17. LIFE AT THE BAR

I signed the Victorian Bar Roll on 10 May 1967. Everyone signing the Roll is given a number, which is an identifier for the rest of one's career and beyond. Mine is 810. There is something oddly agreeable in the thought that each of us has a distinctive number in an unbroken line including Sir Owen Dixon (No. 117) and Sir Robert Menzies (No. 155). The signing took place at the first Bar Council meeting after I commenced reading, so I had already started work. My fee books record my first brief as an appearance for Jones & Kennedy (Mr Briglia) in an application before a Master of the Supreme Court on 1 May 1967. The fee was $18.

Early advocacy

My staple work in the early years included appearances in Magistrates' courts in cases arising from collisions between motor vehicles, colloquially known as "crash and bash".

One such appearance was before Mr Leo Froude SM. He was a tough, knockabout magistrate but quite an accomplished linguist. I once saw him closely cross-examine a witness on the subtle nuances of a letter written in Italian. On another occasion, I appeared in a *cause non célèbre*, a crash and bash arising out of a collision in a shopping centre car park. My opponent submitted that the case called for the application of the doctrine *res ipsa loquitur* ("the thing speaks for itself"). His Worship's response

to this sophisticated advocacy was brutal: *"Res ipsa loquitur. Vere. Sed quicumque dicit*? The thing speaks for itself, but what the hell does it say?"

As the years progressed, I started to get some briefs in the County Court for civil claims, mostly for personal injuries, particularly "whiplash" to the neck caused by rear-end collisions. Since these usually resulted (or at least were said to result) in soft tissue injuries not detectable by X-ray, there was much scope for subjective variation in the description and assessment of these injuries.

I was often briefed in these matters by the firm of John Cain and Peter Lamers. John later went into Labor politics and became Premier of Victoria. The firm frequently retained a forensic psychiatrist, Dr Paul Kornan, whose usual diagnosis was that the plaintiff suffered from mild to moderate anxiety and depression, which should resolve within eighteen months to two years of the conclusion of the litigation. He would often include in his reports some suggested responses to criticisms of the plaintiff's claim. These would be prefaced by the observation, "Astute opposing counsel may argue ..."

All my briefs in this field were for plaintiffs so I never got the chance to cross-examine Dr Kornan and ask him what astute opposing counsel might argue in the case. Probably it would have been something I had not been astute enough to think of myself.

I also appeared in County Court criminal jury cases, sometimes for defendants on a brief from the Public Solicitor and sometimes as prosecutor. This provided particularly good experience. Jury advocacy is demanding. Asking the wrong question, or omitting to ask the right one, can have unfixable consequences.

My Supreme Court criminal experience was not extensive. I had one murder trial, *R v Webster*. The ruling in the case is reported at [1974] VR 457. I am glad to say my client was acquitted. There is an account of the case in my collection *Excursions in the Law* (Federation Press, 2014, p. 59).

My other memorable Supreme Court criminal case was *R v Mitchell*; an appeal is reported at [1971] VR 46. There were ten defendants, and I acted for one of them. The case ran before Mr Justice Nelson and a Supreme Court jury for 133 days; all the defendants' counsel were briefed by the Public Solicitor at a daily fee of $56 – not bad going in those days. Amongst my colleagues acting for the defendants were Alex Chernov and Tim Smith.

The central figure in the case was Bob Mitchell, a seemingly wealthy businessman who owned a large pathology practice. He sponsored some leading sporting figures, including tennis player Margaret Court. However, his business empire rested on shaky ground and had only been kept going by "kite flying", i.e. dubious cheque transactions. All the defendants were connected with Mitchell in various ways. My client was his bank manager. Another defendant was an assistant to Mitchell. This assistant was a middle-aged man who had been having an autumnal affair with a lady of similar years. One of the many sub-plots in the case involved his alleged misuse, for the benefit of Mitchell, of a power of attorney given to him by his lady friend. The lady gave evidence and was cross-examined by Philip Dunn (later a leading criminal silk). Phil opened up with what he must have hoped would be a knockout: "Mrs X, have you heard the saying 'Hell hath no fury like a woman scorned'?"

She fixed Phil with a steely glare and responded: "I'd like to change that to 'a woman whose money was stolen'."

The trial judge gave the jury a general charge and then charged separately and took verdicts for sub-groups of the defendants. This extended over the best part of a week, with proceedings often running late into the evening. There would be verdicts in respect of sub-groups, say of three defendants, with two being convicted and one acquitted. There would be screams of triumph, delight or despair. It was a truly harrowing experience. I got the general impression that the jury approached its task in a rather broad-brush manner. Those with the most impressive character

witnesses seemed to be acquitted.

The case against my client turned on some rather technical bookkeeping irregularities. I argued that they did not indicate guilt, or participation in the overall conspiracy which the prosecution alleged. But the jury took a different view.

My client got a fairly short prison sentence. I was touched to get a letter in which he gave his "thanks and appreciation for all the time and work you have put in on my behalf". Edward was born not long afterwards and my client's wife sent us a beautiful knitted shawl.

The Full Court was highly critical of the length of the trial. Their Honours concluded their judgment on the appeal with these comments:

> We should not like to part with this case which occupied 133 days to verdict and eight days on appeal to this Court without endorsing, if we may respectfully say so, all that fell from the English Court of Criminal Appeal in *R v Simmonds* [1969] 1 QB 685; [1967] 2 All ER 399, in relation to the conduct of trials of this nature. Where such a mass of evidence and length of trial is involved, an intolerable burden is imposed on all concerned and particularly upon the jury. Whilst a community, such as ours, which is regulated by the principles of the common law, cannot concede that any case is too complex or too extensive to be heard and determined in due process of law, there is a real danger that the system will be frustrated and brought into public disrepute, unless those concerned with the conduct of the trial have the courage and a sense of responsibility to take advantage of the means provided for delimiting the issues, such as s 6 of the *Evidence (Amendment) Act* 1965. In the present case it is plain beyond doubt that, in the result, proof according to the ordinary rules of evidence, and a vast amount of public time and expense, could have been avoided, by use of that section … No responsible person would

> suggest that that where in criminal proceedings facts are open to dispute the Crown should not be put to strict proof, but where they are incontrovertible and known to be so upon reasonable inquiry, a failure to face the facts in the hope that by some chance a failure in proof may occur can go far to place the rule of law in jeopardy.

That was fair comment. I can only say in mitigation that the initiative to negotiate for an agreement on the facts should logically have come from the prosecution. This did not occur in *Mitchell*.

Media law

I started to do some defamation and related media work. Later I had a general retainer from the Herald and Weekly Times (this was before the Murdoch takeover) and also did quite a lot of work in this area for the Police Association briefed by Tom Barrett at Maurice Blackburn.

One solicitor I got to know very well was Clive Brookes of Moule, Hamilton and Derham and later Ebsworth & Ebsworth. Clive was a polished Englishman and a very fine lawyer. He had done National Service in the British Army and would recall harrowing experiences in Palestine in the lead-up to the foundation of Israel. His briefs were meticulous and lucid. He was not, however, a great returner of phone calls. On one occasion I sent him a mild complaint as follows:

> A charming chap is K.C. Brookes.
> He likes to lurk in shady nooks
> Away from city's flash and glitter
> Where streamlets run and birdies twitter.
> The reason for this solitude
> Is not that he's by nature rude,
> Oh no, it's just that he alone
> Of all men is a phobophone.
> He cannot bear to touch or smell
> The gift of Alex Graham Bell.

When told of call he's asked to answer
He charges off like Bengal Lancer.
So friends and clients will be lax
To contact him except by fax.

Returning to the media world, I had the good fortune to join the counsel appearing for the Fairfax company in an inquiry by retired judge John Norris into newspaper ownership. This inquiry had been established by the Victorian Government following Rupert Murdoch's first attempt to take over the Herald and Weekly Times. Above me on the Fairfax team were the leading Sydney silk Tom Hughes QC and a friend from my Tasmanian law school days, David Bennett QC. It was a particular privilege to work with Tom on this and later cases. Recently I have published a review in the *Australian Book Review* of Ian Hancock's biography, *Tom Hughes: A Cab on the Rank* (Federation Press, 2016). Also appearing in the Norris Inquiry were Neil McPhee QC and Ken Hayne, later a Justice of the High Court. All things considered, I would rank Neil McPhee as the best barrister I have observed in action.

Neil once led me in an appeal before the Full Court of the Supreme Court. Our client, the defendant in the trial below, was trying to hold on to a plainly inadequate verdict: $500 for the loss of a spleen. That trial had been conducted before Judge Hewitt and a jury in the County Court. Transcripts were not widely available in those days. The only evidence of the charge to the jury came from His Honour's notebook where he had recorded defence counsel Colin MacLeod's concession that the jury should award the plaintiff "a little something, a little something".

The only faintly arguable point in our favour depended on an obscure House of Lords decision. When it came time for us to present our argument, I kept nudging Neil and whispering to him not to forget such and such case. He politely ignored me for some time. Then, all of a sudden, Mr Justice Little posed a question which raised a perfect opportunity to introduce our

House of Lords authority. Though this did not do any good from the point of view of the result, Neil's judgment and anticipation were quite uncanny.

I particularly liked defamation and media-related work. I am not especially gifted technically and prefer working with language and ideas. Given that inclination, I noted with interest the reported statement of the Secretary of the Australian Journalists Association that the press in the Soviet Union (this would have been in the late 1980s) were in some respects freer than their Australian counterparts. The reason given was that the Soviets had no defamation or contempt of court laws. This prompted the following lyric (*Gatley on Libel and Slander* is a standard text on defamation law):

> In many lands the tyrant's yoke
> Has long oppressed his luckless folk.
> Arrest and jail and execution,
> Parliamentary dissolution,
> Of Human Rights have not a jot,
> That's life with Stalin or Pol Pot.
> But where the rule's undemocratic
> And freedom is at best erratic,
> The saving grace of such a nation
> Is law that's free of defamation.
> There's naught of libel, still less slander,
> In places like Amin's Uganda.
> However cruel an autocrat
> It must be consolation that
> His populace will never see
> A pleading settled by McPhee.
> And torture may be grim and gory
> But Ruskin interrogatory
> Will not oppress with style vexatious
> And show of learning ostentatious.
> So one might think, it's said quite flatly,
> You're better off with Marx than *Gatley*.

Latham Chambers

In the early 1980s, I moved to Latham Chambers, which occupied a floor in National Bank House at 400 Bourke Street. In the south-west corner, we established a group: Don Ryan, Craig Porter, Graeme Thompson, David O'Callaghan (appointed in 2016 to the Federal Court) and myself.

Also on the floor was Jeff Sher QC. Jeff was just moving into commercial work to accompany his large common law practice and he would borrow my *Patterson & Ednie on Company Law*. Perhaps as an indirect consequence of this, I ended up being briefed as his junior in a number of cases. One of these was an ultimately unsuccessful attempt on behalf of National Mutual Life Company to have Channel Nine restrained from broadcasting an exposé of our client's practices with loss-of-income insurance policies: *National Mutual v GTV Corporation* [1989] VR 747. Jeff led Jeremy Ruskin and me. The application before Justice Ormiston took nine days and the subsequent appeal to the Full Court seven. Our team developed quite a complicated process. When some new issue or problem arose, Jeremy and I would caucus and work out an answer. We would then sell it to Jeff, following which the three of us would sell it to the solicitors at Corr & Corr, who would, in turn, sell it to the client.

Jeff Sher was a very effective advocate, with a direct, forceful style. In 1985, he went off to spend some time at Washington and Lee College in Virginia. At the time he had been involved in some widely publicised case over a horse. I forget whether the horse ran too fast, or too slow, or was not of the quality warranted. In any event, the horse's urine was of some importance. Jeff had also been appearing in Aboriginal land claims in the Northern Territory and personal injury cases. The following was a farewell:

> Since 1492 great numbers
> Have followed Christopher Columbus
> And sought to make their mark each day

Upon the good old USA.
From Ozland too came starters classy
Like Rupert Murdoch and Les Darcy.
The latest aspirant we see
Is Jeffrey Leslie Sher QC.
A star upon the local scene,
His cases deal with horse urine,
With claims by dusky tribal elders,
And ghastly injuries to welders.
A model to the junior Bar,
Mild-mannered, too polite by far,
Slow and cautious, self-effacing,
Respect for judges all-embracing.
The Yanks had better hatches batten
Before a land claim to Manhattan
Is made by Aussie litigator!
So farewell Jeff, and see you later.

The Privy Council

There is nothing like a bit of client-funded overseas travel to lighten up the daily grind. One such experience was a case in the Privy Council in 1985. This was a dispute that our clients, Lang Hancock and his partner, Peter Wright, had with Hammersley Iron over the royalty agreement for an iron ore mine at Mount Tom Price in Western Australia. Some experiences in this case are described in the chapter "A Last Hurrah – Privy Council Days" in *Excursions* (p. 104).

The royalty agreement, made before mining operations commenced, provided that our clients would receive four per cent of the sale price for the ore loaded on a ship at the coast. The parties realised that in time facilities would be constructed to upgrade the ore before it reached the coast. That upgrading would make the ore more valuable. Obviously, it would be unfair for our clients to get the full four per cent of the increased value since the upgrading would be entirely at the cost of Hammersley.

The agreement therefore provided that there would be a "deemed disposal" (lawyers like deeming things) of the ore when "beneficiation" (upgrading) commenced. The royalty would be payable on the ore's value at the time of the deemed disposal.

By the time the facilities were constructed, there were three possible points in the process when the beneficiation could have commenced: Point A where the ore was tipped out of trucks on arrival at the plant; Point B where the ore was screened; and Point C deep into a complicated treatment process. From Hammersley's viewpoint, the earlier the upgrading happened, the better. They therefore argued for Point A, or if not A, then B. Our case was for Point C.

In the Supreme Court of Western Australia, I appeared before Justice Olney led by Jeff Sher QC and Doug Williamson QC. His Honour rejected Point A, but found for Point B, so Hammersley won. We appealed to the Full Court of the Supreme Court. By a majority, that court found for Point C, so we won.

Hammersley appealed to the Privy Council. In those days, they had an appeal as a right. To appeal to the High Court of Australia they would have needed to get special leave of that court. There was a risk of special leave being refused since the case was concerned with particular facts and did not raise any question of general importance. So taking the Privy Council route was therefore understandable. And it was an admirable decision from my selfish viewpoint. Much as Canberra is full of charm, it is rather upstaged by London.

Jeff Sher was unfortunately unable to go to the Privy Council, so it was just Doug and myself. I recall a pleasant conference with Doug, poring over a map of London and discussing the relative merits of the Dorchester and the Savoy.

By the time the appeal came on for hearing in the Privy Council, Hammersley's leading counsel S.E.K. Hulme QC was unwell, so the argument fell to his junior, Frank Callaway.

Frank was in love with Point A, despite it never having found

favour with any of the judges in lower courts. For the first fifteen minutes, he discoursed on its virtues. Doug and I sat back, smugly confident that Frank was getting nowhere. Then, all of a sudden, Lord Templeman (apparently his disrespectful nickname at the London Bar was "Sid Vicious") leaned forward and said, "Mr Callaway, we can't understand your enthusiasm for Point A. As far as Point B is concerned, you're pushing at an open door. Indeed we're agog to hear what the respondents have to say about it."

It was downhill for us from then on.

Not long after our case, the Australian Parliament abolished the right of appeal to the Privy Council from all Australian courts.

Bougainville – more mining

Another mining-related case arose out of the seizure of the Panguna mine in Bougainville in the late 1980s. Then the largest copper mine in the world, it has been out of production ever since. Bougainville is legally part of Papua New Guinea, but it is geographically and ethnically quite distinct. In a carve-up between European colonial powers in the late 19th century, Bougainville was allotted to Germany. However it ended up with Australian/British Papua and New Guinea when Germany lost its Pacific colonies after the First World War. When Papua New Guinea became independent in 1975, Bougainville was, much to the discontent of many locals, included in the new nation.

The seizure of the mine was partly driven by political separatist ambitions and partly by environmental concerns arising from the spread of mine waste. I was on the side of insurers, who in the unsporting way of their trade relied on some fine print excluding liability for loss and damage caused by "insurrection, rebellion or civil war". Together with Les Glick, I flew to Port Moresby and then on to Bougainville. We boarded a helicopter and flew over the destroyed powerline leading up to the mine. Our opponents, whose case was that the damage was only caused by some high

spirits getting out of hand, nevertheless declined to inspect the site.

The leader of the locals was a mine employee called Francis Ona. In the course of the discovery process, our side obtained a copy of his employment records. They included a statement along these lines: "competent enough, but lacks leadership potential".

Alan Archibald QC was to lead our team at the trial. For some time, there was a possibility that Alan might also visit Port Moresby and then travel on to Bougainville. Les Glick and I therefore got hold of some letterhead from our instructing solicitors. We took a photo of the most disreputable pub we could find in Port Moresby and sent Alan a letter in which those solicitors purportedly informed him that this was the accommodation arranged for his forthcoming visit since hotels in Port Moresby were almost completely booked. Despite our efforts, Alan's usual perspicacity prevailed.

The trial proceeded before Justice Tadgell in the Supreme Court in Melbourne. We had a lot of technical difficulty in adducing evidence to show that there had been a civil war, or at least a rebellion or insurrection. For example, when we produced a local newspaper report of an attack on a police station, our opponents would object that the report was hearsay, and thus, inadmissible. After many instances of these tactics, I rather did my block and complained: "Insurrections are not run according to the rules of evidence."

His Honour's response was undoubtedly the correct put-down: "But this court is."

Anyway, the case was ultimately settled.

The Rebel tour

Another memorable trip was to South Africa. In those days, when the apartheid regime was still in force, there was a ban on sporting contact with that country. The South African Cricket Association organised a so-called "rebel" tour by an Australian

team led by former Test captain Kim Hughes. Legal proceedings to have the ban declared illegal were commenced in Australia by the SACA. The Hawke government refused to grant visas to our clients to come to Australia for any conferences, so we (Stephen Charles QC, Graham Dethridge from Mallesons and myself) had, as the saying goes, no option but to travel to Johannesburg. As it turned out, most of our time was spent in offices; we didn't see a single rhino. But we were entertained by one of the locals at his home in an upmarket suburb. The houses in the area were surrounded by high walls. The extensive garden of our host had a tennis court seemingly off in the horizon. A highlight of our work was sending and receiving documents by a marvellous new invention, the facsimile machine.

Bar ambience

There is a paradox. The Bar is a highly competitive calling. Barristers compete *mano a mano* in a particular case and more generally for advancement and reputation. Yet many lifelong friendships are formed and the general atmosphere is, at least in my experience, one of camaraderie at a personal level.

Some particular practices reinforce this atmosphere, such as the "open door" policy. Provided a barrister is not holding a conference or otherwise in need of privacy, other counsel may wander in, perhaps to ask for professional guidance or even just to chat or gossip.

And out of court, barristers always address each other by their given names. Titles are not used, even by the most junior to the most senior.

Although of course barristers much prefer winning to losing cases, reputation at the Bar does not seem to depend on any win/loss ratio. Rather it is a case of being *in* such and such a case or area of litigation. It might be said that "he does a lot of High Court work" or "she has a big tax practice". This may be a subtle consequence of the cab rank rule, under which counsel are

obliged to accept a brief, irrespective of their view of its merits or the popularity of the client. It is also no doubt due to the inherent uncertainty of litigation.