

A Learned Profession

**An Address
by
The Honourable P. D. Cummins**

**at the
Law Institute of Victoria
Accredited Specialists' Conferral Ceremony**

**in the
Supreme Court Library**

29 November 2012

Chief Justice Bryant, Your Honours, President and members of the Council of the Law Institute of Victoria, Accredited Specialists, graduates of the 2012 Accredited Specialists Program, and distinguished guests:

Let us travel to London, Prague and Tel Aviv.

London. Michaelmas Term lately over, and the Lord Chancellor sitting in Lincoln's Inn Hall. Implacable November weather. As much mud in the streets, as if the waters had but newly retired from the face of the earth, and it would not be wonderful to meet a Megalosaurus, forty feet long or so, waddling like an elephantine lizard up Holborn Hill. Smoke lowering down from chimney pots, making a soft black drizzle, with flakes of soot in it as big as full-grown snowflakes – gone into mourning, one might imagine, for the death of the sun...

Fog everywhere. Fog up the river, where it flows among green aits [islets] and meadows; fog down the river, where it rolls defiled among the tiers of shipping, and the waterside pollutions of a great (and dirty) city...

The raw afternoon is rawest, and the dense fog is densest, and the muddy streets are muddiest, near that leaden-headed old obstruction, appropriate ornament for the threshold of a leaden-headed old corporation: Temple Bar. And hard by Temple Bar, in Lincoln's Inn Hall, at the very heart of the fog, sits the Lord High Chancellor in his High Court of Chancery.

Never can there come fog too thick, never can there come mud and mire too deep, to assort with the groping and floundering condition which this High Court of Chancery, most pestilent of hoary sinners, holds, this day, in the sight of heaven and earth.²

That word-picture of London and of the law is by Charles Dickens, in the opening passage of *Bleak House*, published in London in 1853. It has remained in the law's consciousness for over 150 years. In the bicentenary this year of Dickens' birth, *Bleak House* was acknowledged worldwide by the legal profession, which especially understands its clarity and its perception. Dickens' works were widely serialised to public acclaim during his lifetime, and he died a famous man.

There was a different story in the early twentieth century in Prague, where a young Jewish writer wrote anonymously. He had been born in Prague and had studied law at the German University of Prague. He died young, giving instructions to his executor to burn his manuscripts. Fortunately the executor

¹ The views expressed are my personal views only.

² C. Dickens, *Bleak House* (1853) 1-2.

disobeyed him. The writer was Franz Kafka, and the works included *Der Prozess* - *The Trial*. *The Trial* is a phantasmagoric tale of the failure of process and of accessibility, as these words attest:

[B]efore the Law stands a door-keeper. A man from the country comes up to this door-keeper and begs for admission to the Law. But the door-keeper tells him that he cannot grant him admission now. The man ponders this and then asks if he will be allowed to enter later. "Possibly," the door-keeper says, "but not now." Since the door leading to the Law is standing open as always and the door-keeper steps aside, the man bends down to look inside through the door. Seeing this, the door-keeper laughs and says: "If it attracts you so much, go on and try to get in without my permission. But you must realize that I am powerful. And I'm only the lowest door-keeper. At every hall there is another door-keeper, each one more powerful than the last. Even I cannot bear to look at the third one." The man from the country had not expected difficulties like this, for, he thinks, the Law is surely supposed to be accessible to everyone always, but when he looks more closely at the door-keeper in his fur coat, with his great sharp nose and his long, thin black Tartar beard, he decides it is better to wait until he receives permission to enter. The door-keeper gives him a stool and allows him to sit down to one side of the door. There he sits, day after day, and year after year. Many times he tries to get in and wears the door-keeper out with his appeals. At times the door-keeper conducts little cross-examinations, asking him about his home and many other things, but they are impersonal questions, the sort great men ask, and the door-keeper always ends up by saying that he cannot let him in yet. The man from the country, who has equipped himself with many things for his journey, makes use of everything he has, however valuable, to bribe the door-keeper, who, it's true, accepts it all, saying as he takes each thing: "I am only accepting this so that you won't believe you have left something untried."

During all these long years, the man watches the door-keeper almost continuously...

But now he glimpses in the darkness a radiance glowing inextinguishably from the door of the Law. He is not going to live much longer now. Before he dies all his experiences during the whole period of waiting merge in his head into one single question, which he has not yet asked the door-keeper. As he can no longer raise his stiffening body, he beckons the man over. The door-keeper has to bend down low to him, for the difference in size between them has changed very much to the man's disadvantage.

"What is it you want to know then?" asks the door-keeper. "You're insatiable." "All men are intent on the Law," says the man, "but why is it that in all these many years no one other than myself has asked to enter?" The door-keeper realizes that the man is nearing his end and that his hearing is fading, and in order to make himself heard he bellows at him: "No one else could gain admission here, because this door was intended only for you. I shall now go and close it."³

³ F. Kafka, *The Trial* (Picador) 239-240.

The history of the manuscript of *Der Prozess* is worthy of a James Bond film. Kafka's executor, Max Brod, having disobeyed the direction to burn the manuscript, retained it himself until the advance of German troops on Prague in 1939. He then fled, with the transcript, to Palestine. There he met Ester Hoffe, first his secretary and then his lover. After Brod's death in 1968 the manuscript lay undisturbed on his desk for twenty years. Then in 1988 the Hoffe family sold the manuscript at Sotheby's for two million pounds. After a protracted family dispute the manuscript came into the hands of Eva Hoffe, daughter of Ester and who lives alone with dozens of cats in a leafy Tel Aviv suburb. This year the Tel Aviv District Family Court ordered that the manuscript be placed permanently in the National Library of Israel.

In my many years lecturing at the Melbourne Law School, I would say each year to my students that to truly understand the law they should read two books. The books were *Bleak House* and *The Trial*.

II

Accompanying that positive injunction was a negative injunction. I would say: do not learn your law from television productions. So let us return from London and Prague and Tel Aviv to our loungerooms and consider what we can learn from television.

As I have said on other occasions, I consider the standard in Australia of television reporting and analysis of legal matters is high and is to be commended. But what of television fictional productions?

III

Undoubtedly there is much representation of the law on television. Much of it is American. The catalyst for contemporary American television programs about the law was *L. A. Law* (1986 – 1994) which cast aside the previous orthodoxy – a white, middle aged, male sole practitioner in crime acting for invariably innocent clients – and depicted, in dramatic form, then contemporary legal practice on the west coast. It also introduced a modern staple – social and ethical issues in

legal practice. *Law and Order* (1990 – 2010) and *The Practice* (1997 – 2004) furthered this development. These are quality productions. Some productions, while entertaining, are shallow or overly dramatised, such as *Ally McBeal* (1997 – 2002), and *Boston Legal* (2004 – 2008); and some are plain wrong, such as *Judge Judy* (1996-2012) and the English *Judge John Deed* (2001- 2007) which portray judges as behaving as judges should not and do not. American television productions usually are high on drama and tension, but they have little relevance to Australian legal process.

English television productions have more relevance for Australian viewers as to procedure, but generally lack the focus on social and ethical issues that is a staple of American productions. Comparative accuracy as to process in English productions doubtless reflects that the best of them were written by lawyers – John Mortimer QC with *Rumpole of the Bailey* and Peter Moffat with *Kavanagh QC* and *North Square*. The English productions, with some regrettable exceptions such as *Judge John Deed*, are generally more restrained than their American counterparts. The ubiquitous *Rumpole of the Bailey* (1975-2012), its lead played by the splendid Australian actor Leo McKern, presents a rich fabric of life in the English criminal courts and in counsel’s chambers. *North Square* (2000-2001) is a compelling series set in chambers in Leeds – compelling principally because of a stellar performance by Phil Davis as the manipulative head clerk of chambers. Davis is memorable also for his portrayal of Bartholomew Smallweed in the 2005 English television production of *Bleak House*. *Silk* (2011-2012) focuses on English counsel’s chambers but gives more attention to their private lives than their legal practices.

A similar preoccupation emerges in the Australian television production *Crownies* (2011) which portrays the professional demands and personal lives (principally the latter) of five young solicitors in criminal prosecution practice. Finally in this brief review⁴ there is the splendidly produced *Rake* (2011-2012).

⁴ This is indeed a brief review. There is good academic writing on the subject, notably J. Bainbridge, “Lawyers, Justice and the State: the sliding signifier of Law in Popular Culture” (2006) 15 *Griffith Law Review* 155; J. Bainbridge, “‘Sexy men in wigs’: North Square and the representation of the Law in British television” (2009) 6 *Journal of British Cinema and Television*

Rake is tightly written, fast-moving, and led by a first-class actor, Richard Roxburgh, who plays Cleaver Greene, a Sydney barrister. I have had the pleasure of seeing Roxburgh play Hamlet, a vast distance from Cleaver Greene. Cleaver Greene is compelled to precipitant, thoughtless action, whereas Hamlet is frozen to inaction by excessive thought. Both characters share a tendency to self-destruction.

None of these television productions formally claims to be an accurate portrayal of legal practice. Primarily, they are entertainment. They also have value as drama and as a window on legal, ethical and social issues in a dramatised legal context.

Professor Richard Sherwin of the New York Law School, and Director of its Visual Persuasion Project, has written:

In early times, the engines of cultural production were poems and songs; mythical tales were recited or sung to the community. Later, they were written down and copied, as rapidly as the technology permitted. In our time, to an ever increasing extent, culture's products are projected onto screens...Our narrative taste is for sight and sound, preferably served with speed. Law is a part of this visual world, and as a result, today law, too, lives in images.⁵

He continued:

...popular legal representations serve as a cultural barometer revealing pressing needs, fantasies, and anxieties, as well as beliefs, hopes and aspirations that are circulating in society. These narrative elements shape and inform the way we understand current legal issues, notorious trial outcomes and the role of law in society in general.⁶

83 (with a useful list of further references at 102); S. Machura and S. Ulbrich, "Law in Film: Globalising the Hollywood Courtroom Drama" (2001) 28 *Journal of Law and Society* 117; M. Pfau et al, "Television viewing and public perceptions of attorneys" (1995) 21 *Human Communication Research* 307; R. Spencer, "'It's the vibe': the impact of the lawyer's image on access to justice" (2009) 31 *Law Society Bulletin* 24; K. Laster, K. Breckweg and J. King, *The Drama of the Courtroom* (2000); and W. MacNeil, *Lex Populi: The Jurisprudence of Popular Culture* (2007). There is also a body of writing on the law in film, which related subject is not considered in this paper.

⁵ R. K. Sherwin, "Law's Enchantment: the cinematic jurisprudence of Krzysztof Kieslowski" in M. Freeman (ed), *Law and Popular Culture* (2004) 7 *Current Legal Issues* 88.

⁶ Op. cit. 90.

Television productions, then, have a function beyond entertainment. They can articulate anxiety and expectation, reinforce the community's desire for justice, and examine shortcomings and injustices fictional or actual.

Unfortunately, because of the power of television, they can come to represent the law. There are three deleterious elements in these productions which need to be acknowledged. First is the premise, sometimes articulated sometimes hidden, that the end justifies the means. Second is the frequent conflation of professional duty to act on instructions with personal belief. Third, particularly in the American productions, is the embedded error that legal procedure is an impediment to true justice. As lawyers, we know the abiding and objective value of legal principles and legal procedure properly applied. Kafka knew it too.

We should leave the final words of this consideration to Aristotle and to Cleaver Greene. Aristotle, in the *Nicomachean Ethics*, said:

And therefore justice is often thought to be the greatest of virtues, and neither evening nor morning star so wonderful; and proverbially in justice is every virtue comprehended.⁷

Cleaver Greene, in *Rake*, said:

It's all bullshit, mate; it's just smoke and mirrors.

We aspire to, but often do not fulfil, the Aristotelian ideal. We can always improve, in which law reform plays its part. But I am with Aristotle. The intelligent and ultimately self-destructive Cleaver Greene was wrong. Let us consider why.

IV

There are three pillars of legal professional practice. The first is ethics – that network of ethical duties personally imposed upon legal practitioners: duty to

⁷ Aristotle, *Nicomachean Ethics* (written 350 B.C.E.), Internet Classics Archive <<http://classics.mit.edu/Aristotle/nicomachaen.html>>.

the law, to the Court, to the client and to the profession. The second is hard work. The committed work practices of legal practitioners are little known beyond the profession, and are never represented on television, but are a hallmark of lawyers. The third is education. Tonight, let us reflect upon education.

As lawyers, we are the beneficiaries of university education or its equivalent. Twenty-five years ago in Australia, at the time of publication of the Pearce Report,⁸ there was some debate whether university legal education should be practical or theoretical. I found such debate sterile, and somewhat dispiriting, for it bespoke a binary confusion.⁹ The Australian Academy of Law was established in 2007 to bring together the elements of the legal community. We are well served by University legal education. At the other end of the journey, judges receive the benefit of continuing education at the National Judicial College of Australia and here in Victoria at the Judicial College of Victoria, a most valuable entity. At the epicentre, the Victorian Bar and the Institute provide continuing professional education to their members.

In 2004, pursuant to s. 72 *Legal Practice Act 1996*, the *Continuing Professional Development Scheme Rules 2004* were introduced, providing for continuing professional development for all legal practitioners holding Victorian practicing certificates. This now comprehends seminars, lectures, practice briefings, forums, conferences and webinars. A central element is the Accredited Specialisation Program. In its initial form introduced in 1989 it was an Australian first. Today the Program is guided by senior solicitors, members of the Bar and academic lawyers. It is chaired by Craig Lynch and ably managed by Elissa Cohan. It develops assessment methodologies and peer review. Accredited Specialists must be members of the Institute, hold a current practicing certificate, have a minimum of five years' practice experience with substantial involvement in the area of practice over the previous three years, and must complete the prescribed

⁸ D. Pearce, E. Campbell and D. Harding, *Australian Law Schools: a Discipline Assessment for the Commonwealth Tertiary Education Commission* (1987).

⁹ The debate continues in the United States: see French CJ, "Swapping Ideas: the Academy, the Judiciary and the Profession" (2008) *Australian Academy of Law Symposium Series* 3-9.

assessment. This is a rigorous three-tiered program of formal written examination, simulated interviews or practical advocacy exercises, assignments and drafting. The Program now encompasses fifteen areas of specialisation, with the sixteenth, administrative law, to commence in 2013. Of the twelve units recognised for accreditation, eight are in the candidate's area of specialisation and four are in other areas including Ethics and Professional Responsibility, substantive law, professional skills and practice management. To maintain accreditation, specialists must comply with continuing professional development requirements. From its commencement in 1989, with the change to practice culture it then entailed, there are now over 900 solicitors in Victoria, some 10% of the profession, who have achieved the status of accredited specialist. Accredited specialists are leaders in the profession.

So it's not "all bullshit, mate." It's not "just smoke and mirrors." I commend the Institute and its leaders for your education programs. You fulfil your responsibility for education and development. I especially commend our graduates this evening. By your initiative, commitment, and capacity you fulfil and advance the law and the profession in the service of the public. The legal profession is a community of knowledge. It is a learned profession. I congratulate you.
