BOOK REVIEWS

PSYCHIATRY, THE CRIMINAL LAW AND CORRECTIONS: AN EXERCISE IN SCIOLISM *By A A Bartholomew* (Wileman Publications 1986) pp i-x, 1-316.

Dr Bartholomew is a psychiatrist of over 30 years' standing. He is pre-eminent in the field of forensic psychiatry in Australia. The revolutionary, perhaps subversive, hypothesis advanced by Dr Bartholomew in this book could not cogently be articulated and developed in written form by a person lacking the author's theoretical and practical mastery of that field, forensic psychiatry.

Sciolism, as the reader is informed in the Foreword, is "the exhibition of pretentious superficiality of knowledge". The author's theses are first, that the courts' present approach to the admission and use in evidence in criminal cases, prior to conviction, of evidence from psychiatrists is based on misconceptions; secondly, that psychiatrists are indulging in sciolism, and are encouraged to do so, when giving evidence on questions of insanity and cognate issues in courts; thirdly, that forensic psychiatrists "should re-appraise [their] claims and [their] expertise and realise that at this point in time we have very little to offer" in the way of rational assistance to juries charged with ascertaining the mental state of an offender (p 3); and that psychiatrists should confine their activities to diagnosis and treatment.

Two propositions directly addressed to the legal system are advanced in the book. The first is that the substantive Criminal Law should be changed so as to revert to a scheme of liability independently of state of mind (chapter 4). The second, which will be dwelt upon in this review, is that the courts should reconsider the question whether psychiatrists are in a position to assist juries to draw inferences, as to a defendant's state of mind, from proven primary facts. This second proposition is asserted explicitly at the outset in the following terms.

> "Acceptance of mental disorder as diminishing or eliminating criminal responsibility demands the ability to get inside someone else's skin so completely as to determine whether he acted wilfully or knowingly, and also to experience the strength of the temptations to which he is exposed. That, I submit, is beyond the capacity of even the most highly qualified psychiatrist" (p 2, quoting Barbara Wootten, *Crime and Penal Policy).*

The foundation of this thesis is laid in chapter 3, in which the author convincingly demonstrates the unreliability and arbitrariness of psychiatric diagnosis.

In some cases, this lack of reliability is attributed to "covert incompetence" on the part of practitioners (pp 35-36); in others, it is attributed to the transient nature of "mental illness" (pp 45ff); the residual category of unreliable diagnosis arises from the very loose nature of diagnostic terms: the endeavour to diagnose in terms of "labelling" is shown to be becoming "rather useless and thus meaningless" (p 46).

If this second proposition be true, then this book is one which, along with the source material on which it draws, should find its way into the hands of Crown Prosecutors required, in the course of trial, to meet a defence of insanity or a case of exculpation based on automatism, diminished responsibility or altered consciousness. It is Crown Prosecutors who have the capacity and, if the author is correct, the duty to initiate a curtailment of the use in courts of psychiatric evidence.

The facts in *R* v *Fowler* (1985) 39 SASR 440, a case decided since publication of Dr Bartholomew's book, provide a useful reference point. At his trial in the Supreme Court of South Australia, the accused was advancing a defence to two charges of murder. The defendant admitted that he had killed the victims by shooting them at close range. The jury ultimately convicted the defendant on one count of murder. In his unsworn statement to the jury, the defendant said that, at the time of the killings, he was under the influence of amphetamines, cannabis and psilocybin. This was done as the factual foundation for the assertion that, at the time of the killing, the defendant was in a "psychotic state" and therefore lacked the intention to kill which is an ingredient of murder.

In furtherance of this ground of exculpation, the defendant called Dr Lucas, a psychiatrist, and sought to put to him the following question:

> Is it a reasonable possibility on the history that you obtained and that you have heard here that at the time the shotgun discharged Fowler did not intend to kill or cause grievous bodily harm to [one of the victims]?

The question was objected to by the Crown. The witness's capacity to answer the question was the subject of a *voir dire,* during which the following exchange occurred:

Q [Counsel for the Defendant Fowler]

Of course I suppose over the years many of your assessments of persons convicted or charged or suspected of criminal offences have been assessments in relation to in part the question of intent?

A [Dr Lucas]
Yes.

Q How does that come in, for example?

A In the usual assessments, say of someone charged with murder, I take a psychiatric history. You certainly talk to them about the actual events, the state of mind, what was intended and so forth. Frequently with offenders you are seeing after conviction you have to work back to get some appreciation of what happened, and what they intended at the time (Transcript p 402).

. . . .

Q Dealing with the question of drug abuse, you have read widely in this field, the literature?

A I would not say that I read frequently and very widely, but I read what I need at a particular time. I don't specialize in drug abuse, nor do I treat drug offenders, so I am not as widely read as some (Transcript p 402).

. . . .

A Accepting the history he [the defendant] gave me and the other material I have read, I realize the term 'toxic psychosis' has been used in evidence so far. I believe that on that day he was undoubtedly heavily intoxicated with drugs. There were four drugs in him at that time. He had used four drugs that day. He was intoxicated in the sense that the intoxication was beyond the normal - in other words, he wasn't just like a person who had been drinking and was happy and talkative; he was maladdictive and causing trouble and at a stage in the day it is quite likely that his level of intoxication was such that you would describe it as exhibiting a degree of disorganization and failure to test reality. If you had seen him at the time you would probably describe him as psychotic. That is going on the history I obtained and not only of the day but also of his drug use over a long period.

Q [Mr Abbott]

So your answer to the question as to whether or not it is a reasonable possibility that he was suffering from a state of toxic psychosis on 17 June 1984 is -

A It is reasonable, a reasonable possibility (Transcript p 406).

. . . .

Q [His Honour]
What would have been his state of mind, intending to pull the trigger and knowing that he was then standing over the man lying on his back, standing over him at his feet pointing the gun at his chest and intending to pull the trigger? What would be the state of mind, if there was no intention to kill or inflict grievous bodily harm?

A I can only say what he told me about his state of mind at the time (Transcript p 409).

. . . .

Of course, this is not an easy matter to make one's mind up about but it is, considering particularly the amphetamines and the hallucinogenic drug in the mushrooms, his description of his mental state is consistent with that, and it certainly poorly (sic) explained or unexplained acts of violence occur especially with amphetamines. So it is consistent and that is why I say the possibility exists that at the time he pulled the trigger he was not intending to do it (Transcript p 410).

At the conclusion of the *voir dire,* the trial judge ruled the proposed question to be inadmissible without permitting the Crown Prosecutor to cross-examine the witness on expertise. The trial judge's ruling was based on the lack of factual foundation for the question. This ruling was the target of one of the defendant's grounds of appeal to the Court of Criminal Appeal. While upholding the appeal, the whole Court agreed with the trial judge on this point and held that the question proposed to be put to Dr Lucas was inadmissible.

The majority (King CJ and Matheson J) held that the question was objectionable on the unconvincing ground that it was "the ultimate question for the decision of the jury. This was not one of those quite exceptional cases in which an expert is permitted to express an opinion on the ultimate question" (39 SASR 441-442, see, too, 452-453). The better view, with respect, was that expressed by Johnston J. His Honour said of the question (p 453):

> " . . . its inadmissibility arises primarily not from the fact that it is the very question for the jury (I do not think it is) but on the basis that the answer is not capable of being understood and the question or answer are thereby irrelevant."

The question and intended answer were, his Honour held, incapable of being understood because counsel for the defendant had not elicited from the witness the facts from which the witness was being asked to deduce an opinion (pp 453-454).

The whole Court assumed that a psychiatrist was capable of "stepping into the mind" of the defendant to inform the jury in a reliable fashion that the ingestion of particular drugs might have such and such an effect on the defendant's ratiocination and emotional state. It was not proposed, at the trial, to ask the witness whether he had ever ingested drugs of the kind referred to by the defendant and, if he had, whether they had induced psychosis in him. The Court did not inquire whether, in truth, the answer sought to be elicited from the witness was capable of being informative or was merely speculative.

If, during the *voir dire* at the trial, the witness had been cross-examined by the Crown as to the validity of what has been referred to in this review as Dr Bartholomew's second thesis, then the trial judge would have had a second ground on which to reject the question put to Dr Lucas. In particular, the substance of the following propositions from Dr Bartholomew's book might have been put to the witness:

> "At this point it is reasonably clear that the psychiatrist is far from able to make a reliable diagnosis (Chapter 3) and is equally unable to say with any general authority that some abnormality he detects is to be termed a 'disease of the mind' or a 'mental disease'. This strongly suggests that the psychiatrist's diagnosis should be most carefully scrutinised by the court and that, whilst it is reasonable to ask the psychiatric witness his opinion as to whether the 'abnormality' is, or is not, a disease of the mind, the court should not feel bound by the answer.
>
> Whilst such scrutiny is obviously necessary under the present system, it will be argued in this book that the better answer is to very largely remove the psychiatric witness from the courtroom - at all phases of the criminal justice process (Bartholomew 1982). This is not to say that an offender cannot receive treatment from a psychiatrist during his period of punishment - custodial or non-custodial — it simply means that the psychiatrist does not spend his time attempting to make decisions that he is not competent by training to make. He should return to his proper fold - medicine - and cease to play 'auxiliary counsel' and

'pretender to the Bench' and also 'one man jury'. His role is diagnosis within the limits of his subject and treatment. In terms of both these clinical endeavours he should be concerned with active research so that, maybe, in the years to come the psychiatrist will be able to attend courts more frequently as a true 'expert' and offer the court advice that is well grounded in fact rather than fancy and wishful-thinking" (pp 86-87).

". . . psychiatry is taught as a post-graduate subject to medical graduates (see Foudraine, 1974). Thus, the bulk of the teaching is medically or organically orientated. Endeavours to claim expertise in fields far removed from the area of teaching are fraught with danger as the expertise claimed is largely idiosyncratic and based, for the most, on very insecure foundations.

The danger of travelling unduly far from one's teaching is that psychiatrists are hardly very secure in their own, rightful, back-yards. They are unreliable in diagnosis, and often unable to measure any change that the treatment prescribed may have produced. Finally they more often than not are unable to make worthwhile predictions. The harsh comment of Ericson (1976) may hurt but cannot so easily be refuted.

The criminal law, as with the law generally, has adopted psychiatry to a very considerable extent and the psychiatrists practising in the forensic area have responded to the adoption quite uncritically and mostly with enthusiasm. Psychiatry should stick to its last and, if people wish to become experts in something else other than psychiatry, so be it. But the two fields of expertise should not become confused. Lord Mansfield C.J. stated in *Folkes* v *Chadd,* (1782) 3 Doug. K.B. 157. 'The opinion of scientific men upon proven facts may be given by men of science *within their own science'* (the writer's emphasis).

Where the question that has to be answered is related to diagnosis, the natural history of a psychiatric condition, treatment regimes, prognosis with treatment and, possibly, psychopathology, the psychiatrist certainly has a role - and that role should be carefully scrutinised and the true expertise carefully assessed" (209).

"There are, of course, occasions when the psychiatrist should properly be called upon to give evidence, but he should be kept to his 'science'. For example, a diagnosis may be offered the court and the features which led the psychiatrist to make such a diagnosis should be given and tested. But that is a far cry from expressing the opinion that someone is unfit to plead, or did not know that an action was 'wrong' (even with the qualification regarding the ability to reason with a moderate degree of sense and composure as to 'wrongness'), or that there was a capacity to form an intent, or that the intent was formed, or that a particular witness was dishonest and not to be believed on oath, or finally, that someone should not be released

> because a psychiatrist was given to predicting 'dangerousness' " (210).

One flaw in the book is purely stylistic. The author makes frequent and extensive use of quotes. This is unobjectionable when done to illustrate a point but becomes an obstacle when done to make a point. The volume of quotes, particularly in chapters 2 and 3, reaches distracting proportions and impedes thematic development. It is suggested that the lay reader, in particular, would be assisted by the author synthesising into his text the substance of published opinions on which he draws in substitution for verbatim quotes.

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LIBELS, LAMPOONS AND LITIGANTS: FAMOUS AUSTRALIAN LIBEL CASES, *by Graham Fricke* (Hutchinson 1984).

Graham Fricke, a judge of the Victorian County Court, has summarized more than 30 defamation lawsuits involving prominent personalities. Organized under three rubrics – "A Pride of Politicians," "Sportsmen, Migrants, Thespians and Writers," and "Detectives, Felons and Architects" – Fricke describes the factual background, legal issues and arguments, and outcome of each of the cases he has chosen for discussion. Cases involving such well known Australians as Arthur Calwell, Jim Cairns and Junie Morosi, John Gorton, Wilfred Burchett and Darcy Dugan are treated in this fashion.

Rarely do judicial opinions reveal to the reader very much of the underlying human conflict. The litigants' pain and passions are usually lost in the neutral, bloodless tones of judicial prose. It is only the very best judicial stylists – Lord Denning immediately comes to mind – who are able to retain some of this human flavour in their opinions and thus remind us that these judgments are the products of deeply felt and personal conflicts. The greatest service Fricke has performed in writing this book is providing some of the human context within which these disputes arose. Thus, while the decision of the ACT Supreme Court in *Gorton* v *ABC* (1973) 22 FLR 181, for example, concerns itself primarily with the jurisdictional differences in Australian defamation law, Fricke's discussion of the case locates former Prime Minister John Gorton's suit in the context of his "rugged and undisciplined" personality and the struggle for power within the Liberal Party between Gorton and Malcolm Fraser. In providing such background information about each case, Fricke has contributed a worthwhile added dimension to our understanding of them.

The difficulty with Fricke's treatment, however, is that what the reader is intended to draw from the cases is not readily discernible. If the primary purpose of the book is to entertain by providing interesting facts and anecdotes about well known litigants, it is ill served by Fricke's failure to adopt an appropriately light and entertaining writing style. Unfortunately, the prose in *Libels, Lampoons and Litigants* too frequently resembles the dry recitation of facts found in most judicial opinions.

On the other hand, if the primary purpose of the book is to give insight into the state of Australian defamation law it falls considerably

short of the mark. Fricke offers little in the way of unifying theme, principle or analysis other than the prominence (in some cases notoriety) of the plaintiffs. The cases summarized in Part I are united by the common occupation of the plaintiff: all are politicians. This unifying factor, however, is lost in Parts II and III where plaintiffs with considerably diverse occupations are lumped together. Why for instance, are cases brought by detectives, criminals and architects gathered in Part III? Any common characteristic of the occupations or individual plaintiffs, or any other reason for the organization of the cases, remain unexplained.

In several instances Fricke does attempt to draw some significance from the plaintiffs' occupations. In discussing John Gorton's suit against the ABC, Fricke asserts that "It is rare for a political libel action to involve a conservative politician" (p 53). The political libel cases Fricke has included in his book do not prove the point. Of the eight chapters in Part I devoted to such cases, three concern suits brought by Liberal or National Party politicians. His unsubstantiated assertion exemplifies a serious problem with the book: there is no detailed or sophisticated analysis of defamation law as revealed by the cases. Fricke's treatment is descriptive rather than analytic. After recounting the factual circumstances and describing the legal issues involved in the cases, Fricke offers little but the most superficial and brief statements on their legal significance. In the eight pages devoted to *Gorton* v *ABC* Fricke's analysis of the legal significance of the case consists of the following bland paragraph:

> "The Gorton case is interesting from a number of aspects. It reflects the tension which exists between politicians and the media, and the difficulties which can arise when politicians attempt to be selective in the material they furnish to the media. It represents the only example in this book of the trial of an action brought in respect of imputations directed at a reigning prime minister. Finally, it highlights the vagaries of the various laws which apply in different jurisdictions in Australia. The capricious operation of this variety of laws has recently created pressures to enact uniform legislation in this area" (p 57).

Libels, Lampoons and Litigants tells us very little beyond the most elementary aspects of defamation. There is a 15-page introduction summarizing the broad issues of defamation law, an introduction offered "For those readers hoping for edification as well as entertainment" (p 1), but for readers genuinely interested in an education about defamation law this book represents little more than a primary school primer. The superficiality and lack of substantive analysis would not necessarily be fatal flaws if the book were genuinely entertaining. While Fricke has assembled some interesting facts, the book's entertainment value founders on the author's dry and uninteresting style. Ultimately, *Libels, Lampoons and Litigants* offers neither edification nor much entertainment.

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CROSS EXAMINATION PRACTICE AND PROCEDURE: AN AUSTRALIAN PERSPECTIVE *by J L Glissan* (Legal Books 1985) pp i-xi, 1-281.

The title of this book does it a disservice. It is not a work on cross-examination. It is far more extensive and valuable than that. Cross-examination is the subject of chapter 5 (pp 84-128). In addition, chapter 9 (pp 188-266) presents edited versions of some instructive cross-examinations. If the book is to be stereotyped at all, it is best characterised as a practical manual of the law of evidence. Its subject matter is adjectival law in general and, collaterally, the ethics of the Bar (ch 8) and matters of etiquette (ch 1).

The real scope of the book is accurately portrayed by its table of contents. The reader will find that the conduct of an entire case by an advocate is dealt with, including pre-trial preparation. It is this quality which entitles the book to be made compulsory reading by students at skills courses (or post-graduate qualifying courses by whatever name) throughout Australia.

The book is ripe for expansion. On the topic of ethics, for example, it would be convenient to append, either to ch 8 or as a discrete appendix, the formal rulings on ethics by one or more of the larger State Bar Associations. On the topic of etiquette, professional guidelines as to the relations between instructing solicitor and counsel pertaining to responsibility for pre-trial preparation could profitably be added.

Furthermore, there is room for an enlarged treatment of the rules of evidence. The preface tells us that the book is addressed to the junior advocate. Many barristers in that category will not yet be comfortable with the rules of evidence; given that evidence is now an optional subject in some law schools, some junior practitioners may have had no tertiary instruction in evidence; even graduates with a thorough theoretical grasp of evidence may wonder how those rules inter-relate with the practical precepts found in Mr Glissan's book.

For these reasons, it is suggested that, in subsequent editions, an outline of the law of evidence be added and existing reference and allusions throughout the text to points of evidence be expanded. To the extent that the book deals with the simple matter of "which question should I ask", it is incomplete without some guidance as to "what form of evidence am I entitled to elicit" and "what perils or penalties may I encounter if I put (or refrain from putting) a particular question or submission?" For example, the perils of submissions of no case to answer in magistrates courts and in civil cases, which trespass upon factual matters or which descend to comments on the weight of evidence, might be dealt with. The proper formulation of a submission of no case in a criminal matter being tried by jury is within the natural scope of a work such as this. Equally, the treatment of *Browne* v *Dunn* (cited at pp 95 and 96) is a little cursory. An inexperienced reader might regard the "rule" laid down in that case as conflicting with the "cautionary rules" found at pp 97 and 98. Next, there is (at p 55) the briefest allusion to splitting one's case. It is in some instances difficult to know when the beginning party is entitled to adduce affirmative evidence twice in the course of a trial. This is a topic on which the junior advocate would profit from assistance. Finally, the "right to begin" should be dealt with.

There are some propositions in the text with which some will disagree. For example, at pp 36 and 82, the advocate is cautioned not to object to a question unless the anticipated answer is "both inadmissible and clearly damaging". It is this reviewer's opinion that there can be no justification for permitting the eliciting of irrelevant information and that all questions which might foreseeably elicit irrelevant information should be objected to. A failure to object will tend to lengthen the hearing, contrary to the public interest and to the private interests of one's client. Furthermore, in a practical sense, some irrelevant material has a tendency to compel or invite an answer, thus increasing the number of issues in a trial.

There are some matters on which additional authorities could be added. For example, on the question of the scope of re-examination (ch 6), the judgment of Wells J in *Szach* (1980) 23 SASR 504, 511-519 warrants reproduction in part. On the order of witnesses, statutory provisions which require the defendant to go into the box first, if he or she proposes to give sworn evidence, might be referred to. The criteria regulating a witness's access to a document for the purpose of refreshing memory in the witness box were re-stated in *R* v *Van Beelen* (1972) 6 SASR 534, in terms different from those set out at p 71. The distinction between in-court and out-of-court refreshment (or attempted refreshment) of memory is not alluded to. And proposition (4) at p 72 may need to be qualified in the light of *King* v *Bryant* [No 2] [1956] St R Qd 570.

Given its objectives, the book serves its purpose well. The author is to be commended for making a work on the topic of examination of witnesses accessible to junior practitioners at a time when foreign-sourced works are either outdated, unavailable or prohibitive in price.

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