

*What common lawyers do*

Sydney lawyer John Marsden (1942-2006) admitted in *I Am What I Am* (Viking, 2004) that he used a false consent defence to get Ivan Milat off rape in 1974:

Then I put to her something that has haunted me to this day ... I suggested that her sexuality might have had something to do with what had occurred with Ivan Milat. Crying and under stress, she ended up agreeing – and in that moment I knew we had won ... we had put into their [jurors] minds that the sex may indeed have been consensual ... I am not proud of my conduct that day, but ... I had to act according to the ethics of the profession... I had a job to do and I did it.

Milat went on to rape and murder seven young backpackers from, variously, Germany, England and Australia, in circumstances similar to the 1974 case. He was found guilty of the murders and sent down for life in 1996.

Professor Monroe Freedman defended two lawyers' dubious behaviour on the ground that they 'had kept faith with their client, and that is essential to the proper working of the adversary system'. Professor David Luban commented:

Everything rides on this argument. Lawyers have to assert legal interests unsupported by moral rights all the time – asserting legal rights is what they do, and everyone can't be in the right on all issues. Unless zealous representation could be justified by relating it to some larger social good, the lawyer's role would be morally impossible. That larger social good is supposed to be the

cluster of values – procedural justice and the defense of rights – that are associated with the adversary system.

Professor Luban quoted Professor Murray Schwartz's response to that argument:

It might be argued that the law cannot convert an immoral act into a moral one ... by simple fiat. Or more fundamentally, the lawyer's non-accountability might be illusory if it depends upon the morality of the adversary system, and if that system is immoral ... the justification for the ... Principle of Non-accountability ... would disappear.

As we have seen, the system IS immoral because, apart from everything else, it does not search for the truth. The Principle of Non-accountability thus disappears.

Aristotle's *petitio principii* fallacy says if the major premise is false, the conclusion is invalid. The adversary system syllogism goes something like this:

Major premise: The adversary system is the best system.

Minor premise: It requires trial lawyers to pervert justice.

Conclusion: Perverting justice is ethically acceptable.

The adversary system is demonstrably not a system of justice, let alone the best. Lawyers' ethics are thus based on a fallacy.

#### 4. The cartel: law as business

Common lawyers like to think they are members of a learned profession, but the law has effectively been a business since the lawyer-judge cartel was formed to maximise profits (partly by extorting from litigants) more than 800 years ago.

Lawyers may say: 'Cartel? What cartel?' Chief Judge Richard Posner's description was noted in the section on the origin of the common law. Chief Judge Dennis Jacobs is head of the federal Court of Appeals for the Second Circuit, which is based in New York and covers New York State, Connecticut and Vermont. His lecture, *The Secret Life of Judges*, delivered at Fordham University on 20 November 2006, was published in the *Fordham Law Review* in May 2007. Chief Judge Jacobs said judges have:

... a habit of mind that, among so many admirable features of the judicial mentality, amounts to a serious and secret bias ... an inner turn of mind that favors, empowers, and enables our profession and our brothers and sisters at the bar ... It is an insidious bias because it is hard to make out in the vast maze of judicial work ... that are woven together like an elaborate oriental rug in which the underlying image of the dragon emerges only after you stare for a while. I discern in this jumble a bias in favour of the bar lawyers: what they do; how they do it; and how they prosper in goods and influence. This is the figure in the carpet.

Associate Professor Benjamin Barton, of the University of Tennessee College of Law, put the

question, *Do Judges Systematically Favor the Interests of the Legal Profession?* in the *Alabama Law Review* of December 2007. In what may be termed the Barton Hypothesis, he answered his question thus at page two of his 52-page (14,821 words) paper:

Here is my lawyer-judge hypothesis in a nutshell: many legal outcomes can be explained, and future cases predicted, by asking a very simple question: is there a plausible legal result in this case that will significantly affect the interests of the legal profession (positively or negatively)? If so, the case will be decided in the way that offers the best result for the legal profession.

Max Weber (1864-1920), the German polymath who taught law, political economy, economics, and sociology, wrote in 1915.

In England, the reason for the failure of all efforts at a rational codification of law were due to the successful resistance against such rationalisation offered by the great and centrally organised lawyers' guilds, a monopolistic stratum of notables from whose midst the judges of the High Court are recruited ... they successfully fought all moves towards rational law which threatened their material position.

If Larsen E. Pettifogger (*The Kingdom of Id*) were a little smarter, he would be the quintessential lawyer-businessman. In *Greed on Trial (The Atlantic Monthly*, June 2004), Alex Beam quoted Robert Popeo, a plaintiff's lawyer who was seeking an extra US\$1.3 billion for starving tobacco lawyers, as saying: '... the

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law is an industry now, not a learned profession.’ An editorial in *The Financial Times* of 16 June 2005, stated:

A looming shake-up of legal regulation is prompting British law firms to rethink their business models. A recent survey shows two-thirds of the top 100 firms plan to admit non-lawyers as partners, one in five intends to seek outside investors and one in 10 aims to list on the stock market ... As for the supposedly dangerous profit motive, law firms have been ruthlessly pursuing profit for years.

People in business do not have a privilege of secrecy in their dealings with each other. Professor David Luban has noted: ‘[If a] lawyer is really just another businessman, [lawyers] lose whatever claim they have to the perquisites and immunities of the legal profession, [including] such invaluable goodies as the attorney-client privilege.’

## **5. A feeding frenzy of lawyers**

The *Wikipedia* states: ‘Several economic studies and legal decisions of antitrust authorities have found that the median price increase achieved by cartels in the last 200 years is around 25%.’ That may be the norm, but trial lawyers have never been satisfied with 25%, e.g. *Jennens v Jennens*. That raises a question: are they the most avaricious of all businessmen? Some pointers:

As noted, law professor John Banzhaf, of George Washington University, Washington, DC,

said in 2002: 'Like sharks smell blood, lawyers smell money.' In *Anatomy of a Murder* (1958), Judge John Voelker (1903-91) has lawyer Paul Biegler echo the Mafia motto, 'Get the money, and trust no-one.'

Lawyer Arthur Train wrote in *The Confessions of Artemus Quibble* 77 (1924):

There are three golden rules in the profession ... the first ... thoroughly terrify your client. Second, find out how much money he has and where it is. Third, get it.'

Johnnie Cochran knew that O.J. Simpson was guilty of murder but took US\$500,000 to pervert justice on his behalf. At Cochran's funeral in April 2005, Simpson said: 'I thought he represented ... the best in what our adversarial legal system was about.'

Robert Blake, a US actor found not guilty of murdering his wife, said in March 2005: 'You're innocent until proven broke.' He said he had spent US\$10 million on his defence. Alec Baldwin, a US actor, said in 2008 that his divorce had cost him \$20 million, and that judges were 'like pit bosses, keeping the money flowing'.

*Lawyers Weekly* reported in May 2002 that a survey for the American Bar Association's Litigation Section found that fewer 'than 20% of Americans have confidence in the legal profession', and that the reason boiled down to 'a single word: character'. The organ continued:

The American public says lawyers are greedy, manipulative, corrupt and do a poor job of policing

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themselves ... Specifically, respondents said that lawyers: are more interested in winning than seeing that justice is served (74%); spend too much time finding technicalities to get criminals off (73%); are more interested in making money than serving clients (69%).... A respondent said: "[Lawyers] get into a courtroom and they are like sharks. They want that money".'

It should be said that common lawyers do not have a monopoly of avarice. In April 2005, Reinder Eekhof, a Dutch law school graduate, accidentally sent an e-mail saying he had 'finally finished this stupid education' and was 'now looking for someone crazy enough to dump a suitcase full of money in my lap every month'.

## 6. The law as game

Geoffrey Robertson QC, author of *The Justice Game* (Random House, 1998), was asked in 1998: 'Should justice be a game?' He replied: 'Should it? No. Is it? Yes. We can't avoid the fact that the adversary system ... does make justice a game.'

US jurist John Henry Wigmore (1863-1943) referred to 'the game of litigation'. Judge Learned Hand (1872-1961) recalled that he once said to Justice Oliver Wendell Holmes Jr: 'Well, sir, goodbye. Do justice!'

'That is not my job,' Holmes replied. 'My job is to play the game according to the rules.'

In *We, the Jury* (Basic Books 1994), Jeffrey Abramson, a lawyer and Professor of Politics at Brandeis University, Massachusetts, quoted Stephen

Adler, of *The Wall Street Journal*, as reporting that jury consultants openly admit that:

... if a client needs prejudiced jurors, the firm will help find them ... they defend the ethics of their profession by pointing out that they obey the same imperatives lawyers do in our adversary system: they seek their clients' advantage within the rules of the game ... Media accounts strongly reinforce the notion that jury selection is the only game in town and the game is crooked.

Justice Geoffrey Davies, of the Queensland appeal court, and J.S. Leiboff wrote in *Reforming the Civil Litigation System: Streamlining the Adversarial Framework* (Queensland Law Society Journal, 1995): '... the adversarial imperative encourages, each party to ... even deny specifically facts known to be true ... By such tactics the parties [lawyers] are playing a very expensive game.'

Norman Mailer (1923-2007) told me in 2000: 'I've always looked upon our legal system as a high-stakes game played at the top by very skilful men, and once in a while even justice is served.'

The adversary system may be a game, but the playing field is not level. Later sections note how the game is rigged to get money for lawyers.

## **7. Zealous prosecutors**

Prosecutors must know the system is unfairly rigged against victims, detectives, jurors, the community, and themselves, but they do not agitate for a fair

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system, and some try to balance defence lawyers' dirty tricks with their own. The win-at-all-costs culture thus gets the worst of both worlds. Criminals get off and the innocent – particularly the poor and those whose colour is different from those in the majority – go to prison.

Claire Cooper, of *The Sacramento Bee*, noted in February 2004 that in two trials in Solano County, California, prosecutors identified Jonathan Shaw and Mango Watts as the single robber who held a gun to a restaurant manager's head. Cooper said three appellate judges said the prosecutions were 'something between stunningly dishonorable and outright deplorable', but that they could not reopen the case because the Supreme Court had 'never directly addressed the issue of whether due process permits two persons to be convicted for a crime that only one committed'.

Irving Younger (1932-88) was a defence lawyer, judge, academic, inventor of the sodomised parrot defence (see below, Diminished responsibility), and hypocrite. He complained (*The Perjury Routine, The Nation*, 3 May 1967) that judges do not assume that 'arresting officers are committing perjury'. Younger said:

Why not? Every lawyer who practices in the criminal courts knows that police perjury is commonplace. The reason is not hard to find. Policemen see themselves as fighting a two-front war against criminals in the street and against 'liberal' rules of law in court.

If it is wrong for police to lie to put criminals in prison, it is wrong for lawyers to lie to keep them out.

## 8. The judge as Humpty Dumpty

When lawyers got control of the process, judges had to be passive, but they do the decent thing: they try to stay awake. Lord Coleridge's wife sat on the bench and nudged him. A Sydney judge, Roddy Meagher, had his tipstaff at the ready to kick him. Lord Thankerton's solution enraged barristers; he took to knitting on the Bench.

Given the system's distance from reality, it is appropriate that judges' mindset is accurately described in *Through the Looking Glass, and What Alice Found There* (Macmillan, 1871):

'When I use a word,' Humpty Dumpty said, in rather a scornful tone, 'it means just what I choose it to mean -- neither more nor less.'

'The question is,' said Alice, 'whether you *can* make words mean so many different things.'

'The question is,' said Humpty Dumpty, 'which is to be master -- that's all.'

US Chief Justice (1969-86) Warren Burger (1907-95) confirmed the Humpty mindset. Bob Woodward and Scott Armstrong reported in *The Brethren* (Coronet, 1979) that Burger told his brother judge, John Marshall Harlin II: "We are the Supreme Court and we can do what we want."

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In *Bush v Gore* (Monday, December 13, 2000), five Humpties effectively said democracy means you don't count all the votes. They stopped the counting of Florida votes which, research showed a year later, would have made Albert Gore President rather than George W. Bush. There is a view that some consequences were not good. The Humpties were: William Hubbs Rehnquist (1924-2006, judge 1972-2006), Sandra Day O'Connor (b. 1930, judge 1981-2006), Antonin Scalia (b. 1936, judge 1986-), Anthony Kennedy (b. 1936, judge 1988-), and Clarence Thomas (b. 1948, judge 1991-). A dissenter, Justice John Paul Stevens (b. 1920, judge 1975-) observed:

Although we may never know the winner, the loser is perfectly clear. It is the nation's confidence in the judge as an impartial guardian of the rule of law.

Don Vito Corleone said lawyers can steal more than 1000 gangsters, but he did not say how they are helped by judges, e.g. Justice Brett on discovery (1882), Lord Atkin on negligence (1932) and tax evasion (1936), Chief Justice Owen Dixon on tax evasion (1957), and Chief Justice Garfield Barwick on tax evasion (1964-81). Their actions, detailed later, tend to support the Barton Hypothesis.

Judging is different from advocacy, but judges are not trained as judges; they are lawyers one day and judges the next. Abimbola A. Olowofoyekuw, a lawyer, pointed out in *Suing Judges: a Study of Judicial Immunity* (Oxford, The Clarendon Press, 1993):

With all the training given to physicians (college, pre-med, medical school, internship, years of specialist training) no hospital in the world would permit a general practitioner (or a dermatologist) to do surgery. But with no special training, the law permits a real estate lawyer, a banking counsel or a legal scholar to become a judge one day and on the morrow sentence a defendant to thirty years in prison, grant a divorce, adjudicate insanity, render judgment in an accident case, hold a director liable for damages, grant an injunction in a labor dispute, provide for custody of children, reapportion a legislative district, punish for contempt or reduce the tax assessment on an office building. How long does it take a new judge to get a smattering of the learning necessary to do all these things? ... Does it not make sense to train the judges before they go on the bench ... Should not the judge be trained in his special discipline before being given the awesome responsibility of sitting in judgment on others?

Since judges' only training is as lawyers, do they suddenly stop lying and perverting justice when they go aloft? Alan Dershowitz wrote in *The Best Defense*:

... lying, distortion, and other forms of intellectual dishonesty are endemic among judges ... The courtroom oath – 'to tell the truth, the whole truth and nothing but the truth' – is applicable only to witnesses. Defense attorneys, prosecutors and judges don't take this oath – they couldn't!

People who persistently make mistakes are dismissed, but it is difficult to get rid of judges who are persistently wrong. In Europe, judges are trained

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separately from lawyers and appointed on the basis of rigorous examinations.

In the common law world, a judge is said to be a lawyer who knows a politician. A US judge, Curtis Bok, said in 1941: 'It has been said that a judge is a member of the Bar who once knew a Governor.'

In *Trial by Jury* (1875), barrister W. S. Gilbert has a judge admit: 'It is patent to the mob/That my being made a nob/Was effected by a job.' Chorus: 'And a good job too.' During the administration (2001-2009) of President George W. Bush, potential appointees to the Supreme Court were subjected to questioning by Vice-President Richard Cheney. In 2009, President Barack Obama (Harvard Law School) continued the procedure with Sonia Sotomayor.

Chief Justice (NSW) Jim Spigelman said Sir Owen Dixon (1886-1972, High Court 1929-64, Chief Justice 1952-64) was 'Australia's greatest jurist' and that his court was 'one of the great common law benches of history'. Spigelman must have been unaware that Dixon took court further into fraud. He wrote judgments for Justice Sir George Rich (1863-1956, High Court 1913-50), and let Rich put his name on them. He also wrote judgments at variance with his own and let other judges sign them. Lawyers could use the fraudulent judgments in argument before the court.

The origin of lawyers' immunity from suit is a brazen example of the Barton Hypothesis. Courtesy of jurist Brett Dawson, we can name the guilty men: Sir Jonathan Pollock (1783-1870), Sir William Watson (1796-1860) and Sir George Bramwell (1808-92). In

*Swinfen v Lord Chelmsford* (Exchequer Court, 1860), the judges were put to the exigency of protecting a former – and, as it turned out, future – Lord Chancellor who had cheated his client.

Lord Chelmsford (1794-1878) had a glittering career. Born Fred Thesiger, at 13 he was a plucky little midshipmite at the Battle of Copenhagen. Perhaps tiring for the moment of rum, sodomy and the lash, he left the Navy at 17 and took to the bar and Tory politics. He rose to Solicitor General, Attorney General, and Lord Chancellor in 1858, but the 14<sup>th</sup> Earl of Derby's Government fell in 1859, and he fell with it.

Down on his luck and with mouths to feed – his son, Alf, a future appellate judge, was still at Oxford – Lord Chelmsford had to resort to the bar. A client, Ms Patricia Swinfen, instructed him by telegram not to settle but, finding himself double-booked, he took the time-honoured course of settling the action which promised the smaller fee, Ms Swinfen's.

A June 2004 editorial in FLAC (For Legally Abused Citizens) Australia noted how Pollock *et al* defrauded Ms Swinfen and established immunity. The 'reasoning' of the court was: we can't find any case where a barrister has been successfully sued for negligence. Therefore, it must be the law that barristers cannot be sued for negligence. That notion still obtains in Australia, if in few other countries.

The most recent assertion of lawyers' immunity – largely on the ground that legal actions must have some finality – was *D'Orta-Ekenaike v Victoria Legal Aid* (Australian High Court, March 10, 2005). Those

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in favour were Murray Gleeson CJ and Michael McHugh, Bill Gummow, Ken Hayne, Dyson Hayden, and Ian Callinan JJ. When the lone dissenter, Justice Michael Kirby, shortly had an emergency heart bypass operation, *Justinian*, commented: 'It's sad to see that the only judge on the court with a heart is now having trouble with it.' A barristers' carousing song might go: O, the moon shines tonight/On Mrs Porter'/And on her D'Orta.

In May 2006 the Ontario Chief Justice's Advisory Committee on Criminal Trials defined the function of judges thus:

Central to the adversary system is the concept that it is the lawyers who prepare and present the case ... Trial judges would prefer to be, *and should be*, passive observers ... there is no need for the trial judge to become involved in trial management.

It is preferable for judges to be awake when concealing evidence, and when telling the jurors to decide what the remaining evidence means, but for the rest of the trial they might as well be the scarecrows described by T.S. Eliot:

We are the hollow men  
We are the stuffed men  
Leaning together  
Headpiece filled with straw

Sleeping is fairly passive, but Australian High Court judges ruled in September 2008 that two men found

guilty on drug charges did not get a fair trial because the trial judge, Ian Dodd, was sometimes asleep. The judges, who were paid AU\$7,254.42 a week, were apparently unaware that no trial is fair because fairness means truth.

Oxford law professor Patrick Atiyah wrote in *Justice and predictability in the common law* (NSW Law Journal 1992): '... less predictability in the law means more litigation.' Justice Sir Frank McKinnon (1871-1946) said in *Salisbury v Gilmore* (1942) that the law lords are 'the voices of infallibility, by a narrow majority'. David Goldberg QC, a London tax lawyer, said in 1997:

It is, I think, generally accepted that every case or virtually every case which goes to the House of Lords could be decided either way. At any rate Lord Reid is reported by Alan Patterson in his book *The Law Lords* as saying that at least 90% of the cases which came before him [1948-75] could have been decided either way.

That means appeal courts are effectively casinos, lacking only scantily-clad young ladies offering the gamblers high-octane cocktails. Lawyers can thus advise clients to have another roll of the dice; they might win, however dubious their case.

Lawyers can get two bites of the appeal cherry because many common law countries have appeal courts for provinces and another for the nation. Britain has two appeal courts, the Court of Appeal and the judicial committee of the House of Lords.

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Sir Alan Herbert (1890-1971) was called to the Bar in 1918 but never practised, perhaps because he feared he could not keep a straight face. He put the casino question in *Why Is the House of Lords?* (Punch, 1933). In *Board of Inland Revenue v Haddock*, he has the Master of the Rolls (head of the Court of Appeal) admit:

The institution of one Court of Appeal may be considered a reasonable precaution; but two suggest panic ... the legal profession is the only one in which the chances of error are admitted to be so high that an elaborate machinery has been provided for the correction of error ... In other trades to be wrong is regarded as a matter of regret; in the law alone is it regarded as a matter of course.

Harold Clough, a Perth engineer and former President of the Australian Chamber of Commerce, said in 1998:

We avoid litigation like the plague. When we have differences of opinion with our clients and we are stalemated in positions from which neither can move, rather than bring in the lawyers I suggest we toss for it. Tossing a coin has great advantages. It is quick, it is cheap, it is decisive and in my view equally as fair as any court case.

Some judges usurp the role of the jury. Three classic cases:

During the 'troubles' in Northern Ireland in the 1970s, it was said that accused are presumed

innocent until proved Irish. At the 1974 trial of the innocent Birmingham Six, Justice Sir Nigel Cyprian Bridge (1917-2007) told the jury: 'I am of the opinion, not shared by all my brothers on the bench, that if a judge has formed a clear view it is much better to let the jury see that.' Bridge summed up for a conviction. Mike Mansfield QC noted his technique in *Presumed Guilty: The British Legal System Exposed* (Heinemann, 1993):

In a careful, almost total demolition of every defence witness and the lauding, sometimes verging on deification, of prosecution witnesses, the jury was corralled into the guilty pen as though driven by a diligent sheep-dog.

Justice Sir Joseph Cantley (1910-93) presided at the 1979 trial of Jeremy Thorpe, a barrister/Liberal politician, who was accused of conspiring to have Andrew (Gino) Newton murder Thorpe's former lover, Norman Scott, in 1975. Cantley summed up for an acquittal. He said the evidence of the chief prosecution witness, Peter Bessell (1921-85), a Liberal politician, was 'a tissue of lies'. The jury was originally split 6-6, but eventually found Thorpe not guilty. A few days later, Peter Cook (1937-95) detonated a parody of Canley's summing-up at the Secret Policeman's Ball for Amnesty International. Cook, who had said: 'I could have been a judge, but I never had the Latin', called his summing-up *Entirely a Matter for You*, which is judgespeak for 'entirely a matter for yours truly'. Cook said:

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We have heard for example from a Mr Bex Bissell, a man who by his own admission is a liar, a humbug, a hypocrite, a vagabond, a loathsome spotted reptile and a self-confessed chicken-strangler. You may choose if you wish to believe the transparent tissue of odious lies which streamed on and on from his disgusting, reedy, slaving lips. That is entirely a matter for you ... We have been forced to listen to the whinings of Mr Norman St John Scott, a scrounger, a parasite, a pervert, a worm, a self-confessed player of the pink oboe, a man, who by his own admission, chews pillows ... On the evidence of the so-called hitman, Mr Olivia Newton John, I would prefer to draw a discreet veil. He is a piece of slimy refuse, unable to carry out the simplest murder plot ... You are now to retire, as indeed should I, carefully to consider your verdict of Not Guilty.

Justice Sir Bernard Caulfield (1914-94) presided at a 1987 libel case in which a politician, Jeffrey Archer, falsely denied having resorted to a dwarfish prostitute, Monica Coghlan. Caulfield seemed entranced by the icy charm of Mrs Mary Archer, who stood by her man. Caulfield asked the jury:

Has she elegance? Has she fragrance? Would she have, without the strain of this trial, radiance? ... Has she been able to enjoy rather than endure her husband Jeffrey? Is she right when she says to you – you may think with delicacy – Jeffrey and I lead a full life? ... Is he in need of cold, unloving, rubber-insulated sex in a seedy hotel?

The jury gave Archer £500,000, and Caulfield added costs of £700,000. Prime Minister John Major made

Archer a peer in 1992. In 2001, Lord Archer got four years for perjury at the libel trial.

## 9. A country's values

Business economist James R. Forcier wrote in *Judicial Excess: The Political Economy of the American Legal System* (University Press of America, 1994):

A nation's values and problems are mirrored in the ways in which it uses its ablest people. In Japan, a country only half our size, 30 percent more engineers graduate each year than in all the United States. But Japan boasts a total of less than 15,000 lawyers, while American universities graduate 35,000 every year.

Japan uses a truth-seeking system. When Forcier wrote, the population of Washington DC was 500,000, but Washington alone then had 50,000 lawyers, three times as many as Japan. In 1992, France, had 22,000 lawyers.

## D. The corrupt civil process

Judge Learned Hand (1872-1961), said in 1921: 'I must say that as a litigant I should dread a lawsuit beyond almost anything else short of sickness and death.'

Civil litigation is like a cancer; it grows exponentially because lawyers can spin the process out. Trained French and German judges dispose of civil cases in a few hours. Justice Russell Fox wrote in *Justice in the 21<sup>st</sup> Century*:

... there is many a crack in the image of the ideal [of justice]. Mostly these arise from the practice of leaving the practitioner in charge of the collection and presentation of the evidence, which means that the judge may only hear incomplete or inaccurate or unreliable evidence; some of what is relevant may be deliberately withheld.

Philip K. Howard, a US lawyer, notes in *Life Without Lawyers* (Norton, 2009): 'In 2007, 384,330 cases were filed in federal trial and appellate courts, not including bankruptcy cases. In the state courts there were 47.3 million, not including traffic cases.'

One of the cases Howard noted was *Pearson v Chung*. In 2005, Judge Roy Pearson had asked South Korean immigrants named Chung, who had a Washington dry cleaning business, to alter his trousers. By mistake, they went to another branch, where they were altered according to Pearson's

instructions and returned some days after the due date, May 5, 2005.

Judge Pearson refused to accept the trousers and sued the Chungs for US\$67 million. He claimed inconvenience, mental anguish, and lawyers' fees of \$500,000 for representing himself.

In what must be noted as exceptions to the Barton Hypothesis, 13 judges ruled against Judge Pearson: Judge Judith Barntoff in June 2007, three appellate judges in December 2008, and nine appellate judges in March 2009. Donors met the Chungs' lawyers' fees, \$100,000, but the stress of four years of litigation cannot be calculated.

Sir Hugh Laddie QC (b. 1946), a former Justice of the UK High Court, reflected on the length and cost of civil litigation in *Legal Week* on May 26, 2006. He wrote: "Go back to the drawing board and consider the possibility that the adversarial system is past its sell-by date."

*Legal Week* polled senior partners at 100 law firms on whether the system had passed its sell-by date. The organ reported on June 8, 2006 that 40% agreed. The other 60% said the adversary system is 'an essential pillar of British justice'.

On May 22, 2007, Sir Hugh Laddie, now Professor of Intellectual Property Law at University College London, noted in *The Times* that a small to medium patent case costs three to 10 times more in England than in Germany or the Netherlands.

Sir Hugh wrote: 'Perhaps it is time to do the unthinkable and start making our system much more like that used by our continental colleagues.'

## 1. Interminable pleadings

Edward Jacob KC (d. 1841) was editor of *Chancery Reports*. Nicholas Mullany noted in *Pleadings* that Justice Sir William James remarked in *Hall v Eve* (1877):

This case reminds me of a saying of the late Mr Jacob that the importance of questions was in this ratio: first, costs, second, pleadings, and third, very far behind, the merits of the case.

Written pleadings, the vehicle for the invention of the adversary system, are supposed to narrow the issues but are largely useless: as noted earlier, judges have allowed lawyers to lie in pleadings for five centuries. Speaking on behalf of the West Australian Law Reform Commission in 1998, Mullany, said:

The pleading rules ‘stop short’ of requiring the parties [and their lawyers] to be frank about what they allege. There is a tendency of parties to make allegations which they do not believe to be true ... and to deny allegations which they know to be true ... There is, in other words, a lack of ‘truth’ in pleadings.

Lawyers can go on lying in pleadings interminably in see-saw fashion: statement of claim, defence, reply, rejoinder, surrejoinder, rebutter, surrebutter, counter-claim, defence to counter claim, reply ...

Judicature Acts introduced by Lord Chancellor Selborne in 1873 and by Lord Chancellor Cairns in 1875 purported to reform pleadings, but Mullany

said 'they did not introduce a system which operated to define the issues in dispute between the parties'. A committee chaired by Lord Chief Justice Coleridge in 1881 'supposed' from the statistics for more than 20,000 cases in 1879 that 'pleadings were of little use', but all further attempts at reform have been sabotaged.

Mullany quoted Peter Hayes QC, of Melbourne, as stating in a 1998 paper for the Law Institute of Victoria:

I think that pleadings are a big heap of crap, essentially ... the rules - call it anal retentiveness - ... are nonsense, are all an impediment these days to justice.

In 1998, the WA law reform commissioners – WA Bar Association President Wayne Martin QC, law professor Ralph Simmonds, of Murdoch University, and Crown Counsel Robert Cock QC – reported:

It is our opinion that for so long as the Australian litigation system is based on the adversarial tradition ... attempts to bring about *substantial* reform of the current system of written pleadings with a view to facilitating the more efficient administration of justice will fail. (Their emphasis.)

They recommended a procedure which 'resembles most closely that prevailing in Germany'. In effect, they recommended a return to the oral method of pleading that obtained before the invention of the adversary system. Lawyers would presumably still

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lie in oral pleadings, but at least the pleadings would be over in a day.

Martin, Simmonds and Cock said the change could generally be made 'without the assistance of the legislature'. That is, the judges could make the change themselves. That was in 1998. Simmonds went on to the WA Supreme Court in February 2004, and Martin became Chief Justice in April 2006, but in 2009 the court had not yet ended paper pleadings.

## 2. Interminable discovery

Discovery is moving documents from one law office to another. A courier will do it for a few dollars; lawyers can charge millions. Lawyers for one client ask lawyers for the other to 'discover' and hand over documents which might help their side or hinder the other's. The other side responds with lists of the documents they are prepared to reveal, those no longer available and why, and those they want to conceal on grounds of privilege, e.g. client-lawyer secrecy.

Discovery was originally a monopoly of equity lawyers, i.e. those who worked in the corrupt Chancery Court, but was extended to other lawyers by the Common Law Procedure Act of 1854.

A few words by Lord Justice (of Appeal) William Baliol Brett (1815-99) in the guano discovery case, *Compagnie Financiere et Commerciale du Pacifique v Peruvian Guano Company* has made billions for lawyers. Brett said any document is discoverable if it *might*, directly or indirectly, lead to a 'train of

inquiry' which might help the lawyer's case or damage his adversary's. (Emphasis added.)

That made discovery open-ended. Brett became Master of the Rolls in 1883, Baron Esher in 1885, and Viscount Esher on his retirement, aged 82, in 1897. Thanks to him, millions of documents can be discovered, but only a very few are relevant. A UK appellate judge, Lord Justice Johan Steyn said in 1992:

[Discovery] contributes to the tyranny of modern litigation ... It is the experience of Commercial judges that usually 95% of the documents contained in the trial bundle are wholly irrelevant and never mentioned by either side.

Justice David Ipp, then of the WA Supreme Court, said, in Part II of *Reforms to the Adversarial Process in Civil Litigation* (Australian Law Journal, 1995):

... the usual result is that the number of those documents that are critical to the result of the trial are substantially less than 50 [but] sometimes hundreds of thousands [are] discovered.

Lawyers say that if they don't turn over every stone, they could be done for negligence. *The Economist* reported in 1992 that discovery accounts for 60% of the time and money spent on US lawsuits, and that in 1988 a Louis Harris survey showed:

... a big majority of litigators for both plaintiffs and defendants said that discovery is used as a weapon to

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increase a trial's cost and delay to the other side (nearly half said lawyers use it to drive up their own charges) ... In an IBM antitrust [monopoly] suit, discovery took five years and produced 64 million pages of documents ... A partner at a big [US] law firm bragged to law school students about a long anti-trust case: 'My firm's meter was running all the time – every month for 14 years.'

The admissions indicate that many trial lawyers habitually use discovery to extort from their own clients.

Lawyers also use discovery as a tool of blackmail. Perth barrister Paul Mendelow noted in *Discovery: Should the Whistle-blowers Stop the Train of Inquiry?* (WA Law Reform Commission, 1998): 'Parties may attempt to force favourable settlement by driving up costs [of discovery] beyond the value of the case.' Mendelow quoted a 1994 article, *Some Lessons from Santos*, by Justice Peter Heerey, concerning *Trade Practices Commission v Santos Ltd and Sagasco Holdings Ltd* (1993), in which discovery lasted for a year. Mendelow wrote:

Justice Heerey's focus of criticism ... was that it was a mistake to have a general, unqualified order for discovery - in accordance with the test of relevance propounded by the *Peruvian Guano* case. The circumstances pertaining to discovery in this matter resulted in practitioners being 'recruited into a burgeoning army engaged in discovering, inspecting, filing, listing, copying, storing, carrying about, and otherwise dealing with 100,000 documents which had been accumulated for the purposes' of this litigation. An expression that developed

amongst junior practitioners who had been ensnared in the discovery process was: 'I have been Santossed'.

*BT [British Telecom Australasia] v the State of NSW and Telstra* arose out of a contract signed in 1992 by which BT was to supply certain telecommunications services to NSW. Telstra was also to be a supplier directly or indirectly through BT. NSW terminated the contract in August 1995. BT began proceedings in the Federal Court against NSW and Telstra.

By May 1998, lawyers for the parties estimated that the costs of discovery alone had reached AU\$19 million (AU\$32 million at 2009 rates), much of it down to taxpayers. Justice Ronnie Sackville (b. 1943) said:

I have repeatedly said that all parties [i.e. their lawyers] in this litigation have given insufficient attention to the need to control their own request for discovery in the interests of keeping the discovery process within manageable bounds. One consequence of the approach taken by the parties is that discovery in this case has assumed mammoth proportions. A second is that the parties are in continuous disputation as fresh discovery issues are raised, each said to require the time of the Court to resolve. Not only is this extraordinarily costly and, in my opinion, wasteful, but it diverts attention from the need, in a case that has now been going on for three years, to prepare for trial. It also imposes a disproportionate burden on the Court.

In what was reported to be 'a highly unusual move', Justice Sackville said he wanted to see the principals

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at the next sitting. In June 1998, he urged three senior executives of the actual 'parties' to consider mediation. He said: 'This is not a case which is incapable of resolution. After all, it only involves money.' The trial was expected to run for six months, but Sackville's advice was taken. Former Federal Court Justice Trevor Morling QC (b. 1927) took all concerned to Singapore, presumably to concentrate their minds, and mediated a settlement in a week. On February 15, 1999, a cryptic press release said Morling described the settlement as 'eminently reasonable' but the terms were secret.

### **3. Unfair bias in favour of plaintiffs**

Jurist Brett Dawson says aspects of civil law, notably libel (outside the US) and negligence, are unfairly biased in favour of plaintiffs' lawyers. He says the bias encourages people to sue, and the sued have to pay lawyers to defend them.

The bias is compounded by the fact that in eight centuries jurors have never had to give reasons. They can thus award unjust sums against defendants in the belief that they are redistributing wealth and punishing rich companies. In reality, they enrich lawyers and punish shareholders.

**Negligence.** Lord (James) Atkin (1867-1944, Lord of Appeal in Ordinary 1928-44) had a dome as bald and as conical as that of Humpty Dumpty or M. Hercule Poirot, and he was as capable of talking drivel as either. Lord Atkin opened the negligence floodgates in *Donoghue v Stevenson* (House of Lords,

1932), an appeal concerning an alleged (but unproved) snail in a bottle of Scottish ginger beer. He said:

The rule that you are to love your neighbour becomes in law, you must not injure your neighbour ... You must take *reasonable* care to avoid acts and omissions which you can *reasonably* foresee would be likely to injure your neighbour. Who then, in law, is my neighbour? The answer seems to be – persons who are so closely and directly affected by my acts that I ought *reasonably* to have them in contemplation .... (My emphasis.)

When lawyers hear the word ‘reasonable’, they rub their hands together: it has as many meanings as there are human beings. Atkin did not say the neighbour should exercise common sense and personal responsibility, e.g. in avoiding tobacco or a hole in the road. Justice Russell Fox demolished Atkin thus: ‘The simple fact is that no one can define negligence, nor in most cases is it possible to form an accurate view of the facts.’ He said Atkin’s ‘principle’:

... sounded good and proved very durable ... in theory, one can talk in terms of ‘proximity’ and ‘reasonable foreseeability’, and ‘what a reasonable person would have done’. In practice, these are but shibboleths which offer no obstacle to the inclination of judges and juries to provide compensation for the injured (or damaged) plaintiff... Many are not worried by this phenomenon, recognising it as a convenient form of injury (and damage) insurance, and governments are saved the necessity of introducing a

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scheme to achieve a similar result. It is however a very expensive pseudo-scheme because to each claim are added legal costs and these can be 30, 40 or 50% of the amount recovered, sometimes more. Eventually, the community at large, or a large percentage of it, bears the burden, and insurance companies (if they are cautious) and lawyers profit.

The US system does not always oblige losing litigants to pay the winner's costs, and it allows lawyers to charge a contingency (speculative) fee of up to 40% of the payout. It also allows jurors to make punitive awards.

The annual Stella Awards for outrageous negligence verdicts are in honour of Stella Liebeck, 79, who spilled coffee on her lap at McDonald's in 1992, and was initially awarded US\$2.86 million by the New Mexico District Court.

Florida plaintiff lawyers traditionally took 40% of the first \$1 million in medical liability payouts, 30% of the second \$1 million, and 20% of any higher amount. In November 2004, 63% of Florida voters approved a legislative amendment which capped lawyers' fees at 30% of awards up to \$250,000 and 10% of amounts over \$250,000. The lawyers would thus get \$500,000 of a \$5 million payout, but Jane Musgrave reported in *The Palm Beach Post* of July 24, 2005: ' ... personal injury lawyers quickly found a way around the new limits: They simply ask clients to waive their constitutional right to larger shares of any malpractice award they might get.'

The US Surgeon-General warned against smoking in 1964. Richard Boeken, 57, smoked 40 Marlboro cigarettes a day and got cancer, but swore he did not know smoking was dangerous until 1994. In 2000, Los Angeles jurors ordered Philip Morris shareholders to pay Boeken US\$3000 million, of which his lawyers presumably expected to get at least \$1000 million. On appeal, the payout was reduced to US\$50 million.

Brett Dawson says that even in a small country like Australia, lawyers get \$1200 million a year from personal injury litigation, largely from lump sum payouts. A boy got eight cuts at a Sydney school in 1984. In 2002, a jury gave him \$2.5 million, or \$312,500 per cut. Obstetricians, i.e. their patients, pay A\$140,000 a year for negligence insurance. Swedish obstetricians pay the equivalent of A\$500 a year.

Justice David Ipp, now of the NSW Supreme Court, told a conference of anaesthetists in Perth in May 2004 (*Personal Responsibility in Australian Society and Law: Striving for Balance*) that, particularly since the 1970s, 'courts throughout the common law world have awarded damages to plaintiffs without paying any regard to the concept of personal responsibility'. And:

Since ancient times, taking personal responsibility for one's own behaviour has been regarded as fundamental to what it means to be fully human, to lead an ethical life and, therefore, to participate in a just society. Without a fully realised concept of personal responsibility, society cannot be ordered in a fair way.

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It presumably follows that lawyers who do not take personal responsibility for perverting justice are not fully human, do not lead an ethical life, do not participate in a just society; and prevent society from being ordered in a fair way.

Justice Russell Fox said his concern about negligence law stemmed from 'the waste in cost involved, and court time, and damage to court integrity'. He noted that Justice Rae Else-Mitchell, of the NSW Supreme Court, said in 1972:

... the case for all claims arising out of motor vehicle and industrial accidents being decided on a no-fault basis by an administrative tribunal is unanswerable ... more people would be able to go to court and the taxpayer would be better off in the end.

Gough Whitlam QC (b. 1916), Labor Prime Minister of Australia 1972-75, sought to introduce no-fault compensation for injury, but noted in *The Curtin Lecture* (1985) that his Government was thwarted by the stone-walling tactics of interested parties 'aided and abetted by Labor lawyers who specialised in work for unions.' He said:

The basis of their [Labor lawyers'] thriving practices is to charge unions for the expert advice in cases of accidents to unionists at work and on the way to and from work and at the same time to render gratuitous advice to union officials on methods to entrench themselves in office.

A no-fault scheme eliminates lawyers because there is nothing to argue about, and thus eliminates

blackmail and increases the money available to care for victims. It also eliminates Santa Claus judges and jurors, but lawyers say it deprives people of basic common law rights. There is more money in rights than justice.

**Libel.** Criminal law has a presumption of innocence for defendants and judges conceal the truth about them. Libel law has a presumption of guilt for defendants and judges conceal the truth about plaintiffs. Witnesses for defendants can say they believe the plaintiff's reputation is not good, but they can't say why.

Libel law has thus protected rogues, including organised criminals, some powerful and respectable, for seven centuries. It began in 1275 when Edward I's Statute of Westminster invented the crime of *Scandalum Magnatum*, slandering the magnates, most of whom were robber barons. Truth, at least nominally, was a defence. The legislation was re-enacted in 1378 to include judges, prelates, and certain officials.

The printing press, introduced to England by William Caxton in 1477, threatened the reputations of the powerful. The Licensing Act of 1538 forbade books to be printed without a licence, thus enforcing pre-publication censorship. *Scandalum Magnatum* was re-enacted in 1554 and 1559 with new clauses on 'seditious words' which might cause disaffection against authority. The punishment fitted the crime: ears were cut off for a spoken slur; the right hand for a written slur.

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The Star Chamber dealt with some libel cases. Professor Theodore Plucknett said in *A Concise History of the Common Law* that by the time the chamber was abolished in 1641, 'it was settled that truth was not a defence', and that this 'was a break with Roman authority'.

The corrupt Whig oligarchs were tricked into letting the Licensing Act lapse in 1695. Modern journalism, with its intrinsic threat to the power and corruption of politicians and judges, was thus able to begin on 19 February 1704, when Daniel Defoe's *The Review* appeared. Face prevented the reimposition of the Licensing Act, but otherwise all the apparatus of a corrupt trade of authority were immediately deployed to silence the Press: secrecy – always the bottom line on corruption – taxation, bribery, and libel law. Reporting what was said in Parliament became a crime, and *the Review* and other journals, including Addison and Steele's *The Spectator*, were taxed out of existence in 1712.

Many proprietors were bribed for the rest of the century. Francis Williams, the historian of the British Press, says in *Dangerous Estate* (Longmans Green 1957): 'There was hardly a newspaper in those years [the 18th century] that was not in receipt of secret subsidies of one kind or another.' Prime Minister (1721-42) Robert Walpole used the secret police to pay more than £50,000 (about £5 million at today's rates) to newspapers and pamphleteers between 1732 and 1742. Agents for Pitt the Younger (1759-1806), the Tory Prime Minister 1783-1801 and 1804-06, paid bribes of at least £5000 [£500,000 today] a

year to newspapers at the time of the French Revolution. Nine newspapers got an annual bribe; *The Times* got £300 (c. £30,000)

Libel law, however, has proved the most effective and enduring method of silencing the Press. Professor Theodore Plucknett says that in 1704 (the year modern journalism began) Chief Justice (1689-1710) Sir John Holt (1642-1710) said 'it is very necessary for all governments that people should have a good opinion of it'. Professor Plucknett said it seemed to follow that:

any publication which reflected upon the Government was criminal ... Until 1792 the strict legal theory has been accurately summed up in these words: 'A seditious libel means written censure upon any public man whatever for any conduct whatever, or upon any law or institution whatever.

Judges had thus made it a crime to write the truth about corrupt politicians and judges, about bad laws, and about institutions run as criminal enterprises, e.g. Parliament and the courts. To ensure conviction, judges gave the verdict in libel cases; jurors' only role was to decide whether the accused had published the slur.

The Zenger case helped make the US the only English-speaking country in which freedom of speech and information are not legal fictions. John Peter Zenger, proprietor of *The New York Weekly Journal*, criticised the colonial Governor, William Cosby, and was tried on a charge of seditious libel

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on 4 August 1735. Zenger's Philadelphia lawyer, Andrew Hamilton, admitted that he had published the slurs, but argued that citizens should have a right to tell the truth about public officials, and offered to prove the slurs were true. The jurors insisted on finding Zenger not guilty.

The verdict did not change the law, but it did diminish prosecutions for seditious libel, and it did help to establish the notion that, at least in libel, truth is so important that it should be an absolute defence, and that jurors should give the verdict.

Lord Mansfield (1705-93, 7<sup>th</sup> in *The Legal 100*) was Leader of the House when the oligarchy's bagman, the Duke of Newcastle, was Prime Minister 1754-56, and was ineffably obtuse on policy towards American colonists. In his other role, Lord Chief Justice (1756-88), Mansfield invented a brilliant lie: the greater the truth the greater the libel. That is, the more corrupt a politician or judge is, the greater the penalty for exposing him.

The first academic, Blackstone, supported Mansfield's lie on libel, but public outrage resulted in Charles James Fox's Libel Act (1792), which gave libel verdicts to jurors. Judges apparently feared that jurors would refuse to convict journalists who exposed their corruption and that of politicians. Professor Theodore Plucknett said the Act 'was passed in spite of the unanimous opinion given by the judges at the demand of the House of Lords'.

James Madison's First Amendment (1791) to the US Constitution stated: 'Congress shall make no law ... abridging the freedom of speech, or of the press;

or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.’ But for 173 years the onus of proof in US libel cases, as in other common law countries, lay on the defendant rather than the complainant.

Anthony Lewis (b. 1927) notes in *Freedom for the Thought that We Hate – A Biography of the First Amendment* (Basic Books 2008) that libel law in several US States had what lawyers called the ‘three galloping presumptions’:

1. ... any publication that was challenged in a libel action was presumed to be false; the burden was on the publisher to prove it was true.

2. ... damage was presumed. The person suing did not have to prove actual damage, say to his career, as he or she would have to prove in other civil damage cases, such as medical malpractice.

3. ... the publisher’s fault was presumed.

In *New York Times v Sullivan* (1964), the Supreme Court voted 9-0 to repudiate those plainly false presumptions, and to rule that the First Amendment implied freedom of information.

For the court, Justice (1956-90) William Brennan (1906-97) said public officials could only win a libel case if they could show that the slur derived from ‘actual malice’, i.e. ‘knowledge that the [material] was false’, or from a ‘reckless disregard of whether it was false or not’. Actual malice was later extended to cover public ‘figures’. Most significantly, *NYT v Sullivan* shifted the onus of proof from the defendant

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to the complainant. In other common law countries, the onus remains on the defendant.

Law professor Ray Watterson, of the University of Newcastle (Australia), noted in *Media Law in Australia* (Oxford, second edition, 1988) that Lord Atkin 'conceded in *Sim v Stretch* (1936) that judges and textbook writers alike have found difficulty in defining with precision the word "defamatory".' Professor Watterson explained how libel law works:

The mere publication of words defamatory of the plaintiff gives rise to a *prima facie* cause of action ... a plaintiff has the benefit of the presumptions of falsity and of damage. He is not required to prove that the words are false; the law presumes in his favour that they are. The law also presumes that defamatory words cause harm. Thus it is not necessary for the plaintiff to ... to prove that he suffered material or financial loss ... Furthermore, a plaintiff is not required to establish that the defendant intended to harm his reputation ...

Libel law thus oppresses defendants (and the community) outside the US because seven obviously false presumptions unfairly bias the system in favour of plaintiffs. Appearance (reputation) is preferred to reality (character). The private right to reputation is preferred to the public right to information. A slur is always false. The author of a slur is always guilty. The subject of a slur is always innocent. A slur is always intentional. A slur always causes damage.

Geoffrey Robertson QC wrote in *The Justice Game*: 'London is the libel capital of the world

because English law heavily favours plaintiffs ... So there have been celebrated cases where newspapers have published the truth, yet lost.' Sydney cannot be far behind. John Wicklein, reported in the *Columbia Journalism Review* (November/December 1991):

By a recent count, 142 defamation actions against newspapers, most of them filed by politicians and businessmen, were pending in Sydney, which has been called the libel capital of the world. This is nearly twice the libel suits filed in the entire United States in any one year.

The bias against defendants encourages 'libel terrorism' and/or blackmail as practised by Robert Maxwell (1923-91), an organised criminal, asset stripper, newspaper proprietor, and megalomaniac. Libel lawyer David Hooper wrote in *Reputations Under Fire: Winners and Losers in the Libel Business* (Little, Brown, 2000):

Robert Maxwell learned early in his career that English libel law was an extremely useful device for concealing the truth about his reputation and his business methods. Defendants had to prove the truth of what he had striven successfully to cover up, and that was both costly and difficult ... Over a period of 30 years Maxwell developed a policy of using the law of libel to terrorise his opponents. His libel actions covered every aspect of his career: publishing, politics, newspapers and football. As his business empire collapsed, so he fired out his last bevy of writs to muzzle the press.

Maxwell won only one libel action, but he was able to use libel terrorism to rob the public of their right

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to information for three decades before he jumped, or was pushed, or fell off his boat and drowned in 1991.

SLAPP suits (strategic lawsuits against public participation) can amount to libel terrorism. Julian Petley noted in *Free Press* 108 (Jan/Feb 1999) that professors Penelope Canan and George Pring, of the University of Denver, invented the acronym when they noticed 'that corporations were increasingly threatening individuals in the environment movement with actions for defamation, conspiracy, invasion of privacy, interference with business, etc'.

The unfair bias against defendants also means that liars and their lawyers get money from honest soldiers for truth. A short list:

Pianist Wladziu Valentino Liberace, who falsely swore he was heterosexual.

British politicians Aneurin Bevan, Dick Crossman and Morgan Phillips, who falsely denied they were 'pissed as newts' at a conference of Italian Socialists in Venice.

Lord (Bob) Boothby, who falsely denied he had a sexual relationship with an organised criminal, Ronnie Kray.

Dr John Bodkin Adams, who falsely denied he was a serial killer of Eastbourne widows who changed their wills in his favour.

Jeffrey Archer, who falsely denied he had sex with a prostitute.

Juni Morosi, a secretary, who falsely denied she had sex with the Deputy Prime Minister of Australia, Dr Jim Cairns.

Fred Hanson, Police Commissioner of New South Wales, who falsely denied he was corrupt.

Murray Farquhar, chief Stipendiary Magistrate of New South Wales, who falsely denied he was corrupt.

Sir Les Thiess, a Queensland developer, who falsely denied he bribed the Premier of Queensland, Sir Johannes Bjelke-Petersen.

Sir Bob Askin (1907-81, NSW Premier 1965-75, falsely denied he was an organised criminal and would probably have got money from an honest politician, John Hatton, but died before the case got on.

In 2005, Australia's first law officer, Philip Ruddock, announced a plan to allow people to sue from the grave. I reminded him in *Justinian* that Voltaire observed in 1785: 'We owe respect to the living; to the dead we owe only truth', and that his legislation would inevitably be dubbed the Askin/Murphy clause in honour of Askin and High Court Justice Lionel Murphy, who was also a criminal. Ruddock eventually dropped the plan.

'Libel tourism' is the practice of suing US authors and publishers in London because in the US the complainant has to prove the slur is false, but in England the defendant has to prove the slur is true. However, US judges have taken the view that libel defendants cannot get justice in Britain. US courts usually enforce orders made by overseas courts but not when the orders are based on laws 'repugnant' to US law. In 1997, a Maryland court refused to enforce a British libel verdict because, on

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fundamental issues of free speech and a free Press, British law 'is totally different' from First Amendment principles 'in virtually every significant respect'. But if publishers have assets in England, they have to pay.

Libel tourist, convicted paedophile, and fugitive from US justice Roman Polanski sued New York-based *Vanity Fair* in London. The organ had reported in 2002 that in 1969, days after Polanski's actress-wife Sharon Tate was murdered, he tried to seduce a Swedish model in Elaine's restaurant by promising to get her into films. At the trial in 2005, the judge, Sir (a knighthood is automatic for High Court judges) David Eady (b. 1943), concealed from the jury the full details of Polanski's offer to the girl, 13, in the paedophile case to get her into *Vogue*. Polanski gave evidence by video link from Paris. When the jury found in his favour, Eady gave him £50,000; *Vanity Fair's* costs were reported to be some £1.5 million.

Khalid bin Mahfouz (1949-2009) owned 20% of the Bank of Credit and Commerce International (BCCI) between 1986 and 1990. BCCI engaged in all manner of doubtful practices, including fraud, bribery, money-laundering, arms trafficking, and supporting terror. Mahfouz sued or threatened to sue people who accused him of knowingly supporting terrorism 33 times. Mahfouz, who lived in Ireland and was worth US\$3.2 billion, thus contrived to be at once a libel terrorist, a libel tourist, and a libel lawyer's dream.

*Funding Evil* (Bonus Books, 2003), by a New York scholar, Dr. Rachel Ehrenfeld, was not published in England, but 23 books got into the country via online purchases. Mahfouz sued in London. Dr Ehrenfeld did not waste money on defending the action in 2005. In her absence, the libel judge, Sir David Eady, specifically rejected assertions that Mahfouz was forum shopping, gave him US\$230,000 and ordered Dr Ehrenfeld to apologise to him and destroy all existing copies of her book.

Reacting to the Mahfouz-Ehrenfeld case, state legislators in New York unanimously passed a law to protect New York authors and publishers against libel tourism in 2008.

Signing the legislation on 1 May 2008, Governor David Paterson said: 'The statute combats such "forum shopping" in two ways. First, it bars New York courts from enforcing a foreign libel judgment unless the country where it was decided grants the same or better protection as US standards for freedom of speech. Second, it expands an individual's ability to have a court declare a foreign libel judgment invalid in New York. Without this statute, an author could be forced to live indefinitely under the pall of a libel judgment, deterring publishers from disseminating that author's work.' Rory Lancman, a member of the New York Legislative Assembly said: 'Today we reaffirm New York's place as the free speech capital of the world.'

A Free Speech Protection Act was introduced into the US Congress in 2008. If enacted, the

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legislation would allow US authors and publishers to countersue and gain triple damages if a jury found that a foreign suit is part of a scheme to defeat the constitutional right to free speech.

#### **4. Blackmail (theft by extortion)**

Lawyers and clients get money in cases of alleged negligence and libel by pitching doubtful claims at a sum lower than the cost of litigation. The calculation is that the target company will make a commercial decision to submit to the extortion.

Brett Dawson says a woman who asked a married man to pay her to keep quiet about their adultery could be charged with extortion, but if she went through a lawyer, it would be regarded as a legal settlement.

#### **5. US workplace disputes: not a fair go all round**

It was in a workplace dispute case in 1971 that Gilbert Manuel, a NSW Conciliation Commissioner, enunciated the Manuel Test, 'a fair go all round' for employee and employer. US juries tend to be unfair to defendant employers. Jurist Walter K. Olson says workplace disputes take up roughly half the business of US civil courts.

Jerold Mackenzie, who worked at the Miller brewery in Milwaukee, related an incident from *Seinfeld*, a television comedy of manners, in 1993. The 'office scold' complained; Mackenzie was dismissed. Under the Manuel Test, Mackenzie might

have got six months' wages, perhaps \$30,000, or been reinstated on two conditions: that he apologise to the lady, and that she stop making a nuisance of herself. In *Mackenzie v Miller Brewing* (1997), Milwaukee jurors gave Mackenzie US\$26.6 million. His San Francisco lawyers, Littler, Mendelson, presumably got at least US\$8 million.

Emily Couric reported in *The Trial Lawyers: The Nation's Top Litigators Tell How They Win* (St Martins Press, 1990) the case of a New York man dismissed for engaging in auto-eroticism in his office. Jurors agreed that the employer had negligently failed to protect him from sexually harassing himself and gave him \$2.1 million.

Other verdicts: an American Airlines manager got \$US7 million for 'discrimination' when she was not promoted; a Texaco female employee got \$US20 million when she was not promoted; a sacked employee got \$US1.4 million for 'emotional pain and trauma' resulting from an unfavourable reference.

## **6. Larceny by trick: tax evasion**

Larceny by trick is the crime of theft by fraud or deceit. If systematic, it is organised crime. Tax evasion is devised by lawyers, judges, accountants, and bankers. David Marr observed in *Barwick* (Allen & Unwin, 1980):

... the best minds of the Bar are engaged, as [Garfield] Barwick QC was engaged, in tax avoidance, and from the best minds at the Bar High Court judges are chosen. The

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High Court has an inbuilt tendency to be a tax avoider's forum.

London tax lawyers can make £2 million a year. H. L. Mencken (1880-1956) observed:

If all the lawyers were hanged tomorrow, and their bones sold to a mah-jongg factory, we'd be freer and safer, and our taxes would be reduced by almost half.

Justice Russell Fox noted in *Justice in the 21<sup>st</sup> Century* that the British legal system was originally designed to benefit landowners, and was 'later adjusted to the requirements of the wealthy and the powerful'. Adam Smith, who knew about cartels and that greed is good, said that the man who evades tax is 'in every respect, an excellent citizen'. Hugh Richard Grosvenor, second Duke of Westminster, evaded tax, loved Hitler and hated Jews, but had the saving grace of owning much of Mayfair and Belgravia. In *Inland Revenue Commissioners v Duke of Westminster* (1936), Lord Atkin said:

... the deeds were ... a device by which [the Duke] might avoid some of the burden of sur-tax. I do not use the word device in any sinister sense; for it has to be recognized that the subject, whether poor and humble, or wealthy and noble, has the legal right to so dispose of his capital and income as to attract upon himself the least amount of tax.

Atkin's decision applied only to the rich. Poor and humble wage and salary earners cannot evade tax; it

is deducted at source. Australia was a vaguely 'fair go all round' sort of country. Section 260 of the Income Tax Assessment Act 1936 proclaimed:

Contracts to evade tax void. Every contract, agreement, or arrangement made or entered into, orally or in writing, whether before or after the commencement of this Act, shall so far as it has or purports to have the purpose or effect of in any way, directly or indirectly ... relieving any person from liability to pay any income tax ...defeating, evading, or avoiding any duty or liability imposed on any person by this Act; or preventing the operation of this Act in any respect; be absolutely void, as against the Commissioner, or in regard to any proceeding under this Act ...

The operative word is 'absolutely'. The task for tax lawyers and judges was thus to defeat the Parliament's intention. A friend of Garfield Barwick (1903-97), Clyde Cameron, said of him: 'I'd never known anyone who is able to so easily explain in a way that is so uncontroversial that a piece of white paper is jet black and a piece of black paper is snow white.'

In *Keighery v Federal Commissioner of Taxation* (High Court, 1957), Barwick argued that 'absolutely' does not mean absolutely; there could be exceptions. Five judges agreed: Chief Justice Sir Owen Dixon, who was capable of fraud (see above, The judge as Humpty Dumpty), and Justices Sir Dudley Williams, Sir Eddie McTiernan, Sir Frank Kitto, and Sir Alan Taylor. Only Sir William Webb dissented. The five

*The corrupt civil process*

judges' lie opened the tax evasion floodgates in Australia.

Barwick went into politics in the conservative interest in 1958. It was said that Robert Menzies QC (1894-1978; Prime Minister 1939-41 and 1949-66), saw Barwick, 'the undisputed lion of the Sydney Bar', as his eventual successor. He made him Attorney-General. The security section of Barwick's *Crimes Act* 1960 had a presumption of guilt for persons of 'known character'. The leader of the Opposition, Gough Whitlam QC, referred to the section as 'this odious provision'. Barwick, like most lawyers, had a useful capacity for self-deception. Professor Jenny Hocking, author of *Gough Whitlam* (Melbourne University Press, 2008), wrote:

Barwick was accustomed to unquestioned respect, to reverent acceptance of his legal opinion; this depiction of his proposals as dangerous, draconian and undemocratic besmirched his reputation and disturbed him.

Whitlam refused to withdraw his claim that Barwick was a liar; he told the House: 'This truculent runt thinks he can get away with anything.' Barwick got away with it at the Bar and on the Bench for 54 years but not in Parliament. A colleague, Harold Holt (who, as Prime Minister in 1967, swam out to sea and got eaten by sea lice), kindly led Barwick, weeping, from the chamber. Professor Hocking said Barwick's political career 'was effectively over'.

Menzies tried Barwick as Foreign Minister but he failed there too. A job had to be found for him

outside Parliament. Menzies could have sent him somewhere harmless, like Ambassador to Uttar Pradesh or the US, but in 1964, he made him Chief Justice, where his lies on tax matters were frankly criminal. In *Casuarina P/L v the Federal Commissioner of Taxation* (1970), Barwick, Sir Victor Windeyer, Sir Harry Gibbs, and Sir William Owen finished off the 1936 Tax Act. David Marr said *Casuarina* concerned 'a wholly artificial scheme ... to avoid tax ... The *Casuarina* case became the cornerstone of the tax avoidance industry'.

Barwick, Gibbs, and Sir Douglas Menzies committed another fraud on the revenue and pay-as-you-earn taxpayers in *Curran v Federal Commissioner of Taxation* (1974). The lie this time was that a profit of \$2782 was a loss of \$186,046. John Ahern, a Brisbane accountant, explained how *Curran* worked in *A Taxing Time* (1990, Copyright Publishing). This is a précis of Ahern's explanation:

A company with shares worth \$100 issues 100,000 bonus shares at \$1 a share. The shares are now deemed to be worth \$100,100 but are actually worth about \$100. The shares are sold for, say, \$200, a profit of \$100, but Barwick *et al* would say it is a loss of \$99,900.

Self-employed people, e.g. doctors, rushed into schemes based on *Curran*. John Ahern, who adopted the posture of Barwick & Co, went to prison, but the judges were not charged, let alone sent to prison.

The amount of tax money 'liberated' from the Treasury in the eight years after *Casuarina*: was