RECENT DEVELOPMENTS

A paper delivered to the 2001 CQLA Law Conference

26 August, 2001

Recent Developments is one of those topics that can mean almost anything you want it to. It's a good filler when there is a hole in the programme that needs filling or to satisfy the commissioner that the programme is fair dinkum when everyone knows that as the last session almost nobody will be there. It lacks the depth of coverage of a specific topic but as such is ideal for someone who knows a little about almost everything and a lot about almost nothing. I have to confess I selected the topic myself. When Steve asked me if I would speak he also invited me to pick my own topic. Inspiration failed me. What about "recent developments" said I. There was a pause on the other end of the phone. Not a long pause. But long enough. One of those too long to be accidental but not long enough to be obvious type of pauses. A pause just about ideal to suggest "Not another bloody judge who can't be bothered putting in a few hours work on a serious subject". Well he was probably right and here we are. Last hurrah on Sunday morning. A bedraggled collection of mostly hung over lawyers still too embarrassed to face their spouses and partners after the performance they put on last night and a smaller group of idealists who still think there might be a pearl of wisdom I may have accidentally stumbled on and will cast before them this morning.

What's new? There is a lot I could talk about. I have listed my recent top 10 in the written paper which has been distributed. Feel free to read it. I trust no one is embarrassed by number 10. Personally, my state of domestic bliss would be more secure if I was not troubled by Mr Long and the prospect of 6 weeks in Bundaberg. Having considered these matters and the likely condition of the audience I decided to take another tack. There is much that happens in the legal world that is not so readily available in learned publications, except, perhaps, Justinian but it fails the test of learned.

It was of course said that there is nothing new under the sun which makes this paper a little difficult. Judges, however, thrive on difficulty. Just so that you don't think we judges are entirely isolated in our ivory towers I should inform you that our most

excellent Supreme Court librarian supplies us on a regular basis with articles of judicial and non judicial interest gleaned from an eclectic mix of newspapers, journals and web sites. The purpose of these is undoubtedly to convert a white, bigoted, mostly male collection of social and juridical dinosaurs into a group of well rounded useful citizens able to sympathetically and caringly deal with the issues that touch the community. I am not sure that the subject group is yet showing much promise but the articles provide useful material that might loosely be described as "recent developments".

An article appeared in the July edition of the Law Society Journal concerning a most recent development in a United States District Court. The article recorded that a plaintiff's lawyer who threatened to kill opposing counsel with his bare hands and called him a "fat pig" not once but four times during a trial recess has been hit with harsh sanctions according to US web site law.com. The offending attorney was a Mr Marvin Barish who admitted the allegations and apologised by saying "It was not appropriate. I shouldn't have done it. I should have been able to control myself. And I want to apologise to the court and to Mr Gallagher." Alas the apology was not accepted, at least by the Court. Judge Herbert J Hutton found that Barish's conduct was "outrageous" and part of a larger pattern of misconduct on Barish's part that other judges had been complaining about for years. As a result the judge invoked the "inherent powers" of the court to hit Barish with a monetary sanction, disqualify him from the case and refer the matter to the Pennsylvania state attorney discipline board. Now that's a wonderful "inherent power" to have in my arsenal .

Before leaving America and again on the topic of recent developments, an article by Jonathon Rauch in The New Republic for April this year recorded these allegedly true recent developments in American schools. They are certainly "recent developments" and illustrate a measured response or more accurately, the measure of response to the apparent spate of school shootings. Mr Rauch commences by recording in typical self deprecating journalistic style that in junior high he was a small child often picked on. Thinking one of the bigger boys might grab his wallet and run he punched an eyelet in the leather and attached the wallet to a loop on his belt by means of a chain. "Nerdy, yes, but not, in those days a weapon's policy offence requiring mandatory suspension". Times have indeed changed. In September last year an eleven year old

student at Garrett Middle School in suburban Atlanta brought to school a tweety bird wallet to which she had attached her keys with a 10 inch chain. The school awarded her a 10 day suspension for violating its zero tolerance weapons policy. According to the Associated Press, "School officials said Ashley and her parents … knew chains were banned". Ashley, the offender, was apparently baffled. Her response? "It's only a little chain, and I don't think it can really hurt anyone". But we all know, rules are rules.

In words made famous by the Demtel man, but there's more! Last year, four kindergarten children in New Jersey received three day suspensions for pretending their fingers were guns and "Shooting" at each other while playing cops and robbers. "We're very firm on weapons and threats." said the local superintendent. In Nebraska a 12 year old girl was expelled last year for taking a pair of blunt-edged safety scissors to school. (Her expulsion was subsequently overturned). I suppose the upside is that future generations will not have to suffer the ignominy of failing cutting and pasting in preschool.

Even tag apparently infringes the "no touching" policy at a preschool in Annapolis, Maryland.

These bizarre examples were used by Mr Rauch to illustrate what he described as the recent development of "Bureaucratic Legalism". This is the notion that if you get the process right, the outcome must also be right. The alternative is what is described as "Hidden law" or what we might regard as social norms for the conduct of a civilised society. For example, if I called the learned District Court judge a "fat pig" in the best tradition of Mr Barish and he complained to the Chief Justice I should be able to resolve the matter with an apology. I don't believe my recidivism warrants the more serious penalty of a fine and six of the best. The rules of "hidden law" in this context may be stated as follows:

"Up to a reasonable point, targets of slurs are responsible for swallowing their pride and getting on with life.

Up to another reasonable point, if targets of slurs punch their tormentors on the nose, authorities will pretend not to notice.

Beyond that point, if the authorities must notice they will do something that seems reasonable, which they'll make up as they go along based on what they know of the situation and the characters of the people involved."

Mr Rauch is a strong advocate of what the bureaucratic legalists would describe as the "arbitrary and capricious" approach. What we judges might describe as an appropriate sentencing discretion. The bureaucratic legalists respond by introducing mandatory sentencing so that the process and not the result is triumphant.

Let's leave America and head for the cradle of the common law system. Much there falls into the realm of recent developments.

The Times of June 26 reports the warning of a senior judge that computerising the courts could lead to "court rage" with litigants able to fire off claims by e-mail at the touch of a key. The angel of despair in this case was none other than the Vice-Chancellor, Sir Andrew Morritt who is concerned about a spate of impulse actions. It is hard to know whether he is a fan or opponent of computerised litigation.

"Do we wish to have a spate of actions for nuisance by noise commenced on hot Saturday evenings or a deluge of divorce petitions presented annually on December 27?" he asked the Chancery Bar Association. For a start why would anyone ask a body pretentiously describing itself as the Chancery Bar Association anything much less whether they were keen on divorce petitions and common law actions for nuisance? But no doubt aware of this paradox the learned vice-chancellor proposed his own solution. One option, he said, would be to restrict such online facilities to professional litigators, so as to protect defendants from a spate of legal actions issued on impulse. I am not sure that leaving the field to professional litigators was ever the answer to impulse actions. More usefully, he backed the broadcasting of civil trials once courts are fully computerised, which could, he said, be a "nice little earner" for the court. Unlike our Chief Justice he has surely never been to a regional civil court. Even the courtroom theatrics of Mr Crow would not, I think, set off a bidding war between media magnates for the viewing rights. Once evidence was digitally recorded, however, the Vice-Chancellor thought there could be no objection to allowing the media to "feed" off it.

The recent activity of English judges does them more credit than some of the performances of the English cricket team, who required an overgenerous declaration to finally open their account, or the British and Irish Lions. The Times of 11 May this year reported the exploits of 69 year old 5'6'' Judge John Hopkin who grabbed 20 year old Damien Small in a rugby tackle and restrained him until police had him in irons. Mr Small, the prisoner, had run out of the dock, leapt the barristers' bench and tried to attack the judge. Small yelled, "Now you know what it is like to be scared!" I don't know why Small said that. It seems a particularly silly statement after Small had just been apprehended and restrained by a geriatric dwarf in a wig. Needless to say the judge responded that he wasn't in the least bit frightened by Mr Small to whom he had just given 3 years for robbery.

The Times reports that Rita Smith, 50, who was working as a courtroom logger near the judge at the time, said she could not believe what was taking place. I imagine a courtroom logger is something like SRB but perhaps I need to spend some of my jurisprudential allowance going to England to find out for sure. I have no idea what the relevance of Ms Smith being 50 was. Anyway, Ms Smith is reported as saying, "It all happened in a split second. The man suddenly leapt out of the dock, and papers and a bottle of water went flying through the air. The defendant ran across the desktops in three or four strides and then leapt over the judge's bench.

"The judge reacted very quickly. He stood up behind the bench and said he wasn't frightened of boys like that.

"They were both struggling behind the bench. The judge crouched down to tackle his legs. Then one of the barristers tried to get between them. But the judge held on to the defendant's legs until the police and security guard arrived.

"The judge was perfectly calm afterwards and said they should not have the man charged. I have never seen anything like this before and I never want to see anything like it again," she said.

What else has developed recently in that green and pleasant land? We have all heard of the troubles of poor Lord (no doubt soon to be Mr, a-la Terry Lewis) Archer and his dabbling in perjury. But did you know that it seems to be genetic. Most recently, son James Archer, who was formerly a merchant banker in the city in London was

banned by the city for dishonesty. His days of conspicuous cocktail consumption on a Friday night seem to be at least curtailed. More interesting is the antics of the jailbird's father, William Archer. It is amazing the speed with which the press, even the respectable press circles for the kill when someone prominent falls from grace. William Archer's story is told in the Times of Saturday 28 July, 2001. That's really the only reason it qualifies as a recent development. The history begins with his birth in the East End in 1875. In 1907 the old rogue was elected to local government in London although it might be a bit hard calling him old at 32 and the article does not suggest provable misconduct up to that time. Old Rogue was my description because it gives colour to the story. In any event William had given up on his marriage to Alice Linard, with whom he had 2 children, and was living with another woman. They had a child. This no doubt demonstrates a strain of weak moral fibre permeating the blood line. He set up as a mortgage broker, but was declared bankrupt in 1910. You see! Again there is a recent connection. A forerunner to those solicitors who have recently seen the perils of dabbling in mortgages.

To return to William Archer, he went next to America, but soon returned to London where he set up illegally as a mortgage broker. Just before the war he appeared in the Old Bailey on fraud charges, but got bail and absconded to France. That doesn't sound like a smart move in 1914.

He apparently next turned up in New York where he claimed to be a British Army Surgeon recuperating from war wounds and was feted as an aristocrat and hero. Wounded medico opens more doors than absconding fraudster. After a 3 week courtship he became engaged to a 22 year old daughter of a rich real estate agent.

Months later William was arrested for taking money under false pretences when seeking donations for artificial limbs for wounded soldiers. He was convicted and sentenced to 3 years. Released on probation, he went to Canada where, in November 1918, he appeared in a Toronto Court after persuading a widow to let him look after her war bonds which he promptly spent on a car. Old Will got 12 months hard for that one, but was deported to Britain.

In 1939 at 64 he married 23 year old Lola Cook and Jeffrey was born the next year to carry on the family name and reputation.

Recent Developments are everywhere. The antics of Justice Mitchell of the Supreme Court of Bermuda provide an object lesson in how a judge ought not to behave.

The Times of 23 July 2001 reports.

"Like a Minister of Sport with no knowledge of cricket or rugby, a Minister of Transport unable to drive and Turner Prize artists who cannot draw, a judge without judgement is bound to attract ridicule."

Well, what has Mr Justice Mitchell done to deserve this scathing introduction. His great sin, it appears, was to set out upon the Thyssen Trial, a family dispute of serious proportions. David Pannick QC who records the event for the Times outlines the sordid details as follows.

"Baron Thyssen is a billionaire. He and his fifth wife have fallen out with his son Georg, by his first wife, over the administration of a trust set up by the baron in Bermuda to protect a substantial part of his assets."

"Georg is a trustee. In 1997 the baron began legal proceedings against Georg and the trust. Late in 1998 Denis Mitchell, a barrister in Hong Kong, was appointed as a judge in Bermuda. He was assigned to the Thyssen case."

"After preliminary applications, the trial commenced before Justice Mitchell in October 1999. Last March, after 105 hearing days and many days of adjournments, and with the hearings expected to last well into 2002, the trial was aborted."

The trial stopped when Mr Justice Mitchell announced in court: 'To be blunt, I have had enough.'"

'He explained to the parties that he had come to Bermuda on a three-year contract. He was, he complained, 'brought here under misleading circumstances' in that he had

been ‘given incorrect information about how much I would have to spend on housing’.”

“He alleged that the Governor had asked him not to leave and had promised that employment conditions would be improved.”

“But no change had occurred. The case would probably not be concluded before the end of the judge’s three-year stint. He did not intend to remain and, he said: ‘Our professional, family and sporting lives have been planned accordingly.’”

“Mr Justice Mitchell believed that ‘it was not my job to find the solution’ to the problem. He had told the Governor the terms of his ‘package’ for remaining on the island – ‘one that would compensate me for reversing my plans’. But the Governor had rejected those demands.”

“Mr Justice Mitchell commented that the ‘extra strain of having to deal with my own employment position’ had made the job ‘intolerable’ and had ‘begun to affect my health’.”

“So ‘in fairness to myself and my family’, he had to ‘put an end to the cause of the strain’.”

“The judge therefore withdrew from the case.”

Pannick QC, departs momentarily from the role of objective reporter to venture a personal opinion.

“This is the most extraordinary statement in court by a judge since Chief Justice Ellett announced in 1977 in the Supreme Court of Utah that only ‘depraved, mentally deficient, mind-warped queers’ would adopt the reasoning of the United States Supreme Court in obscenity cases, and that judges with such views were ‘reminiscent of a dog that returns to its vomit in search of some morsel in the filth which may have some redeeming value to its own taste’.”

"Mr Justice Mitchell", so Pannick QC records, "is no Solomon. He was unable to maintain proper case management to ensure that the litigation was conducted efficiently."

" His squabbles with the Governor and bizarre final speech indicate that he should be searching for a career that does not involve communication, diplomacy or fine judgement"

The case has, however, not been a complete waste. The article records estimates of the legal costs to the date of former Mr Justice Mitchell's major dummy spit at close to 70 million pounds or in our sadly faltering currency, around $200 million. It makes even the John Marsden case seem cheap.

Having by now contributed nothing to legal learning or jurisprudence, and because this is a paper to a legal conference on recent developments I propose to read some extracts from a judgement delivered on 26 June this year by Judge Samuel B Kent a United States District Court judge in Galveston Texas to demonstrate what we judges have to put up with and justify our sometimes testy dispositions. I have no idea what some of the American legal jargon means but the sense is clear.

The story concerns Mr Bradshaw, an injured seaman, Phillips Petroleum Company and an application to strike out a claim as statute barred. The issue was simply whether the federal limitation period applied as the plaintiff contended or the state limitation as Phillip's contended. After briefly stating the issue and noting the absence of any relevant facts in the pleadings or authorities in the submissions Judge Kent continued by noting:

"This case involves two extremely likeable lawyers, who have together delivered some of the most amateurish pleadings ever to cross the hallowed causeway into Galveston, an effort which leads the Court to surmise but one plausible explanation. Both attorneys have obviously entered into a secret pact – complete with hats, handshakes and cryptic words – to draft their pleadings entirely in crayon on the back sides of gravy-stained placemats, in the hope that the Court would be so charmed by their child-like efforts that their utter dearth of legal authorities in their briefing would go unnoticed. Whatever actually occurred, the Court is now faced with the daunting task of deciphering their submissions. With Big Chief tablet readied, thick black

pencil in hand, and devil may care laugh in the face of death, life on the razor's edge sense of exhilaration, the Court begins."

If you were one of the attorney's involved you would start to wonder if it might not have been a better idea to have actually started work on the brief before 10 to 10 on the morning of the application. Judge Kent notes that the only authority cited by the plaintiff is from a nonexistent volume of the law reports and when actually located it turns out to be a 40 page opinion to which no pinpoint reference is given. Unfortunately it also has no relevance to the application. The mark of a true gentleman, however, is to find the good in everyone. Judge Kent is nothing if not a true gentleman. He goes on:

"Despite the continued shortcomings of plaintiff's supplemental submission, the Court commends plaintiff for his vastly improved choice of crayon – Brick Red is much easier on the eye than Goldenrod, and stands out much better amidst the mustard splotched about plaintiff's briefing. But at the end of the day, even if you put a calico dress on it and call it Florence, a pig is still a pig"

We are all allowed to complain a little about counsel but in the end one has to turn one's attention to the case in hand. Judge Kent, likewise did not miss the main game.

"Now alas, the Court must return to grown up land. As vaguely alluded to by the parties, the issue in this case turns upon which law - state or maritime – applies to each of plaintiff's potential claims versus defendant, Phillips. And despite plaintiff's and defendant's joint, heroic efforts to obscure it, the answer to this question is readily ascertained. The Fifth Circuit has held that 'absent a maritime status between the parties, a dock owner's duty to crew members of a vessel using the dock is defined by the application of state law, not maritime law'."

Perhaps Judge Kent was entitled to be a little smug.

"Take heed and be suitably awed, oh boys and girls – the Court was able to state the issue and its resolution in one paragraph . . .despite dozens of pages of gibberish from the parties to the contrary."

The case was over. Judge Kent summed up.

"After this remarkably long walk on a short legal pier, having received no useful guidance whatever from ether party, the Court has endeavoured, primarily based upon its affection for both counsel, but also out of its own sense of morbid curiosity, to

resolve what it perceived to be the legal issue presented. Despite the waste of perfectly good crayon seen in both parties' briefing (and the inexplicable odour of wet dog emanating from such) the Court believes it has satisfactorily resolved this matter. Defendant's motion for summary judgement is granted."

But here is the part that warms my heart. Despite perhaps a slight stumble below the standard expected of counsel, Judge Kent still has their best interests and well being at heart.

"At this juncture, Plaintiff retains, albeit to his befuddlement and/or consternation, a maritime law cause of action versus the alleged employer, Defendant Unity Marine Corporation, Inc. However, it is well known around these parts that Unity Marine's lawyer is equally likeable and has been writing crisply in ink since the second grade. Some old timers even spin yarns of an ability to type. The Court cannot speak to the veracity of such loose talk, but out of caution suggests that plaintiff's lovable counsel had best upgrade to a nice shiny No 2 pencil or at least sharpen what's left of the stubs of his crayons for what remains of this heart-stopping, spine-tingling action. In either case, the Court cautions Plaintiff's counsel not to run with a sharpened writing utensil in hand – he could put his eye out."

Well that exhausts my knowledge of things recent. Some of them may not exactly have been developments but what more could you expect on a sunny Sunday morning when any sensible person is sipping cocktails by the pool or idling away a useful hour or two on the golf course.