

Barrow Creek or Bust...

An after-dinner address given by Justice David Angel at the NT Office of the Director of Public Prosecutions 5th Biennial conference (19-21 March 2004, Jabiru) Anita and I are very pleased to be here and I am, of course, honoured to have been invited to speak to you tonight.

When the Director asked me to speak I enquired as to what he would like me to speak about and he said "Say anything you like". As you will appreciate, even the Director knows that I am confined by the laws of sedition and of libel, so I am unable to follow his guide to the letter. *Les grands decisionnaires*, that is, those in government entrusted with the public good, may find some comfort in the reflection that the Director of Public Prosecutions' submissions in the Court of Criminal Appeal are occasionally more helpful.

Appreciating the importance of this occasion I decided to have a hair cut in preparation. As you well know the relationship between the one who cuts hair and the client can be a very intimate and special one. The person who cuts my hair is named Isaac. Having insufficient guidance from the Director I decided to ask Isaac what I should talk about tonight. He said "Talk about me". Isaac who is in his early 20's, is a monarchist, loves the Queen, loved Princess Di but is not so keen on Charles or the one Diana called the Rottweiler. Isaac believes the future of the world would be better if there was a British Empire revival though not like the good old days. He is confident that these days it would be even better.

Having broached the topic of Royalty and people in high stations in life the subject eventually turned to me. Isaac enquired how should people address a Judge. I told him that in Court I was addressed as "Your Honour" though on less formal occasions such as this evening, people call me "Judge". I did not

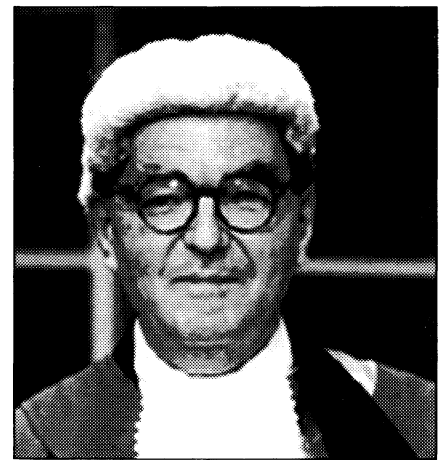
tell him Dr Nairn Rogers from Alice Springs has sometimes wished to call me other things. "Judge" said Isaac "What a cool nick-name." Nick-name? Cool?

Of course when I was invited to speak to you tonight I was filled with trepidation. I thought of what Dr Bray, the former Chief Justice of South Australia said at a farewell dinner given by the University of Adelaide upon his retirement as Chancellor.

He said:
"An after dinner speech should be short enough to allow everyone ample time to get on with the drinking and conversation, long enough to show respect for the audience, witty enough to preserve it from slumber and serious enough to give it the illusion that it had undergone some sort of intellectual experience."

He added he had never been able to carry out those specifications to his own satisfaction. If not, what hope was there for me?

Of course I could talk about myself at the risk of being vainglorious or reminisce at sufficient length to confirm in your mind that I am well past my used by date. The Director has mentioned that I played cricket at school with Ian Chappell and I could speak on matters of cricket, of having seen, amongst others at the Adelaide Oval, Peter May, Greg Chappell, Rohan Kanhai, Garfield Sobers, Barry Richards, Viv Richards, and the truly great Graham Pollock who made 170 odd against Australia in 1963. He was indeed the greatest batsman I ever saw apart from Bradman, who long after his retirement made 100 on the Railway Oval off West Terrace in Adelaide for a team of stockbrokers against some team or other.



Or I could tell you about steam trains, a long held passion of mine. The recent hoo-hah about the first passenger train to Darwin included the statistic that it weighed a little more than 2000 tonne. To put that into perspective, during the Second World War on the Duluth Missabe & Iron Range Railroad single steam engines were scheduled daily to pull 15,000 ton ore trains. In the late 1930's single "A" class steam engines of the Norfolk and Western Railway hauled 10,000 ton trains at 60 miles per hour on level track. One day perhaps steam locomotives will return. I, for one, hope so.

The Director also made mention of the fact that Anita and I collect art. Collecting runs in the blood. I had a grandfather who collected butterflies, some from near Parap in 1946. Collecting runs in Anita's family also. She has a cousin who collects girl friends near Florence.

I could also tell you about my career at the Bar, about the cases I won, which would not take long, or the cases I ought to have won which could keep you here all night, but I thought instead I would say something tonight about statistics and where they can lead. I will not use statistics – as so many do – like a drunk uses a lamp post, to lean on rather than for illumination.

Bradman's highest first class score was 452. That is a cricket statistic known to anybody interested in cricket. In the rarefied atmosphere of Judges' Chambers in one's spare moments it is sometimes amusing to grab a volume of the Law Reports

or a volume of Law Journal articles, turn to page 452 and start reading. Thus one can use Bradman's famous statistic.

In volume 45 of the Australian Law Journal at page 452 there appears Chief Justice Bray's paper "Law, Liberty and Morality" which discusses the famous Hart-Devlin debate. In these relativistic morally ambivalent post-modern times it is well worth revisiting that debate which concerns the relationship between law and morality.

Of course whenever one reads anything in the Law Reports or in a Law Journal one always looks to see what precedes and what follows that which one is reading. At page 451 of that volume of the Australian Law Journal there is reported a speech of Lord Diplock who expressed, and I quote, "utter, profound and complete disagreement" with Bray CJ's statement that a Judge's function is to interpret the law rather than to make it. In that same speech Lord Diplock says that the disposition of matters in Court is a team effort between the presiding Judge and those at the Bar table. That is a matter that I wish to stress particularly to those Police prosecutors present tonight.

The Opening of the Legal Year service serves to remind us all of what is too often forgotten, that the practice of the law is more than a mere trade or business and that you who are engaged in legal practice are the guardians of certain ideals and traditions to which you should dedicate yourselves anew each year. It is easy to accept the daily routine of practice but it is important that you remind yourselves and others of the true justification of your calling. One of the State's prime concerns is to maintain Courts of law to resolve disputes and to dispense justice according to law. In order to discharge this function efficiently, the existence of a legal profession is indispensable - a legal profession skilled in advocacy and advising and helping people in the vindication of their

rights both as between citizen and citizen and as between citizen and the State. In applying principles of law to concrete cases in which lawyers are engaged the lawyer makes a real contribution to the development of the law and as Justice Kitto said in his forward to the first edition of Meagher, Gummow and Lehane on *Equity* it is a task for reverent hands to carry forward the common law and equity into a world which is changing rapidly but in many respects is ever the same. Law is not an exact science. We should remind ourselves that it is a very human thing. As has been said many times, the better the argument in Court the better the result. A strong Bar makes a strong Bench. It is important that you all understand that in your daily business you are discharging a public duty. You are not conducting a business or merely engaging in a means to a living.

The Director made mention of my birthday. My birthday is on the 5th of July. You may think that is an inauspicious date.

It is.

Of course it is the day following American Independence Day. On the 4th of July 1970, American Independence Day, there died a famous New York abstract expressionist painter and anarchist Barnett Newman. The Australian art critic Robert Hughes could only contribute that Newman painted stripes. That is what he painted but much more. In a book "Paths to the Absolute" based on the 1997 Mellon lectures, John Golding, one time Professor of Fine Art at Cambridge University, said that the hallmark of Newman's work was the combination of stunning simplicity, subtlety and ambiguity. One wonders, given that simplicity, why it is, that one keeps being drawn back to his paintings. Golding expresses the view that Barnett Newman is responsible for a number of major pieces of 20th Century art including the 6' x 18' *Vir Heroicus Sublimis* in the Museum of Modern Art New York painted in 1950-51, *Cathedra*, a 6'

x 18' work painted in 1951 in the Stedelijk Museum in Amsterdam, *Uriel*, a 6' x 18' work painted in 1955 in the Onasch collection in Berlin and *Shining forth to George*, a 1961 work in the Pompidou Centre in Paris. Newman's work raises such passion that a number of his works have been physically attacked in public museums.

I mention Newman because of his anarchic ideas and emphasis on the worth of the writings of the 19th Century Russian nobleman and anarchist Prince Peter Kropotkin. Of course I am not here to persuade you to be anarchists - far from it - but anarchic thought in the sense of a strong recognition of the worth of the individual, a scepticism towards conformity and strong independence of mind is nevertheless something well worthy of your consideration.

It has been truly said that judicial independence is ultimately founded on independence of mind. A member of the US Supreme Court has expressed a view to the effect that he would rather be accompanied on the Bench by people of anarchic leanings than by people who are easily lead.

No doubt you will appreciate the irony of a Judge sworn to uphold the law entertaining anarchic thoughts. Nevertheless, in our daily work we should all strive to maximise individual freedom consistent with the integrity of our society and individual claims for privacy.

In an article "Judicial Competency: How it can be Maintained" (1980) 54 ALJ 581 at 586 Justice Samuels, a former Judge of the New South Wales Court of Appeal, referred to a description of the ideal legal practitioner put forward in a paper written for the Australian Legal Education Council by E M Heenan, Professor H K Lücke and G Nash in the following terms:

"The ideal legal practitioner would have good powers of recall and of analysis, and an imaginative

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understanding of human nature, particularly of the sensible regulation of human affairs; he would be well-educated in the use of language and possess a well-developed sense of analogy; he would be well-versed in the use of precedent and in the techniques of statutory interpretation; he would be a good listener with an instinctive capacity for understanding the significance of facts and for ordering, in a systematic way, a wealth of factual information; he would have a feeling for ordered, concise presentation and good powers of communication; last but not least, he would have a sense of fairness and justice."

To those attributes I would firmly add independence of mind, what I have called the "anarchic" spirit.

As legal practitioners, we are required and trusted to have a spirit of independence. I have said on a previous occasion that although a legal practitioner's services are for hire by all including the Executive, the conscience of a good lawyer can not be organised or rented by any political party. Ideally it should be easier to herd cats than to regiment legal practitioners.

In his celebrated Hamlyn lectures of 1949 called "Freedom under the Law" Lord Denning said, amongst other things, "What matters ... is that each man should be free to develop his own personality to the full: and the only duties which should restrict this freedom are those which are necessary to enable every one else to do the same. Whenever these interests are nicely balanced, the scale goes down on the side of freedom."

He went on to say "By personal freedom I mean the freedom of every law abiding citizen to think what he will, to say what he will, and to go where he will on his lawful occasions without let or hindrance from any other persons...(This freedom) must be matched, of course, with social security, by which I mean the peace and good order of the community in which we

live. The freedom of the just man is worth little to him if he can be preyed upon by the murderer or thief. Every society must have the means to protect itself from marauders. It must have powers to arrest, to search and to imprison those who break the laws. So long as those powers are properly exercised, they are themselves the safe guards of freedom. The moral of it all is that a true balance must be kept between personal freedom on the one hand and social security on the other."

It is your duty in your daily work to appreciate your very important role in our society bearing in mind the striking of the balance to which Lord Denning referred.

In the rarefied atmosphere of Judges' Chambers apart from looking at page 452 in various volumes in the law library there are other alternatives to pass the time. One such is the Alternative Law Journal. In volume 24 of that Journal at page 230 there is an article about backpacking. Now please do not misunderstand me. Anita and I are not enamoured with backpacking. We prefer to sleep under the stars – preferably five. Accompanying the article on backpacking is a cartoon showing a barrister holding a brief marked Fred Smith QC. One has the impression it might as well have been Joe Bloggs QC rather than a reference to the most famous Frederick Smith, the First Earl of Birkenhead, Lord Chancellor 1919 to 1922, who, in his day, was universally regarded as a great advocate with a sharp tongue.

"I have read your case and I am none the wiser," said one Judge to Smith who replied "Perhaps not my Lord but far better informed."

On another occasion Smith was acting for a tramway company which had injured a boy. It was a civil case before a jury. "Poor boy" said the Judge, "let him stand on a box so the jury can better see him" which was prejudicial to Smith's

case. Then ensued the following exchange:

Smith: Perhaps my Lord would like the boy passed around the jury like an exhibit.

Judge: That is a most improper remark.

Smith: It was prompted by an even more improper suggestion.

Judge: Have you heard the saying by Bacon, the great Lord Bacon that youth and discretion are ill wed companions.

Smith: Yes, My Lord, have you heard the saying by the same great Lord Bacon that a much talking judge is like an ill-tuned cymbal.

Judge: Mr Smith, you are being most offensive.

Smith: Yes, my Lord we both are. The difference is I mean to be and you can't help it.

On another occasion an exasperated Judge said:

"Mr Smith: Why do you think I am on the bench?"

To which Smith replied "It is not for me to fathom the inscrutable workings of Providence."

My favourite saying of Smith's is "I don't deal in subtleties. I am only a lawyer."

Thank you once again for having us and for the opportunity to speak to you tonight. I wish you all well in your endeavours in the law. (1)