

Judges, barristers and NT reminiscences

Ian Barker QC delivered the following address at a Northern Territory Bar dinner in Darwin on Friday, 26 July 2013

During the few intermittent moments of rational thought allotted to me, I sometimes ponder the relationship of barristers with judges.

Quite obviously, the system assumes respect and courtesy and reasonable conduct from both sides, and, generally speaking, it so works. As the NSW Court of Criminal Appeal put it, it is the duty of counsel and judicial officers to conduct themselves in a temperate manner (*Toner v Attorney General* (1991) NSW CCA p.8). This was in the context of a somewhat entertaining case which produced the catch words 'Barrister Shouts at Judge'. The judge convicted the barrister of contempt. The Court of Criminal Appeal quashed the conviction, holding in effect the shout was not loud enough to constitute contempt.

You may think that my theme of the relationship between barristers and judges is really a pretext in order to tell you about some of my favourite anecdotes. You may be right. You may well have already heard some which have been distilled from other papers of mine. Some are recounted in Dean Mildren's excellent book. If you have heard them, just sit back and think of Kevin Rudd. I won't be long. But when thinking about what to say, my interest was reinvigorated by a recent report from Queensland telling us that a judge there, having invited submissions from counsel, proceeded to say to the barrister, a little unkindly, 'You're an idiot. Do your clients know you're an idiot?'

Judicial disapprobation when it happens, is usually cast in less direct terms. But the disposition and prejudices of judges can have a significant bearing upon both the conduct and the result of litigation. Most judges retain civility and follow the same reasonable conduct they displayed whilst at the bar. Of others, it is sometimes said there was a speedy metamorphosis from judge hating barristers to barrister hating judges. Some, I have observed to my sorrow, quite quickly assume a mantle of almost terminal pomposity.

Contempt of court is a subject of endless prolixity in law reports and has been around since the

13th century. For example, it was contempt to draw a sword to strike a judge. It probably still is. Speaking very generally, a test whether conduct amounts to contempt is whether it interferes with the administration of justice. There was a rather unusual example in Alice Springs in 1962. Before then, criminal trials were by judges alone, without juries (except in capital cases). In arranging the first criminal sittings with jurors, the Attorney General's Department, true to form, forgot to revise the jury list so we had about 20 men from which to draw 12 jurors for about 10 trials (it was some time before women were allowed on juries).

Lawyers in Alice Springs were not thick on the ground, and I finished up appearing for the defence in, I think, 7 of the cases, in 6 of which the accused were acquitted. Clearly, I should have retired then and there. The seventh person was convicted.

What happened then infuriated Justice Bridge. The *Centralian Advocate*, published in the early afternoon after the conviction contained a blistering indictment of the jury system, saying (and I speak from memory):

Being tried by an Alice Springs jury is like buying a lottery ticket. They acquit 6 people then find a person guilty'. (And other comments in like vein.)

But the comments infuriated not only the judge. The jury panel sent the judge a note saying they would not sit any more until the newspaper's editor apologised. The judge had him hauled into court, where he did apologise, after receiving a scathing lecture. Part of the lecture was directed to the need for accuracy in reporting, and it was quite wrong to suggest the judge ate tomato sandwiches for lunch (as the editor had reported).

Personally, I doubt that falsely accusing a judge of eating tomato sandwiches is contempt, but Bridge J referred the whole matter to the Department in Canberra to consider charging the editor with contempt. That was in 1962. I understand the issues are still under consideration.

My earliest contact with the judicial arm of the

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government of the Northern Territory was with a magistrate in Alice Springs in 1961. Quite a nice man but a little over-steeped in the rich traditions of the law.

He once floated the idea that the Alice Springs Bar should observe the beginning of the legal year by parading robed along Todd Street, to the John Flynn Memorial Church, led by him. As the Alice Springs Bar at the time consisted of two practitioners, and as such a parade would inevitably have attracted to its ranks several drunks, a lot of children and fourteen or fifteen dogs, the idea was abandoned. At least, we managed to keep it suppressed. Alice Springs was not then ready for the law's majestic panoply. Certainly not in 40°C in February.

It was in those early days of my professional education that I met, or rather collided with, an extraordinarily short tempered judge from Melbourne, sitting in Alice Springs as the Supreme Court of the NT. He was a remnant of the old Industrial Court, regrettably appointed for life. The Commonwealth kept him where possible in the far north or at Christmas Island or in courts of marine inquiry sitting in the Arafura Sea, or at the very least north of the Tropic of Capricorn. That is not precisely accurate because Alice Springs is about 16 miles south of the line 23° 26 minutes south of the Equator. It used to be marked by a sign on the Stuart Highway saying 'Tropic of Capricorn. Drink Penfolds Wine'. I was never sure whether this was some sort of entry requirement, or an administrative mandatory adjuration or a mere invitation. At all events the ambiguity was cured by the present imposing stone edifice. The point of all this is that the judge in question, Justice Dunphy, sat in Alice Springs on an occasion in the early 1960s at a criminal sittings of the court. I was in the first of the trials.

Unfortunately the judge's associate, the Crown prosecutor and I lost track of time while having a cup of tea with the court clerk. The judge did not lose track of time. He kept a rigid hold on it and at precisely 10.00am he got on the bench and spent some minutes glowering at an empty court. Then some time was consumed in a thundering denunciation and a lecture about dignity owed to the court. Being young and naturally respectful, I apologised several times for the inexcusable and wholly disruptive five minutes delay, but it seemed to be of little avail. It all stopped when I inquired did he want me to grovel as well as apologise.

But I thought the judge's conduct in a trial in 1962 was instructive. My client was charged with killing a heifer, cattle killing being a serious offence (even though half the NT lived by the practice). He was a cook at the Warrego mine near Tennant Creek and one night went into town for a few beers. On his way back to the mine he says he saw what he thought was a kangaroo on the road ahead and shot it. To his horror, on closer inspection he discovered the animal was more bovine than macropod. But, the remains should not be wasted, so he butchered them then and there and took the meat back to the mine.

So he said in evidence. It was an honest and reasonable mistake (although I don't know what he had against kangaroos). As his evidence progressed, Dunphy J began to exhibit indicia of considerable stress, including an alarming reddening of the face and some foaming at the mouth. Finally he could stand it no more: 'What nonsense' he proclaimed, in front of the jury, 'everybody knows cows don't hop'. Well, apparently not, for the jury acquitted.

I scored the same judge in 1970 in a murder trial in Darwin. It was a strong case. Knowing the

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relationship between counsel and judge was, well, awkward, I was apprehensive of the effect this would have on the trial. I suggested to my client that he should consider pleading guilty to manslaughter. Is there anybody, I asked, who could attest to your good character?

He thought for awhile and said 'I have a mate in Brisbane who would help if he could' and then produced a letter from his pocket, from a home for the Criminally Insane. 'Why is he there?' I inquired 'Oh', he said, 'he murdered a sheila'. I said I didn't think this would be helpful. I mean I was really looking for a character witness, not an expert. I notice in Dean Mildren's book the client said 'murdered a sheik' which, if factual, would these days have added a terrorist dimension to the case. I am not often at odds with the former judge, but it was either my indistinct speech or a typo which caused the error.

At all events my client was tried and convicted of murder and I have the distinction of having acted for the last person in Australia sentenced to death. When asked how the day had been, I said it was pretty average, three bonds and a death. Fortunately a benign High Court quashed the conviction and substituted a verdict of manslaughter.

It was all a bit unnerving, particularly having to seek from the governor general monthly remissions of the death penalty.

Jury verdicts are, I think, usually arrived at without physical violence. However, I did once see a sort of sequel to *Twelve Angry Men*; it was less time consuming but a little more robust.

The old court house at Alice Springs was a converted house, in which the jury room was close to the library. I was sitting in the library one day waiting on a verdict. I was browsing through a book the Commonwealth had thoughtfully provided to the

Central Australian Bar, being Marsden's *The Law of Collisions at Sea*, when suddenly the foreman punched another juror through the jury room door, then dragged him back and slammed the door shut. Shortly after that they acquitted my client. I think it was a murder trial. The processes of reasoning by jurors are sacrosanct and I saw no reason to report the incident, to the detriment of my client. No doubt it could be argued that a juror may have acted under duress and therefore did not return a true verdict, but an examination of that proposition would have required evidence from the juror after the verdict. On the face of things we were entitled to retain the acquittal.

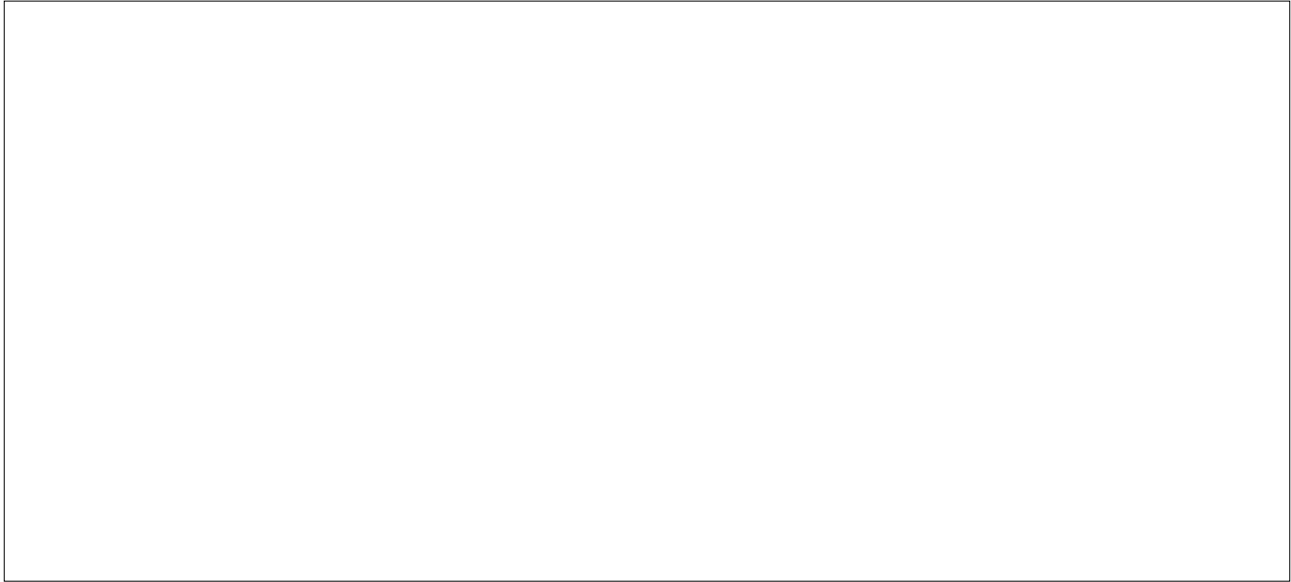
I may have seen things differently if the verdict was guilty.

As we all know, the rulings of judges have had a profound effect on the reception of evidence. Take expert evidence. Qualifying the witness was once a tolerably easy task, until Justice Heydon made it well nigh impossible to qualify anyone as an expert. But I like to think I made a modest contribution to the developing law, long before *Makita v Sprowles*.

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In the 1960s Central Australia was hostage to a lengthy drought. People forgot what rain was. Many children had never seen it. So watering regulations were enforced, one of which was you couldn't water your garden except by a hose held in the hand, and then for a limited time at night.

I had a client tried before a magistrate for watering outside the allowed times. He said his water meter was faulty and showed watering when there had been none. The prosecutor said the meter worked normally and called a government inspector to say so. I objected, on the ground that the workings of water meters were matters for expert evidence. The magistrate said, in effect, this was nonsense. If he



Government House after Cyclone Tracy. (Photo by News Ltd / Newspix)

wasn't an expert he would not have been called. 'You are an expert aren't you' he put to the witness, who answered in the affirmative. It seemed to me something was missing, and after debate the magistrate reluctantly allowed me to ask a question on the voir dire. It was, 'in what area of endeavour are you an expert'? He replied 'I am a tailor'. The magistrate finally gave in and rejected the evidence.

A little later a Tennant Creek man was indicted for forging and uttering cheques. He was one of Tennant Creek's professional alcoholics, a pensioner, an Irishman who found a cheque book in Paterson Street obviously left for him by God. He managed to sign and cash several cheques before he was arrested. Being honest, in an Irish way, he signed them all in his name with his signature.

A tolerably clear case, I thought, speaking from the perspective of counsel for a legally aided client who would rather be engaged in a more fruitful pursuit. But, clear or not, the Crown wanted more, so they called in an expert. He was a police sergeant who had convinced the commissioner of police that the NT police force needed a forensic science branch. He was then sent to Melbourne where he undertook a course in forensic science for three months and returned to Darwin an expert in ballistics, fingerprints,

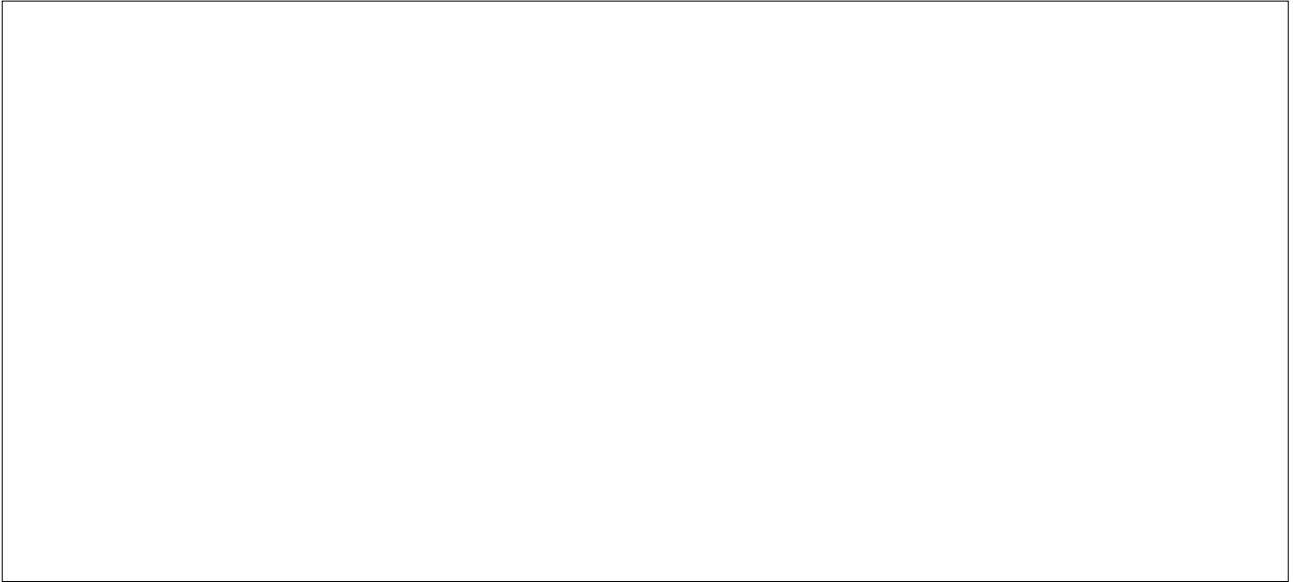
handwriting and the behaviour of cold steel under stress.

We were presented with myriad charts of samples of handwriting, all of which did no more than point to the bleeding obvious, which is that the signatures were written by the accused. Justice Blackburn let it all in, over objection. An argument was that the witness had never before given such evidence. The judge's response was 'if that is the case he will never be qualified'. I said I didn't know about that, but I would prefer he didn't experiment with my client.

We lost the argument. Post *Makita v Sprowles* we would have won but I think my client by then had long died from cirrhosis of the liver.

A history of what counsel wear and why is beyond the scope of this paper, except perhaps to justify an anecdote or two. Dean Mildren talks about the issue, for example, the criticism of Wells J for permitting counsel to remove wigs and gowns in 1933.

In my time fashions in court dress changed when progress came to Darwin. Before 1964, the Supreme Court building was a Sydney Williams hut in the Esplanade left over from the war. Somehow it had escaped the Japanese bombing. The building was nice enough, with bougainvillea trailing past the



Alan Stretton (back of picture) takes control of relief following Cyclone Tracy. (Photo by Bruce Howard / Newspix)

louvres, but it was not air conditioned, and during the rain no one could be heard, which meant that in the Wet court cases tended to proceed more or less intermittently. In those days one wore a robe over a shirt, with no bar jacket. When the second court building was opened in 1964, the late Justice Bridge decreed that because it was air conditioned, bar jackets would henceforth be worn. It was just as well really. The judge had very firm views about what the Darwin climate ought to be, quite ignoring what it was, and the temperature in the building required not only bar jackets, but jumpers and mufflers also. Litigants occasionally sustained frost-bite, but the advantage of the system was that you could chill a carton of beer simply by leaving it on the bar table. The need to leave the building during the morning adjournment was thus obviated. The present courts are pleasantly cool and who wants to drink beer in the morning?

I think the practise of law in Darwin has never been quite the same since Cyclone Tracy. The house of the chief judge blew over the cliff into Darwin Harbour; never to be retrieved. Justice Muirhead lost both his house and his Volvo car, the latter turning up some days later in Adelaide to where it had been driven by some people who stole it in Darwin on Christmas Day. They collected free petrol at Alice Springs on

the way, having apparently determined that pillage was part of the natural order of things. It may have been: I think we all teetered for a while on the brink of anarchy.

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I went into the court building on Boxing Day 1974. It was flooded. Court 4 contained a large and exceedingly dead turkey; I never learned why. It was clearly not sheltering from the storm. I sloshed my way upstairs and looked into the chief judge's chambers. Two young people were copulating on his desk, so I left again. I think I was the only one of the three prepared to withdraw. It was not something of which Sir William Forster would have approved, so I didn't ever tell him. I suppose it was another manifestation of anarchy, although it may have been the only dry place in Mitchell Street. At some stage some people had taken shelter in the robing room. For a long time there remained in one of the cupboards a large collection of dead butterflies, which the owner

had not thought to remove, although at the time it must have seemed important to safeguard them from the elements. For a long time there was a bottle of chloroform with them, but it disappeared eventually, to be used for purposes I dare not contemplate.

A bit of Australian history vanished in the cyclone, namely the wig once worn by Herbert Vere Evatt. It had somehow come into the custody of Tom Pauling, I think by honest means, but disappeared in the wind. Someone somewhere has a wig once worn by two erudite constitutional lawyers one once a High Court judge. So please return it. No questions will be asked except why did you want it in the first place?

The profession survived Cyclone Tracy. Lawyers may not be well-loved, but they are durable, and pillaging brought with it the necessity for people so accused to be legally represented. So work went on. For awhile there were no rules about court dress. I remember appearing before a magistrate for a man charged with stealing several trolley loads of goods from a supermarket on Christmas Day. I forget how I was dressed, but my instructing solicitor wore shorts, sandals, some sort of T-shirt and a baseball cap. His right to wear a baseball cap in court whilst instructing counsel went unchallenged.

The first such pillager was an enterprising man who, along with 10,000 others, took refuge in the Casuarina High School when the houses blew away. Representing himself as a Commonwealth police officer, he divested a man of a bottle of whiskey, informing him that alcohol was prohibited. The owner of the whiskey parted with his bottle without a fight, an unusual circumstance for Darwin. One can only conclude that after the cyclone he had no fight left. The impersonator was arrested and sentenced by a magistrate to nine months imprisonment, which was seen at the time, by some anyway, as a manifestation of emerging anti-Aboriginality. Whatever else, he showed himself to be a man of considerable enterprise. The case sparked a bizarre conflict between the magistrate and Darwin's de facto Executive, when General Stretton confronted the magistrate and attempted to assert some sort of authority over the court and its sentencing policies. He was ignored. The legality of the authority Stretton

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purported to exercise was always cloudy, to say the least, but he added a lighter dimension to a major human tragedy, and we all needed a laugh. I think he saw himself as a latter day King James in his feud with Sir Edward Coke about the powers of the Crown.

In 1978 I tended to see things a bit differently, being solicitor-general. It was an interesting office to have, because no one quite knew what a solicitor general did, beside prosecuting in poisoning trials. Such trials in the NT were, I think, a rare event. Subsequent solicitors-general, Brian Martin, Tom Pauling and Michael Grant, added learning and lustre to the office.

I do remember prosecuting one of Sydney's 'colourful identities' along with a police officer, for conspiring to possess large amounts of cannabis.

There are two anecdotes deriving from that case more or less relevant to my talk, which, as the bureaucrats would say, I would like to share with you. The first involved defence counsel from Adelaide who was given permission by the deputy sheriff to park his car on the court house lawn.

One morning I was sitting at the bar table wondering how I could best stuff up the day, when counsel complained to me that the Crown's principal witness was, as he said, 'having it off' with a young woman who was a court official.

Clearly, neither defence nor prosecution should have intimate contact with a court officer, at least until the trial is over. It is unlikely that such occasions of lust would occur in circumstances such as to infect the deliberations of the jury, but it may *look* bad.

'Well' I said 'I understand. Do you want to have the jury discharged?' 'Christ no' he responded, clearly believing he was on a winner. 'Just use your authority

to stop them doing it.' So I tried. I summoned the deputy sheriff, who marched in. He had a curious habit of standing at attention when I addressed him. I sometimes wondered whether he believed an invasion was imminent. I put the problem. In a sort of bark he said he would attend to it, and he and his powers marched off. I think he may have saluted.

The next day the parade returned. 'I have investigated the complaint' he barked. I sat expectantly. 'It's bullshit', he continued, 'the bastard is bonking her himself'.

I sat speechless. But he went on. 'I'll tell you something else. I've withdrawn his parking privileges'. He turned, saluted and marched off. I heard nothing more of the affair. The trial continued. The jury remained untainted and some sort of justice looked as though it was being done. The complaining barrister parked, in the public car park, with the common man.

But something else happened during the trial, a possible crisis handled by Justice Forster with considerable aplomb. He was probably the calmest judge I have ever seen.

The trial was about a large cannabis plantation out near the Queensland border, with a manager who lived at the plantation.

One day defence counsel said to me that he wanted to see the judge in chambers. So up we went: three barristers and three solicitors. 'Hello' said Sir William, 'what can I do for you?' The barrister said 'I want to put an accusation to this present witness but I thought I should raise it with you first.' 'I understand' said the judge, 'what is the accusation?' 'Well' he responded, 'I want to put to him that out there in the plantation at night he used to have sexual congress with his border collie'. Justice Forster remained imperturbable. 'I see' he said, 'to what issue would the questions be directed?' He responded 'they would go to his credit'.

Justice Forster said 'I suppose if the witness answered in the negative, you could not call evidence in rebuttal - the answer would really be the end of the issue'. 'That's right' said counsel.

Forster J gazed at him and said 'well, it seems to me

that if he affirms the allegation, his credit is forever established. I think no.'

So, this interesting bit of history to this day remains unexplored.

Let me return to the subject of the judiciary and the disposition of judges.

For a long time in Australia there has been a debate about freedom of speech, including the limit to which a journalist may go in stridently criticising a judge. It seems to me that journalists these days are all a little timid when appraising judgments they don't like. Back in 1890s the famous John Norton, founder of *Truth*, disapproved of the conduct of a NSW District Court judge called Docker, frequently referred to in the press of the day as Dingo Docker.

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In 1886 11 youths were tried for the rape of a young woman at Moore Park, before Windeyer J. The trial was widely regarded as farcical because of Windeyer's bias against the prisoners and the oppressive manner in which he ran the trial. Two were acquitted, four hanged and the rest served ten years after being reprieved. The *Truth* on 29 November 1896 reminded readers of the trial judge's morose and murderous will. The editorial went on to say:

The facts of the trial, together with WINDEYER'S conduct in keeping the jury sitting all night, after a protracted trial of four days, and compelling counsel to commence their addresses to the jury after midnight, and to continue them until nearly 4 o'clock in the morning; his monstrous summing up and almost diabolical determination to prevent as far as possible, the exercise of the Royal prerogative of mercy are too indelibly engraved on the public mind to call for recapitulation.'

But Norton aimed his main salvo at Docker J.

On 7 November 1896 Norton's the *Bulletin* observed that Docker (obviously sitting in quarter sessions) had caused juries to sit for 18 hours continuously and not rising until 3.45a.m. The *Bulletin* went on:

After the gross scandals incidental to the reign of the unspeakable Judge WINDEYER, surely the people of N. S. Wales do not contemplate setting up a tinpot imitation of the man from Tomago!...

Judges know, or should know, that the hearing of a criminal charge is not for the convenience of the jurors, is not for the convenience of the judge, but is for the extension of a fair trial to the accused. There are three courses open -

- a) to dismiss or otherwise regulate Mr. Docker;
- b) to pass an eight hour sitting Bill with regard to criminal trials;
- c) to enact that in cases where juries are being Dockered, they shall, at intervals of four hours during every night-sitting, receive hypodermic injections of cocaine sufficient to brace them up for the occasion.'

And during 1896 to 1898 *Truth* had such bylines as:

'Docker's Doings ... Quarter Sessions Scandals. BY A

TINPOT IMITATOR And Unworthy Successor of Sir William Windeyer.

DOWN WITH DOCKER! THAT'S how we speak of this subsidiary judicial snob and tin-pot autocrat...

DOWN WITH DOCKER. MORE JUDICIAL MADNESS. Crazy Crankiness from the Bench. Derogatory Dodderings by Docker.

DINGO DOCKER.. MAKES HIMSELF MORE KINDS OF AN ASS. His Zoological and Entomological Eruption.'

The most direct attack was probably in *Truth* on 17 April 1898 when Norton devoted an entire page to an open letter to Judge Docker. It included:

I propose to prove circumstantially and without circumlocution, that you are ... utterly unfit for your position ...

Your consistent conduct on the subordinate Bench has been alternatively that of an idiot and a brutal, bewigged

bully. Some of your judicial *obiter dicta* - the obstreperous observations of an ignorant, irascible jury ranter - would seem to indicate that a padded-room at Callan Park would be a fit and proper abiding place for you ...

You are one of the opprobrious spawn of the old Convict System; and would, had not Providence delayed your advent to this world in order to curse our Courts, have made an admirable member of the military rum-selling mob of martinets who mercilessly murdered, by the mockery of judicial process, men and women at the triangles and on the gallows. Your bullyings of counsel defending prisoners, your browbeatings of juries, your brutal behaviour towards prisoners, innocent and guilty alike, but more often towards the innocent, mark you out as a man devoid of all decency, and as a Judge whose vagaries would disgrace a Jack-Pudding.'

And so on.

The 1811 *Dictionary of the Vulgar Tongue* tells us that a Jack Pudding was a jester to a mountebank.

Those were the days.

Personally, I would hesitate to publicly call a judge a brutal bewigged bully fit for confinement in an institution for the insane.

This is not because I sometimes don't want to, but I don't see such statements as benefitting my practice or strengthening my hold on my practising certificate.

By the 1960s, disrespect of judges in NSW (publicly anyway) was largely limited to the bestowal of nicknames.

For example, who could forget the chief judge in Equity in the 1960s, known affectionately as Old Funnel Web. Then another Supreme Court judge, gracious and dignified, was called the 'stately galleon'. Another was 'the mechanical mouse'. Then there was the District Court judge, commonly called 'chook on speed'.

I have tried to limit my discourtesy to occasionally shouting at judges, but quietly. The applicant in *Toner v Attorney General* is now a District Court Judge. He may now and again shout at barristers. I wouldn't blame him.