

Sequiturs and Non

It is a silly language. Too many words in English have more than one meaning or they might be verbs, adjectives or nouns depending on their context.

One Chief Judge, whom I recall with a little affection (he recommended the approval of my application for Silk) had a very quaint, but unintended, way of exposing this silliness. This was in the course of his monthly speech at admissions to practice new barristers and solicitors. By way of exhortation, he would say something to the effect:

"You should, in your profession, always properly demean yourself. And I use the word 'demean' in its original and classical sense and not with its later pejorative meaning".

(The reader should imagine all this said with a beautiful Cambridge-Australia delivery).

The first time I heard this set patter, I went running for my dictionary to check the two meanings of demean and that (one only, thank goodness) for pejorative.

*Demean (1) ... behave
Demean (2) ... degrade
Pejorative ... disparaging or scornful*

(the reader will immediately spot the dictionary as *The Penguin* 2nd Ed. 1965)

"Aha!", I thought at the time, "I see what he means"

It would have been too simple, I suppose, for him to have said:

"You should behave yourself properly".

I was reminded of this the other day when, as part of my responsibilities to stay up to date with current legal matters all around the world, I was at my desk reading the *American Bar Association Journal* (The Lawyers Magazine - September 1995 ... at page 80, for those interested). The article I was reading commenced.:

"The public image of the legal profession can be pretty much summed up by the New Yorker cartoon in which a lawyer tells an acquaintance that he is 'not a lawyer in the pejorative sense'".

This in turn reminded me of some of the old saws (for which can also be

read "sores") about lawyers.

Anyone who has visited my chambers may have noticed the plaque containing the famous quotation from Shakespeare's Henry VI Part II (Act IV Scene II):-

"The first thing we do..., lets kill all lawyers".

Shakespeare, of course, was writing in the latter part of the 16th Century. The characters in his play - who voice the sentiments expressed above - were living in the previous century.

We lawyers sometimes think that our image problem is a modern thing. We might find some comfort (or perhaps even more consternation) in the fact that lawyers have always been disliked. A Roman's epitath read:

"From this tomb let all fraud and all lawyers be absent"*

Fortunately, lawyers have maintained an ability to laugh at themselves. Some of you might remember my favourite anti-lawyer joke which explains why, in California, they use lawyers rather than rats for scientific experiments. There are a number of punch-lines but the final one is:

"There are some things the rats just won't do."

The title of one of the articles in the *ABA* magazine referred to earlier, explaining why lawyers do not use one particular computer program, is:

Some just won't do Windows

Obviously this is an allusion to the same joke-line.

And it just as well we can grin and bear it - lawyers have always been the butt of jokes, innuendos and sarcasm. It is almost getting to the stage where we can make a class complaint to the Anti-Discrimination and/or Vilification Commissioners. Partially to combat the bad imaging and media imbalance, the Victorian Bar has, for example, in the last twelve months appointed a Director of Public Affairs.

Of course, we are not completely bad! We have partners and families that love us; we don't kick our dogs! (Well, not any more than any one else) and we do make contributions to the community outside of work hours.

In most concluded legal cases there is at least one loser. Thus, fifty percent of litigants are disenchanting with the

profession. If you add those litigants who have had judgment given in their favour, but have spent their life savings in doing so, then a further percentage emerges. There are other winners who are really losers (it is often said that the only winners in a court cases are the lawyers). It is obvious that a majority of those who go to court will be unhappy.

The community generally sees the lawyer as a nit-picker, pedant and loop-hole finder.

I suspect it might be the low standards of integrity maintained by the profession from the earliest of times which most contribute to the low standing of the profession in the community. It was apparently necessary in 1275 for the *Statute of Westminster*, C. xxix, to provide:-

... That if any serjeant, pleader, or other, do any manner of deceit or collusion in the King's Court, or consent unto it, in deceit of the Court, or to beguile the Court, or the party, and thereof be attained, he shall be imprisoned for a year and a day, and from henceforth shall not be heard to plead in that Court for any man...

Shortly after, the Mayor of London drew up a long list of the duties of a counter (or pleader) which included the following:

1. Not using foul language or insults
2. Not fighting the case for a share of the damages. (This would lead to being permanently struck off)
3. Not taking money from both sides of the case. (A breach of this led to suspension for three years).
4. Not approaching the judge without being invited to do so.

The second of these is interesting as it seems to frown on contingency fees. In the late thirteenth Century this prohibition was grouped with swearing, etc, but it will be noted from the penalty that it was regarded as the more serious offence. Yet, in the late twentieth Century, in Australia, we are considering acceptance of such fees as proper.

The first prohibition has traditionally been honoured in the breach. Sir Edward Coke, before he became Lord Chief Justice, was attorney-general. In 1603 he prosecuted Sir Walter Raleigh for treason. During the trial

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which reads like a disputative dialogue between he and the accused - he said:

I will prove you the notorious Traitor than even came to the bar.

Thou art a monster; thou hast an English face, but a Spanish heart...

I will track you out before I have done ...

You are the absolutist Traitor that ever was...

You (this to the members of the jury) respect not the wickedness and hatred of the man ...

... Thou viper: for I thou thee, thou Traitor

Raleigh: *It becometh not a man of quality and virtue, to call me so, but I take comfort in it, it is all you can do*

Coke: (probably with a sneer) *I have angered you?*

Thou has a Spanish heart, and thyself art a spider of hell.

There has never lived a viler viper!

Raleigh was convicted and sentenced to death. He was not executed until 1618. By this time, coincidentally, Coke was the Lord Chief Justice. Execution was sought from him in that capacity, and granted, Coke's performance in the trial was deplorable but was excused, a little reluctantly by Lord Chief Justice Popham, as being: *... out of the zeal of his duty, for the service of King ...*

Coke however, must have been an irascible counsel. In another case, the following exchange took place between him and Francis Bacon, who was the very first Queens Counsel.

Coke: *Mr Bacon, if you have tooth against me, pluck it out, for it will do you more hurt than all the teeth in your head will do you good.*

Bacon: *Mr Attorney, I respect you; I fear you not, and the less you speak of your own greatness, the more I will think of it.*

Coke: *I think scorn to stand upon terms of greatness towards you, who are less than little, - less than the least. [Hence he added some other similar expressions with (according to the reporter) an insolence which cannot be ex-*

pressed].

Bacon: *Mr Attorney, do not depress me so far; for I have been your better and may be again when it please the Queen.*

But even these were comparatively enlightened days. In the first century AD, Pompey was defending a man in Rome when Clodius, tried to shout him down, with the support of his gang. Then Clodius rose to speak. Cicero (who was present in Court, and an enemy of Clodius) reports:

Wishing to return the compliment outside gave him such an uproarious reception that he lost command of thoughts, tongue, and countenance.

After an hour and a half of uproar, Clodius gave up trying to make a speech, and turned to personal abuse.

"Who's starving the people to death?" he shouted.

"Pompey!" replied his gang.

"Who wants to go to Alexandria?"

"Pompey!" they shouted again.

Soon they were spitting at their

opponents, and a free-for-all broke out; Cicero beat a prudent retreat.

As will your correspondent.

— Rex Wild QC

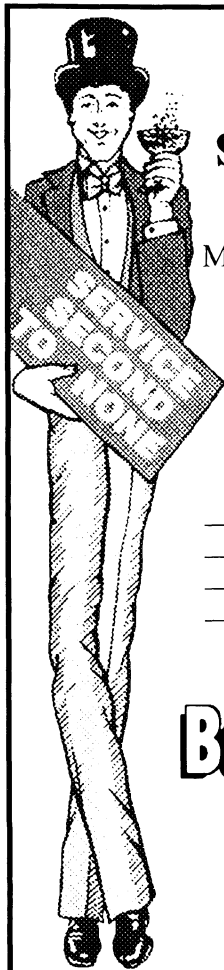
* I have not provided footnotes to what appears in this article. Any one interested in miscellany of barristerial history might like to read *All Jangle and Riot* (1986m, Professional Books Ltd) by RG Hamilton, an English barrister.

Statutory Derivative Action

The Attorney-General recently announced that the draft provisions, which will amend the Corporations Law to provide for statutory derivative action, are being released for public comment. Copies of the draft provisions may be obtained on (06) 250 6071.

Comments on the draft provisions should be provided by 8 December 1995 to:

Assistant Secretary
Companies and Accounting Branch
Attorney-General's Department
Canberra ACT 2600



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BOSCAINI REAL ESTATE

41 2238

71 McMinn Street, Darwin.

GPO Box 104, Darwin, NT, 0801 Fax 41 2284

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