

AFTER DINNER SPEECH
TO DEVER'S LIST
ESSOIGN CLUB, OWEN DIXON CHAMBERS
FRIDAY 15 OCTOBER 2004

WELCOME BACK

Good evening your Honours and members of Dever's List and a particularly warm good evening to John Dever and Pat Utting.

I shall commence with the bad news. Justice Peter Buchanan and I were greeted at the door this evening by Pat Utting. She said, "my favourites are back!" So I am sorry to tell you that it is now official that Justice Buchanan and I are the favourites of Pat on the switchboard.

Thank you Jeremy Ruskin, Q.C., so good to know you kept all the secrets - so I will do the same about you (or most of them).

Well - it is wonderful to be back with my list and my clerk. If I close my eyes I can wait - "tick.... tick.... tick" then, "ring - ring - ring" (instant pickup) and then that inimitable voice of John Dever: "*Best Solicitors in the Universe Inc. want you to do an injunction this afternoon - I'll put him on - .*" But it doesn't happen any more - no more briefs, no more writing up the fee book: do you still do that Ross (to Ross Gillies)? Somebody says that Ross suffers from RSI writing up his fee book. For me, just relentless waves on the shore called "cases" and "judgments".

Some people have asked me what changes I have introduced since I assumed my new burden. One thing I have done is change the Supreme Court Rules Committee. Traditionally the Chairman of the Rules Committee has been a senior and eminent white knuckled member of the bench, for example, Mr Justice Booking, Mr Justice Tadgell, Mr Justice Ormiston, Mr Justice JD Phillips. I decided to make a change and approach my dear friend Justice Buchanan and ask him: "How about it - I impose the sunset clause of December 2005." He dropped his head and sadly and mournfully agreed. And so one of my early changes has been to put a motor cyclist in charge of the Rules Committee.

Now when I last spoke at this dinner (five years ago) I spoke about the force, the power of List D. I told you about some secret judges' business - I can't do that now - but, I thought I would tell you about the Court of Appeal instead! (Quickly while no one is listening!)

But first, some jokes are necessary, indeed essential, about the Court of Appeal.

In the Court of Appeal one of the judges said to counsel:

"Mr X, you say the learned judge did not put the point to the jury, but it was a point that you yourself did not take."

"Yes" replied the barrister, "but it is the learned judge I am criticising, not myself". (Apparently, the barrister was Jeremy Ruskin.)

In another case in the Court of Appeal the learned presiding judge said to counsel:

"Give us some credit for knowing something." This counsel replied: "Your Honour, that was the mistake I made in the court below."

(Apparently that barrister was not Ruskin but some one from, I think, Foley's List.)

Now there are four categories of barristers in Victoria:

First, the commercial barristers - impeccably prepared, great massagers of difficult facts and, folder freaks! They work and re-work a point to perfect clarity.

Secondly, the criminal barristers - the criminal barristers - who pretend not to be prepared, to know nothing about the authorities and specialize in leading the trial judge out to the end of the pirate ship plank whilst the criminal appellate sharks circle and cruise below.

Thirdly, then, there are the common lawyers - the snake oil merchants who push, finesse and cajole.

That reminds me of the very first time I had a civil jury trial shortly after I was appointed as a trial judge. The case was one of those very sad mesathelioma cases where the plaintiff was dying. Hardies were the defendants. Richard Stanley Q.C. appeared for the plaintiff and John Barnard Q.C. appeared for the defendant. I was merely a commercial "girl" barrister who knew very little about civil juries. At the end of the second day at about 4.10pm Barnard rose and said, "Your Honour, there is a matter I need to raise in the absence of the jury". Despite my panic I agreed and sent the jury home. I then said "Now what is the matter you wish to raise Mr Barnard?" Barnard said, "It's the lost years." Now you need to know that one of my favourite rock bands is Midnight Oil. They have a song called "The Lost Years". Now I knew that it was incomprehensible, indeed inconceivable that John Barnard would have even heard of Midnight Oil let alone know their individual songs. I was quick enough to say "How long will this take Mr Barnard?" He said, "Quite some time your Honour." So I said, "I see the time in the circumstances you might leave that until tomorrow morning." I immediately raced upstairs to Allan MacDonald's chambers. "What is this thing called 'the lost years?'" He said, "What's Barnard up to now?" He briefly explained to me what it was about and told me the High Court cases I should look at. Now you need to know that I was absolutely determined not to be shown up on this so I stayed up until 1.42am the next morning. By the time I had finished I was totally on top of the "lost years". I knew all about Todorovic in the High Court and all the other cases. I

was ready to deal with Barnard and anyone else that the common law bar could field. Needless to say the inevitable happened. At 10.29 and 42 seconds the next morning, "Your Honour, Mr Barnard and Mr Stanley have asked for some time." Yes, you guessed it, at 10.36am, "Your Honour we are pleased to advise that the matter has been resolved and settled."! Now you need to know that I have kept my notes. I am ready for the first common law barrister to raise with me, "the lost years".

Now I was talking to you about the way categories of barristers behave at trial. Now, that is how many of those barristers perform at trial but on appeal – a different story!

First, take the commercial barristers. Well forget clarity and precision – the tack is all about mud, mud and more mud and then confusion plus confusion (hopefully so that the trial judge will be revealed as muddied and confused).

Secondly, then the criminal barristers. Well they undergo a metamorphosis. They are cameleons: they know the law, the facts, the evidence and probe and cut and slice with the appellate scalpel until they find the judicial flaw, the weakness. And then they work it.

Now the common law barristers on appeal: well, when they step up to the lectern in the Red or the Blue Court, the snake skin is shed, and, the entertainer appears: jokes, anecdotes, stories about cases, yarns about old judges (particularly if an old judge was the father of a sitting judge). In fact, the Court of Appeal become quite excited when they learn that Mr [Blank] "is appearing today."

That reminds me of my first experience in the Full Court in a common law case. I had the privilege of being briefed as junior to John Hedigan Q.C. The case was all about a "gun" shearer who had injured his back and achieved a huge verdict in the County Court. We were appealing the verdict. After some hours, Jack being in fine form, the case seemed won. A young, new silk called Richard Stanley stood and proceeded to put very plausible arguments to the Full Court. Every time Stanley made a good point Jack, sitting on my left and me to his right, would heave his elbow and grunt and complain. After a number of hours of this with considerably bruised ribs I decided to take some defensive action. The time came for Jack to reply. He stood up and he took the Full Court into his hands and he plied them. He plied them with his very fine common lawyer skills. Whilst this was happening I deftly slid away from Jack towards the end of the bar table on his right. After a little while Jack looked down and saw where I was. He stopped mid sentence and said "You – get back here." in not so much of a sotto voce voice. And I did! Jack won the case and the verdict was set aside and remitted for re-trial.

So in the best tradition of the common law bar, I have to say keep up the repartee, the robust levity, you common lawyers – goodness knows we need it.

Now to tell you of one of my experiences in the Court of Appeal last year, I was a trial judge sitting as an "A.J.A.", as the chaps call it.

We had a few appeals listed, one common law matter settled but counsel were there - (a few jokes later) - it was apparent that the form of the minute of order was not quite right, it had to be fixed!

So counsel were sent away, agreed to submit signed minutes, but, in the correct form. The court adjourned "sine die" and every one went off in their own directions. The corrected minutes arrived the next day as discussed. All was well... not so. I received a frantic message from the presiding judge that the court would sit at 12.50 that next day.

What was wrong I puzzled? - I turned up as requested - knock, knock, in we went - the tipstaff said: "*All stand and remain standing*"... I took my place - I peered out - there was no one there - no one was standing - no one was "*remaining standing*".

The presiding judge bowed, so too did the other judge and I. We sat. The tipstaff said: "*Be seated.*" But no one did - no one was there! The Red Court was empty.

I thought (as the presiding judge pronounced the minutes of signed, consent orders) - I am on the Court of Ghosts. You see you just never know what might happen at the Court of Appeal!

Now my dear friend Justice Buchanan has promised not to tell. He will not have a lift home otherwise!

But I forgot - the fourth category of barristers. Those barristers who can do anything, anywhere, anytime, for any fee - the "can do" barristers: List D of course!

So it is lovely to be back and see everyone. Thank you so much for inviting Mick and me and I hope that you have a marvellous evening.