

My [very] learned friend, David Ross QC

I Rex Wild QC

Treat your opponents, and the judges, with respect and in return you will earn theirs and the courtesy that is due by, to and from all participants in the court processes.

This piece started out life as a brief discussion on *learned friends* and the origin and use of that expression. The reference to *my learned friend*, is old-fashioned but a pleasant and courteous way of acknowledging and respecting the colleague at the other end of the bar table. It is a much more attractive style than the lazy and mocking use of the expression *my friend*, which lately seems to be more in vogue. An example of the latter may be found every day in the courts, but a particularly ugly instance is contained in the following exchange in the New South Wales case of *McIntyre [2000] 111 A Crim R 211*.

Counsel: I am instructed by my client that he feels in no way could he receive a fair trial from you, because he feels strongly that you are totally prejudiced and biased against him... I must say in honesty and fairness... that I agree with my client.

My friend here thinks this is a big bloody joke, I know, everybody thinks it's a joke, and I appreciate that both you and *my friend* are anxious for a conviction—

His Honour: Well I don't think it's a—

Counsel: —at any cost—let me finish. I am sick of this farce of a trial. I've had nothing but opposition from you and Mr Crown [a rare lapse into a proper form of address] and it seems to me, I've mentioned it before, you are incompetent to have heard this trial...

Counsel in this passage, and there are many, many other examples in that awful case, seems to have disobeyed all the principles of courtesy and propriety taught to us by our seniors.

The history of the use of the term shows it, like much of our etiquette and professional conduct, to be derived from the United Kingdom. The following excerpt from *Barristers in England and Wales [Wikipedia]* discusses its origin:

In Court, barristers refer to each other as '*my learned friend*'. When referring to an opponent who is a solicitor, the term used is 'my friend'—irrespective of the relative ages and experiences of the two. Historically, this is a sign of mutual respect for the common heritage and position they occupy. It is a reminder of the time when the Bar was small enough for all practitioners to know each other personally, which is to some extent still true.

Of course, in the Territory we are all legal practitioners, and equally entitled to be referred to as learned. Although some are members of the Bar and other practitioners are solicitor/advocates, each is entitled to the same respect having obtained their legal qualifications by the same method. That is, they are equally learned in the law, which is the basis of the expression. Until very recently, and still in circuit courts in the Territory, police officers' conduct summary prosecutions and court lists. Without meaning any disrespect, those officers are not entitled to the adjective learned unless, as is sometimes the case, they are admitted to practice.

To consider the matter further, I turned to two written gems that comfort me in moments of legal stress. One is a slim volume entitled *Advocacy*. The other is a veritable tome, a copy of which you will find in the library of most Victorian and Territory criminal lawyers (and all our NT judges), *Ross on Crime*. Both works are by David Ross QC, now sadly deceased, who was an eminent member of both

the Victorian and NT professions, and appeared and taught Advocacy widely in other Australian jurisdictions (not to mention Bangladesh and Guyana—in the latter of which he was appointed Silk).

Both works have passages on professional courtesies. I mention only a few of his enjoinders in this area:

- Respect the judge and the judge's position;
- Be polite to all and maintain your composure;
- Do not talk over anyone, particularly the judge; and
- Observe the courtesy of the bar table;

McIntyre's counsel, referred to above, ignored all of these.

I knew David Ross very well and over many years watched him in court and appeared in many cases against him. He never ever dropped the learned adjective when referring to his opponent. It was while delving into his writing over the last few days, I was reminded not only of his fine legal mind but also of his charm and wit. You may know that *Ross on Crime* had its origins in an exercise book (or two or three or more) that David maintained throughout his career. In them he noted issues and points and decisions that came to his attention during his careful research, preparation and running of cases. It was his Court Book. It was an invaluable aide and many of his colleagues profited from its contents. Moreover, it was written in beautiful copperplate handwriting in black ink from a fountain pen that David always used. It could be easily read. At some stage, his publishers became aware of the wealth of information contained in his notes and insisted it be shared with all of us.

Ross on Crime, which is now in its sixth edition, is in an unusual alphabetic format. I have always known, from the first edition and his notebooks, that David included a section on Jazz. Here he collected cases, vaguely legal in nature, involving jazz musicians and other entertainers. Much of it is very droll and includes the humour for which David was known; some examples:

- A gentleman is a man who can play the piano accordion and doesn't. Unless, of course, he has had too much to drink: *Heinze (1992) 63 A Crim R 83*
- A woman who plays the accordion skilfully in the street is no lady and may be a beggar: *Eggins v Webber (1939) 56 WN (NSW) 73*
- Gilbert O'Sullivan had his management's contract set aside because of undue influence. *O'Sullivan v Management Agency [1985] 1 QB 428*: He was alone again, naturally! [This last remark an example of David's whimsical nature]

He was an accomplished musician himself, playing semi-professionally both the sax and sousaphone. In the early years of our friendship, he also played guitar and sang.

David was born in 1943 in Melbourne. He commenced his law degree at Melbourne University in March 1962. I had gone to school in Sydney and had no friends when I arrived at Melbourne University. We started the same day. He took pity on me. We became close friends. He played a vital role (that is, with vitality) in undergraduate activities. He was a member of the record-breaking law students' team that got the most bodies into a VW. There are pictures in *Farrago* [the university undergraduate magazine] of a ridiculously young looking straggly bearded 'Rossie' from the early sixties. He was admitted to practise in 1967 and went immediately to the Bar. I was a solicitor for some years and went to the Victorian Bar in 1973. The rule then was that new barristers had to read in the chambers of an experienced member of the Bar... to learn their way around and not do anything too horrible to their clients. There was no Readers' Course in those early days of the seventies. The sole qualifications of the Master (the *reader* was known alternatively as the *Pupil*, or *Pup*) were that he had to have been at the Bar for five years and not taken silk. That changed fairly soon thereafter, but by 1973 David could take a reader and I was his first.

We shared Chambers but only for a short time, as David was appointed to the Leo Cussen Institute as its first Director of Practical Training. He wrote the entire curriculum for that Institute's first pilot intake of graduate students in 1974. Its ultimate objective was to take over from Articles as the means of qualifying for admission to practice in Victoria. David Byrne (later a QC and after that a supreme court judge) and I were drafted by Rossie into helping prepare the civil procedure course. We both taught in it for some years. That experience enabled me, with David's encouragement, to accept the task of preparing and coordinating the Bar's Readers Course in 1979, with the first course outline mimicking the method taught to me by David.

Rosemary Balmford, later Justice Balmford, was the first Executive Director of the Institute. In the Tenth Sir Leo Cussen Memorial Lecture, delivered on 22 October 1997, she described David's contribution to the Institute in these words:

The success of the courses, to this day, is in large part due to David's creative leadership, his commitment to operating along proper educational lines and his toughness. Lawyers are always happy to say, "Yes, I'll come and give a talk for you." It is hard work to persuade a lawyer to use a blackboard, let alone any other aid

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to communication. Most lawyers think you can explain anything with both hands tied behind your back. It was David who forced the instructors to run a truly practical training course, not a series of lectures. It was David who liaised with appropriate educationalists to set up the objective-based instruction which, I understand, still prevails.

By another one of those quirky coincidences, for some years I was the Bar Council representative on the Board of the Leo Cussen Institute, but this was after both David and Rosemary had moved on.

David returned to the Bar and for two years was a Crown Prosecutor, earning, as he put it, the Queen's shilling. It was during this period that he grew his famous Ned Kelly beard. It was the most ridiculous sight to behold David off to court, fully gowned and bewigged, with this beard nearly down to his waist. At the same time, he sported a version of the closely shaven hairstyle usually favoured by U.S. Marines... a strange combination! Still, it probably looked good when he was in his folk-singing persona, another of his out-of-court activities.

David competed in the annual Murray River marathon canoeing event every year and for about twenty years, I think. Originally he paddled a double Canadian but later switched to a single. He sold the former to me and I used it for many years, but not on the Murray. He was incredibly adventurous. In the late seventies, he canoed up the Mekong River, staying wherever he was made welcome; at small villages and monasteries. He travelled alone. He submitted his story and photos to National Geographic. It would have made a grand story but I am not sure if it was published. For the whole of his life he was a keen surfer and living at Anglesea, he was able to indulge his passion on a daily basis. Quite frankly, I don't know how he fitted it all in.

Our legal lives intermingled regularly. We both undertook master degrees at Monash University in the seventies.

One of the other students was Frank Vincent QC, later a supreme court judge. In 1993 I came to the Territory. By then, David, of course, was already long and truly established here as a visiting counsel. I was struck by the wonderful relationship he had with the young lawyers, particularly those of CAALAS in the Centre and the then, NAALAS, in the Top End. When he was in Darwin and known to be in the Supreme Court, the troops would come from out of nowhere to see him perform. It was slightly confronting to us lesser mortals who happened to be opposed to him in court at the time. He gave generously of his time, out of court as well, delivering lectures on aspects of criminal practice. He had a great feeling for and affinity with Aboriginal people. At his funeral in Melbourne, there was a picture of Rossie sitting down in the red dirt at Ali Curung, conferring with his client before court. He would love to be remembered that way.

We did a number of murder trials and appeals together... the Master and his Pupil... and we both enjoyed the contests. I was reminded at his funeral that we had gone to the High Court (it was sitting in Adelaide) to argue the case of Roland Ebaterinja. Benjamin Lindner, another of David's readers, presented a wonderful eulogy [you can Google it] at David's funeral on 24 December 2009 and described the case this way:

David appeared in courts at all levels, including the High Court where on one occasion, in a case called *Ebaterinja v Deland* (1998) 194 CLR 144, he obtained an order of prohibition directed to the Magistrate forbidding the further hearing of the committal proceedings against his client, a deaf, mute and illiterate Aboriginal defendant charged with murder. In that case, he was opposed to his former reader, Rex Wild QC.

David also appeared for the Northern Territory Director of Public Prosecutions in a particularly unpleasant case, which required both sensitivity and courage. I remember being very impressed with the gentle way in which he treated the complainant and the mother in a very traumatic situation. They each expressed to me subsequently their complete confidence and trust in his advice and judgment.

But let me remember his quirkiness. David attended the Criminal Lawyers Bali conference on a number of occasions. There, as in Darwin, he demonstrated a very unusual habit. Knowing full well that we don't wear coats in the Top End, he nevertheless brought with him to Darwin (and Bali)—his dinner jacket. This he would don, with black tie, and venture forth to whatever function coincided with his visit to town. It might just be to Friday night drinks at the pub or some legal office. But the really strange thing was that he would add a pencil thin drawn moustache to his look. It was quite off-putting! I challenged him once or twice as to this behaviour, without receiving satisfaction. David, to my certain knowledge, was a teetotaler from his earliest days at the Bar. I remember a young man at uni who did take a drink but he gave up in his twenties. Again, I don't know why. What I do know is that he smoked a pipe all his adult life. He absolutely refused to conform to non-smoking rules, edicts and laws. The only place I know where he didn't smoke, was in court!

David was a master of trivia. He loved to show his knowledge of little-known information. He was dining at my table in Ludmilla one night, on a visit to the Territory. There was a small mixed group of family and young friends. David was enjoying himself... he always did... Suddenly, he banged the table and loudly proclaimed, "I've got one!" I was a little apprehensive. Was it a cockroach intruding on our hospitality? David continued, "What was the name of the girl in Marty Robbins' song El Paso?" The answer, of course, was Felina, but since Marty wrote the song in 1958 I was the only other person at the table who had even heard of it. I got the answer wrong. Other similarly obscure questions followed.

Apparently David telephoned his brother in the wee small hours one night, and asked, "Who in the 1977 Grand Final took five or six bounces and then kicked a goal?" The brother was told, still in his sleep, 'Phil Manassa'.

David was a wonderful lawyer. He loved arguing the law and addressing the jury. He adored what he called, in arguendo before the court, 'nice little points'. By nice, he meant neat. But he had the nous not to persist with those that did not attract the interest of the court.

"One of the drawbacks of my profession (says Mr Valmik, the lawyer) is the total lack of humour. The law is a grim unsmiling thing. Not justice, though. Justice is witty and whimsical and kind and caring."

– *Rohinton Mistry, A Fine Balance.*

That's how I think of David... he was like justice... witty, whimsical, kind and caring... and with it all, learned in the law.

I miss him still.

And so I remember a good friend and pass on, again, his instructions: Treat your opponents, and the judges, with respect and in return you will earn theirs and the courtesy that is due by, to and from all participants in the court processes.

