More Tricks for New Players

M M Park [Published 86 Victorian Bar News 61-4 (Spring 1993)]

Abstract: a further collection of anecdotes involving bold, insouciant, or impudent behaviour by counsel directed towards the court or the practice of law.

The editors wish to emphasise that they accept absolutely no responsibility for, and do not warrant the efficacy of, any of the stratagems described herein.

On a less sombre note, the editors are pleased to announce a new competition with the winner to be rewarded with a bottle of Essoign plonk.

Readers will note the first extract below is from Paul O’Neill’s Life magazine article on the legendary US criminal lawyer Edward Bennett Williams, whose clients have included Alger Hiss, Leona Helmsley and Michael Milken. The editors are of the view that O’Neill’s prose is of the “fly-blown” rather than the high-flown variety and consequently, inspired by the English Lit Department of an American university which has an annual Bulwer-Lytton Fiction Award for the worst opening sentence of a novel, propose to make a similar award for such prose arising in a legal context — perhaps the award could be dubbed a “Drakey”.

Negotiations have not yet been completed but the editors are seeking to enlist Mr Justice Byrne (qv 82 Bar News 7, Spring 1992) to judge the award. So let’s hear your example of convoluted, tortured and regrettable imagery. Would-be entrants should not be dissuaded from submitting suitable examples for judging because of their reluctance to subject the physically disabled (gnawed elbows) Byrne J to the onerous task of judging the entries. We hope to announce shortly that Mrs Justice Byrne will turn the pages for His Honour.

LAWYERS’ ETHICS: DEFENDING THE CRIMINAL CLIENT

A criminal lawyer, like a trapeze performer, is seldom more than one slip from an awful fall, and because he must swing rascals away from the clutches of the law to get top billing, he is eternally pinned in the hot arc-light of controversy. If he drops his client in mid-air, he is damned for clumsiness. If he slides the sinner down the guy-wire near the exits, he is absolutely certain to be booed by those in the audience who feel the miscreant will get home ahead of them and steal the silverware. If he grows
reckless in his zeal to win, he may learn, too late, that no splints yet invented will heal a lawyer’s broken reputation.

O’Neill, *Life* magazine (22 June 1959)

**Adapting Well-known Quotations**

As Fortas hammered away at the prosecutor’s arguments, the lawyers on the defence side took heart. One scribbled an epigram on a piece of paper and passed it to a friend:

“If God be Fortas, who can be against us?”

Shogan, *A Question of Judgment — the Fortas case and the struggle for the Supreme Court* (1972) 123

The judgments of Associate Justice Frank Murphy (US Supreme Court, 1940-8) were described as embodying “justice tempered with Murphy”.


**Learn from your Clients**

Wednesday, 19 November 1947

Garner Anthony, an old student of mine and former Attorney-General of Hawaii, dropped in to say hello. He is a very successful lawyer in Honolulu and I greeted him with, “Anthony, I hope you are not making too much money”. And he said, “Don’t worry, Sir”. I said, “You know, too much money isn’t any good”. He answered with vehemence, “I can assure you it isn’t. In observing some of my clients, I find ample proof of that.”

*From the Diaries of Felix Frankfurter* (ed Lash, 1975) 328

**Judicial Independence**

The responsibilities of the Chief Justice were, of course, considerable. Decision making and opinion writing were a substantial part of his work, of course. He had certain procedural duties and prerogatives: he arranged the Court agenda, presided over the Court at open argument and closed conference, and assigned the writing of opinions when he was in the majority. But he was one vote in nine, one among equals, a fact nicely illustrated many years earlier by Justice James C McReynolds’s answer to Chief Justice Hughes when Hughes one day despatched a messenger for his colleague — it was late, Court was about to open, and the brethren were waiting impatiently in the robing room behind the bench for the absent member. Reported the messenger to Hughes: “Justice McReynolds says to tell you that he doesn’t work for you”.

Justice WH Rehnquist (as he then was), “The Supreme Court: Past and Present”, *59 ABA Journal* 361 at 362 (1973)
**SOLICITUDE TOWARDS YOUR OPPONENT’S CLIENT**
In one trial in which Mr Wildman’s client was charged with negligence by a middle-aged businessman whose wife died in an auto wreck, he had his attractive blonde secretary come into the courtroom at the end of the trial and sit next to the widower. Following Mr Wildman’s instructions, she asked the man an innocent question, smiled, patted his hand and left. “Just one look at the cold expressions on the lady jurors’ faces was enough to tell me that we were home free”, Mr Wildman recalls with a smile. “When the jury came back [with a verdict against him] the plaintiff’s lawyer never knew what hit him. You see, the entire interchange took place while he was facing the jury in the midst of his closing argument.”

O’Connell, *The Lawsuit Lottery: only the lawyers win* (1979) 32-3

**GUIDE AND ASSIST YOUR INSTRUCTING SOLICITOR**
To a solicitor who sent Tim Healy endless further observations about a case, he wrote, “Ammunition is what I need, not stores”.


**LEGAL PROFESSIONAL PRIVILEGE**
Joey Adams cracked jokes about Roy’s loose tongue: “The wonderful thing about Roy is loyalty. As you know, what goes on between the lawyer and his client is privileged information. When you tell something to Roy Cohn, you’re guaranteed of absolute confidentiality. Nobody will know about it, nobody but ‘Page Six’ of the Post, nobody but Liz Smith at the News.”


**ENDEAR YOURSELF TO THE BENCH**
A political decision. Who are those three old farts in the Court of Appeals, who give us a fifteen minute argument and obviously, despite what they say, did not read the record?

Disappointed plaintiff’s attorney Barry Nace after the Court of Appeals overturned a $1.16 million jury verdict in favour of his client.

Huber, *Galileo’s Revenge: junk science in the courtroom* (1991) 123

**CUTTING THE GORDIAN KNOT**
In one session, a judge explained how he resented the catch-22 created when a social services department refused to return to their mother the children of a woman who had completed a residential alcohol treatment program because, in the interim, she had lost her subsidized housing. At the same time, the housing bureaucracy denied her eligibility until she had her children back. The judge said he ordered the state to pay for a motel to house the woman and her children until the state bureaucracies could
work out something more permanent. Another judge interrupted, “You can’t do that”.
“Well, I did it”, said the first judge.


**FAMILY LAW**
After the quasi-ex-husband had departed, the petitioner spoke to me. I expressed some surprise at seeing them together.
“Oh — we’ve been staying here together during the case”, she told me.
“Not as husband and wife?” I exclaimed in horror.
“Oh — no, not exactly. We did have separate rooms, though we managed to make love every night. I never could resist the beggar”.

I don’t know what the judge would have thought of litigation by day and copulation by night.

Parris, *Under my Wig* (1961) 177

**USER PAYS**
“The statement that genius is the capacity for taking infinite pains might have originated in speaking of the justice”, said [Justice Brandeis’s third law clerk Dean] Acheson about Brandeis’s approach to opinion writing. A Brandeis decision went through many drafts; he scrawled out the opinion with pen, sent it to the printer to be set in type, and then revised the galleys. He would do that four, five, sometimes twenty times, a revision often being a complete rewrite.

Because Brandeis put his decisions through so many revisions, using the Supreme Court printer as a typewriter, he offered to pay the costs of his revisions. “It would not, in the least, embarrass me to pay”, he told Chief Justice Taft. But Taft would not allow it: “I think we would make a great mistake if we allowed the fear of expense to interfere with the necessary procedure in making our opinions what we wish them to be …. It is a legitimate and necessary expenditure in the discharge of our duty.”


**STATUTORY INTERPRETATION**
In 1981 the telephone number of a woman named Rita was enacted into law because it had been scribbled in the margin of the only copy of an amendment being voted on, and the following day it was duly transcribed into the printed copy of the bill.

Tribe, *God Save this Honourable Court* (1985) 131
ENCOURAGING SCHOLARSHIP
The cleverest thing said about [Sir Samuel] Griffith’s version [of Dante] was said by Sir Julian Salomons. When Mr WM Hughes became Attorney-General of the Commonwealth, the Bar rather sneered at the idea of a “junior” with not much practice becoming the official leader of the Bar in Australia. But Salomons took wider views, and made a point of “calling on” the new Attorney-General. The two men found plenty to talk about without law, and a cordial liking led to Hughes being invited to Salomons’s house. He was shown pictures and curios and books of interest, and presently Salomons took up Griffith’s translation of the *Inferno*.

“Look at this book, Mr Hughes! Notice the inscription! ‘From the author’. I was very careful to get that put in. You see I’m an old man now and I don’t know what may become of my belongings. I shouldn’t like anybody who might pick up this book with my name on it to think I had stolen it! *Still less, that I bought it!*”

Piddington, *Worshipful Masters* (1929) 240

ADVANCEMENT
(i) The Labour Government was perhaps moved as much by fear of being accused of finding “jobs for the boys” as by lofty principles. It is a fear from which the Tory Party has always been free, no doubt because of its supreme confidence that its members are divinely ordained to occupy all the important posts in the State.

Parris, *Under my Wig* (1961) 117

(ii) “Become a Tory”, Lord Hewart is reputed to have advised a younger colleague at the Bar. “The Tories have all the loaves and most of the fishes.”

*Id.* 118

LEGAL SCHOLARSHIP
“Roy [Cohn] would have been a great lawyer”, an older colleague in the US Attorney’s office said in an affectionate remembrance, “if he’d ever cracked a law book.”

Van Hoffman, *Citizen Cohn* (1988) 75

CLARITY IN COMMUNICATIONS
A crusty and humourless man, [Harold] Ickes was a self-described curmudgeon who delighted in fighting critics. “Although I … have never met you, I feel that I know you very well as a cowardly, skulking cur”; he once wrote a publisher whose newspaper had printed an unflattering editorial. “I can see you in my mind’s eye eating
your own vomit with relish but enjoying even more the savour of the excrement in the pigsty in which you root for choice morsels.”


**DON’T ACCEPT GIFTS FROM CLIENTS**

One of Birkett’s best lay clients was an old man with a white beard and deceptively courtly manner, named Tommy Evans, a professional pickpocket, whose acquittal Birkett secured on three occasions. Happening to meet Tommy on a railway station, where he was catching a train, Birkett admonished the pickpocket to mend his ways, as he could not rely on [Birkett] to get him off a fourth time. While they were talking, Birkett, whose mind was on the departing train, felt for his watch and discovered to his annoyance that he had forgotten to bring it with him.

“What’s the matter?” asked Tommy Evans. “Haven’t you got a watch?”

“No, confound it — I must have left it at home.”

“Wait a moment, guv”, said Tommy with his usual innocent-looking air. “I’ll get you one!”

Fortunately the whistle blew at this moment, and Birkett was glad to bolt for his train.

Hyde, *Norman Birkett — the life of Lord Birkett of Ulverston* (1964) 72-3

**ROUNDABOUTS AND SWINGS**

As one old country lawyer used to rationalize when he was criticized for winning too often, “When I was young, I lost a lot of cases I should have won. Now that I’m older, I win a lot of cases I should lose. Justice gets averaged out.”

Spence, *With Justice for None* (1989) 125

**CLINCHING THE CASE WITH YOUR CLOSING ARGUMENT**

It is prevailing wisdom in California courts that murder cases without bodies are won or lost in closing arguments. One story, perhaps apocryphal, has a defence lawyer winning his case with the following ruse. As he finished his closing remarks, he dramatically withdrew his pocket watch and announced to the jury, “Ladies and Gentlemen, I have some outstanding news. We have found the supposed victim of the murder alive and well, and, in exactly one minute, he will walk through that door into this courtroom.”

A hushed silence falls over the courtroom, as everyone waits for the momentous entry. At the end of the minute the lawyer turned towards the courtroom door and shouted the victim’s name. Nothing happened.
The lawyer then said, “The mere fact that you were watching the door, expecting the victim to walk into this courtroom, suggests that you have a reasonable doubt whether a murder was committed!” Pleased with the impact of the stunt, he then sits down to await the acquittal.


Not bad, eh! But do be wary of the other version clearly demonstrating the danger in such a ruse. It is included here as a cautionary note.

**Clinching the Case for Your Opponent with Your Closing**

Again, pleased with the impact of the stunt, the lawyer sits down to await an acquittal.

The jury is instructed, files out and returns ten minutes later with a guilty verdict. Following the proceedings, the astounded lawyer chases after the jury foreman to find out what went wrong. “How could you convict?” he asks. “You were all watching the door!” The foreman explains, “Most of us were watching the door. But one of us was watching the defendant, and he wasn’t watching the door.”


**Family Law**

(i) The plural of spouse is spice.

(ii) One man’s mate is another man’s passion.

**Payment into Court**

A long time ago it is said that an irrepressible Irish barrister, appearing for a plaintiff, told the jury how much money the defendant had paid into Court.

When he had recovered his breath the appalled judge, shaking with fury, said that never in his life had he heard such monstrous behaviour at the Bar. “I have been at pains to look the matter up in the books”, came the answer in a satisfied brogue, “and I find, my Lord, there is no law against my telling the jury this. It is merely” — an expressive gesture waved away the triviality — “merely a gross breach of professional etiquette.”


And, perhaps, therein lies the origins of Order 26, rule 5 and Order 63, rule 23

**Confining Precedent**

Justice Stewart asked whether he was right in his impression that Fortas was not arguing for the old proposition that the Fourteenth Amendment had incorporated the Sixth Amendment as such. Fortas agreed — he was not. But the answer that pleases one justice may arouse another, and this one aroused the member of the Court who
had been arguing for a generation that the Fourteenth Amendment incorporated the entire original Bill of Rights — Justice Black. He asked in a puzzled way why Fortas was laying aside that argument.

“Mr Justice Black”, Fortas replied, “I like that argument that you have made so eloquently. But I cannot as an advocate make that argument because this Court has rejected it so many times. I hope you never cease making it.”

Justice Black joined in the general laughter.

Lewis, *Gideon’s Trumpet* (1964) 174

**SHARING DOMESTIC CHORES**
I let Earl go with me to a delicatessen just once. We never could afford it again.

Nina Warren, on shopping with husband Chief Justice Earl Warren

**RESPECT YOUR OPPONENT**
Once when opening an argument before the Full Court, Sir Julian Salomons said, “This really is a short point, Your Honours. My learned friend has brought his whole library into court, but that, Your Honours, is only because he is apprehending some harshness on the part of his landlord.”

Blacket, *May it please Your Honour* (1927) 34

**SET A GOOD EXAMPLE TO IMPRESSIONABLE YOUTH**
In 1928 he turned up for the Oxford *versus* Cambridge match very obviously the worse for drink, wearing the loudest check suit, and accompanied by his faithful cairn terrier, Jane, for whom an exception had to be made to the rule that dogs were not admitted; he was propped up just enough to deliver his usual sparkling speech, as witty as ever, but then, before the eyes of the delighted undergraduates — still holding a drink in one hand, a cigar in the other and Jane tucked under one arm — slid gently under the table.


**PICKING THE BRAINS OF YOUR COLLEAGUES**
It is told of a popular solicitor that he called upon another brother of the profession, and asked his opinion upon a certain point of law. The lawyer to whom the question was addressed drew himself up and said, “I generally get paid for what I know!” The questioner took half-a-crown from his waistcoat pocket, handed it to the other, and coolly remarked. “Tell me all you know, and give me the change!”

Willock, *Legal Facetiae* (1887) 12
REFUSE TO BE INTIMIDATED BY HIGHER AUTHORITY
A British Columbia judge had acquitted a man in a bestiality case involving a dog. He was informed by a court official that the BC Court of Appeal had just reversed his decision. “It doesn’t surprise me,” the judge said. “They know more about fucking dogs than I do.”

McDonald, Court Jesters (1985) 50

WISHFUL THINKING
They met at the Manhattan Opera House on 26 October, 1924, to debate “Is capital Punishment a Wise Policy?” The tickets sold for $1.65 to $4.40.

Judge Talley opened, “In the heart of every man is written the law: ‘Thou shalt not kill!’”

Darrow fended off the opening statement with humour, “I think every man’s heart desires killing. Personally, I never killed anybody that I know of. But I’ve had a great deal of satisfaction now and then reading the obituary notices.”

Weinberg and Weinberg, Clarence Darrow: sentimental rebel (1980) 315

THE PUREST OF INTENTIONS
When High Court judges are appointed, they are at first invariably courteous and patient. At that stage they recollect the indignities they have all suffered at the hands of judges during their career at the bar, and are determined not to inflict them on others. They may be in the mood of Mr Justice Russell (the present one) when he took his seat on the Bench for the first time. “I have made a number of resolutions”, he said, “but I will not reveal any of them, because I don’t wish to encourage wagering amongst members of the Bar as to how many will be broken and how soon. I will do my best.”

Parris, Under my Wig (1961) 189-90

ADVISE YOUR WITNESS TO FOLLOW HIS HONOUR’S PEN
In 1945 [James Christie] was appointed a temporary Judge of the Supreme Court (an office he held for two years). Wishing to follow the methods of his master Salmond in the taking of notes of cases he was to hear, he asked the Court staff to find Salmond’s first notebook. As he described it later, he opened the book with a feeling of reverence. “And there”, said Christie, “I found the name of Salmond’s first case, the date, and nothing else but a pen-and-ink drawing of a butterfly.”

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