BUNDABERG DISTRICT LAW ASSOCIATION CONFERENCE
Heron Island
20 February 2004

Key Note Address

One of the purposes of a key note address is to set the tone of the conference that follows. One of the dangers inherent in the selection of the speaker is that the speaker has the opportunity to hi-jack the agenda on a personal whim. As far as is possible in the 15 minutes allowed to me for this paper I intend to do just that.

In a recent opinion poll conducted by Roy Morgan, the results of which were published in the Courier Mail on 8 January this year Supreme Court Judges rated an overall approval of 72%. Not bad in view of all the adverse publicity about public risk insurance, lenient sentencing and the flow on from the Magistrates' troubles of last year. In fact, it put Supreme Court judges behind only nurses, pharmacists and doctors.

By contrast solicitors rated only a 31% approval rating. At least it was better than politicians on 17%, journalists on 13%, real estate salespersons on 11% and the perennial wooden spooners, used car salesmen, on 5%. The low rating of solicitors might have been contributed to by the solicitor who, as reported in the Sydney Morning Herald on 4 February 2004 billed his client for 27 hours work on one day and when queried explained the apparent anomaly by saying he had worked on two of the client's matters at once.

The poll result suggested one topic on which I might have chosen to speak would be "the infallibility of judges". While the prestige of the pope in western secular society wanes it appears we judges can do little wrong – at least little not corrected by the Court of Appeal. I have more modestly, however chosen to look at what it is that gives the public confidence in the legal system as represented in this instance by the judges.

In his Brennan Lecture, *The Art of Judging"* American jurist, Justice Stewart Pollock, said that **"***the business of law is to make sense of the confusion of what we call human life – to reduce it to order but at the same time to give it possibility, scope, even dignity."* [1] Of course I only mention such noble statements in order to lead into something entirely unworthy of the sentiment. How does the reality measure up to the ideal?

There have always been some judges who did not fit the mould described.

In the *Times* newspaper of 13 January this year regular legal commentator, David Pannick QC reviewed a recent book on the life of Mr Justice McCardie. Mr Justice McCardie, said to be "*obsessed with sex and dark thoughts of death*", departed the bench by the irregular means of suicide by shooting in 1933 leaving behind substantial gambling debts and a mistress (but no wife). Mr Justice McCardie had

[1] Stewart G Pollock, The Art of Judging, 71 NYUL Rev 591, 614 (1996).

been an exceptionally successful barrister during his years at the bar but was said by Pannick to have been neither a happy nor distinguished judge. Publicly reprimanded by Prime Minister, Ramsey MacDonald for injudicious comments during a libel trial and by Lord Chief Justice Hewitt for remarks in a sentencing proceeding McCardie bottomed out when Scrutton LJ humiliated him in an appeal from his decision in a claim by a husband against another man for allegedly enticing away his wife. Allowing the appeal Scrutton LJ said that *"if there is to be a discussion of the relationship of husbands and wives, I think it would come better from judges who have more than theoretical knowledge"*. To further aggravate Mr Justice McCardie, Scrutton LJ added, purely by way of gratuitous aside, that he was *"a little surprised that a gentleman who has never been married should, as he has done in another case, proceed to explain the proper underclothing that ladies should wear*." While in the 21st Century we can only smile at the naivety of that remark its bite was keenly felt by McCardie. McCardie's response to the judgement was to say that he would not make his notes available to any future Court of Appeal of which Scrutton LJ was a member. Those were the days before the availability of transcripts.

Mr Justice McCardie is not the only judge to have had strong opinions on particular topics which might have been better left unexpressed.

A perennial problem is the sleeping judge, illustrated most recently in the much publicised appeal by the men convicted of plotting a 200 million pound ($469.61 million) robbery of the Millenium Dome in London – Australian newspapers always give a conversion in Australian dollars if it gives a higher figure than the relevant currency because it makes the amount seem even more spectacular. As judges sometimes do, particularly on warm afternoons when counsel is droning endlessly on about a topic devoid of interest, trial judge, Coombe J, fell asleep. In the words of counsel for the appellants, *"Everyone can be forgiven for momentary lapses of concentration, but it is another matter if there is sleepfulness accompanied by noises associated with sleep, drawing attention to the person who is asleep and deflecting the jury's attention"*. In other words it is alright for the judge to be asleep as long as he doesn't go the whole hog and start snoring. It did the appellants no good at all. The sleeping judge is not a sufficient ground for to overturn a verdict and leave to appeal against conviction was refused. The high approval rating of judges in Queensland to which I earlier made reference, unlike our English counterparts is such that such minor peccadilloes apparently pass un-noted here. The reports of the English judge's behaviour on the television news I watched were prefaced by describing the appeal as unique. Not so. In a decision of the Court of Appeal in Queensland in *Stathooles and Ors v Mt Isa Mines Limited* [1996] QCA 323 (03/09/1996) the Court dismissed an appeal against a District Court judge who allegedly fell asleep during a crucial part of the cross-examination of a witness whose credibility was critical to the outcome of the case. Macrossan CJ delivering the judgement said,

> *To experienced counsel there should have been no difficulty other than perhaps some slight embarrassment in being required to draw the judge's attention to the concern that was felt that he may be missing an important feature of the evidence. Experienced professional advocates may be called on to display conduct which will need to be more robust than that in their day to day practice in the courts. There should have been no fear that what needed*

> *to be done could not have been handled with the customary courtesy that should, and usually does, prevail between judge and counsel in the hearing of cases*."

What Macrossan CJ was trying to say in his gentlemanly way was that if the judge falls asleep wake him up. Don't whinge about it later. I recall a good example when I was an articled clerk instructing Tom Shepherdson in a personal injury case. The day before trial the injured party's husband who was himself claiming loss of consortium and who was, in my lay opinion, stark raving mad, announced that he intended being at Court the following day with an automatic rifle and would shoot all those involved if the case did not go to his satisfaction. Needless to say he was arrested and carted off. As things transpired it was just as well as the trial judge, D.M. Campbell J, promptly fell asleep after lunch and showed no signs of waking until Tom in a display of what Macrossan CJ would describe as conduct "*more robust than* [in his] *day to day practice in the courts"* picked up his rather large brief and dropped it noisily from a height onto the bar table causing the judge to wake with a start. As I recall the plaintiff ultimately did rather well.

Despite their success when somnambulism is raised as a ground of appeal judges should be careful to avoid falling asleep if at all possible. There is high authority that a judge falling asleep may be a sign of drug addiction. In a case in 9th Circuit Court of Appeals in the United States in 2001 Warren Summerlin, an axe murderer, sentenced in 1982 by a Judge Marquardt who admitted on standing down as a judge in 1991 to having been addicted to marijuana since 1975, appealed on the grounds that Judge Marquardt's judgement may have been impaired when he handed down the death sentence. The majority allowed the appeal, Judge Trott saying, *"we can tolerate a certain number of insignificant parts of arsenic in our drinking water* [and some] *insect parts in our grain supplies* [but we should not] *similarly tolerate a single drug-addicted jurist whose judgement is impaired."*

While the sentiment is admirable I am in greater sympathy with the dissenting opinion of Judge Kozinsky. Judge Kozinsky opined that the appellant should have produced evidence that the judge was affected by marijuana. He might, for example have "*presented affidavits from those who observed the trial to the effect that Judge Marquardt was seen staggering when mounting or leaving the bench; that he had a glazed stare during the proceedings; that he had trouble comprehending arguments; that he fell asleep in court."*

Anyone of a certain age and fitness level can have trouble climbing the stairs to the bench. The glazed look and lack of comprehension is often contributed to by the obtuseness of counsel. But falling asleep…!

Absent evidence of the sleepy judge, Judge Kozinsky feared that to allow the appeal would encourage unwarranted intrusion into the private lives of judges by parties unhappy with the outcome of litigation. He pictured lawyers spending much of their time pouring over reports from private detectives on "*whether the judges who preside over their clients' criminal cases might have been observed at parties dancing with lamp shades on their heads"* Lamp shade wearing is, it seems, a not unknown phenomena among judges or putative judges. I have a somewhat fuzzy recollection some years ago, well before I became a judge, of dancing on the front lawn of a

private residence at Newmarket in the company of at least 2 other current members of the Supreme Court each of us crowned with the obligatory lampshade.

It goes without saying that any discussion of judges who fall short of providing order, scope and dignity to the drudgery of human life will find a rich vein in America. Examples include the judge in the 1970's who when asked by a lawyer of Japanese extraction for extra time to prepare said, "*How much time did you give us at Pearl Harbour?"* and Judge Joseph Troisi of West Virginia who resigned in 1997 after taking off his robes, stepping down from the bench and biting a defendant on the nose. Chief Justice Ellett of the Supreme Court of Utah made headlines in 1977 when he announced that only *"depraved, mentally deficient, mind-warped queers"* would have adopted 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 his vomit in search of some morsel in the filth which may have some redeeming value to its own taste.*"

Attacks on trial judges by appeal courts are more common than vice versa. There is a strict pecking order in this regard. Those of you who remember Connolly J will recollect that he did not suffer fools and was unconcerned at whether his language was temperate or not. One of the most sarcastic attacks on any judge in my memory was by Connolly J directed to a District Court judge who though retired is still, as far as I am aware, hale and hearty and hence nameless. The full judgement can be found reported as *R v Ferguson; ex parte Attorney General* [1991] 1 Qd R 35. The issue arose this way. S563 of the *Criminal Code* says:

> *An officer appointed by the Governor in Council to present indictments in any Court of criminal jurisdiction may inform that court, by writing under his hand, that the Crown will not proceed further upon any indictment then pending in that Court.*
> *When such information is given to the Court the accused person is to be discharged from any further proceedings upon that indictment.*

So far you might think everything is straight forward. The trial judge, however, rejected the *nolle* presented at the conclusion of the prosecution case and directed a verdict of acquittal. The prosecutor was sufficiently miffed to refer the matter under s669A of the Code. In his reasons for rejecting the *nolle* the trial judge said:

> *I consider that the indictment here, which has had considerable proceedings upon it in the nature of a trial through to the close of the Crown case, is no longer 'then pending in this court' within the meaning of that expression in s563. That reference I consider to be a reference to an indictment which has been presented in the Registry and is awaiting further proceedings upon it. I stress the appearance of the word 'then' appearing in the second paragraph of s563.*

You might be forgiven for thinking this to be a somewhat eccentric construction of the statutory provision. We judges of the trial division often have eccentric views of which we are gently disabused by the greater wisdom of the appeal courts.

Connolly J began in friendly enough vein.

> "*On its face this is a bewildering statement. Indictments are not presented in the Registry. Indictments are presented to the Court. … The notion that the indictment was not pending in the District Court at Brisbane on 1 September when the nolle prosequi was handed to the learned Judge and when the learned Judge, having refused to act upon it, then proceeded with the trial in the sense that he directed the jury to acquit is almost incomprehensible.*"

After referring to the universal practice of accepting a nolle proffered by the Crown Connolly J got into stride.

> *Plainly enough the view of the learned Judge is that everybody else, both in this generation and in past generations, has got it wrong.*
> *It must be an intoxicating thought that, alone of all the judges to have exercised this jurisdiction in Queensland, one has a proper understanding of so fundamental a question. By the same token, it ought to give pause to any judge. This is especially so where there is a longstanding decision to the contrary of a judge who was an acknowledged master of the criminal law. I refer of course to* Sneesby *[1951] St R Qd 26 where Philp J refusing to direct a verdict of acquittal when a nolle prosequi had been presented said …* and the passage is quoted.

This is without doubt a sound verbal thrashing. There is a slightly ironic twist however. Although Connolly J did indeed correctly identify an error in the approach of the trial judge he was himself dissenting in the appeal.

Just as you thought that my time was surely up and my remarks to date pointless may I return to my theme. Remarkably, despite the indiscretions of judges we do, in general, retain the confidence of the public. In opening the annual conference of Supreme and Federal Court judges in Auckland in January Gleeson CJ noted this phenomena and attributed it to the consistency and predictability of judicial decision making. The minimal percentage of disputes which call for a judicial determination is almost certainly because lawyers on both sides of a case can generally agree on what the outcome of the case will be and resolve the dispute without the need for a trial. Cases are resolved because the outcome of a trial is predictable. What the Chief Justice did not refer to, however, was the role the professions play in achieving this predictability. For a judge to consistently arrive at a result within an anticipated range is because of the level of assistance generally expected of and given by those who appear in the courts.

Judges do not have all the law at their fingertips. We are in large part dependant on the research and experience of lawyers involved in the case to identify the relevant precedents which govern the outcome. In *R v Ferguson* to which I earlier referred, the trial judge would have avoided embarrassment if he had been referred to the earlier authorities which were at odds with his own reading of the statute. If it were necessary for the judge to research every decision in full it would be impossible to deliver judgements consistently within an acceptable time frame.

One of the functions of a conference like the one now commencing is to educate the profession in recent changes and developments in the law so that the participants are better able to fulfil the important role of assisting in the resolution of disputes. Continuing Legal Education was a popular catch phrase in the 80's. It has since become such an accepted part of legal practice that it is unnecessary to attach a label to it these days. Nonetheless it is helpful sometimes to think why, in a practical sense, it is so important.

As the public becomes better educated to their legal rights it becomes ever more important to ensure that those rights are readily identifiable and their enforcement consistent and predictable. That is a key challenge for lawyers in the present age. I also kind of like the ring of 72% approval and would like to keep it. Any higher would seem smug. Too much less would be embarrassing.