

Duty of the Bar in the Conduct of Criminal Trials

A recent matter which came before the Bar Council raises an issue as to the duty of the Bar of which all barristers should be aware.

A barrister was appearing in a Criminal Trial. The judge was in the course of summing up when the trial was adjourned at the end of the day to the following day. The barrister had previously been briefed as junior counsel with senior counsel for a plaintiff in a civil trial the following day. It was a matter in which much preparation with senior counsel had taken place. The barrister was faced with a dilemma: which could should be attend?

He chose to appear in the civil matter with his leader. He arranged for the barrister appearing for the co-accused in the trial to look after his accused's interests.

The matter came to the attention of the Bar Council and was referred to a Disciplinary Tribunal comprised of Murray, Q.C., Martin, Q.C., and Horler to investigate and determine the question of whether the barrister had acted in breach of Rules 9 or 21 of the Bar Rules.

The Tribunal found that the barrister had breached Rule 9. It regarded his duty as clear. He should have made arrangements with his solicitor and senior counsel in the civil trial for alternative representation.

In its reasons for determination the Disciplinary Tribunal said:

"The Bench is entitled to be able to count on the Bar for every appropriate assistance during any trial: the community is entitled to have the Bar fearlessly and competently pursue, within the system, the interest of a client. Whilst the realities of practice as the pursuit of a living must be recognised by all, no competent barrister would permit self-interest to distort the paramount duty to the client: to be useful you must be present.

No competent practitioner would fail to appreciate the importance of the charge or summing up to the Jury, and the necessity of the presence of Counsel engaged during that procedure. Whether a written set of rules of legal professional conduct includes such a requirement or not, the all powerful standards of the Bar demand such conduct.

It is difficult to conceive of a situation short of emergency such as accident or illness which would involve the absence from the summing up of Counsel engaged: this requirement transcends any obligation of the Bar to accept a criminal defence task where the only conflict is a non-criminal brief — the N.S.W. Bar Association Rule 9 is merely an example of one aspect of this duty."

There were some matters of mitigation in the present case which led to a reprimand for the barrister and a requirement that he undertake three months extra pupillage.

The Bar Council reminds the Bar that Rule 9 requires criminal trials in which a brief is already held to be given priority over civil proceedings. This is all the more so where the criminal trial is part heard.

The trial judge's summing up is no less an important stage of the trial than any other. It is not proper conduct within Rule 9 to abandon the criminal trial in the above circumstances. In certain circumstances such conduct may well be a breach of Rule 21 in that it is conduct contrary to the standards of practice becoming a barrister.

Membership

1058 practising barristers were members as at 8th October 1986. They were in chambers as follows:

Wentworth	224
Selborne	175
University	42
Wardell	84
Edmund Barton	75
Blackstone	32
Frederick Jordan	54
Chalfont	30
Culwulla	16
Garfield Barwick	60
Windeyer	84
Mirvac	6
Lionel Murphy	4
Crowns Prosecutors and Public Defenders A.C.T.	23
Newcastle, Wollongong, Parramatta and Coffs Harbour	19
Others	43
Interstate and Overseas	29
	58

There were 16 Life Members and 290 Ordinary Members Classes "B" and "C"; the total membership being 1364.

Gifts

The Hon. D.F. McGregor, Q.C. presented the Library with Corben on Contracts. (This gift was made in 1985 and the Editor apologises for this late acknowledgment).

The Hon. Sir Gerard Brennan, K.B.E. presented the Library with 'The Inns of Court and Chancery' by W.J. Loftie and illustrated by Herbert Railton.

B.W. Walker presented the Library with 'Great Legal Fiascos' (S. Tumim) and 'Samuel Walker Griffith' (R. Joyce).

Four silver menu holders were donated by A.M. Gleeson, A.O., Q.C.

The Association appreciates these gifts and thanks the donors.

Religious Services

Services to mark the beginning of the Law Term were held as follows:

On Monday 3rd February a Red Mass was celebrated in St. Mary's Basilica. The Celebrant and Preacher was His Lordship Bishop David Cremin, D.D., Bishop of the Southern Region.

Also on Monday 3rd February the Reverend John Mallison, Th.L., Past Moderator of the Uniting Church, preached at a Service held in St. James', Queen's Square.

On Wednesday 5th February a Service was held in the Greek Orthodox Cathedral of the Annunciation.

On Saturday 8th February a Law Sabbath Service was held in the Great Synagogue. The Rabbi Apple was the Minister.

A mid-year Service was held at St. Stephen's Uniting Church on Wednesday 23rd July.

Reform of the Highway Non-Feasance Rule

The New South Wales Law Reform Commission is seeking comments on its reference on the reform of the non-feasance rule.

The Non-Feasance Rule

Because of the non-feasance rule, highway authorities are under no duty to road users to undertake positive measures to ensure that highways under their control are safe for normal use. Accordingly they incur no civil liability for injuries or damage caused by their failure to maintain or repair a highway. Nor can they be liable for failing to act to ensure the safety of the public in other ways, such as sign-posting or fencing off dangers occurring on or near the highway, or for failure to remove obstructions on the highway. Such failures to act amount to non-feasance.

Terms of Reference

The terms of reference which the Commission has received from the Attorney General under its Community Law Reform Programme require it to examine whether the non-feasance rule should be modified or abolished.

Need to Reform

A great deal of confusion surrounds the operation of the rule. The rule is subject to various ill defined exceptions and the central distinction between non-feasance and mis-feasance is unworkable and its operation unpredictable. However, this legal confusion is not the main reason for reform.

The major argument for reform is that individuals whose loss may be great are denied a legal remedy even if they are able to show that their injuries were caused by the negligence of a highway authority. On general principles of tort law those who can show fault are entitled to compensation. The non-feasance rule is anomalous in denying compensation.

Tentative Proposal for Reform

The Commission's tentative view is that the rule should be abolished. However we are conscious that limits must be placed on the liability of highway authorities. Limits could be provided by the enactment of statutory guidelines which define the circumstances in which liability is to be imposed. However the Commission believes that greater flexibility can be achieved by relying on the common law. Developments in the law concerning the liability of public authorities in other matters indicate that the courts are alive to the need to balance public and private interests.

Effect of Abolition

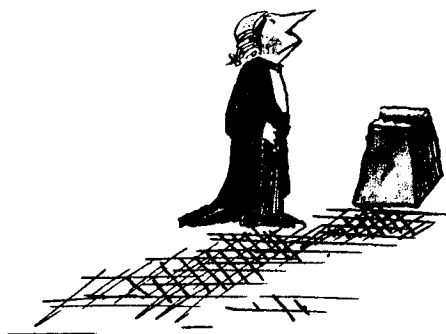
On abolition of the non-feasance rule the Commission would expect the common law to impose a duty on highway authorities to protect the public from unnecessary risk. This would not necessarily impose a duty to repair or maintain as on many occasions the obligations could be met by placing warning signs or protective barriers. The standard of care required would vary with the circumstances of each case, in particular with the class of road involved. This liability will be further tempered by the immunity for policy decisions taken by public authorities recognised by the High Court in *Heyman's* case 59 ALJR 564. This immunity would allow highway authorities scope

to set their financial priorities free from judicial scrutiny. In *Heyman*, Mason J said "a public authority is under no duty of care in relation to decisions which involve or are dictated by financial, economic, social or political factors or constraints. Thus budgetary allocations and the constraints which they entail in terms of allocation of resources cannot be made the subject of a duty of care."

Comments Sought

The Commission seeks comments on the matters raised above. As we intend to complete our Report in December we would like comments by mid-November. They should be sent to Ms Helen Gamble, Commissioner in charge of the Community Law Reform Programme, New South Wales Law Reform Commission, GPO Box 6, Sydney, 2001.

The Commission has expanded on the views expressed here in a consultative paper which it has provided to the President of the Bar Association. Copies are available from the Commission on request.



That Sinking Feeling . . .

In the course of the *Special Commission of Inquiry into the Policy Investigation of the death of Donald Mackay*, some counsel got very involved . . .

Bongiorno Q.C. (Victorian Bar)

Q: I tell you this that in the report of Mr. Justice Stewart into the Age tapes he has reported that Sgt Seedsman — and I will give it to you exactly as he said it — that Sgt Seedsman had had some 20 contacts with Trimbole shortly prior to his leaving Australia and that those contacts had been brought to the attention by Seedsman of the Assistant Commission for Crime, Mr. Abbott. If that were the case would it not have been do you think, and you may not be able to answer this, appropriate that someone should have told you that the police had some sort of contact with Trimbole at a time when you were contemplating charging him with conspiracy to murder. Should not the system have been such, assume that Sgt Seedsman's contact with Trimbole was at the request of and with the knowledge of his senior officers should it not in ordinary proper police communications have somehow been brought to your attention that this was occurring. (Objected to; allowed).

The question was read out by the shorthand reporter.

Bongiorno, Q.C.: "That's an appalling question — I withdraw it."

Motions & Mentions

Conferences 1986-87

Date	Conference	Place	Contact
November 12-13	Symposium — Financing in the new liberalised Japanese market	Tokyo	Lawasia
November 13-14	IBA Seminar Protection of Sellers in Transnational Sales	Hong Kong	International Bar Association 2 Harewood Place, London W1R.9HB, England
November 14-16	5th Victorian Legal Convention	Geelong	The Secretariat, P.O. Box 180, Geelong, Vic. 3220
November 17-20	Lawasia Energy Section 1986 Conference	Bangkok	Lawasia, 170 Phillip Street, Sydney
November 24-25	Seminar — National and International financing of commercial real estate: legal and business issues	Frankfurt	IBA, 2 Harewood Place, London W1R 9HB, England
1987			
January 22-25	Conference and workshop — Commercial arbitration	Colombo, Sri Lanka	Bar Association of Sri Lanka, 129 Hultsdorp Street, Colombo 12, Sri Lanka
February 15-18	International Bar Association Arab Regional Conference	Cairo	IBA, 2 Harewood Place, London W1R 9HB, England
March 6-7	IBA Seminar — rights and obligations of the parties to insurance contracts	Zurich	IBA, 2 Harewood Place, London W1R 9HB, England
May	IBA Seminar — International and financial law	Paris	IBA, 2 Harewood Place, London W1R 9HB, England
June 28-July 1	Section on General Practice Conference	Montreaux	IBA, 2 Harewood Place, London W1R 9HB, England
June 29-July 4	10th Lawasia Conference	Kuala Lumpur	Lawasia, 170 Phillip Street, Sydney
August 24-28	8th World Conference on Procedural Law	Utrecht, Holland	Utrecht University, Utrecht, Holland
September 10-11	Seminar — international arbitration	London	IBA, 2 Harewood Place, London W1R 9HB, England
September 14	IBA Seminar — Life after big bang	London	IBA, 2 Harewood Place, London W1R 9HB, England
September 14-18	Section on Business Law Conference	London	IBA, 2 Harewood Place, London W1R 9HB, England
September 18-20	9th National Labor Lawyers Conference	Perth	Nuala Keeting, Society of Labor Lawyers, G.P.O. Box P1596
September 20-25	24th Australian Legal Convention	Perth	Law Society of Western Australia G.P.O. Box A35, Perth
October 1-5	New Zealand Law Conference	Christchurch	Organising Committee, 1987 New Zealand Law Conference, P.O. Box 4459, Christchurch, New Zealand