

LAWYERS AS VICTIMS
(The Hon. Dean Mildren RFD QC)

For centuries, if not millennia, lawyers have been victimised both as a class and as individuals, for nothing more than being lawyers. The purpose of this speech is to discover why this is so, and what, if anything, can be done about it.

Before I begin, there are two matters I wish to touch upon briefly. First, when I speak of lawyers, I intend to include judicial officers as well, for reasons which I hope will become evident. Secondly, I do not intend to dwell upon any of the numerous instances when an individual lawyer has been victimised, although there are a few instances to which I shall later refer; nor will I dwell on the bad behaviour of some judges who bully lawyers, which should never be tolerated. My focus will be upon lawyers as a class, and the two main ways they have been and still are victimised- the first being social victimisation and the second being institutional victimisation.

Social and institutional victimisation has a long history. The earliest known lawyers were probably the orators of ancient Greece. Originally, the parties to a suit were required to represent themselves, but this was soon by-passed by the practice of allowing representation through a “friend”, the forerunner of the modern McKenzie Friend. By the middle of the 4th century BC, it was recognised that the friend could be anyone at all, so that skilled orators could be

engaged, although they were not permitted to charge for their services. The Athenians soon found ways around this by the making of gifts, but the pretence that the orator was merely an ordinary citizen helping out someone in need had to be maintained. The situation in ancient Rome was no different. Indeed, in 204 BC the Cincian law barred advocates from taking fees, and although widely ignored, it was not until the 1st century AD that the Emperor Claudius lifted the ban. Even so, advocates were limited to charging no more than 10,000 sesterces for their work, which in today's money is probably only a few thousand dollars, and if anyone charged more it was punishable as extortion.¹ According to Pliny the Younger, a barrister and part-time judge who lived from the middle of the first century, this fee could only be demanded after the case had been concluded². He himself refused to charge anything and was quite hostile to allowing advocates to charge at all.³ The conservative view of his times was that advocacy was an honourable profession, but if advocates could be allowed to charge for their work "of all the articles of public merchandise nothing was more venal than the treachery of advocates."⁴ In 53 or 54 AD the Roman Senator Silius argued in the Senate that "...quarrels, accusations, hatreds and wrongs were encouraged in order that, as the violence of disease brings fees to the physician, so the corruption of the forum might enrich the advocate."⁵ This

¹ Tacitus, "Annals" Bk xi, 9.

² The Letters of the Younger Pliny, Bk V, 9.

³ Pliny, *supra*, Bk VI, 23.

⁴ Tacitus, Annals, Bk XI, 7.

⁵ Tacitus, annals, Bk XI, 9.

view prevailed in the Senate, but some advocates persuaded Claudius that if the Cincian law was maintained, the profession would perish and only the very wealthy could afford to be advocates. This institutionalised victimisation of advocates, by denying them the right either to charge at all, or only for a limited sum, found its way into English law, and countries which inherited English law, in the rule that barristers could not sue for their fees.⁶ I pause here to note that the only other profession or calling so victimised is the world's oldest.

Similarly, lawyers have long been one of the few professions who have traditionally been the subject of laws limiting the fees which they can charge their clients, and providing for special mechanisms outside of the general law enabling clients to challenge the fees charged. Indeed, as we all know, the charging of excessive fees can, even today, lead to disbarment.

Lawyers have long had a poor public image. Stan Ross observes:

“Lawyers are often shown to be pompous, arrogant, insensitive, obsessed with money, boring, inhuman, lacking humour, incomprehensible, devious and untrustworthy.”⁷

Additionally they are often perceived as a conservative force in society, because by having a monopoly over legal work, they stifle competition and thereby maintain the high cost of legal services. Some of these perceptions have Biblical

⁶ The bag at the back of a barrister's gown was not for legal fees as popularly supposed, but had its origins in a mourning hood worn by members of the bar at the time of the execution of King Charles.

⁷ Stan Ross, “The Jokes on Lawyers”, Federation Press, p4.

origins. In the King James Version of the New Testament, Luke quotes Jesus as saying:

“Woe unto you, also, ye lawyers! For ye lade men with burdens grievous to be borne and ye yourselves touch not the burdens with one of your fingers...Woe unto you, lawyers! for you have taken away the key to knowledge; ye entered not in yourselves, and them that were entering in ye hindered.”⁸

Stan Ross points out that “this quote portrays lawyers as hypocrites, creating complications, not solving problems, not taking responsibility for the harm they cause, and although helping clients gain access to justice, having no interest in justice.”⁹ It is not to the point that the quote has been misunderstood, because it was mistranslated. Jesus was not referring to lawyers, but to the religious teachers, i.e. the rabbis. For centuries the original version was used to disparage lawyers.

Court behaviour by some advocates has done little to improve the image of lawyers. By the end of the 1st century, some advocates were hiring large audiences to clap and cheer their speeches.¹⁰ Whilst this practice soon died out, other unimpressive practices have remained, and some would say, even until recent times. Writing in the 4th century, the Roman historian Ammianus

⁸ Luke, 11:45-46, 52.

⁹ Op. cit., supra, p11.

¹⁰ Pliny, op.cit supra, Bk 2, 14.

Marcellinus described, with no holds barred, the sad state of Roman society by the end of the Western Empire, including the state of the legal profession.

Some, he said, were slaves to their own greed:

Once they have a man in their toils, they entangle him in a web of complications, deliberately holding up the case by taking it in turns to plead sickness. The citation of a single well-known authority requires the preparation of seven catchpenny preambles; this is a way of creating interminable delays. Finally, when after the passage of days and months and years the parties are stripped bare and the actual case is long out of date, these leading lights appear with a crowd of ghost advocates in the train. Once they are at the bar and the property or life of the client is in danger... the opponents confront one another for an age with wrinkled brows and histrionic gestures...till at last by previous arrangement the more confident speaker utters a kind of sugary prologue... and finally he reaches the conclusion that after three years of this mockery of a trial the advocates must plead that they are not yet fully briefed. So an adjournment is granted, and the advocates clamour to be paid for all the toil and danger they have undergone in their Herculean efforts.¹¹

Following the collapse of the Western Empire in the 5th century, the legal profession disappeared and was not revived in Western Europe until the 13th

¹¹ Ammianus Marcellinus, *The Later Roman Empire*, Book 30, 4-13 to 4-19

century. At this time laws were introduced in France, the Kingdom of Sicily and the City of London concerning the admission of barristers, including the administration of an oath. Notwithstanding these efforts at regulation, and the longstanding requirements of the Eastern Empire dating back to at least the 6th century that lawyers had to complete a four year course of legal study as well as a study of rhetoric and produce testimonials from their teachers in order to gain admission, the image of lawyers did not improve. This poor image has been perpetuated by artists, authors, poet, playwrights and social commentators. So far as art is concerned, two examples will suffice. The first is Hogarth's portrait of "The Bench" engraved in 1758. The second is Honore Daumier's lithograph, "The Lawyers and Litigants" from about 1845. The French at the bottom of the drawing means: "Be sure to respond to me, and I will reply back.... This will lead to two more defence speeches that we can charge our clients for."

So far as literature is concerned, both Sir Walter Scott and Charles Dickens did much to perpetuate and engrain hatred for the law, and by extension, the profession. Scott's novel, *Redgauntlet*, published in 1824, set up a situation in which, in the words of Alan Dilnot,

"...we are ready to regard lawyers and the law as being swayed by political influence and expediency, pure justice being impossible to be

found, and sanity, a relative matter, all of us being placed somewhere on the spectrum from quirky to daft.”¹²

Dickens’ treatment of the subject in *Bleak House*, published in 1851, is famous for satirising the delays in Chancery. Austin Asche said:

Bleak House is Dickens’s savage but justified attack on the delays in Chancery, and the first chapter of that novel is one of the most powerful pieces of writing in the English language...

The delays in Chancery had reached scandalous proportions in the early 19th century. This was partly due to understaffing of the court and partly to Lord Eldon’s habit of reserving judgments for long periods. He commenced his judgment in *Earl of Radnor v Shafto*¹³ with the celebrated remark, “Having had doubts upon this will for 20 years, there can be no use in taking more time to consider it.”¹⁴

The subject of *Bleak House* was the fictional case of *Jarndyce v Jarndyce*, a suit which had been going on for so long that it had been handed down through three generations of lawyers. By the time it finally came on for hearing, there was no estate left after lawyers’ fees and court costs were deducted. All that was left to be litigated over was costs. One commentator has observed that the

¹² A. Dilnot, *Madness in The Law*, in *The Happy Couple: Law and Literature*, The Federation Press 1994, p 64.

¹³ (1805) 11 Ves. 448; 32 ER 1160.

¹⁴ A.K.Asche QC, *Dickens and The Law*, in *The Happy Couple*, op.cit. fn 12, p 87.

inspiration for *Jarndyce v Jarndyce* was the *Jennens* case, which began in 1798 and was still extant in 1915.¹⁵

Even modern writers often present lawyers as greedy scoundrels. The popular American novelist John Grisham pursues these themes in his best-sellers, *The Firm*, and *The Partners*, and in *The Brethren* even judges become grist for his mill. The zenith of unpopularity of lawyers in the United States of America followed the Watergate Scandal, which saw a lawyer and President, Richard Nixon, force to resign when faced with impeachment; John Mitchell, the Attorney-General convicted and gaoled for perjury; Richard Kleindienst, also Attorney General, convicted for refusing to answer questions and sent to prison; John Ehrlichman, counsel to Nixon, convicted of conspiracy, obstruction of justice and perjury; John W. Dean III, counsel to Nixon, convicted of obstruction of justice; Herbert W. Kalmbach, personal attorney to Nixon, convicted of illegal campaigning; and Charles W. Colson, special counsel to Nixon, convicted of obstruction of justice. Most served time in prison. As a direct result, legal self-help books became popular because of public distrust of the legal profession, and lawyer jokes soared in popularity.

Stan Ross, in his book *The Jokes on Lawyers*¹⁶ divides the jokes into five broad categories which often overlap:

1. Those dealing with lawyers' obsession with money;

¹⁵ K. Dolin, *Bleak House, Chancery and Equity in The Happy Couple*, op.cit. fn 12, p 75.

¹⁶ Op cit, supra fn 7

2. Those which suggest lawyers are devious, manipulative, untrustworthy and unethical;
3. Those which imply that lawyers are pompous, inhuman, boring and useless;
4. Those which imply that lawyers are hateful and contemptible, and we should get rid of them; and
5. Those which imply that there are too many lawyers and that we need less of them.

Laughter can be triggered by a wide range of social stimuli including, at one end of the spectrum, joy, affection, amusement, cheerfulness, etc., and shame, aggression, taunt and schadenfreude¹⁷ at the other.¹⁸ Nearly all of the lawyer jokes reflect the emotion of sneering contempt directed at humiliating lawyers. Yet, some of them are funny in their own right even to lawyers, but only because we have learned not to take the jokes seriously.

Even the Australian playwright, David Williamson describes all of the lawyers in his play, *Top Silk*, as truly dreadful people. The main character, Trevor Fredericks QC, is portrayed as having no scruples when it comes to pursuing his own ambitions. His wife, also a lawyer, is quite prepared to bribe police in order to get her clients off drug charges. She also blackmails another lawyer, the Attorney General, in order to promote her husband's prospects of

¹⁷ Pleasure in another's misfortune e.g. slapstick comedy.

¹⁸ See Jesse Bering, *The Rat That Laughed*, in *Scientific American*, July 2012, p60 at 63.

success in the next state election; whilst the Attorney-General is blackmailing Trevor Fredericks QC in order to stop him from becoming a candidate.

Of course, not all literature about the profession is negative. John Mortimer's famous Rumpole books paint Rumpole as a knight in shining armour, although not all of the other legal characters come out quite so well, especially Mr. Justice Bullingham, who is painted as a bully, who sides with the Crown and ogles sickeningly over a new attractive female lawyer when she has her first trial in his court. Modern TV series have also tended to paint defence counsel as heroes, especially in North America and to a lesser extent Australia. Yet, the popular social images of lawyers have not improved despite the efforts of Law Societies and Bar Associations to raise the standards of the profession and to present a more endearing profile. Far from improving the imagery, the latest efforts at law reform seem to be reinforcing the old perceptions, with its ponderously verbose, lengthy, pedantic and almost incomprehensible statutes such as the Northern Territory's *Legal Profession Act*, which some would say is all about the self-interest of its promoters as against the self-interest of its detractors. Of course, we all know that this is not so, that the motives behind this legislative reform are as pure as the driven snow, that the vast majority of lawyers are paragons of virtue who believe strongly and passionately in the ethics of the profession, which despite the errors of a tiny minority, they do their best to uphold no matter what.

What can be done to get rid of this poor image? I hesitate to offer any better solutions when some of the best minds in the profession have failed, but might I suggest, first, a vigorous defence of the honour of the profession in both word and deed by all of us; secondly, by reminding the public of the true heroes and heroines of the profession- those who fought against injustice against long odds, or stood up for and represented those accused of the vilest crimes despite the negativity this brought to them personally; and thirdly to remind the public that a strong and independent legal profession is a necessity if we want to prevent authoritarianism and inhumanity.

This brings me to my second major theme, the institutionalised victimisation of lawyers. Let us begin with the states which abolished their legal professions: Prussia in 1780, and France in 1790- the bi-products of revolutions as authoritarian as the political systems they replaced. In the 20th century, although the profession was not officially abolished, legal practice as we know it was virtually obliterated in the Soviet Union, The People's Republic of China and Nazi Germany, as well as in other totalitarian states. In the Soviet Union, all pre-revolutionary laws were abolished in 1917, and with that went the rule of law, civil liberties and the protection of private property. Criminal procedure required a preliminary examination before the indictment and trial. Until 1958, an accused was not entitled to legal counsel before the trial. Defence attorneys were required to be members of the communist party, and

took their clients' guilt for granted. The purpose of a public trial was not to decide questions of guilt or innocence based on evidence. This was pre-determined by the investigator, to the extent that party policy permitted such questions to remain relevant.

A similar system operated in China, but in recent times both Russia and China have permitted private law firms to be established and to practice with relative freedom. In criminal trials guilt is no longer presumed. Nevertheless, in China legal practice is still fraught with difficulties and dangers. Chinese lawyers routinely face obstruction, harassment, intimidation and even physical abuse.¹⁹ Survival demands both formal and informal ties to the bureaucracy, called *guanxi*, which enable lawyers to gain access to public actors in the judiciary and elsewhere who can be expected to expedite, facilitate and simplify their work. In short, it is not what you know, but who you know which brings results. The expectation is that the influence of *guanxi* will decline, but only over time.

The situation in Nazi Germany was possibly even worse. Under Hitler, the private profession was gradually transformed into a facile organ of the state, beginning with a law which automatically disbarred all Jews, Communists and other politically unreliaables. Women were basically excluded from professional practice and only a few were permitted to attend law schools. In 1934 women

¹⁹ E Michelon, *Lawyers, Political Embeddedness, and Institutional Continuity in China's Transition from Socialism*, American Journal of Sociology (Sept. 2007), Vol 113 No2, p 352

lawyers were summarily dismissed even from government service. After 1936, law graduates were required to undergo four years of practical training before being eligible for admission, but only party members could apply. Upon admission the new lawyers were required to swear an oath of personal loyalty to Hitler. Lawyers were required to employ their legal skills only in harmony with Nazi legal theory. Failure to give the Hitler salute resulted in a fine or suspension. If briefed to defend a client in criminal proceedings, leave was required from the Justice Ministry as well as from the court concerned, which could be withdrawn at any time, even in the middle of a trial, for "such infractions as too strenuous a defence effort."²⁰ Defence counsel had to walk a fine line between not antagonising the court, the judges of which were almost entirely Nazi Party members or sympathisers, and not injuring their clients. A lawyer who failed to prevent his client from committing perjury or from making anti-Nazi remarks in court was considered an accomplice to his client's crimes and would face criminal prosecution and disbarment. The ultimate irony of this bizarre system was that it was so politically dangerous to defend the politically unpopular that in order to ensure that lawyers would accept briefs to defend the so-called "enemies of the state" the Gestapo resorted to threats of the concentration camps, in order to secure co-operation when the regime deemed it politically necessary for public opinion. Hitler had a very poor opinion of lawyers, regularly calling them "traitors", "idiots" and "absolute Cretans." The

²⁰ K.C.H. Willig, *The Bar in The Third Reich*, reproduced in *Law, A Treasury of Art and Literature*, Macmillan's, 1990, p 224

reasoning behind all of this was to unify legal administration into a single organ which would carry out its orders efficiently and obediently. Effectively the private profession was placed in the same situation as government paid lawyers.

The situation with the German judges was similar. Although most judges supported Hitler and the Nazis from the start, there were of course brave men who would not bow to the inevitable. Jewish judges were removed from office by a 1933 law. Under Nazi law, Hitler was both the supreme legislator and the supreme judge, and as such, could and did intervene in individual cases when either the result of the trial or the punishment imposed did not meet his expectations. In 1942, he was empowered to remove from office any judge who in his opinion had failed to do his duty according to Nazi theory and instruction. There were no procedures or normative standards to determine whether a particular judge ought to be sacked, or whether a particular decision of a court ought to be interfered with. Moreover, a member of the Security Service was assigned to each judge to funnel information about the judges back to Hitler and his cohorts. After 1942, the Ministry of Justice systematically distributed letters to the judges called “Richterbriefs” which discussed various decisions in the courts which did not conform to Nazi ideology, the purpose of which was to

pervert justice, not to offer genuine guidance. Judicial independence had entirely evaporated.²¹

Although Anglo-American law never reached anywhere near the systematic victimisation of lawyers as was practised in the totalitarian regimes, there were nevertheless some examples which we cannot be proud of. Most notably, women were discriminated against from joining the profession until the latter half of the 19th century, and even in the 20th century there were social obstacles to be overcome. Perhaps the starkest example of institutional discrimination against women was the decision of the Full Court of the Supreme Court of South Australia in *In re Kitson*²². In this case the Court decided that there was no power to appoint a woman as a public notary. The Court interpreted the word “person” in s.3 of the *Public Notaries Act 1859* (SA) as meaning a male, notwithstanding the fact that the *Interpretation Act* had the usual provision that meant that words in the masculine gender included the feminine gender and vice versa. Fortunately, Parliament intervened with an Act called the *Sex Disqualification (Removal) Act 1921* (SA), which provided that a woman was not disqualified from appointment as a notary merely because of her sex or the fact that she was married. When I read this, I wondered whether only bachelors had previously been entitled to be admitted.

²¹ See generally the findings of the War Crimes Tribunal’s decision relating to the trial of the German Judges reported in *United States of America v Alstotter et al.* (1948) 6 L.T.R.W.C. 1

²² (1920) SALR 230

Nevertheless, to this day lawyers are subject, and have long been subject to ill-advised, out of date and complex regulatory regimes which either do not apply to other professions, or at least, not to the same degree. A few historical examples are: the old rule limiting a partnership to not more than 20 members; laws which precluded legal practitioners from incorporating; the old torts of maintenance and champerty which have still not been abolished in all state and territory jurisdictions; and laws which prevent barristers from suing for their fees. Possibly the worst of all is the current *Legal Profession Act* (NT), which is absurdly long and convoluted; and the drive for a national legal profession which has the danger of centralised political control of the profession by the executive branch of the federal government and which would reduce the supervisory role of the courts to little more than rubber stamps. Why is it necessary, we may well ask, for lawyers to be so rigorously controlled when accountants have no legislative regime dealing with them at all, but are now able to enter into business with lawyers as full profit-sharing partners?

Another aspect of the problem is that governments of all political persuasions are more and more passing legislation which seeks to micro-manage every aspect of business, professional and even social life. Whilst the numbers of acts and regulations passed by the Commonwealth and State and Territory legislators has not significantly changed over the years, the length and complexity of legislation has altered significantly for the worse. Some notable

examples, such as the *Income Tax Assessment Act* and the *Corporations Law* are so voluminous and so regularly amended that even the government printer has given up giving the official versions page numbers. Essentially only lawyers who devote their whole professional lives to a study of this type of legislation have the ability to understand it; and as for the rule of construction that the court must construe an act as a whole, this is a farcical impossibility even for the most industrious judge. Worse, lawmakers have created a zillion or so administrative bodies whose procedures must generally comply with normative rules, including the rules of natural justice, the total effect of which is to place into the hands of lawyers the role of carrying out government policy in circumstances where they are likely to be blamed for every badly drafted law or regulation. Even the courts are starting to shy away from the traditional means of dispute resolution by insisting on virtually compulsory mediation of civil disputes before even a writ can be issued. The mediation solution is driven by expediency. Instead of reforming the ponderous procedures of the courts which cause interminable delays and enormous costs, we are washing our hands with the problem and handing it over to a new industry. This is an acknowledgment that civil litigation is too costly, too time consuming, too administratively expensive for the taxpayer, and the solution virtually insoluble- and the fault of all this is with the lawyers, of course!

What is needed to bring about a lasting realisation that lawyers, and an independent legal profession, are an integral part of democracy and of freedom of the individual? That they are in fact honest, trustworthy, ethical professionals who are not driven by greed or self-interest? In *Julius Caesar* Shakespeare wrote that “the evil that men do lives after them; the good is oft interred with their bones.”²³ So it is with lawyers. We all remember those in the profession who have, by their conduct, given the profession a bad name, but what of the heroes and heroines in our profession? What does the public know of the work of Sir Samuel Griffith, or Thomas Babington Macaulay who chaired the commission who produced the first draft of the Indian Penal Code? Do we remember that Abraham Lincoln or Nelson Mandela were practising lawyers before they went into politics? Mandela was repeatedly arrested for his work as a lawyer. He was tried and found not guilty of treason in 1961, then arrested and convicted in 1962 of sabotage and trying to overthrow the government. The truth is that we do not even know who our true heroes and heroines are or were. Have we forgotten that Cairns Villeneuve Smith because he was junior counsel for Rupert Maxwell Stuart at the Royal Commission’s enquiry into his conviction for the murder of a 9 year old girl, was so ostracized that he was driven out of South Australia and joined the Melbourne bar? Or that Herbert Vere Evatt QC courageously defended the Communist Party in the Communist Party Dissolution case which consigned him and probably the Australian

²³ Act III, Scene 1.

Labour Party into years of opposition, but on the other hand led to the introduction of the cab-rank rule into the Victorian bar, because no barrister in that state had been willing to accept the brief? Or that Joan Rosanova QC, Victoria's first woman silk, was treated by foreign embassies as a revolutionary merely because she defended a Jewish-Communist journalist in habeas corpus proceedings in the Supreme Court of Victoria?²⁴ Or that Melinda Taylor spent 45 days imprisoned in Libya for courageously carrying out her duties as counsel for Gaddafi's son, Saif Islam Gaddafi, who is facing trial in the International Criminal Court? We must remember our heroes and heroines and emulate their example as best we can no matter what the personal cost. The greatest asset of any lawyer is his or her good name and courage in adversity. Perhaps then, stigmatisation of lawyers will disappear in just the same way as it is no longer acceptable to make racist remarks or to discriminate against women.

²⁴ See Chief Justice Warren, *Why Be A Lawyer?*, Sir Anthony Mason Honorary Lecture, 15 August 2007.