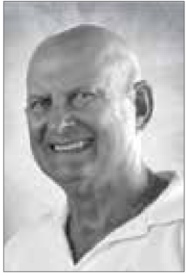


No hard feelings, Sir

REX WILD QC AO

One advantage of being retired nowadays, but still sitting on the bench (and I'm talking of a park bench), is that I am free to reminisce about things old (and new?).

My father was in the Army. In the mid-fifties he was the Major in command of the RAEME workshop at Bulimba in Queensland. One of his troops went AWOL. Dad was obliged to report the matter to the authorities and did so. He was then instructed to place the soldier before a court-martial and prosecute the matter. He thought this was very unfair. It made him, in his view, both complainant **and** prosecutor. He did his duty very reluctantly. The soldier was duly found guilty and received an appropriate penalty. He approached Dad at the conclusion of the proceedings, held out his hand, and said, *no hard feelings, Sir*. Dad was flabbergasted. In his view, there were never any hard feelings involved on his part. He was doing his job. He was hurt to realise that the man under his command thought that there might be any malice in the proceedings.

I was thinking of this the other day. I remember some time at the end of the last century I was prosecuting a local larrikin in Darwin. He was charged with stabbing a fellow member of a lodging house in the CBD; grievous harm was alleged. The premises were inhabited by fellers with time on their hands and a penchant for alcohol and the like. They usually got on, except when they didn't. My friend Richard Coates defended, and very successfully. Self-defence was the issue raised, and accepted by the jury. Clearly there was conflict between the men, and the accused man was victorious at the time of the incident **and** at the trial.

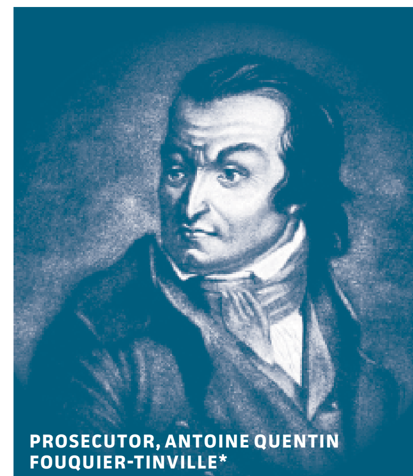
At the end of the contest, Richard came over—somewhat embarrassed—and said that his client wanted to speak with me. The accused held out his hand, and thanked me for getting him off! This had not been my intention, and I wasn't flattered by his view of my, apparently, very fair presentation of **his** case.

For some years afterwards, Jordan (as I'll call him) would stop me on the street and indulge in mutual congratulations on our great result against the complainant in that matter. I was always embarrassed!

But this in turn reminded me of the prosecutor's duty of fairness, as discussed in all the relevant cases (look elsewhere for learned discussion). I have been preparing a script for the play-reading at the forthcoming CLANT Bali Conference. It presents the trial of Marie Antoinette in Paris in 1793. The Inquisitorial process was involved, of course, but it was a very fierce procedure. I must say there is a fair bit of dramatic licence in the words put by me into the mouth of prosecutor, Antoine Quentin Fouquier-Tinville, but there is little doubt from the transcripts available that he went in very hard, and was determined that the Queen would pay for her sins with her head. Politics, naturally, paid an enormous part in the trials during the years of The Reign of Terror in France. As it transpired, the prosecutor, some of the witnesses and the Court's president were all guillotined by 1795! Who prosecuted them, I wonder?

Courts in the UK and Australia have not discouraged prosecutors from robust presentation of the Crown's case. However, scrupulous fairness is necessary. The attitude of the Victorian Director to the use of police informer X, and the need, and litigation through the courts, to reveal the identity of that informant to her former clients, is a good example of the prosecutorial disclosure function operating at its highest.

However, at a time when the interests of victims of crime is properly acknowledged within the system of justice, it is still necessary to prosecute on behalf of the community or public, by whatever name, and not simply for or on behalf of the victims. It is easy to lose objectivity.



PROSECUTOR, ANTOINE QUENTIN FOUQUIER-TINVILLE*

It is a good thing, in my view, for lawyers involved in criminal litigation to have experience at both ends of the bar table. It helps with objectivity and balance. I know that some counsel feel ideologically unprepared to prosecute ever; and I have seen counsel from the defence Bar when briefed to prosecute who have brought their same determination to succeed to the Crown side. Personally, I would have found it impossible to prosecute cases where the potential penalty was execution. Mandatory sentencing, of any kind, was difficult enough.

In 2001, Richard Coates—a man of many coats, as we know—(then the Director of Legal Aid in the Territory) and I presented a joint paper to CLANT's 2001 Conference which highlighted the dilemmas imposed by mandatory life sentences for murder. We recommended amelioration of its harshness. We were encouraged by both the then CLANT President, John Lawrence [now SC] and the late Stephen Bailey J to present that paper. CLANT passed a resolution calling on the then CLP Government to modify the legislation. It took, however, a change of Government to look at the provisions. As we know, in 2003, the current regime was introduced. Although not going as far as lawyers had hoped, it moved some distance towards fairness in sentencing for murder, given the disparate circumstances that may be involved in that offence. It demonstrated that cooperation between defenders and prosecutors could achieve something positive in the administration of the criminal law.

Prosecutors have always been encouraged to attend the biennial CLANT conferences. These better facilitate the exchange of ideas and concepts with defence lawyers which can achieve progress and advances in the criminal law. Funding, of course, is scarce for attendance at these worthwhile exchanges. CLANT itself has always encouraged attendance of all participants in the justice system—lawyers on both sides, judges, police investigators, forensic scientists and other expert witnesses and policy makers from the Departments. Papers are presented on areas of common interest and controversy. It is good that some funds have been made available to assure a reasonable ODPP turn-up in June 2019, along with their counterparts at the defence organisations. There is no doubt that the interaction, and dare I say friendships, developed during these conferences contribute to the smooth running of cases in court. Ask any judge, and you will be told that pleasant relationships at the bar table—consistent with maintenance of the proper adversarial protocols—help greatly for the smooth administration and conduct of trials.

In thinking about some of these disparate issues, I came across an article in the *New York Times* (August 2016) entitled *America's Deadliest Prosecutors*. It concerned the death penalty in various states and counties and the determination of prosecutors (district attorneys—some of them, no doubt, elected) to secure not just convictions, but death penalties in all such cases. One had a poster from the movie *Tombstone* on his office wall with *Justice is coming* emblazoned on it; another used a miniature model of an electric chair as a paperweight; a third, dubbed the *Queen of Death*, said she was *passionate* about judicially killing people and described the emotion of watching an execution as a *non-event*.

The five were profiled in a 2016 report from Harvard Law School's Fair Punishment Project. Titled *America's Top Five Deadliest Prosecutors*, the report highlights the lion-sized role in the modern death penalty of just four men and one woman. What they all had in common was a vast appetite for putting men and women to death. What additionally made them special was that they all had the power to turn such unusual tastes into sentences.

As head prosecutors in their counties, apparently those five individuals had been responsible for putting no fewer than 440 prisoners onto death row. There had been just over 8000 death sentences handed down since the death penalty was re-introduced in the United States in the 1970s; approximately one in 20 of them had been the responsibility of five district attorneys alone. What makes it even more distasteful, is that these same prosecutors had very high rates of convictions overturned because of improper prosecutorial trial practices.

We are indeed fortunate not to have such determined tunnel-minded prosecutors in our jurisdictions. I remember Peter Tiffin, when working as a prosecutor at the ODPP, coming back to chambers after a jury had delivered guilty verdicts in a trial. He was congratulated on his *victory*. He quickly, and modestly, corrected us, pointing out that he had merely presented the Crown case in an adequate fashion and that justice followed. It was not the occasion, he said, to take personal glee in the result but to be satisfied that the job had been done properly.

It is not appropriate for (park) bench-sitters to tell those who follow them, how to perform their duties. However, it is hoped that present trial counsel, at both ends of the bar table, conduct themselves with ***no hard feelings*** to the other counsel, witnesses, victims or the defendant. ■

* Image sourced from *The public prosecutor of terror, Antoine Quentin Fouquier-Tinville* by Alphonse Dunoyer, 1913 https://archive.org/details/cu31924024298519