Master and Readers Dinner

Mr Justice Sully discourses on the vicissitudes of life at the Bar

Mr Chairman, Mr Attorney, Ladies and Gentlemen,

Thank you for the chance to join you this evening. It's nice to be back among old friends at the Bar, and, as far as the pupils are concerned, perhaps some new ones also.

Those of you who are masters will know, and those of you who are pupils will soon learn that into the life of every busy Barrister there must fall from time to time not, as the song suggests, "a little rain", but instructions which are to the following effect:

"Herewith our file. Will Counsel please advise and in due course appear."

My instructions this evening are in exactly that state of disarray. When Tobias QC telephoned with the invitation, I did not forget, I am pleased to think, my training as a barrister, and I asked the obvious question, namely, "What on earth am I going to talk to them about?". He snapped into his most silken mode: "Old chap", he said soothingly, "just talk to them about anything you like, but it's in order to introduce a little levity". Well, it has been three years since I last practised at the Bar, but when I did practise, that sort of brief was known colloquially as a "flick pass", and there was a well established etiquette for dealing with it: flick it back to whoever sent it: flick it on to some other poor unfortunate: but at all costs flick it away from yourself before what is now the sound of something ticking becomes the sound of something exploding. Alas, and as you can see for yourselves, when one becomes a Judge, it is not only in respect of one's income that the buck stops.

So, what's topical? Well, if I were a Junior, and even more so if I were a pupil, I would be more than just a little worried by the inquiry by the Trade Practices Commission which is about to break over the Bar, and I would be just as worried by the accompanying campaign against the Bar which is so obviously taking shape. So, I thought that I would say something about those matters. I must at once pause and follow with due reverence in the footsteps of the learned President of the Court of Appeal who is, after all, my second chief work supervisor, and say that the author's views are the author's own.

Let us being, then, with a reference back to the Monroe Doctrine. Not, of course, the version for which the late President James Monroe is famous, but the alternative version for which the much later Miss Marilyn Monroe is responsible.

An interviewer once asked Miss Monroe for her views about sex. He did not put the question in the form of the question that has made, if not quite a living national treasure at least a living professional anecdote out of at least one member of this Bar, but in the form: "What *do* you think about sex?" Miss Monroe was equal to the occasion, although she did not answer in the preferred forms for a good witness, which is to say that she did not reply: "yes" or "no", or even: "I don't know" or "I can't remember". She replied, simply: "I think it's here to stay".

I tell ;you that, because it seems to me that whenever judges and barristers start talking about the rule of law, or the Bench or the Bar, they always show, so worldly-wise and sophisticated as they think themselves to be, a truly childlike faith in that later version of the Monroe Doctrine. Certainly, there might have to be a change of nuance here, or some silly little appeasement about shaking hands, there; but, in the end, "I think it's here to stay".

Well, I'm not so sure. I say so because, in my view, there are present, this time around, two new factors which are very worrying.

The first is the resentment which has been generated by the undoubted fact that, broadly speaking, the Bar has seen off very successfully its critics of the last 12 or 15 years or so. Anyone who read the editorial which appeared in one of last week's *Herald*s under the heading: *"Lawyers: this time get it right*, will have remarked on the undisguised bile and venom with which that editorial expressed resentment at that apparent success of the Bar. It seems to me that that is a very dangerous sentiment to have swirling around the Bar in the coming days.

The second factor is, of course, the joining by, as it would seem, at least some of the mega-partners of at least some of the mega-firms, of the new campaign against the Bar, bearing in mind always that such a campaign against the Bar will necessarily develop, if successful, into a campaign against the independence of the Bench, and so against the very foundations of the rule of law itself.

The importance of this adherence of these mega-partners to the anti-Bar, or as I would prefer to call it, this anti-rule of law, campaign is that they have the capacity to give that campaign a veneer - they could never give it any more than that - of respectability and even of responsibility which the campaign does not have and must not be allowed to pass itself off as having in fact.

So, let us take, like good barristers, a closer measure of the enemy, starting with those golden oldies among the new campaigners, the politicians, academics and journalists.

The measure of the politicians can be taken from something said the other day by a leading Government spokesman. He rebuked another Member by saying of him: "he prefers to live in the world of outmoded symbols rather than in the real world", the real world, mark you, "of triple-A ratings and the economy".

The kindest thing that can be said about that level of thinking is that it is the ultimate in cynicism, regard being had to Oscar Wilde's definition of a cynic as somebody who knows the price of everything and the value of nothing.

The measure of the academic members of the new campaign - and there would be no show without this particular Punch - is best taken in a programme note in which the English playwright, Robert Bolt, describes as follows a character in one of his plays:

"A studious unhappy face lit by the fire of banked down appetite. He is an academic, hounded by self doubt to be in the world of affairs and longing to be rescued from himself."

Quite so.

The measure of the journalists and so-called "media personalities" can be taken by a paradox. They call themselves the Fourth Estate, and then have the nerve to criticise us for

being, supposedly, attached to legal fictions. The notion of their being a Fourth Estate is not only ridiculous in itself, but involves at least as great an appeal to legal fiction as could ever be laid at the doors of John Doe and Richard Roe.

The measure of the new campaigners, the mega-partners, can be taken in one simple word: greed. Naturally they would never put it so bluntly. They prefer to call it "the dynamics of microeconomic reform"; "economies of scale"; or, if the mask slips just a little, "client billable hours". The fact remains, to paraphrase Gertrude Stein, that "greed is greed is greed". It is true that a couple of years ago greed actually won the Academy Award for *Wall Street*, but anyone with eyes to see now knows that Gordon Gekko was wrong. Greed is not good; in the end greed does not work; but in the meantime greed can do an awful lot of damage to an awful lot of people and institutions.

That, then, is the enemy. What should be the Bar's response?

It seems to me that the answer to that question depends upon what exactly the Bar wants to achieve. If the Bar will be content, once again, merely to win the battle, then press releases and PR and rallies and meetings might once again do the trick. But if the Bar is willing, this time around, to do something better than that, and to make for once a serious effort not only to hold the line, but actually to turn around positively the tide of opinion, then it will be necessary for the Bar to re-think carefully both the theory and the practice of some basic principles.

Judges and barristers are very good at talking about the rule of law. The phrases trip easily off the tongue, and they sound good. Thus we talk about a body of independent and principled judicial decision; or about the searching out of the truth in adversarial proceedings conducted by fearless and independent barristers. Unfortunately, most of us stop at that point, without acknowledging and thinking through the undoubted fact that there lies behind that notion of the rule of law a series of interlocking assumptions, a breakdown in any one of which will necessarily entail the breakdown of the rule itself.

The first such assumption is that most people are, at least for most of the time, decent and responsible people who will choose to obey the law. It is assumed, secondly, that such people will so choose to obey the law, not from an understanding of or a liking for the law, but rather because, at the end of the day, they are prepared to trust and respect the law, realising whether by reason or only by instinct, that the law is the cement that holds together everything else in any civilised society. It is assumed, thirdly, that they will so trust and respect the law because they are prepared, at the end of the day, to trust and respect, particularly, the Courts which administer justice according to the law, and the Bar which provides the principal professional support to the Courts. Fourthly, and finally, it is assumed that that trust and respect will be forthcoming to, relevantly, the Bar, because of the existence in every true barrister of certain essential characteristics.

What are those essential characteristics? There are, I suggest, three of them.

The first is integrity. Integrity does not mean what you can get away with. Integrity does not mean what is included between the covers of the Bar Council's black book of rules and rulings. Integrity for a real barrister means, simply, the behaviour of a lady or a gentleman. In this context, a lady or a gentleman is not a person who speaks with an exaggerated accent and who knows, so to speak, how to eat jelly with a fork. A lady or gentleman is a person who applies in a patient and disciplined way to the whole of life, the Golden Rule: not Lord Wensleydale's version, but the other version that speaks about treating others as we would have them treat us.

The second essential characteristic is courtesy. By that I do not mean extravagant protocol or manners. I mean what William of Wyreham meant when he said all those hundreds of years ago: "Manners maketh man". He was, of course, then safely beyond the reach of the anti-discrimination legislation, but these days he would be, no doubt, happy to comply with that legislation by adding: "and woman". It has always seemed to me that, at every point of contact in the normal course of a barrister's work: with the instructing solicitor and the client: with the witnesses, the professional opponent, and with the Court itself, simple good manners will get a simple good result, or at the very least, will make a significant contribution to the obtaining of such a result.

The third, and final, of those essential characteristics is what I would call a sense of vocation. By this I do not mean some exaggerated pietistic pose. I mean rather, and to begin with, a sense of privilege. For it is, in truth, an immense privilege to be a barrister. A barrister - I mean, of course, a real barrister - does not practise a trade or conduct a business; nor does he merely practise a profession. A real barrister answers a vocation and thereby follows in a very real and fundamental sense, a calling. Not any one of us has some claim of right to that calling. It is a gift of Divine Providence, and it might with all justice have been given as well to somebody else as to you or to me. Anybody who has a grasp of that reality of privilege will naturally have a grasp of the necessary co-relative, which is responsibility and duty. And it is in truth a tremendous responsibility and a tremendous duty that the barrister carries. Every time a barrister goes to Court, the good fortune, the good name, and sometimes even the very liberty of the client go with him. So do his own good name and the good name of his calling.

When I speak of a sense of vocation, I have in mind a properly formed interior disposition which holds in what I would call a prudent moral balance that sense of privilege and that sense of responsibility and duty of which I have been speaking.

A barrister who has these essential characteristics will not need any Bar Council book of rules and rulings. He will know instinctively, and, due allowance made for human failty, will do as instinctively the honest and upright thing according to the given circumstances.

I know that all of that must sound a bid ponderous; but I say it all to you because I love the Bar with a passion. I practised at the Bar for twenty seven and a half years, and I can tell you truly that I never once regretted that choice. Furthermore, I not only love the Bar, but I believe in the Bar and its special place in the upholding of the rule of law in which, also, I believe with unwavering conviction. I do not want to live in a world where there are, so to speak, 2 motor cars in every garage and every imaginable gadget in every kitchen, but where we are all a race

of slaves in those things that really matter: that is to say, in the things that touch the heart, move the mind and lift the spirit: and I believe as a matter of abiding conviction that, in the end, it is the rule of law as I have earlier spoken of it, and that rule of law alone, that can protect us against such a prospect.

I, and all who love the Bar as I do, will hope that this time around the Bar will try to do more, much more, than merely hold the line one more time. If the Bar will but reassert those essential characteristics in principle, and, much more importantly, rejuvenate them in patient and consistent practice, then, I believe, the tide can indeed be turned positively around.

For those decent and responsible ordinary people of whom I earlier spoke are not stupid. They are the people who make up our juries; and anyone with any jury experience at all will know that, as I say, they are not stupid. They do know a good thing when they see it; and, much more importantly, they know when they are being short-changed in something that they have a right to expect. A return, consciously and consistently, by the Bar to those essential characteristics of which I have been speaking, will not be lost on those people; and will draw back to the Bar that trust and respect and that broad community support which, also, the Bar has allowed to hemorrhage away so badly in recent times. That broad-based trust, respect and support alone will give the Bar the protection it needs against those who would destroy it; and so, by necessary extension, will protect also the true independence of the Bench, and so, by necessary further extension, the very rule of law itself.

I began with an anecdote. May I conclude with a very quick game of Not-So-Trivial-Pursuit? The rules of the game are simple. I will give you two very short quotations. You might care to guess at the identify of the speaker: it is the same speaker in each case.

The first quotation is:

"The lawyer doesn't consider the practical repercussions of the application of the law. He persists in seeing each case in itself. (The lawyer) cannot understand that in exceptional times new laws are valid"

And the second:

"Let the profession be purified. Let it be employed in public service. Just as there is a Public Prosecutor let there be only", -"only", mark you, - "Public Defenders".

The speaker is not, as it happens, one of our politicians having an attack of the populist vapours; nor one of those knights of the woeful countenance from the world of academe; not even one of those journalists or so-called "media personalities" who are always so sure that they have every answer to every problem if only we will let them stuff their social fantasies down our throats at our own cost. It is not even one of the mega-Gekkos.

The speaker is Hitler. He was expounding his vision of the German Bar in his version of a new world order.

Food for thought, isn't it?

I'll leave you to do some thinking. ❑

More Pitfalls for Plaintiffs Under The Workers' Compensation Act

We are all familiar with the provisions of ss. 151G and 151H of the *Workers' Compensation Act 1987*. Despite the recent amendments to those sections, it is still necessary for a plaintiff/employee to establish damages for non-economic loss in excess of $60,000 (now $67,800) for injuries received after 1 July 1987 before that plaintiff can succeed against his employer. He must establish that same amount or a loss of not less than 33% of the maximum amount payable under the "Table of Maims" set out in s.66 of the Act before that plaintiff is entitled to damages for economic loss.

We all know how hard it is to advise a plaintiff with any confidence that he is likely to exceed those thresholds when for injuries occurring after 1 July 1989 he must give up his rights under ss.66 and 67 of the Act for lump sum workers' compensation if he commences common law proceedings.

A recent decision of Mr Justice Allen in *Leonard v Graham Smith & Anor* (6 March 1992, unreported) has illustrated other obstacles for an employee/plaintiff to overcome.

The facts involved an employee of the Wyong Shire Council being injured when his leg was crushed by a front-end loader driven by a contractor. The injured employee brought common law proceedings under the *Motor Accidents Act 1988* against the contractor but not against his employer. The third party insurer of the front-end loader joined the employer as a cross-defendant and raised as part of its defence the provisions of s.15Z(2)(c). The effect of that sub-section is to allow a non-employer defendant to reduce the damages which it is obliged to pay to an employee/plaintiff by the amount which it would have been entitled to recover from the employer as a joint tortfeasor if the *Workers' Compensation Act* were not in force.

His Honour found that liability was to be apportioned as to 75% to the contractor and 25% to the employer. The effect of that apportionment was that after his Honour had assessed the plaintiff's damages under the *Motor Accidents Act* , the amount was reduced by 25% in order to implement the 151Z(2)(c) defence.

The cross claim brought by the third party insurer against the employer failed despite the apportionment of 25% because the damages awarded were not sufficiently high to come within the thresholds provided by the *Workers' Compensation Act* . This followed as a result of s.151Z(2)(d). A verdict was entered for the cross defendant.

The final position of the plaintiff/employee was that as well as having had 25% of his verdict deducted, he will be obliged to repay to the worker's compensation insurer from the balance, those moneys paid to or on his behalf under the *Workers' Compensation Act* because of the effects of s.151Z(1)(b). This follows because no liability was found against the employer on the cross-claim. ❑

C R R Hoeben