clerks and waiting clients. Chambers occupied the ground floor and first floor; and possibly the basement: I do not remember. There were apartments on the second floor; presumably these were first intended for barristers to live in, but in the post-war period they were home to protected tenants who could not be winkled out. Their presence was greatly resented as the space would have been useful for chambers, and there was some muttering that the women who lived there were ladies of ill fame. The present Selborne Chambers stands on this site.

North of Selborne was a twentieth century building owned by the Teachers Federation, which had

offices there. The present Law Society building stands on this site. There were no barristers in that building. High in the building was a lecture hall which was used for some lectures by Sydney Law School. I remember lectures by Rae Else-Mitchell, and by Laurence Street, whose lectures began dramatically when he ran down the central corridor and jumped in one bound onto the stage, turning about to give his lecture immediately. The red brick Canberra Private Hotel, with respectable occupants, stood next to the Teachers Federation building: this too gave way later to the Law Society building. Beyond the Private Hotel were three or four terrace houses, in which there were a few barristers' chambers and some solicitors' offices. This space is now occupied by the Reserve Bank.

North of Martin Place was a small patch of greenery left over from demolitions before the War which widened Martin Place. Then there were chambers owned by the Sydney City Council and known as the Old Stamp Office, extremely overcrowded. Then there were several small shops, then Chalfont, a modern office building probably constructed about 1932. The upper floors were Chalfont Chambers, the most modern building then occupied by barristers. There may also have been an insurance company on the lower floors. North of Chalfont there were no more chambers, with one or two exceptions when barristers not acceptable anywhere else set up in old terrace houses. One of these was Peter Clyne; he established Club Chambers of which he was

the only occupant. There was a large printing house once occupied by *Smith's Weekly*, a disreputable rag published by Joynton Smith, which in its time had a firm hold on the bottom of the market for sensational journalism. Then on the corner of Hunter Street was a disreputable pub patronised by *Smith's Weekly* journalists and the *Push*. When I first came to work in the city in 1954 *Smith's Weekly* had perished and there was some other disreputable publishing activity going on, but the *Push* still patronised the pub, and engaged in disorderly behaviour in the street outside, public displays of affection more *épater les bourgeois* than for interest inherent in the much-practised activity. Beyond Hunter Street Phillip Street continued in a straight line to the Quay, a mixture of twentieth century office buildings and old dwellings and some useful businesses: one shop repaired violins.

At that time there were many pubs in the city. In King Street there was a hotel on the western Phillip Street corner, another on the eastern Elizabeth Street corner and another opposite on the western Elizabeth Street corner. The next was one block away, the Surrey on the south-western Castlereagh Street corner. Barrels of beer were dropped from horse-drawn drays to their basements through trapdoors in the footpaths. From the outside these pubs were small dark smelly caves of noise and dinge: I never went in. They had an unfortunate influence on public service clerks and law school lecturers: beer seemed to fill a large space in many lives. I was

put off beer for life. When I first worked in the city the hotels closed at 6.00 pm, and the hour after work was an appalling scene. In 1954 a referendum narrowly approved extension until 9.00 pm, and things became a little calmer. The vote was so close that the electoral commissioner first typed a return on the writ showing that six o'clock closing had won, but had to cross the typing out and sign the correct return when the count came out the other way by a few thousand votes.

The pub on the King Street corner of Phillip Street was patronised by witnesses for the courts across the street, with poor results. Then on the western side of Phillip Street there were two or three small shops including a barber, then St James Parish Hall used as the Phillip Street Theatre, a very lively scene in the 1950s, where I saw several strong Shakespeare productions and also saw Barry Humphries on stage for the first time: I remember one of his sketches, in which a cravatted artist eulogised his model Bessie Plenderleith. This too was sometimes used for law school lectures, and on one disastrous occasion the full court sat there for an admission ceremony; the atmosphere was all wrong. Then there was the old law school, a nineteenth century office building with barristers' chambers and on the higher floors lecture rooms and the university Senate room. An undergraduate summoned there was in deep trouble. This was connected to a more modern law school building with a frontage to Elizabeth Street, with the library, students' common room and more chambers.

**Continued on page 73**

## APPOINTMENTS

### The Hon Justice Geoffrey Bellew

Geoffrey Bellew SC was sworn in as a Judge of the Supreme Court of New South Wales on 31 January 2012.

His Honour attended Marist College North Shore Sydney and was college captain in 1977. His Honour qualified via the Barristers Admission Board in 1983, working as a law clerk in the Commonwealth Deputy Crown Solicitors Office. Bellew J then worked in the Sydney office of the Commonwealth Department of Public Prosecutions from its establishment in 1984 until 1989 when his Honour went to work for the personal injury firm Daley & Co at Kogarah. Bellew J was admitted to the bar in 1991. His Honour commenced practice on 13<sup>th</sup> floor Selborne Chambers where Davies, Harrison JJ and Hallen AsJ were juniors, moving after six months to 8<sup>th</sup> floor Selborne. In 1998 Bellew J made a final move, to 7<sup>th</sup> floor Garfield Barwick Chambers. His Honour was appointed senior counsel in 2006.

His Honour practised in both the criminal and civil jurisdictions. Much of his Honour's criminal practice was on behalf of the Commonwealth DPP, on a variety of matters including narcotics importations, revenue fraud, confiscation, people smuggling and terrorism offences. His Honour's civil practice mainly involved commercial and personal injury litigation for major national and international insurance companies.

The attorney general spoke on behalf of the New South Wales Bar and the State of New South Wales. The president of the Law Society of New South Wales, Mr Justin Dowd spoke on behalf of the solicitors of NSW and Bellew J responded to the speeches.

The attorney general noted his Honour's passion for rugby league:

Your late father, Tom Bellew OAM, was a former chairman of the Australian Rugby League and an acknowledged expert in the game and a very highly respected man. You have certainly followed in your father's footsteps, having been a former director of the National Rugby League Limited, a former director of the Manly Warringah Leagues Club and a former chairman of the Manly Warringah Sea Eagles Football Club. You have done your bit to keep the club players on the field.... other clubs noticed too, to the point that you were retained at some point by 12 out of the NRL's 16 clubs. You became the first choice defence counsel at the NRL judiciary with the Daily Telegraph describing you as "a legal eagle with the best strike rate in the business". I am sure that means getting the charges struck out.

Both the attorney general and Mr Dowd referred to his Honour's liking for the rock band the Doobie Brothers.



Photo: Courtesy of the Supreme Court of New South Wales.

The attorney said that was another reason for his Honour's frequent trips to America:

You have been known to fly over for a long weekend and then back again just to see them in concert and did you really once get up on stage and take part as they belted out one of their hits? There could be a future for you in music in Sydney as well.

Mr Dowd answered the attorney's question:

My information is that it is not only true but it has happened twice, firstly in the United States in 2006 and later at a Sydney concert, the date for which I do not have but I understand you were invited to join them on stage during an encore.

...

While it was not until 1997 that your Honour was given the opportunity to meet the band members back stage after a concert in Las Vegas, members of the 7th floor Garfield Barwick Chambers attest that as a result of that meeting their colleague contracted a serious disease called Doobie-mania.

Mr Dowd also referred to his Honour's involvement with rugby league:

It was around 1989 that Dragons' chief executive, Geoff Carr, enlisted your help to represent Saints Peter Springer in 1989. Never mind that you failed to get him off a high tackle charge, your Honour's subsequent overriding successes gave you a certain notoriety with the press has been keen to indulge referring to your Honour as the National Rugby League's nemesis, and I quote:

"He has never played first grade and never made a tackle but Geoff Bellew SC has suddenly become the Blues most important player."

recorded the Herald Sun in June 2010, and that was on the eve of your Honour's defence of Parramatta's Jarryd Hayne and Penrith's Luke Lewis. As a Parramatta supporter myself I thank you for your efforts on that day.

#### Bellew J said of his decision to study law, that

the only disappointing experience about school that I can remember was the day that the Year 12 students were visited by the vocational guidance officer. ...even as long ago as that, there was only one real choice and that was a career in the law. But I remember coming out of the interview being almost crushed by what I had been told. It wasn't the academic performance, thankfully, that was the problem. It was, I was told, the job market. "There are too many law schools", I was told, "And they're producing too many lawyers and there won't be a job when you finish". ... I decided that she must know what she was talking about and that I should heed her advice and so, accordingly, I decided to get a job in the law and study part-time, which I thought might give me some advantage. My first position was the exalted role of the mail clerk at the Manly Local Court. It involved, in the main, addressing envelopes.

...

It was whilst I was at the Crown Solicitors Office that I first met a barrister. My supervisor came in one morning with an envelope, sealed and marked "confidential", and told

me that I was to go to the District Court. The instructions were to deliver the envelope to a person to whom he referred only as "Sully QC" and so off I went. I walked up to the District Court, which was then sitting at Darlinghurst. I walked in and I was immediately overcome.

This was supposed to be a jury trial, I had been told, but there was no jury. That did not mean, however, that there was a lack of numbers in the Court. There were 10 accused and what seemed to be an endless stream of barristers in front of them. And as I sat there for the next 45 minutes the entirety of the proceedings sailed well above my head. They kept referring to something called the voir dire. I could not pronounce it, let alone have an understanding of what it was. At the end of the 45 minutes, the proceedings adjourned and I suddenly realised that although I had instructions to deliver the envelope to this person, I did not have a clue who he was. I had never met him. Drawing on my years of experience I said to myself, "Well, if he's a QC he must be old, so look for the man with grey hair", and I did. Thankfully, there was only one person who fitted that description and so I made my way, thrust the envelope into his hands, mumbled an introduction and started to make my way away, all the time hoping that I had actually got the right person and that I was not disseminating confidential information about the Crown case to counsel for one of the accused. What struck me at the time was that Mr Sully QC, as he then was, stopped and spoke to me. What struck me even more was that in doing so, he gave me the genuine impression that he was not just going through the motions, but that he was genuinely interested in what I had to say.

In a short time, the conversation turned round to what I had seen in the court earlier that morning. I was forced to embarrassingly admit that I found it all beyond my comprehension. "In particular, Mr Sully", I said, "I didn't understand a word of what the judge said." "Oh, don't worry about that, dear boy, none of us did", was his response.

## APPOINTMENTS

### The Hon Justice James Stevenson

James Stevenson SC was sworn in as a judge of the Supreme Court of New South Wales on 1 February 2012.

His Honour graduated from the Australian National University with degrees in arts and law and in 1973 began his career as an associate to Walsh J in the High Court of Australia. After his Honour passed away in November of that year Stevenson J began work as a litigation solicitor, first at Sly & Russell (now Deacons), then from 1976 at Smithers Warren & Tobias (now DLA Piper), in 1979 moving to Henry Davis York where he became a litigation partner in 1980.

Stevenson J came to the bar in 1989 and began practising from Eleven Wentworth. His Honour's practice included commercial law, equity, trade practices, insolvency, insurance and professional negligence. His Honour took silk in 2003.

The attorney general spoke on behalf of the New South Wales Bar and the State of New South Wales. The president of the Law Society of New South Wales, Justin Dowd spoke on behalf of the solicitors of NSW. His Honour responded to the speeches.

The attorney general said that his Honour has been described

as a leading Australian litigator, particularly in the area of banking litigation. Your work with regulators [ASIC, APRA] is also particularly well regarded, leading to your reputation as an outstanding member of the profession. ...

You have advised every major Australian bank and also foreign banks in cases such as the *State Bank of New South Wales v Swiss Bank Corporation* in 1995.

The attorney general also referred to his Honour's membership of one of the Bar Association's Professional Conduct Committees:

You have been a member of the Professional Conduct Committee since 1997, and I was a colleague of yours on one of those conduct committees for two years, I think in 2003/4. Your colleagues in the Professional Conduct Committee have emphasised that you are a willing volunteer who is never afraid to roll up your sleeves and get stuck into complex investigations. They speak fondly of your good humour, which I have experienced, your generosity in mentoring many junior members of the committee, and the exceptional quality of your reports. They say that your experience, diligence and affable nature will be greatly missed. They also praise your innate sense of what is ethical: a skill which cannot be taught.

Mr Dowd noted his Honour's interest in AFL:

On Sunday, 6 June 1999, Tony 'Plugger' Lockett kicked his



Photo: Courtesy of the Supreme Court of NSW.

way into the history books when he became the highest goal scorer in VFL/AFL history in the game between Sydney and Collingwood at the Sydney Cricket Ground. Such was your Honour's delight at the time, you readily joined the multitude of fans who ran onto the ground to celebrate. Acknowledging my obligation for full and frank disclosure to the Court, I, too, may have trespassed on the ground on that day.

...

Your Honour's interest in trains, particularly steam trains, has been described as bordering on an addiction. Your Honour's other borderline addictions include chocolate, an encyclopaedic knowledge of The Beatles music and early morning cycling.

Your Honour's advocacy skills and passion for the law became apparent well before you entered the profession. Alan Sullivan QC, who was instrumental in your Honour's move to the bar and with whom you read, was inspired to study hard after witnessing your Honour's debating skills at Narrabundah High. ...

A devoted and proud family man your Honour is just as happy indulging in early morning cycling, attending the cricket with your step-daughter Candice or barracking for the mighty Swans. Then there are the European vacations, holidaying at Hyams Beach with friends or sitting in the dark contentedly listening to your Leonard Cohen collections and sipping your recently acquired taste, Mick's Hunter Shiraz. Your Honour, the big questions remain. Firstly, will your successor in 11 Wentworth see fit to retain those blindingly shiny red laminated panel cupboards or revert to more traditional barrister's chambers, will your Honour still participate in the exercise groups and lunchtime walks around Hyde Park and the gardens? Will your Honour reveal the source of your

Honour's perpetual youthfulness, an observation that was noted by all those we contacted in preparing this speech? It seems your Honour may have, indeed, discovered that secret, although your wife, Lyn, assures us there is no Dorian Gray style painting withering away in a dark corner in an attic. Playwright George Bernard Shaw declared that youth is wasted on the young, but it seems your Honour has managed to marry youth with the wisdom of age and experience.

Stevenson J said that his appointment to the position in Equity Division made vacant by the elevation of Barrett JA, in turn caused by the retirement of Giles JA at the end of 2011 had an element of serendipity, explaining :

Roger, if I may call him that here, Roger's arrival at and departure from the Court have been the occasion of my arrival at and departure from the Bar. As I will mention in a moment, Roger's departure from the 11th floor Wentworth was the occasion I came to the Bar and his departure from the Court is, in the way I have described, the occasion for my appointment. I am today wearing the ceremonial robes that Roger wore whilst on this Court. I am honoured that Roger has passed them on to me. I should add that some minor adjustments were needed. They do not call him "thin Roger" for nothing. Roger has also passed on to me his Bench wig which had in turn been passed on to him by an earlier judge of the Court. I shall wear it with great pride, starting tomorrow.

Stevenson J referred to this time as an associate:

I had five short months with Sir Cyril Walsh at the High Court. I was very saddened to be his last associate, because he died while I was there. One thing I will always remember is finding my draft of his Honour's judgment in the case of *Wigan v Edwards*, now reported in (1973) 47 ALJR 581, neatly folded, unmarked, in the judicial rubbish bin after he left in chambers one night.

Mentioning two highlights of his years at Henry Davis York, Stevenson J said:

The first, and the major one, was the chance to work with George Weaver. George Weaver was then the leading banking solicitor, probably banking lawyer, in Australia. He was the co-author of the well-known text, *Weaver & Craigie*. And this was in the good old days when it was not looseleaf. His advice to the bank, who I could not possibly name, but who he always described as "the one true bank" – in those days solicitors only acted for one bank – were models of clarity and erudition. It was a privilege for me to sit at the feet of a master. If I am now a good lawyer it is as a result of what George taught me then. I am delighted George is here today.

Another highlight was going to the Privy Council ... instructing the late Theo Simos QC and Bob Macfarlan, as his Honour then was. ...

...

I left Henry Davis York with great reluctance and only after Alan Sullivan, who I am also glad to see here today, rang me in April 1988 several times to tell me that Roger Giles had taken an appointment to this Court and that here was my opportunity, he said: "James to do that which you have said you had always wanted to do, go to the Bar".

I have known Alan for a long time. We went to school together, and as has been said, Uni. He is very, very persistent.

Stevenson J also referred to the late Chris Gee QC:

As Justice White said about Chris a few years ago at his swearing in, "Chris had an easy and elegant turn of phrase and his cross-examinations were courteous and deadly". That is what I always aimed to do.

He taught me a great deal, including, of course, the famous Gee rules of litigation, which I should remind you about here today.

The first rule was that the correct answer to every question you are asked in litigation is "no". The second rule was never say more than is absolutely necessary to any of your opponents. That is the rule I found hardest to follow. The third rule was that there is no case that cannot be improved by a good verbal, by which, I hasten to add, he did not mean make up stories. Often to get a narrative together, you can ask a witness, "Well, did someone say something?" The fourth was never pass the water bottle. The fifth, never smile at a jury trial. There was a special rule for banking litigation. The rule was that if you were acting for a bank and you had to call the bank manager you are in serious trouble. They are not the exact words of the rule. It is more brief.

## APPOINTMENTS

# The Hon Justice Robert Beech-Jones

Robert Beech-Jones SC was sworn in as a judge of the Supreme Court of New South Wales on 12 March 2012.

His Honour graduated from the Australian National University in 1988 with honours in law and science, and the Commonwealth Constitutional Law Prize, the Evidence Law Prize and the AN Tillyard Prize for outstanding contribution to university life. Initially Beech-Jones J worked as a solicitor with Freehill, Hollingdale and Page, and from 1990 with Craddock, Murray and Neumann. Beech-Jones J was called to the bar in 1992, and practised from at 11<sup>th</sup> Floor St James Hall, primarily in the areas of commercial law, regulatory enforcement, white-collar crime and administrative law. His Honour took silk in 2006.

The attorney general spoke on behalf of the New South Wales Bar and the State of New South Wales. The president of the Law Society of New South Wales, Justin Dowd spoke on behalf of the solicitors of NSW. His Honour responded to the speeches.

The attorney general referred to his Honour's view

that a good barrister should have a wide breadth of experience and be able to appear anywhere ... reflected in the wide variety of legal proceedings you have been involved in over the years. Your name is associated with a number of landmark cases. You appeared as counsel for the Minister in the High Court appeals *SZBYR v Minister for Immigration and Citizenship* and *SZFDE v Minister for Immigration and Citizenship*. You also acted as counsel for former Guantanamo Bay detainee Mamdouh Habib in *Habib v The Commonwealth* in his suit against the federal government, and as counsel for Christina Rich in one of the largest sexual harassment case in Australian history (*Rich v PricewaterhouseCoopers*).

You have acted for the Australian Securities and Investments Commission on a number of occasions, including as counsel for ASIC against senior executives of GIO Insurance in *ASIC v Vines* and in trial and appeal proceedings against former directors of James Hardie.

You also performed the role of counsel assisting the Royal Commission into the collapse of HIH from 2001 to 2003, and have acted as counsel assisting the Independent Commission against Corruption.



Photo: Courtesy of Supreme Court of NSW.

The attorney general described his Honour's style in court

colleagues comment that 'you look more disorganised than you really are'. I have no doubt this is a clever ploy designed to casually disarm your opponents. Because above all else, your peers emphasise that in a profession renowned for its academic excellence, you stand out as being bright. Exceptionally bright.

And while you take great pleasure from the intellectual challenge of court proceedings, your contribution to the law extends far beyond the courtroom.

You are a passionate defender of human rights, serving as a member of the NSW Bar Association's Human Rights Committee in 2011.

The attorney general also made reference to the Bar Association's Professional Conduct Committee of which his Honour was a member of for a number of years:

you took on a number of large investigations. You were highly regarded by your colleagues there, who describe you as a genuine asset, a 'delightful man' with a fine sense of humour.

The Professional Conduct Committee also remembers you for your excellent writing skills. You have contributed to numerous articles to the Australia Institute of Administrative Law Forum. And while you may never equal the achievements of your wife Suzie, who has won the prestigious Kit Denton Fellowship for excellence in performance writing, the legal community still appreciates your efforts.

The attorney general concluded with further reference to his Honour's other passions in life:

Growing up in Tasmania you formed an early obsession with Australian Rules Football. You have maintained this connection into your adult life and coach at your son's AFL club, the East Sydney Junior Bulldogs.

...

Outside the sporting arena you are renowned for your dazzling mathematical ability, with a Bachelor of Science to complement your qualifications in law. Your colleagues speak fondly of your willingness to bore them with complex mathematical principles over lunch. I am told that should I ever need to calculate the angles required to send a rocket to the moon, you are the person to ask.

## The Hon Justice Anne Rees

Anne Rees SC was sworn in as a judge of the Family Court of Australia on 15 December 2011.

Her Honour graduated with a Bachelor of Laws from the University of Sydney in 1976 and in 1978 was admitted as a solicitor. Her Honour gained early experience working as an articled clerk at John S Gibson in Penrith. After admission Rees J joined Grossmans as a solicitor, and in 1979 formed the partnership of McDonald Rees.

From 1981 to 1987, her Honour worked with the Australian Legal Aid Office and the Legal Aid Commission. In 1987, her Honour became a partner with Laurence and Laurence Solicitors. Her Honour was called to the bar in 1993, and specialised in family law, including property, children's and appellate work.

Her Honour was a member of the Joint Working Party of the Law Council of Australia and the Family Law Council responsible for drafting the best practice guidelines for lawyers doing family law work, a former member and chair of the Family Law Review Tribunal of the New South Wales Legal Aid Commission, and a member of the Family Law Committee of the Law Society of New South Wales. From 2002 to 2005 her Honour was a member of the Committee of the Family Law Council reporting to the attorney-general on the representation of children.

Since 2006, her Honour has been a teacher with the Australian Advocacy Institute. Her Honour was appointed senior counsel in 2009.

Ms Janet Power, Assistant Secretary of the Family Law Branch, Access to Justice Division, Civil Justice & Legal Services Group of the Attorney-General's Department spoke on behalf of the Australian Government. Mr Ross Lethbridge SC spoke on behalf of the New South Wales Bar Association. Mr P\_\_\_ Doolan spoke on behalf of the Law Council of Australia. Mr Justin Dowd spoke on behalf of the Law Society of New South Wales. Rees J responded to the speeches.

Ms Power noted that her Honour had been described:

as a trailblazer in recognising, protecting and representing the rights of children, possibly no better illustrated than by your invaluable contribution to the Independent Children's Lawyer Training Program.

Lethbridge SC said of her Honour's early practice at the bar:

From the outset of your Honour's career at the bar, you became known as counsel prepared to take on difficult cases. This was particularly so in children's matters. For



Photo: Courtesy of the Family Court of Australia

example, your Honour was counsel at trial in *Re P*. The arguments your Honour there developed and presented were the arguments later accepted by their Honours in the High Court.

Your Honour was never one who saw practice at the bar, or indeed in law, as one where one earned income and that was that. From your Honour's early years, your Honour gave back, and gave back significantly to the profession. In 1998, your Honour was asked to replace now Ainslie-Wallace J as the New South Wales bar representative on the Family Law Section of the Law Council. Your Honour was thereafter elected and remained the representative until your Honour's appointment.

Your Honour has delivered papers and lectured the profession. Recently your Honour travelled to Prato to lecture. I understand that the quality of your Honour's paper presented there was matched, if not surpassed, by your Honour's capacity to shop. One of your Honour's judicial colleagues tells me that it is remarkable how many handbags and pairs of shoes can actually be made to fit into one piece of carryon luggage.

Mr Doolan referred to her Honour's involvement with Law Council committees:

You acted as a sections representative on the Law Council's Access To Justice Committee. You chaired the Executive's Anti-Discrimination Committee when that body existed. You made vociferous submissions to a former Attorney General leading to the establishment of the Federal Judicial Commission, a body in respect of which we now



## APPOINTMENTS

trust your Honour never had personal experience. You worked on the Australian Law Reform Commission's review of the family violence legislation. You contributed significantly to the section's response on the Child Paramountcy Principle Inquiry, and you helped draft submissions responding to the shared parental responsibility legislation.

Your Honour's political and diplomatic skills were also in evidence during your many years on the Family Law Section. Perhaps the most difficult of all tasks – namely the allocation of seating arrangements for judges and dignitaries at national conferences, dinners and balls – was often left to your Honour's wise counsel. In performing that task, your Honour routinely ignored the well meaning, but unwelcome advice of others, who were doing their best for sheer entertainment purposes to position known enemies and those involved in blood feuds in adjoining seats.

Mr Dowd noted that mention had been made of a number of cases in which her Honour had been involved, and added his own for the record:

Your Honour will recall in this particular case, having appeared for a wife against my client, a judge of a court in the state jurisdiction. Your Honour was able to persuade the court that my client's prospective entitlement to a statutory judiciary pension was indeed a very valuable superannuation interest within the meaning of the Family Law Act. This was notwithstanding that my client had been a judge for only one year, that his pension scheme was unfunded, it had no trustees against whom orders could be made, and a host of other technical factors.

In any event, the court found, at your Honour's urging, that the entitlement was divisible between the judge and a non-judicial spouse upon separation. I assume that your Honour did disclose that case to your Honour's new sisters and brothers. The old phrase, "Be careful what you wish for" does come to mind. For my part, for the record, I sought to argue that the judicial pension was a statutory, but not superannuation entitlement, at most a resource, but, alas, was unsuccessful. In any event, there is no turning back for your Honour, as I understand your chambers at Culwulla have already been disposed of.

Rees J referred to how she had come to study law:

My father was very anxious when I left school that I should accept a teacher's college scholarship to university. He was very keen on job security. I went into the equivalent

of the University Admissions Board clutching my paperwork from Penrith High School, and I handed it over to a lady who was taking enrolments. And she had a look at it and she said, "You could do law with those marks," and I said, "Okay." Thus was my legal career launched. I do not know who she was, but I'm very grateful to her.

Her Honour also spoke of her mentors and fellow floor members:

As you have been told, I was fortunate to work in private practice, after I left Legal Aid, with the late Joseph Shore Goldstein. He was the funniest man I have ever known. I think he was the funniest person I have ever known. But he loved the law, and he loved the practice of the law, and he was passionate about being a lawyer. He supported and mentored me. He taught me and he encouraged me to go to the bar. I read at Culwulla Chambers with the late Tim Ostini-Fitzgerald. We had been article clerks together in Penrith, and we remained, until his death, great friends. ...

The members of Culwulla Chambers in the nearly 19 years that I have been on the floor have become like a second family to me. There is a tremendous friendship and care in those chambers. I cannot recall a time when after either a really bad day in court or a really good day in court that somebody did not think of an excuse to stay behind so that there would be somebody there to have a glass of wine with and either commiserate or celebrate with.

Bob Lethbridge was head of chambers when I took silk in 2009, and his support of me has been unswerving, and I am very grateful. The members of Culwulla Chambers have supported me and cared for me through good times and very bad times, and I will continue to rely upon and value that relationship. Judy Ireland was the clerk at Culwulla Chambers when I commenced my reading, and the honourable Peter Rose was head of chambers. If you have briefed the floor you will know that Judy has very firm notions of how barristers conduct their practices, and if you are on her floor you would be well advised to go along with them.

She is a wonderful clerk. In her care I was a reader and then a junior and then a senior junior, and with her encouragement, a silk. She says that I am her first homegrown silk. She has played a huge role in my legal life and she will be my Jiminy Cricket and she will continue to be my dear friend. ...

## Appointments to the District Court

There have been three appointments to the District Court of New South Wales from the bar so far this year.

**His Honour Judge David Arnott SC** was sworn in on 13 February 2012.

His Honour was admitted to the bar in July 1980, having practised as a solicitor since 1977. His Honour initially practised mainly in personal injury, until becoming a crown prosecutor in 1991. His Honour took silk in 2005 and then became a deputy senior crown prosecutor, regularly appearing in complex appeal matters, including almost all cases in which a five-judge bench sat in the Court of Criminal Appeal.

**His Honour Judge Peter Maiden SC** was sworn in on 12 March 2012.

His Honour had practised in a wide range of areas over the past 38 years, having been admitted as a solicitor in 1974 and to the bar in 1981. In criminal matters his Honour had acted for the prosecution and defence in trials, sentence hearings and appeals. His Honour

defended Fiji's former prime minister, Major-General Sitiveni Rabuka and politician Ratu Inoke Taviekata against charges on inciting mutiny. His Honour was appointed senior counsel in 2006. His Honour had been a councillor of the Bar Association.

**His Honour Judge Phillip Mahony SC** was sworn in on 19 March 2012.

His Honour was admitted as a solicitor in New South Wales and the ACT in 1979, and admitted as a barrister in 1986. His Honour's practice included criminal trials and, in the civil jurisdiction, appearing on behalf of both plaintiffs and defendants in common law matters including professional negligence, industrial accidents and motor vehicle accidents. His Honour was appointed senior counsel in 2004.

## Before Wentworth Chambers (continued)

Then there was the Sun Building, where *The Sun* newspaper was published. The newspaper left about 1958 and the Government Insurance Office took it over. Then its side to Phillip Street and its frontage to Martin Place was the APA building, an office building which uniquely is still there, occupied by solicitors and business houses. North of Martin Place was the Rural Bank, then other office buildings, but no more chambers. In one of these office buildings there were some federal courts, the Federal Court of Bankruptcy and a Court of Petty Sessions which heard only federal business, although it was a state court. The headquarters of the Police Department stood on the Hunter Street corner.

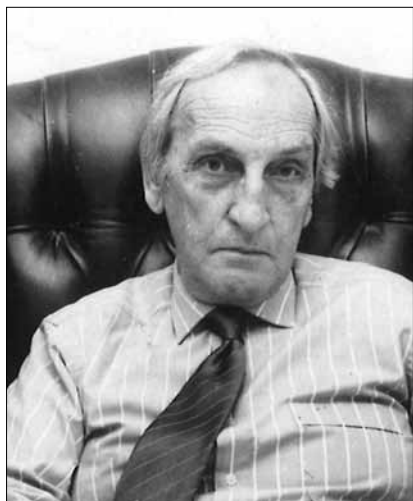
This was the whole precinct in which barristers' chambers could be found in the 1950s. All bar chambers were

crowded and most rooms seemed to have at least two people who used them or floated through them. This continued until construction of office buildings resumed after a long interval for the Depression, Second World War and post-war disruptions, and rent control, which for many years effectively prevented new investment and prolonged the acute shortages of premises. In 1955 there were 300 or 400 practising barristers; it is difficult to give a clear number, as some people were only nominally practising while others were doing enough work for two or three. There was no need for a practising certificate or for insurance, and it was easy to flit in and out of active practice, if you could find chambers to float in. One or two may have practised from home or haunted the robing room at Darlinghurst. When Wentworth Chambers opened it was filled at

once by people who had been putting up for years with shared chambers or unsatisfactory locations such as the terrace houses. For a while practically all barristers were in Wentworth, old Selborne, Denman, University or Chalfont, but the bar grew steadily and within a few years new Selborne was completed about 1964, and filled at once. There was still more need for chambers. Some very junior barristers including myself established Forbes Chambers in 1966 in a building on the western side north of Martin Place which had earlier had been the Pearl Insurance Company and still earlier the Tudor Hotel. From then on many more new chambers were formed, always movement and change, after years of stasis.

## John Clifford Papayanni (1920–2012)

By Gabriel Wendler



John Clifford ‘Cliff’ Papayanni died in the early hours of the third day of January 2012. He was in his 92<sup>nd</sup> year. Cliff was born in 1920, the year Sir Hayden Starke commenced his 30 year tenure as a justice of the High Court of Australia and two of the court’s inaugural members, Chief Justice Sir Samuel Griffiths and Sir Edmund Barton, departed this world. It was also the year Sir Owen Dixon, then a barrister of the outer Victorian Bar, married a vicar’s daughter.

About six weeks before Cliff died my wife Elizabeth and I visited him in Concord Hospital. He was alert and courteous but physically fragile. Cliff was missing Joan, his beloved, ebullient and selfless wife of 46 years. Tragically, whilst Cliff was convalescing in hospital Joan suddenly predeceased him. For 22 unpaid years, Joan had been a president of the World League for the Protection of Animals. ‘There is always a woman at the beginning of all great things’, as Cliff often said of Joan. They were a remarkable couple; their scheme of life was quiet, indefatigable philanthropy within their community. Cliff hoped to be discharged from

hospital soon and looked forward to sharing the new Pymble home of his attentive daughter Nicole and her husband David. Cliff joked about debating the laws of cricket with his precocious grandson Jack. He informed us how proud he was that Jack, at 12 years of age, had recently been selected to play for the NSW private schools cricket team. Cliff knew and loved the game of cricket. He had been an outstanding cricketer having played First Grade for St George and Manly. Cliff had also been a member of the Australian Services Team during and after the Second World War. He was a wicket keeper and batsman and counted cricketing giants such as Keith Miller and Ray Lindwall as fellow team members and friends.

Cliff and his two brothers, Basil and George, grew up in Kogarah. Cliff attended selective Canterbury Boys’ High School where he was always at the top of his class. Due to impecunious family circumstances he was forced to quit school early. Cliff loved school and cried the day he was compelled to leave and find work. Attendance at school and gaining an education are often disparate experiences. Cliff ultimately found employment in the Department of Child Welfare.

When the Second World War erupted Cliff answered the call by joining the RAF’s 101 Squadron based in Lincolnshire, England. At 23 years of age Cliff was hostage to the inhospitable confines of an Avro Lancaster bomber, flying in tight formation over Germany to visit damage upon Herr Hitler and his Nazi gangsters. Cliff was proficient in the German language enabling him to operate specialist

radio equipment that intercepted and disrupted the Luftwaffe’s communications. He endured and survived 36 combat missions. Cliff completed his war service in July 1946 with the rank of flight lieutenant. It is reported that on the occasions Cliff was briefed in what euphemistically was described as ‘difficult’ criminal matters, he would mollify the anxiety of his instructing solicitors by suggesting ‘difficult’ was managing a Lancaster bomber being attacked by a Messerschmitt 109 with cannons blazing!

Perchance I made Cliff’s acquaintance in Canberra whilst we were both waiting to have our applications called on for special leave to appeal to the High Court of Australia. It was 1984 when a special leave application was heard by a bench of five bewigged justices unconfined by a limit on time. Cliff inquired the nature of my application. He said I had: ‘no chance’. His prediction, as they say in horse racing was ‘on the money’! From that time we became mutually supportive colleagues and friends. When not litigating we episodically met for morning tea at the same cafe in Elizabeth Street. We discussed cases he or I had completed or were about to commence. He never varied his morning tea order of black tea and raisin toast.

Cliff was admitted to the NSW Bar in February 1960 and practised from Wentworth Chambers eventually joining the Office of the Public Defender under HF Purnell QC. Cliff was a clever, courageous barrister with a mind for the technicalities of criminal trial procedure and affabrous approach to the task of

adversarial fact finding. Although Cliff acted for or advised high profile litigants such as High Court judge Lionel Murphy, bookmaker Robbie Waterhouse and ex Premier Neville Wran he most certainly did not wish to be known as a 'celebrity lawyer'. Cliff was no hot-spur barrister nor was he lucriferous, often working without remuneration. Many of his colleagues at the bar were unaware Cliff's horsehair wig had been a gift from his friend, former High Court judge and chief justice of NSW, Herbert 'Doc' Evatt. Sir Laurence Street remembered Cliff as 'much liked' and 'popular' with the Court of Criminal Appeal. Specialist criminal law solicitor William Chan, whose criminal law practice extends to Hong Kong described Cliff as a 'patient teacher' from whom he learnt much about the law of criminal responsibility. Clive Jeffreys, now his Honour Judge Jeffreys of the District Court, formerly one of Sydney's outstanding criminal law solicitor advocates, considered Cliff his appellate counsel of first choice.

In over 40 years at the bar Cliff established a reputation as a tenacious and successful appellate advocate before the High Court of Australia and the New South Wales Court of Criminal Appeal. Historically some of the appeal cases in which Cliff appeared as leading counsel deserve to be mentioned. In *Andrews v R* (1968) 126 CLR 198 Cliff established before the High Court there had been a miscarriage of justice. Astonishingly Andrews had been indicted and tried for the wrong offences! The High Court quashed the convictions and sentence. The decision in *Andrews* provoked a powerful and acerbic observation from the High Court:

As we see the matter the applicant was not in reality tried for the offences for which he was indicted and the Court of Criminal Appeal has failed to exercise the supervision it ought to exercise over the procedure at criminal trials. The very fundamentals of a proper criminal trial have not been observed and the manifest deficiencies of the summing up have been excused by the Court of Criminal Appeal for reasons which in our opinion cannot be justified.

In the appeal of *Giorgianni v R* (1985) 156 CLR 473, Giorgianni was the owner but not the driver of a fully laden coal truck with defective brakes resulting in the vehicle careering out of control down Mt Ousley, killing five people and injuring others. Giorgianni was charged as a principal in the second degree with culpable driving causing death. It was the Crown case Giorgianni procured the driver to drive a defective vehicle. Cliff established the trial judge's summing up was seriously defective because the judge directed the jury that recklessness was a sufficient state of mind to constitute Giorgianni an aider, abettor, counsellor or procurer. The High Court agreed with Cliff and said: 'No one may be convicted of aiding, counselling or procuring the commission of an offence unless knowing all the essential facts which made what was done a crime, he intentionally aided, abetted, counselled or procured the acts of the principle offender... neither negligence nor recklessness is sufficient'. Giorgianni was granted a new trial.

I was led by Cliff in *Bulejck v R* (1994-95) 185 CLR 375. Cliff obtained an order from the High Court for a new trial

in circumstances where the trial judge permitted a jury to listen to a recording of the accused's unsworn statement for the purpose of comparing the accused's voice to that of a voice surreptitiously recorded by undercover police and alleged to be that of the accused. The High Court held that the trial judge had committed a fundamental failure of procedure going to the root of the criminal trial process. *Bulejck* remains an important case in Australia on the admissibility of voice identification and comparison evidence.

Cliff was often successful before the Court of Criminal Appeal securing new trials for a variety of criminal offences. Two of many successful appeal cases come to mind. In *Harrison & Georgiou* [2001] NSWCCA 464 Cliff obtained new trials for two outlaw motorcycle members who, in a basement of a saloon, shot dead three members of a rival club. In *Taber and Styman* [2004] NSWCCA 245 Cliff's powerful appellate advocacy on the complex issue of causation moved the Court of Criminal Appeal to quash convictions and indeterminate sentences for murder and order a re-trial for manslaughter. *Taber and Styman* was a shocking case. They had been charged with the murder of an elderly woman following a home invasion and robbery where the victim had been left alive, bound and gagged, for some 19 days. A triple-0 call to emergency services went unanswered because the call had not been relayed to police. *Taber and Styman* were later convicted and sentenced for manslaughter.

Death has severed our connection

with Cliff but he lives on in the memories of colleagues, friends and the reported judgments of the superior courts of Australia.

Swinburne wrote: 'Things gained are gone, but great things done endure'. Cliff is survived by his daughter Nicole, son in law David,

grandson Jack and brother Basil aged 96.

Requiescat in pace, John Clifford 'Cliff' Papayanni.

## Sandra Daniela Ocampo (1965–2012)

Sandra Ocampo was called to the bar with my cohort in February 2000, at the turn of the century. She sadly passed away, too soon, on 7 February 2012.

Ocampo's pride in being a member of the NSW Bar was endless. She was proud to be part of the bar and the bar is proud to have had her as a member. She was a woman of great spirit, whose infectious smile and presence only lent class to the courts which she graced. All who knew her were enriched by that association.

She did not follow a conventional path to the bar. It was a struggle for her and it made her appreciate the privilege of membership all the greater. The pathway which she took – and the manner in which the bar embraced her – provides a beacon for all those who eschew the perception of the bar as incapable of diversity. It demonstrates the true meritocracy that marks our calling.

Sandra was born 29 March 1965. She migrated to Australia from exotic Uruguay, with her family, at the age of six. She spoke no English on her arrival.

Sandra shared her childhood with Joan Baptie who, by co-incidence, was also a member of the great bar class of '00. They both attended Moorefield Girls' High School in the

early 70s and remained life long friends.

It was working at the Law Society that first introduced Sandra to the world of the legal profession. She remained fascinated with the profession ever since. Sandra commenced working at the Law Society following school and, while there, commenced a course of study for the Legal Practitioners Admission Board.

The next step for Sandra was as an associate at the District Court. Sandra served in the chambers of judges Flannery and Moore at various times. This work gave her a thirst for a life at the bar. She was privileged to be immersed daily in a room in which the advocacy she admired took place. The generous support of the judges in fostering and supporting her progress to the bar is a great tribute to them and she was very grateful.

Ultimately, Sandra found her way to my bar reader's course. She and I were mooting partners before Elizabeth Fullerton (as her Honour then was). The experience bonded us as firm friends ever since. She developed other life long friendships in the course of being called to the bar, including Catherine Parry and many others. It was easy for her to make friends in that environment.

I could see in Sandra that essential

spirit of the advocate, often missing in many other lawyers. She had an intrinsic understanding of human nature; and empathy with those who come within the orbit of the court, so that she could walk in their shoes. With that empathy and understanding came a real talent in criminal matters for finding the small and mundane pieces of information that would expose falsity. She had the fearlessness to challenge authority, where reason and justice dictate it must be so.

Sandra read at Blackstone Chambers, took rooms at Fredrick Jordon Chambers and finished her career at Ada Evans Chambers. She loved each of those collegiate environments as much as she was loved by them.

Sandra struggled with breast cancer from 2008, having been diagnosed with that condition shortly after marrying her husband Nigel. He was the love of her life and her rock. She fought it as hard as she fought everything, alas she lost, it was unjust and there is no appeal. She died on 7 February 2012. She will be greatly missed.

**By Shane Prince**



'I do apologise your Honours – I am afraid that I lingered over my potatoes, working my application up into a frenzy.'

## Bullfry and the amber light

By Lee Aitken (illustrated by Poulos QC)

You are six minutes late, Mr Bullfry.

Your Honours are paid to wait, I am not. (The immediate scowls on the faces of both jurists suggested that channeling Hayden Starke was, as ever, a bad forensic tactic).

Not before 2:30 pm means exactly that!!

I do apologise your Honours – I am afraid that I lingered over my potatoes, working my application up into a frenzy.

Mr Bullfry, get on with it – you are only indulged here because of your track record – or lack of it.

Your Honours, may I come immediately to the point – the New South Wales Court of Appeal is 'drinking from a hose pipe' – one is usually appealing from Caesar unto Caesar since only one of the judges with the asterisk has ever read the papers - this was, to the trained eye, a C plus court at best.

Mr Bullfry, are the 'hose pipe', 'the asterisk', and the 'delay' *Kable* points?

No, your Honours. Polite company would invoke the visitorial jurisdiction of this court under section 35A – in the Bar Common

Room of old (now sadly abolished and replaced by an 'information centre'!) – it would be described as a simple SNAFU – a vulgar and venerable, but effective acronym, to describe where a matter has badly miscarried although such a situation was to be expected – 'we are born to trouble as the sparks fly upwards'.

The Book of Job is not a sound basis for a grant of special leave, Mr Bullfry. What is wrong with the judgment?

Your Honours, where would one begin, or having begun, stop? On no account should a householder

reasonably expect that an invitee to a formal dinner would be so affronted by the unexpected appearance of a pet mouse on the dining table that he would be moved to seize and use a carving knife, and cut off, by mistake, two fingers from the hand of a fellow diner.

Was it a blind mouse, Mr Bullfry?

Your Honour had a reputation at the bar for levity which is unbecoming on the bench. The mouse was ultimately killed by the household cat, Simba, which so it seems from the evidence, had a habit of bringing back dead possums twice its weight into the kitchen from its nightly forays. As the defendant said in testimony (judgment [49]) – ‘the mouse did not touch the sides’.

But what is expected at such a soiree, Mr Bullfry? And why shouldn't the householder owe a duty of care to a dinner guest?

Your Honours, we say that the entire matter falls squarely within the classic analysis of Mr Justice Bryson in *Parissis v Bourke* [2004] NSWCA 373 at [52].

That is the methylated spirits on the B-B-Q case, Mr Bullfry?

Yes, your Honour – and covered in his Honour's inimitable style –

Young guests in liquor might well be unruly; it is not in my opinion in the foreseeable range that they will behave with criminal negligence and persist against warnings. Horseplay, leap frogging, dancing on tables, swinging on tree branches and arm wrestling are in one class of unruly behaviour; throwing methylated spirits from a bottle containing several inches of methylated spirits on a barbecue where there is some ignition is behaviour of a completely different order, obviously grossly dangerous to life and limb. .... A person of whom such behaviour is foreseeable could be dealt with only by not including him in a social function at all; he could be left to seek the company of those whom all reasonable people avoid, who might throw bottles and glasses at other guests or bring pet snakes or hand grenades to social events.

So, your Honours, we say that at a demure dinner party in Pymble, where the guests are merely making merry, it is not to be expected that a guest will seize a knife and negligently wound another guest when affrighted by a small rodent.

Is a pet mouse *ferae naturae*, Mr Bullfry? And does it fall within the same class of animals as the ‘pet

snake’ which Justice Bryson refers to?

I beg your Honour's pardon – what?

Is a pet mouse within that category of wild animals which attracts a special duty of care in relation to its management?

Will your Honours pardon me for a moment, while I consult my learned junior, Ms Blatly, who is trying to tell me something? Thank you, for that indulgence. Your Honours, according to our researches, a pet mouse is clearly in that class of animals *ferae mansuetae*, or tame animals – although there is no authority on the point apart from a decision of the full Federal Court which involved a starving guinea pig – special leave was refused in that case because, as one of your Honours' learned brethren pointed out in argument when special leave was sought, there was no relevant federal ‘matter’ even though the guinea pig had been brought from interstate.

How tame was the mouse, Mr Bullfry?

Your Honour, it would appear that the mouse was a sixth birthday gift for the daughter of the house – it had been acquired from ‘Pymble

*Your Honours, according to our researches, a pet mouse is clearly in that class of animals *ferae mansuetae*, or tame animals – although there is no authority on the point apart from a decision of the full Federal Court which involved a starving guinea pig ...*



Pets' and was fully certified and vaccinated – how it escaped from its little cage in her bedroom and entered the dining room was unclear on the evidence – there was a great household murine danger issue given the constant presence of Simba downstairs – the carving knife was, of course, a usual instrument to find on a dinner table when lamb is being served – the charge of negligent wounding resulted in a good behaviour bond – the mouse was not a risk covered in the household

policy – the special damages were very large because of the respondent's extraordinary success as a harpist – I see the amber light your Honours.

Always a blessing to an embattled advocate, Mr Bullfry – 'port after stormy seas'. We need not hear from you, Mr Snodgrass. We shall take a short adjournment.

3.08 pm

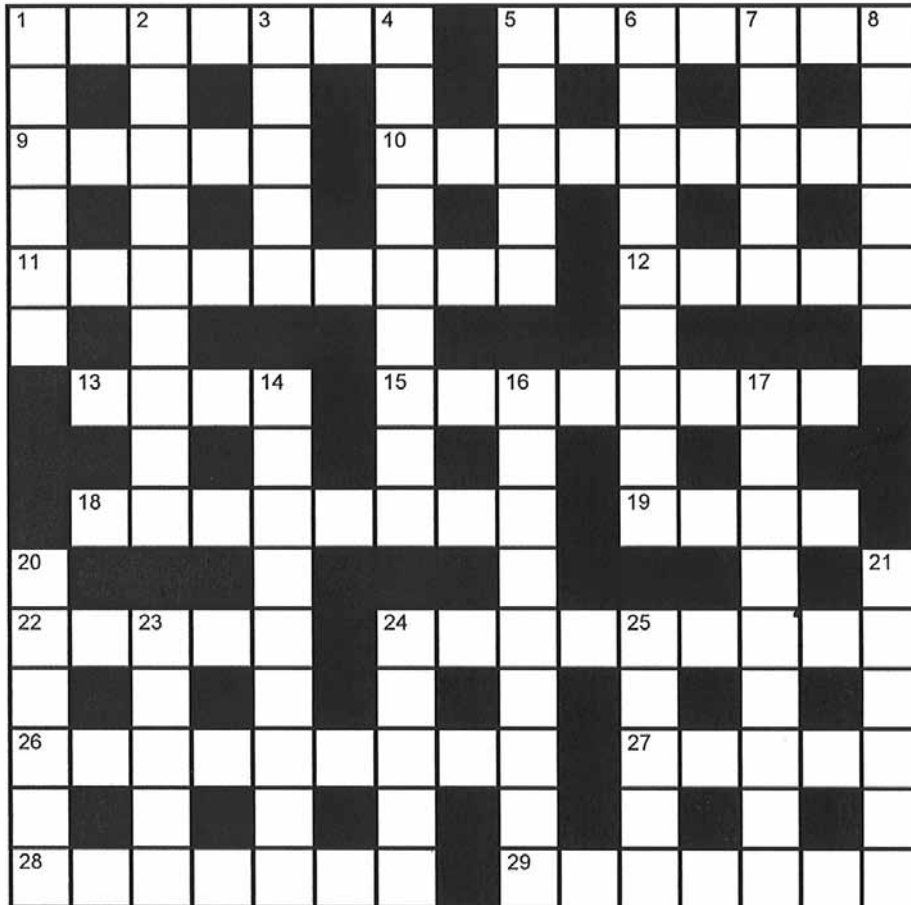
There will be a grant of special leave in this matter fixed for half a

day. Parties should be prepared to argue the *ferae naturae* question, and the position of an invitee under the Civil Liability Act. The issue of the Court of Appeal and *Kable* generally may await another day. There was no need to bring Simba into court Mr Bullfry, and he may be returned once my associate has fed him.



# Crossword

By Rapunzel



## Across

- 1 Horsedrawn taxi to Saint-Saen's death poem. (7)
- 5 Flirty forced off and enveloping a sound second-class freedom? (7)
- 9 Shove high note "Hail!" (L) (5)
- 10 Helmet man attacked by holy Swiss curd. (9)
- 11 Represented by thrones at Queensland's place in Australia? (9)
- 12 Fib or tumble-down true Aussie shack? (5)
- 13 Turf that is very loud within. (4)
- 15 Trained horses? Pigs' feet they are! (8)
- 18 Stratified shop for ponytail curtailer of stories (abbr). (8)
- 19 Nod off, Santa's Vixen takes on Zebra. (4)
- 22 Number crunchers, a reversed cab number one? (5)
- 24 These sing in Sing Sing. (9)
- 26 Alexander's position in Macedon. (9)
- 27 To decide to jump start unforced fudge. (5)
- 28 Our essences aren't us served up? (7)
- 29 L-plater sued TNT by accident. (7)

## Down

- 1 New DCJ moulded any measure of resistance. (6)
- 2 A comfort for a skier with a surprisingly frail itch. (9)
- 3 Sound wood upon Judge's taking one? (5-5, with 24 down) (5)
- 4 A gent yell by mistake? Only if done so. (9)
- 5 Bound, I am within my bed (Fr). (5)
- 6 A sound second-class requirement about good health done well. (9)
- 7 Short term for short term recovery? (5)
- 8 Cry pain, coward! (6)
- 14 Alien form of erring foe. (9)
- 16 Orderers? Adorers put in order. (9)
- 17 Extra sharp blade on the lawless ledge. (5,4)
- 20 Mayhem runless over a denim Judge. (6)
- 21 Climb! (Like, a little degree?) (6)
- 23 Let in letters of ATM id. (5)
- 24 See 3 down. (5)
- 25 Bling pied a terre. (5)

Solution on page 82

## Soccer

Thanks to the generosity of players and supporters of NSW Bar FC, \$2,750 was raised for the Nangala Project. Earlier this year, 14 Indigenous boys and girls aged 14–18 attended a two-day coaching course at Borroloola in the Northern Territory. All of them completed the course and obtained their FFA Junior Coaching Licence. One of the communities chartered a plane to fly a boy to Borroloola, such is the interest in the project. Sixty-one children have commenced training with the academy, which aims to improve the health and well-being of children who may not otherwise have had such a wonderful opportunity. Thank you to David Stanton for co-ordinating the NSW Bar FC's involvement.

Below: squad photo on the first day of training..



Above: one of the 14 Indigenous coaches receiving her certificate after completing the FFA Junior Licence course. She is being congratulated by George Singh of Football NT, James and John Moriarty.



# Bench & Bar v Solicitors Golf Match

By D M Flaherty

It has been a long time coming (not since 2006 to be precise). But finally and emphatically the Bench & Bar team was victorious against the solicitors on 23 January last.

Over 60 players teed up at the picturesque Elanora course in the annual event for the right to hold the Sir Leslie Herron mace (suitably engraved) for another year. Of the 15 matches played the Bench and Bar were victorious in 10, the solicitors 4 and one match was halved. Gyles QC accepted the mace with the appropriate degree of modesty and humility on behalf of the triumphant Bench and Bar team.

**Other results**

**Barristers**

52 points  
John Harris & Terry Ower

46 points  
Vinnie Hrouda & Chris Maxwell QC

**Solicitors**

47 points  
Roger Williams & Michael Kissane

44 points  
John Chapple & Brian Maker

1<sup>st</sup> nine 25 points  
Stephen O’Ryan QC & Phil Taylor SC

2<sup>nd</sup> nine 23 points  
Judge Robert Toner & Colin Heazlewood

Nearest to pin (5)  
Mick Coghlan

Nearest to pin (17)  
John Harris

Longest drive (11)  
Shaun Clyne

Before next year’s event a decision will have to be made as to whether the event returns to the new (and presumably improved) Manly course or remains at Elanora (or even moves elsewhere). Any input on that topic is welcome.



# Extempore

**Before his honour Judge Cross  
Thursday, 8 March 1973**

- (i) **Regina v David Allan Laundess**
- (ii) **In the appeal of David Allan Laundess**

## **Sentence**

**HIS HONOUR:** It has been said that revenge is a kind of wild justice. And, though the courts may not approve the infliction of deliberate injury, still one's heart goes out in sympathy to all those who are moved to violence in defence of their family. Circumstances, which understandably give rise to a degree of passion may properly be regarded as mitigating factors on the question of sentence for violent conduct.

In the present case Mr Laundess had been happily married for seven years and has four small sons. The evidence reveals that about a week before 18th February, 1973, his wife informed him that she wanted him to leave the home in Grenfell as she no longer loved him. The surprised Mr Laundess asked if there was another man. No, lied the wife, she had merely fallen out of love with him. In an understandably bewildered state Mr Laundess was shortly afterwards informed by a friend that a local milkman named Keys had been carrying on with his wife. Mr Laundess confronted Keys, who admitted it. Mr Laundess then confronted his wife with his information, whereupon she confessed her past misconduct with the milkman, said she was madly in love with the milkman, could not live without him, etc.etc. She told Mr Laundess that he would have to leave home, and he subsequently found his bags had been packed for him. He was understandably confused. Of course, he could have ordered his wife out of the house; but there were four small sons in need of a mother's care. Considerations such as these, added to the understandable bewilderment and confusion, led him to accept his wife's direction and he moved out.

He felt, of course, some sense of injustice. He approached Keys and complained of the milkman's intrusion into his marriage. He pointed out the possible disadvantage to the children, and he asked Keys if Keys was really going to take on all the responsibilities that the wife was asking him, Mr Laundess, to abandon. Keys replied that he would give the situation a week's trial and let Mr Laundess know!

This statement by Keys that he would take the wife for

a week, apparently on appro., no doubt deepened the husband's gloom. He felt that he - at least he - was getting the wrong end of the stick. He brooded over a few drinks with his brother on the night of 17th February. Thoughts turned to resolve and resolution to action; and about 3am on 18th February, Mr Laundess and his brother arrived at the matrimonial home.

They entered the house, and Mr Laundess entered the bedroom. He found the wife and the milkman both naked in bed together. In Mr Laundess's own words, 'I lifted him up and got into him'. When he finished getting into the milkman, Mr Laundess told him to get out. The milkman raised a minor objection to appearing in the Grenfell streets at night totally unclad. The husband, becoming irritated at the thought of the milkman's sense of propriety being offended by these sartorial or thermometric considerations, happened to notice a rifle on the top of the wardrobe, which he remembered was loaded, perhaps not inappropriately, with rat-shot. He grabbed the rifle and asked the milkman to leave. The milkman had by then donned some clothes and commenced to move off.

All this time, the wife - as some wives, tend to do in these situations - had remained noticeably audible. She had put on a dressing gown and now decided to leave with the milkman. At this stage the husband, becoming even more irritated at the slow rate of the milkman's departure, at his wife's wailings and at her pursuit of the milkman, decided to fire some rat-shot at or near the milkman's feet to speed him on his way. At that very moment, however, the wife had run up near the milkman; and perhaps by another piece of wild justice (and partly due to the husband's inexperience at shooting from the hip) the pellets hit the wife's legs and not the milkman's. This development did not cause the wife to fall silent. The husband's brother then took the rifle from him. The milkman helped the wife into the milk truck which was parked outside and, getting his priorities into an order that may not have instinctively occurred to all persons, drove first to the police station to demand that the husband be charged and only then to the hospital, where the devoted surgical staff removed eight pellets from the skin of the wife's lower legs. Since that night the wife's mother has visited her in Griffith and I am informed that there is some possibility that the wife with the children may move to the mother's home at Katoomba; and there was a

suggestion that the milkman's ardour has cooled.

It is in the light of that background that it falls to this court to determine an appropriate sentence on the two charges preferred against the husband – one, a summary charge of assault on the milkman and the second, an indictable charge of 'Malicious' wounding of the wife. The learned magistrate felt that an appropriate penalty for the husband assaulting the milkman was one month's imprisonment with hard labour.

The affair between the wife and the milkman had been carried on for some time before the husband knew of it. The husband was acting as father, husband and provider while the milkman was clandestinely the wife's lover. When spoken to by the husband the milkman replied in terms which were on any analysis contemptuous of the husband and indeed contemptuous of the wife. It appears to me that if a man elects to intrude into another's marriage, putting the welfare of the children as well as that marriage at peril, he must expect a hiding from the husband. On any realistic basis this milkman appeared to have asked for what he got. In my opinion the circumstances surrounding this assault on the milkman are such as to reduce its seriousness below the level which attracts a prison sentence, even one to the rising of the court.

**TO THE PRISONER:** In lieu of the learned magistrate's penalty you are fined the sum of twenty cents, which you must pay to the Clerk of Petty Sessions, Cowra, within seven days; otherwise imprisonment with hard labour for twenty-four hours.

As to the shooting it must be said that rat-shot from a .22 rifle from some distance away is scarcely lethal. There was clearly no intention to do serious injury to any person nor was any serious injury done. The incident occurred at a time when your mind was cursed by domestic affliction. And it must also be remembered that it was the milkman and your wife who created this explosive situation which you in an understandable excitement merely detonated. You do not present any threat to society; you are conceded by the police to be an honest and hard worker; and you have already spent fourteen days in Bathurst Gaol as the result of the magistrate's order. Compassion blends with responsibility in inducing me to defer passing sentence on you entering into a recognisance yourself in the sum of \$400 to be of good behaviour, for a period of two years and to be liable to be called up at any time for sentence for any breach committed within that period. That recognizance may be taken before a magistrate.

As to the appeal, I formally say that the appeal is dismissed, the learned magistrate's conviction and findings are confirmed, but in lieu of the learned magistrate's penalty of one month's [sic] imprisonment, you are fined the sum of twenty cents, in default imprisonment with hard labour for one day.

# Extempore

## ORDER

The herein matter having been scheduled for a trial by jury commencing July 13, 2011, and numerous pre-trial motions, having yet to be decided and remaining under submission;

And the parties having informed the court that the herein matter has been settled amicably<sup>1</sup> and that there is no need for a court ruling on the remaining motions and also that there is no need for a trial;

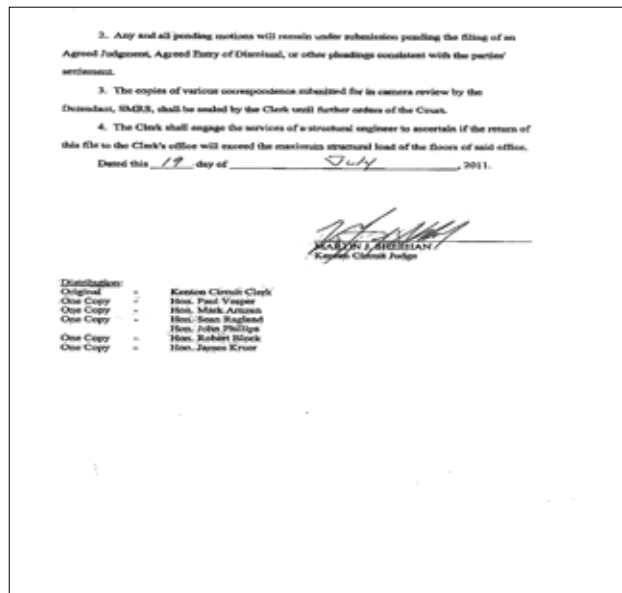
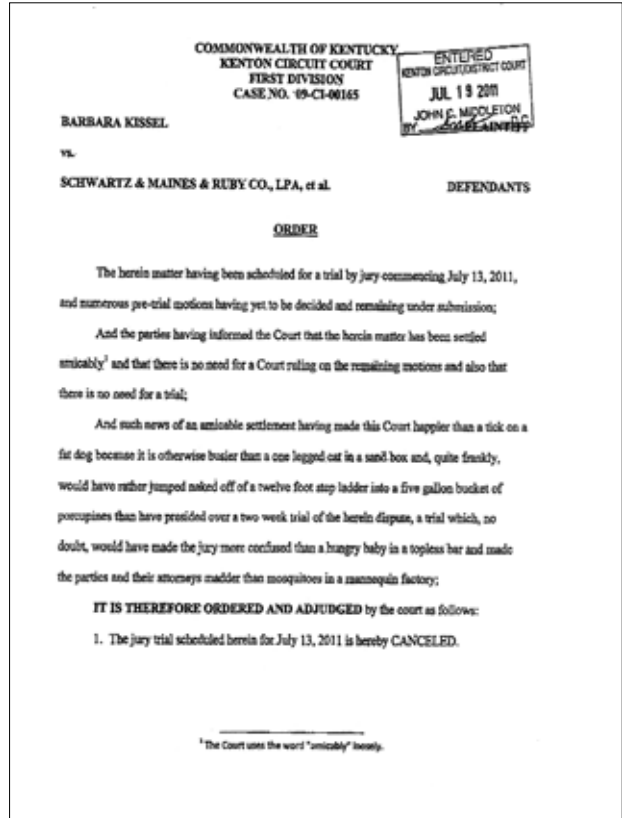
And such news of an amicable settlement having made this court happier than a tick on a fat dog because it is otherwise busier than a one legged cat in a sand-box and, quite frankly, would have rather jumped naked off of a twelve foot step ladder into a five gallon bucket of porcupines than have presided over a two week trial of the herein dispute, a trial which, no doubt, would have made the jury more confused than a hungry baby in a topless bar and made the parties and their attorneys madder than mosquitoes in a mannequin factory;

It is therefore ordered and adjudged by the court as follows:

1. The jury trial scheduled herein for July 13, 2011 is hereby canceled [sic].
2. Any and all pending motions will remain under submission pending the filing of an agreed judgment, agreed entry of dismissal, or other pleadings consistent with the parties' settlement.
3. The copies of various correspondence submitted for in camera review by the defendant, SMRS, shall be sealed by the clerk until further orders of the court.
4. The clerk shall engage the services of a structural engineer to ascertain if the return of this file to the clerk's office will exceed the maximum structural load of the floors of said office.

Dated this 19th day of July 2011.

<sup>1</sup> The court uses the word 'amicably' loosely.



# The Last Word

By Julian Burnside

## Bloviating

Warren Harding was a magnificent specimen of manhood, but is generally accounted one of the worst ever presidents of the United States of America. His impressive style, it seems, concealed a near-complete lack of substance. William Gibbs McAdoo, a Democrat, spoke of Harding's speeches as '...an army of pompous phrases moving across the landscape in search of an idea.' Apparently Harding used the word bloviate a lot and, because his style of oratory was characterised by bloviation, it is not surprising that he was given credit for it. Some authors have suggested that bloviate was coined by Warren Harding (1865–1923), but quotations in OED2 go back to 1845. Unhappily for Harding's memory, dozens of books dealing with language or oratory use bloviate principally in connection with Harding's style.

Bloviate is a good-sounding word, pleasing to say but not much heard these days. OED2 defines it as 'to talk at length, esp. using inflated or empty rhetoric'. Its sound evokes the parallel idea of a blowhard. How can we have lost such a word in a world run by lawyers and politicians?

It is generally the case that those who bloviate are found to be speaking rubbish. It is astonishing to find how many words English provides to describe rubbish. Although English does not provide many proper words for ideas concerning sex, it provides generously for ideas about rubbish. In Tom Stoppard's *Artist Descending a Staircase*, a choleric old modernist painter (reformed) offers a terse appraisal of his unreformed colleague's latest work, which comprises a layered sound recording made in a silent, empty room. This provokes the following exchange:

DONNER: I think it is rubbish.

BEAUCHAMP: Oh. You mean a sort of tonal debris, as it were?

DONNER: No. Rubbish, general rubbish. In the sense of being worthless, without value, rot, nonsense. Rubbish in fact.

BEAUCHAMP: Ah. The detritus of audible existence, a sort of refuse heap of sound ...

DONNER: I mean rubbish. I'm sorry, Beauchamp, but you must come to terms with the fact that our paths have diverged. I very much enjoyed my years in that child's garden of easy victories known as the avant-garde, but I am now engaged in the infinitely more difficult task of painting what the eye actually sees.

Donner could also have described Beauchamp's work as bilge, bosh, bullshit, crap, dung, flim-flam, horseshit,

jazz, nonsense, nut, punk, ruck, skittle, skunk, slag, slop, slush, straw, stuff, toffee, tosh, toy, trash, trumper, or eyewash. The OED2 notes nearly 400 words whose central meaning is rubbish.

Tosh is not much heard these days. It was invented in the late nineteenth century and was frequently used in cricketing circles. On 25 June 1898 Tit-Bits noted that 'Among the recent neologisms of the cricket field is 'tosh', which means bowling of contemptible easiness.' Tosh is an interesting word, because it has a number of other meanings apart from that which cricket conferred on it. It is a bath or footpan; it is also those items of value that may be retrieved from sewers and drains. As a contraction of tosheroon, it means two shillings, or money generally (compare Australian slang dosh); it can also be used as a neutral, informal mode of address, equivalent to 'guy' or 'squire'. Strangely, when tosh is

used as an adjective it takes on an entirely new set of meanings: neat, tidy, trim, comfortable, agreeable, familiar.

Bilge is a very satisfactory word: short, luscious and stinking, it conveys a sloshing sense of its meaning. Its primary meaning is the bottom of a ship's hull, or the filth that collects there, but it is also very often used in its metaphorical sense of rubbish or rot. Much less obvious is its use as a verb, meaning 'to stave in the hull of a ship, causing it to spring a leak'. So

Admiral Anson wrote in his account of his epic, four-year voyage around the world: 'She struck on a sunken rock, and soon after bilged.' And this use as a verb may also be metaphorical. In 1870 Lowell wrote: 'On which an heroic life ... may bilge and go to pieces.'

Bilge is interesting in another way. Of the 625,000 or so words in the English language, only 11 others end with the letter sequence -lge. Three are well known and obvious: bulge, divulge, and indulge. The rest are very strange and rare:

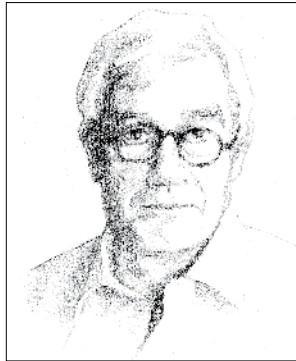
bolge (n): the gulfs of the eighth circle of the inferno (Also malebolge. Dante did not think well of it.)

effulge (v): to shine forth brilliantly (Hence, the coded proverb: 'All that shines with effulgence is not, ipso facto, aurous.')

emulge (v): to drain secretory organs of their contents

evulge (v): to disseminate among the people; to make commonly known, hence to divulge

promulge (v): to make known to the public, as in promulgate (Also provulge, and probably a corruption of the same)



milge (v): to dig round about

thulge (v): to be patient

volge (n): the common crowd; the mob ('The mob' is a contraction of mobile vulgaris: literally 'the common people in motion'.)

While bilge is a good word, my favourite word for expressing succinct condemnation is bullshit. It has the merit of being terse, expressive, and naughty enough to shock without being beyond the pale. It can sometimes be heard on ABC radio, which is our linguistic gold-standard. It appears without a fig-leaf in more than 40 judgments in the NSW Supreme Court, but only in circumstances where it is quoting the evidence. It is at risk of becoming polite however, which would strip away much of its force. In 2005 Harry G. Frankfurt published a book titled *On Bullshit*. Frankfurt is a philosopher, so his take on this vital subject is useful but not obvious. He discusses the difference between bullshit and lying by reference to an anecdote about Ludwig Wittgenstein who distinguishes between a '... statement ... grounded neither in a belief that it is true, nor, as a lie must be, in a belief that it is not true'.

Incidentally, bullshitter was recognised by Sidney J Baker in his *Popular Dictionary of Australian Slang*, but it had not been absorbed into the Oxford as at February 2012. A draft addition in the OED2 dated 1993 suggests that it will be recognised in due time. Until then, it remains a distinctively Australian expression for a bloviator.

Bloviating usually involves self-important, over-inflated speech. Other varieties of idle speech are well-catered for by English vocabulary. Words denoting idle talk include (among many others) babble, balderdash, bibble-babble, bourd, braggadocio, cackling, clatter, claver, fiddle-faddle, flim-flam, gossip, jangle, jaunder, jibber-jabber, labrish, palaver, prattle, tattle, tittle-tattle, trattle, truff, twattle, yap and yatter.

Most of these are self-explanatory; some are obviously archaic. Jaunder is simply idle talk. Claver is 'idle garrulous talk, to little purpose'. There is a Scottish saying: 'Muckle claver and little corn' (muckle = much), referring to eloquent preaching which uses many words but has little substance. The pun is on claver, clover. A truff is 'an idle tale or jest'. It is a fifteenth-century word, which seems to have disappeared some time in the seventeenth century.

Twattle (also twaddle, and in that form commoner in Australian English) is idle talk or chatter; and just as we

now have the expression chatter-box, in the eighteenth century there was twattle-basket.

Yatter is onomatopoeic and self-evident, but not often heard although it is still in use. It is originally a Scottish dialectal word and is still used in Scotland. OED2 offers a quotation from (of all places) the *Brisbane Sunday Mail*: 'No one in the Brisbane Valley any longer believes the tourist yatter given out by government...circles.' The quotation dates from May 1978, when Sir Joh Bjelke-Petersen was the Queensland premier. Given Sir Joh's narrative style, and his famous reference to press conferences as 'feeding the chooks', yatter seems to be an apt word in the circumstances.

Just as idleness of speech is well served by English vocabulary, so is idleness of character. About 500 English words have idleness at the core of their meaning. Words which suggest idleness of character include: bumble, do-nothing, dor, drone, gongoozler, loon, lubber, lurdan, lusk, picktooth, quisby, ragabash, rake, shack, sloth, slouch, sluggard, toot, trotevale, truandise, vagrant, and wastrel.

Some of these are obvious, but others deserve a closer look. A bumble is a blunderer or idler, also known as a batie bum. A gongoozler is originally 'an idler who stares at length at activity on a canal; hence more widely, a person who stares protractedly at anything'. A highly specialised word indeed, its first recorded use is in that well-known organ Bradshaw's Canals & Navigable Rivers of England & Wales. In an attempt at survival its meaning broadened, but the word remains obscure.

A lubber is 'a big, clumsy, stupid fellow; especially one who lives in idleness; a lout', and it became specialised as a sneering term used by sailors to mean 'a clumsy seaman; an unseamanlike fellow', especially in the compound expression land-lubber.

The OED2 defines lurdan as 'a general term of opprobrium, reproach, or abuse, implying either dullness and incapacity, or idleness and rascality; a sluggard, vagabond, "loafer"'. Its heavy sound fits it well to the task, and the word has been around since the fourteenth century, so it is a pity that it has disappeared. Similarly, a lusk is 'an idle or lazy fellow; a sluggard'. Cotgrave's description of someone as '... sottish, blockish ... luske-like' could not be mistaken for a friendly observation. Like lurdan, it dates back many centuries, but even as the number of people increases to whom it could be fairly applied, it has fallen out of use.



# Mason's miscellany

## Dynasties in the law

The Australian judiciary has had so many dynasties that the English appear upwardly mobile by contrast. At the apex stand the Douglas clan with six senior judicial officers.<sup>1</sup> Next come the four Stephens,<sup>2</sup> three Street CJs, three Macrossans (two of them chief justices), three Owens, Windeyers, Winnekes and Evatts, and the (presently) smaller judicial dynasties of two bearing the names of a'Beckett, Andrews, Barton, Brennan, Brereton, Burt (two chief justices), Cohen, Curlewis, Davies, Dowling, Dovey, Ferguson, Garling, Gavan Duffy, Flannery, Forbes, French, Fullagar, Hanger, Hart, Heenan, Herron, Jackson, Jeffcott, Joske, Kirby, Levine, Long Innes, Macfarlane, Mansfield, Maxwell, McLelland (two CJs in Eq), McLoughlin,<sup>3</sup> McMurdo, Molesworth, Nicholas, Noel, O'Bryan, Slattery, Smith, Smithers, Starke, Studdert, Williams, Winneke and Woinarski. If I have left any off, I apologise.

Judges who are married to each other are now fairly commonplace, especially in Queensland, the home of many legal propinquities. At present there are two sets of husband and wife on the Supreme Court.

Brian Frank Martin was chief justice of the Northern Territory between 1993 and 2003. His successor was a man of almost the same name (Brian Ross Martin). Rumours circulated that the territory government was too strapped for cash to afford new stationery or to paint a fresh name on the door.

I know of two families that have produced three successive generations of senior counsel: the Shands (Alexander Barclay Shand KC, John Wentworth (Jack) Shand KC (later QC), and Alec Shand QC). The first Street CJ (Phillip Whistler Street) never took silk, but his son (Kenneth Whistler Street), grandson (Laurence Whistler Street) and great-grandson (Alexander Whistler Street) were all appointed senior counsel.

The Wentworths are a legal dynasty of a different order. Their progenitor D'Arcy Wentworth was twice acquitted of a capital crime and left England quickly for New South Wales in 1789 to avoid a third brush with death or transportation. He had no legal training but rose to become chief magistrate in the colony much to the disgust of the Exclusives. His illegitimate, native born son<sup>4</sup> William Charles, dubbed by his biographer Australia's greatest native born son, was an explorer, barrister, publisher, politician and statesman. He became president of the Legislative Council in 1861 and gave his name to the blue-ribbon federal electorate to which his great-grandson Billy Wentworth and Billy's niece Kate Wentworth would at times unsuccessfully seek election. Billy was a barrister

and successful Liberal Party politician, holding the federal seat of Mackellar between 1949 and 1977. Kate Wentworth's campaign under the banner of 'Wentworth for Wentworth' was unsuccessful. For many years she was engaged in litigation with past and present members of her family and others. A summons to have her declared a vexatious litigant was, however, dismissed.<sup>5</sup> Ms Wentworth later obtained legal qualifications, but her application to be admitted to the bar was rejected by the Court of Appeal on the ground that she was not 'suitable...for admission'.<sup>6</sup> A Bill was introduced in the Legislative Assembly for Ms Wentworth's admission, but it lapsed.

The Pedens are a fine dynasty of legal academics. Sir John Peden KC was professor of law and dean at the Law School of Sydney University<sup>7</sup> where his great-granddaughter Elisabeth Peden is currently a professor. Elisabeth's father Professor John Peden taught at the same law school before becoming dean at Macquarie University Law School.

This, the first of a number of planned pieces, is extracted from Keith Mason's forthcoming *Then and Now: An Australian Legal Miscellany* that will be published by Federation Press later this year.

### Endnotes

1. Robert Johnstone Douglas was the northern judge in Queensland between 1923 and 1935; his elder brother Edward Archibald Douglas was a Supreme Court judge between 1929 and 1947 (he was passed over for the position of senior puisne judge in controversial circumstances); his son James Archibald Douglas was appointed to the Supreme Court in 1965; James' son Robert Ramsay Douglas was a judge of the same court from 1999 until his untimely death in 2002; Robert's brother James Sholto Douglas was appointed to that court in 2003. Naming the sixth, another son of James, Francis Maxwell Douglas QC, who for a short time was a judge of the Court of Appeal of Fiji, requires only a slight poetic licence. Fiji's admission as an Australian state was contemplated at federation and, as with New Zealand, is provided for in s 121 of the Constitution (see *Western Australia v Commonwealth* (1975) 134 CLR 201 at 273-4).
2. John Stephen was the first puisne judge of the Supreme Court of New South Wales; his son Alfred was chief justice between 1844 and 1873; his son Matthew Henry was a judge between 1887 and 1904 and Matthew Henry's younger brother, Edward Milner Stephen held the like office between 1929 and 1939.
3. Bernard and Cornelius McLoughlin were brothers who served concurrently on the District Court of Queensland in the 1970s. Another pair of brothers to serve together on the Supreme Court in that state were E A and R J Douglas.
4. A 'currency lad'. Governor Macquarie's locally-issued paper money or currency was regarded as inferior to sterling.
5. *Attorney-General v Wentworth* (1988) 14 NSWLR 481.
6. *Wentworth v New South Wales Bar Association*, NSWCA, unrep, 14 February 1994, relying on *Legal Profession Act 1987* (NSW), s 4 (2). Special leave was refused: (1994) 68 ALJR 494.
7. He was also, for a time, the president of the Legislative Council of New South Wales who lent his name to the leading constitutional law case of *Trethowan v Peden* (1930) 31 SR (NSW) 183.