OHMS: SOME REFLECTIONS ON THE BUSINESS OF OUR COURTS

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ABSTRACT: the author expresses regret at the importation of business management principles into the provision of a service to the public.

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THE recent receipt of a letter from the County Court of Victoria in a postage-paid envelope with OHMS in large bold letters adorned across the front redirected my mind to a matter with which I have been concerned for some time. [For those readers born after Armstrong and Aldrin's 1969 moon landing I shall return to the quaint subject of OHMS government postage later.]

Because of the reference in the letter to the external clients of the Court my first thoughts went back to last year's retirement address by Justice J.D. Phillips of the Supreme Court of Victoria, which in turn took me back to an interview with the then recently appointed Chief Justice (see Jason Silverii, "Supreme Court reclaims jurisdiction", 78(7) *Law Institute Journal* 24, July 2004 — coincidentally the same issue carried a report, also by Silverii, on the release of the Attorney-General's Justice Statement setting out the proposed directions of the Victorian justice system over the next decade).

When did the Victorian community, the public, become "external clients of the Court"? Is the convicted prisoner serving a long stretch a grateful client of the Court? Are civil litigants aware that generally only 50 per cent of them will become satisfied clients? Surely, the mission statement of the Court should aspire to a higher satisfaction quotient than a mere 50 per cent! How on earth can the Court's CEO expect the ISO 9001:2001 "World's Best Practice" tick for compliance/accreditation with such a low rate of client satisfaction? Can the Court simultaneously deal with two clients whose interests are diametrically opposed without being compromised? Are there internal clients of the Court? Who are they? What is wrong with the old-fashioned terminology of serving the public, except that it may possibly conjure up the

vision of a meek cardigan-wearing middle-aged man who lacks the get-up-and-go to obtain real employment: a public servant.

The fact of the matter is that the courts exist to resolve disputes that in a less civilized society would be settled with sticks and stones, with the attendant drain on our medical and hospital resources. The courts exist to serve the needs of the community and unlike a commercial enterprise they should not be seeking to expand their business. Indeed a utopian society would have court officers and staff drawing unemployment benefits. Similarly for employees of penal institutions. Are penal inmates referred to as clients by senior management?

Why is this so? Unfortunately the management of our public service institutions do not enjoy the connotation of themselves being cardigan-wearing public servants and wish to cloak themselves in the garb of practitioners of a profession — a profession which does not deal with the public (it being too infra dig to have any association with the mobile vulgus) or render service to the community but instead renders services to its clients. Thus the resort to style over substance in order to pander to their vanity when they have nothing otherwise of which to be vain. They are unable to comprehend that a public institution and its officers are here to further the public good and not the other way about: it is not the role of the public to further the interests of the public institutions and their officers.

Is it possible for a disappointed litigant to bring a suit in negligence against a judicial officer based upon a breach of the duty of care owed to a client? This is against the whole line of authority that confers absolute privilege on such judicial officers and even prosecution officers (I have never been able to figure out the

basis on which a well-known Melbourne business figure was supposedly suing the DPP for wrongful prosecution after his judge-directed acquittal). Is it that the immunity from suit can be lost merely because some mid-level bureaucrat suffering from an inferiority complex seeks to boost his self-esteem?

Bar News readers may be surprised to learn that Justice Phillips's retirement speech of 17 March 2005 was widely reported and commented upon editorially: not only in *Bar News* (issue 132, page 48, Autumn 2005) but also *The Age* and elsewhere, and it figured in a National Press Club address by Richard Ackland. Consequently it can be found at many websites besides that of the Supreme Court of Victoria. [Doubting readers should do a Google search for the phrase "Business Unit 19".] Readers will recall that Justice Phillips spoke with regret on the increasing erosion of the independence of the courts (and in particular the Supreme Court). Your correspondent encourages readers to read the whole speech rather than rely upon his single-sentence summary.

I confess to some reluctance in broaching the subject of the article based on an interview with the Chief Justice six months into her office. Initially I feared that the journalist may have inadvertently written an unbalanced account of the Chief Justice's views and an assessment of her views as reported could be erroneous. In the 18 months since the publication of the article there has been (to my knowledge) no complaint or request for correction. It is a brave or foolhardy editor or journalist who declines to act upon a complaint or request of a Chief Justice. Thus I have concluded that the *LJJ* article was "accurate".

The thrust of the article was that the

Supreme Court was actively seeking to grow its business by taking over cases that were previously brought in the County Court as evidenced by the then recent transfer of an important drug trafficking case from the County Court to the Supreme Court after an unopposed application by the Director of Public Prosecutions. This had followed from the Supreme Court's encouragement of the DPP to "look to [the Supreme] Court on the basis that it has the senior criminal judges in the state and [it] will endeavour to accommodate these trials". The *LJJ* report included the concurrence of the DPP's office in fully supporting the Chief Justice in this initiative. Unfortunately the article fails to explain the DPP's rationale in bringing this trial before what was later thought to be the less appropriate forum of the County Court. The article also does not canvass the issue of appeals from the County Court on the ground that it was a less appropriate forum in which to prosecute a major non-homicide trial.

The Chief Justice also indicated that the Court was seeking to attract more complex civil trials and has issued an invitation to the legal profession to closely consider the Supreme Court.

The Chief Justice's initiative does not canvass the costs penalty incurred by a successful litigant imposed by the Supreme Court (General Civil Procedure) Rules 2005 (S.R. No. 148/2005), in particular Rule 63.24: Money claim in wrong court. There is an exception to the penalty imposed by this rule where the case has been transferred to the Supreme Court under the *Courts (Case Transfer) Act 1991*. Presumably a case that has been thus transferred with the approval of a judge is, by definition, not a claim in [the] wrong court. However, this does not assist

the party whose solicitor has taken up the CJ's invitation to commence proceedings in a forum that may later be held to be "wrong". Perhaps Rule 63.24 should be headed "Money claim in less appropriate court".

Similarly the article does not explain why it was that the DPP's application for "uplift" to the Supreme Court was unopposed. Surely no practitioner would approve of such an uplift merely to draw on the higher professional fees allowed

trial. Maybe it was explained to the client that opposing the DPP's application would require further additional funding?

It is this minimal reference to the lay client in the article that causes concern. It may be that the CJ, when issuing her invitation to the legal profession to closely consider the Supreme Court, meant for the profession to always keep in mind the interests of the profession's clients and that it was unnecessary to expressly spell this out as it was obvious to all, with all understood to include the CJ, the profession, the officious bystander, and everyone else (even Uncle Tom Cobley). Well, it wasn't that damn obvious to your correspondent but I suppose it is not unreasonable for the CJ to cast her message only at those with a higher IQ than that of your correspondent, who is admittedly a bit of a dill. And it certainly didn't come out in the article. Otherwise, the lay clients may well rue the veracity of George Bernard Shaw's dictum that all professions are conspiracies against the laity. In fairness to the CJ, the article reports her as saying the "aim was to provide a better service to litigants ...", and providing "a best practice, best standard service to the citizens of Victoria", and includes a reference to the need to dispose of a large number of common law trials quickly because the plaintiffs are ill.

Of further concern to me is the intent of the CJ to "grow the business" of the Supreme Court at the expense of the County Court. If the Qantas subsidiary JetStar can grow the business by creating further demand or by "stealing" passenger seats from Virgin Blue then well and good — I am sure that Allan Fels and Graeme Samuel will applaud. It is a different matter, however, if JetStar can only grow by cannibalizing Qantas sales. One of the ear-

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for? Presumably their decision not to oppose the DPP's application was on the instructions of their client and only arrived at after full and frank advice to that client with that client wishing to avail himself of the Court with the senior criminal judges in the state and which will endeavour to accommodate his criminal

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liest and more successful of the business “how to” books was that of the 1970s CEO of the American car rental company Avis, Robert Townsend, who described a similar idea in his *Up the Organization*. Having dreamt up the idea of a no frills budget subsidiary of the parent car rental business he sounded out his top executives on the idea. One responded in no uncertain terms that “I don’t know what you call it, but us Polacks call it pissing in the soup”.

Thus, while I disagree that the business of the Supreme Court (or any court) is to “grow the business”, at least such growth, if sought should be at the expense of a competitor such as the Federal Court or perhaps the Supreme Court of NSW or perhaps some of the alternative ADR providers springing up lately. The County Court is not a competitor and if growth of the Supreme Court’s business can only be achieved at the expense of the County Court then no amount of seasoning will disguise the taste and smell of urine in the consommé.

It is this sort of biz-speak that has the Federal Productivity Commission in a recent report purporting to assess and rank the nation’s courts on their productivity. How? It is not as though we wish to compare a Victorian dairy with its NSW counterpart where each are producing similar litre cartons of milk. How does one compare the Federal Family Court with the NSW Land and Environment Court? Or the WA Mining Warden’s Court with the Queensland Court of Appeal? In regard to the major drug trafficking case uplifted from the County Court to the Supreme Court; does this result in an improved productivity score for the County Court in that it has successfully disposed of the case with minimal expenditure of resources?

How about the successful defence submission early in a criminal trial where the trial judge, upholding the submission, directs the jury to return an acquittal. Years later, upon the hearing of the DPP’s appeal (brought by way of a case stated) the Court of Appeal upholds the DPP’s case stated, which result does not in any way prejudice the acquitted defendant. Does the criminal trial, completed early with the judge-directed acquittal earn the Productivity Commission’s praise? What happens to the next years productivity assessment after the Court of Appeal has upheld the DPP’s case stated?

All this biz-management cant reminds me of the Northern Territory defendant in a case where an expert witness responded to a defence suggestion that he was mistaken by saying, “That’s why I’m the expert.” The defendant was reported to have turned to a friend in court and, mouthing the words “I’m the expert”, gestured as if masturbating.

As earlier promised, I now return to the postage-paid OHMS envelope carrying the recent correspondence from the County Court. Back in the days before user-pays and economic rationalism the government instrumentalities were exempt from government fees and charges — thus the electricity generating utility did not pay postage charges and the Post Office did not pay for its electricity consumption. Such government instrumentalities used OHMS emblazoned envelopes in lieu of postage stamps. On this point alone the presence of the OHMS on a postage-paid envelope is an anomaly. Perhaps this was the result of some economically minded management executive utilizing a vast unused store of such envelopes that was the subject of an over-order back in the 1960s. If so I would applaud such initia-

tive. Alas it is not so — witness the return address at 250 William Street and the printed square “Postage Paid Melbourne Vic. Aust. 3000” located at the top right placing the origin of these envelopes in the last few years with the Court’s new location.

What on earth would inspire a nameless bureaucrat in the Court to order such stationary in the 21st century, long after inter-government immunity from charges was done away with? Isn’t it totally out of place in these days of management-speak, mission statements, style taking precedence over substance, ASA-certified compliance and other meaningless artifacts designed solely for the purpose of justifying the huge fees charged by outside consultants? It is speculation only but I have a suspicion that those who are horrified by the appellation “public servant” do, deep down, harbour the desire to be seen as authorized to act On Her Majesty’s Service (à la the debonair James Bond): deep down inside every public servant there is a Walter Mitty who dreams of slaying dragons and rescuing fair maidens.

Perhaps I protest too much — surely the existence of OHMS envelopes is an indication that the privatization of our courts is not imminent, for which we should be grateful.

[STOP PRESS: this article was written and submitted, and the decision made to publish, before the occasion of Justice Ormiston’s retirement address (see the front page report in *The Age* by Fergus Shiel — 23 February, 2006). While *Bar News* has covered Justice Ormiston’s retirement elsewhere in this issue we are of the view that his observations on the “business of our courts” reinforce the tenor of this article.]

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