

scholarship. After agonising, he decided to continue with his plans for the law. If he made the wrong decision, then he is no doubt now being given a second chance (to paraphrase something Jim Poulos recently said).

## The Hon. Russell Bainton QC (1930 – 2001)

By Peter Jacobson QC

Anyone who met Russell Bainton will tell you that he was a very quiet and private man. What many did not know was that he had an extraordinarily dry sense of humour which he delivered, usually, in a modest number of barely audible words. Sometimes they were spoken at the Bar table, but more often over a glass in his chambers. He was quick to laugh, particularly in the company of friends and colleagues.

He achieved an outstanding measure of success in over 40 years of practice. There were two reasons for this. The first was preparation. Bainton was always the complete master of the facts and the law in every case in which he was briefed. If expert evidence was involved he knew as much as, and often more than, the experts retained on both sides of the record. He was one of the few truly numerate barristers.

The second reason was his ability to reduce a case to its most essential propositions in a page and a half of tightly packed prose. This skill was probably innate but it was no doubt refined and reinforced when he read with D A Staff on coming to the Bar in 1955.

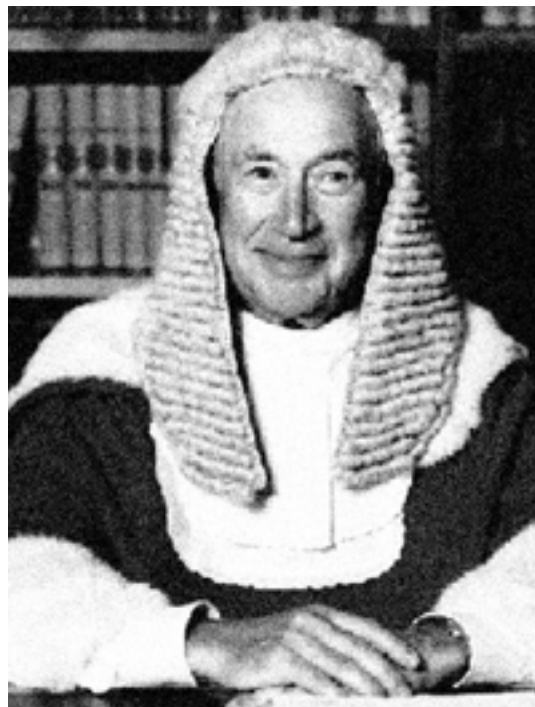
Bainton passed on his skills to a number of his readers including P.G. Hely and, later, to T F Bathurst, for whom Bainton was an unofficial pupil master.

Bainton was a man for the really hard case. He knew the issues on which a difficult case could be fought and won. An example of this was his defence of the claim for professional negligence brought against the auditors of the failed Cambridge Credit Corporation. He admitted liability but defended the claim on the ground that the liquidator could not prove causation.

At first instance, Rogers J found against the auditors and awarded \$145 million in damages. However, Bainton's approach was vindicated when he persuaded the New South Wales Court of Appeal to overturn the trial judge's finding of causation; see *Alexander v Cambridge Credit Corporation Limited* (1987) 9 NSWLR 310. His arguments in that case, and their acceptance in the Court of Appeal, were a precursor to the principle subsequently adopted by the High Court in *March v Stramare Pty Limited* (1990-1991) 171 CLR 506 (in which Bainton did

not appear); i.e., the ultimate test for causation is whether, as a matter of common sense, the negligent act or omission is a cause of the loss.

Bainton's skills were not confined to appearances in Australia. He appeared with success in the Privy Council. An example of this is *Cumberland Holdings Limited v Washington H. Soul Pattinson & Company Limited* (1976-77) 2 ACLR 307, an oppression suit, in which he succeeded



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in reversing the findings of Sir Nigel Bowen, then the chief judge in equity.

Another of his victories in the Privy Council was in *Borambil Pty Limited v O'Carroll* (1974) 48 ALJR 13. He appeared for the respondent. Their Lordships dismissed an appeal from a judgment of the New South Wales Court of Appeal on a determination of a fair rent under the *Landlord and Tenant (Amendment) Act 1948*.

Bainton was not always successful. He was known, on at least some occasions, to become cross with clients or solicitors who had misheard his advice. After one defeat in the Privy Council he said, 'I did not say you would win. I said you should win. My view has not changed.'

Bainton joined 11 Selborne Chambers on its establishment in 1958. He moved to 7 Selborne in 1974. He did so in order to fill a need which had arisen when the floor lost all of its commercial silks by reason of elevation to the Bench or otherwise. Bainton moved into the room which was vacated when Philip Jeffrey was appointed to the Supreme Court.

Brian Bannon, who was Bainton's clerk on seven, has said that when Bainton joined the seventh floor he had a well-established practice as a QC. He had taken silk in 1969 and Brian just 'polished his practice up a bit for him'.

Polishing up Bainton's practice seems to have included finding briefs for him outside his usual fields, which everyone (except for Bannon) thought were confined to revenue law, commercial law, corporations and securities law and professional liability.

In those halcyon days of the 1970s and 1980s no brief was ever allowed to leave the Seventh Floor. The powers of persuasion of the clerk were not inconsiderable. However, those powers came to an end after Bainton was persuaded to accept a brief for a defendant in a defamation trial. Bannon says that even Bainton's well-known and well-justified self-confidence was shaken by his loss; although only for a short time.

Bainton was a founding member of the Barristers' Superannuation Fund when it was established in 1957. He was a director, and later chairman, until his appointment to the Bench in 1995. During his chairmanship he ran the fund almost single-handedly from his own chambers. Of course this was done without fee and without fuss in the highest traditions of the Bar.

The same can be said of his elevation to the Bench. He accepted it at the age of 64 out of a sense of duty to the court to fill a vacancy which had arisen and for which he was thought to be the best candidate.

Despite his love for the law, Russell Bainton's first love was his family. His profession and his vineyard ran a dead heat for second. His many other interests were not far behind.

## Patrick Costello (1943 - 2001)

*A eulogy by Anthony J Bellanto QC, delivered at the memorial for Patrick Costello on Thursday 1 February 2001.*

At Pat's funeral service on Saturday last, at Byron Bay, following each of three eulogies, something extraordinary occurred. The large congregation applauded. Each eulogist spoke about his life and the response was typically Patrick: unexpected, spontaneous and enthusiastic.

When he was called to his maker on Saturday 20 January at about 11:10pm, his face changed and evinced a look that could only be described as angelic and at peace. The peaceful expression may have been because he had achieved his commitment to face the inevitable head on and complete a seamless transition to a better place. As for the angelic expression, Pat was generous, charming, stylish, flamboyant, gregarious and thoughtful - but he was no angel. The paradox is perhaps emblematic of his life - sometimes there is simply no explanation and he is up there keeping us guessing.

When my wife Trish and I arrived on that Saturday morning he waved his trademark admonishing finger (which has been known to capture the ire of many a

magistrate) and said 'I'll be watching over you two from up there'. He then demanded Chris Watson and I take his clubs and golf cart and have a game of golf - which we did. On returning he enquired who won. Winning was a passion reflected throughout his life, particularly in the law. His zeal in court often brought him into conflict with the bench and opponent and he shares the distinction along with my late father of being the recipient of some barbs from the New South Wales Court of Appeal. A decision which, incidentally, was split 2-1. Whilst such comments may deflate the egos of most of us, Pat embraced the challenge and honed his considerable forensic skills to become a fantastic cross-examiner, at times having the witness agreeing to propositions earlier disavowed or which the witness hadn't heard of.

A good way to judge an advocate is to speak to someone who has been opposed to them. Peter Hastings QC, who prosecuted on behalf of the Commonwealth Crown in a number of cases in which Pat defended, describes him in fond terms. They got on very well although Pat described Peter as his nemesis, commenting that he knew too much about his past.

Testimony to Pat's reputation and standing was reflected on the Monday following his death when Justice Reg Blanch, Chief Judge of the District Court, in open court made special mention of Pat's passing, expressing his and the Court's condolences.

Pat brought a charisma to the courtroom and on a good day would dominate the court. Even a busy court with a long list seemed to revolve around the matter or matters involving Pat Costello. The wake following his funeral last Saturday engendered such discourse that there were people mingling and talking about Pat from 11:30am to 9:00pm in the evening, swapping stories, anecdotes, all reflecting some aspect of Pat's life. It was a very special scene at the Beach Hotel looking out to sea across Byron Bay. Not only is it geographically idyllic, but a scene appropriate for such an occasion.

It is also worthy of note that the press has acknowledged his passing with obituaries and articles, again testimony to his reputation. The press loved him for his flare and colour, which transcended the courtroom.

At the Downing Centre recently I was in conversation with Major Joyce Harmer, the Court and Prison Chaplain and she spoke of Pat giving her a kiss on the cheek, asking how she was and if he could help her with anything. He often gave his time without fee for the underprivileged. He was humble and caring. Joyce said that when he was in the building it gave her a sense of comfort. Pat had this effect on people. She gave me her card and on the back of it were these words 'Never be afraid to trust an unknown future to a known God'. These words say a lot about Pat Costello whose fearless advocacy broke boundaries in pursuit of his commitment to his client but at the same time there was a deep humility and reverence for his God, perhaps the result of his Jesuit upbringing.

He was a straight shooter and expected the same in return. If Pat liked you, you had the feeling he was looking