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"The Benefit of Counsel"

by

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THE BENEFIT OF COUNSEL

This brief paper might more properly be called *The Benefit of* ***Competent*** *Counsel.* It is written as a companion piece and introduction to the playlet which follows, ***The Trial of Ned Kelly***.

Having counsel is, of itself, not always beneficial. There have been many cases where counsel's lack of forensic competence has led to inappropriate verdicts. Appeal Courts have been prepared to pardon accused for the sins, omissions and negligence of their counsel. (See, for example, ***Re Knowles*** [1984] VR 751). The usual result in such cases might be a re-trial. Compare this with the initial system following the introduction of criminal appeals in England in 1907 where if a conviction was obtained as a result of a miscarriage of justice, the conviction was quashed and no re-trial could be ordered. In such cases it might have been a positive advantage to have had incompetent counsel! (This topic was the subject of consideration by John Mortimer in his radio play ***Dock Brief***; I might seek permission to present this at the next CLANT Conference in Bali in 1999 if I am fortunate enough to once again attend).

I interpose to note that there is little protection, for the community, against incompetent prosecutors. An acquittal is an acquittal is an acquittal!!

Nor should the benefit of counsel be confused with the right to counsel. This is a different abstraction altogether. I think it is often assumed that a lawyer will be a more competent defender of an accused than the man himself. It is said that *a man who is his own lawyer has a fool for his client.* Although that may generally be true, there are many instances where an accused man has successfully defended himself. Albert Langer, the Monash University draft avoider of the Vietnam days - who was a brilliant mathematical student and nowadays works as a *postie* in suburban Melbourne, won some notable court victories. In the Northern Territory, the forces of the Director of Public Prosecutions have suffered at the hands of one Matthew McDonagh. Matthew is a barefooted Darwin River camp dweller who wears dirty shorts and a tattered singlet to court (the latter inscribed with the words ***Save police time, beat yourself up***). He has represented himself successfully in a trial before the Supreme Court. Before that, one Michael Lewis, when he was alive, won some famous victories against the forces of right and good, including one in Canberra before the High Court when the Northern Territory was represented by an illustrious member of the local profession (and here present). Having said that, although I am not so much concerned here with the right to counsel, I nevertheless remain interested in the concept. Those of you who were here in 1995 may remember the presentation of the seventeenth century trial of ***Ireland, Pickering and Grove*** on charges of treason. They had no counsel. Until 1695 those accused of treason were prohibited from using counsel. In that particular trial (and others of that period) the Crown had the services of at least four members of the Bar **and**, it seemed, the presiding members of the Bench.

So once again, when I am reminded of the grand old liberties and rights which we inherited from the common law (and statutes) of *old Englande*, I am surprised to find what is an apparently recent confirmation of such rights.

The concept of the right to counsel is, of course, bound up with the concept of a right to a fair trial. In ***Jago v District Court*** (NSW) (1989) 168 CLR 23 at 56, Deane J said:

> *The central prescript of our criminal law is that no person shall be convicted of crime otherwise than after a fair trial according to law. A conviction cannot stand if irregularity or prejudicial occurrence has permeated or affected proceedings to an extent that the overall trial has been rendered unfair or has lost its character as a trial according to law. As a matter of ordinary language, it is customary to refer in compendious terms to an accused's* ***right to a fair trial.***

In ***McInnis*** (1978-79) 143 CLR 575, the High Court was concerned with the refusal of an adjournment in a case where the accused had sought an adjournment to enable him to obtain the services of counsel. In the course of his dissenting judgment, Murphy J said:

> *Courts should not allow the integrity of the judicial process to be undermined by the financial exigencies of legal aid schemes. The threat to its integrity is real when legal aid administrators in Western Australia, and apparently elsewhere (see* ***Reg. v Beadle*** *(1979) 21 SASR 67), can decide when an indigent accused will be aided and when he will not, and courts implement those decisions by forcing persons to trial without legal assistance although the interests of justice require (as is obvious in all serious cases) that legal assistance be provided. If a person on a serious charge, who desires legal assistance but is unable to afford it, is refused legal aid, a judge should not force him to undergo trial without counsel. If necessary, the trial should be postponed until legal assistance is provided, and in an extreme case, the accused, if not already on bail, should be granted bail.*
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> ***Judge acting as counsel for an accused.*** *The trial judge, when refusing the applicant's request for adjournment, said: "it will be*

my obligation to assist you as much as I can in the conduct of your defence". A judge's assistance to an unrepresented accused does not make up for lack of counsel. In an adversary system, it is not his function to assist one party. An attempt to do so generally serves only to gloss over procedural injustice; how can a judge assist effectively without having conferred with the accused and his witnesses in circumstances in which the accused has the protection of the confidentiality rule?

In the eighteenth century, the English common law denied representation in felonies and treasons but permitted it in misdemeanours. This was denounced by Blackstone: "For upon what face of reason can that assistance be denied to save the life of a man, which yet is allowed him in prosecutions for every petty trespass?" (4 Comm. 355). In support of the common law, Coke relied on the ground that the court itself was counsel for the prisoner. In ***Powell v Alabama****, after referring to the Blackstone-Coke controversy, Sutherland J (delivering the judgment of the Court) said ((1932) 287 US at p.61 [77 Law Ed. at p.166]):*

> *"But how can a judge, whose functions are purely judicial, effectively discharge the obligations of counsel for the accused? He can and should see to it that in the proceedings before the court the accused shall be dealt with justly and fairly. He cannot investigate the facts, advise and direct the defence, or participate in those necessary conferences between counsel and accused which sometimes partake of the inviolable character of the confessional."*

Dietrich (1992) 177 CLR 292 is, of course, a leading case on the question of the right to counsel and its part in the fairness of the trial process. This was, as we know, tied up with the question of the provision of counsel at the public expense. ***Dietrich*** is authority for the proposition that there is no right to be provided with counsel at the public expense, as such. The ultimate question is whether by reason of a lack of representation for an accused person, who desires such representation, the trial is not fair. Nevertheless, in the course of the comprehensive judgment in that case there was considerable discussion of the development and history of the right to counsel. There is an interesting observation in the joint judgment of Mason CJ and McHugh J (at 310):

> *In addition, recognition of an absolute right to counsel provided at public expense would create its own problems. First, the court would logically be driven to decide whether such a right to counsel entails the right to the "effective assistance" of counsel, as it is called in the United States (see* ***Cuyler v Sullivan*** *(1980), 446 US 335;* ***Evitts v Lucey*** *(1985), 469 US 387). That is, if an accused has a right to counsel, does he or she have a right to demand counsel of a particular degree of experience and who can conduct the defence "effectively"? How could such a right be monitored properly by the trial judge?*

In his judgment, Brennan J (p.317) respectfully agreed with the observations made in other judgments in the case and in ***McInnis*** as to the desirability of competent legal representation for an accused person in a criminal trial. As a footnote, he commented:

> *The dangers of incompetent legal representation to an accused are sadly familiar to judges in the criminal jurisdiction.*

It is those separate comments which lead naturally into the presentation of selected parts of the trial of Ned Kelly.

The common law had never recognised an entitlement for all those charged with criminal conduct to be represented by counsel at trial. It was not until 1836 that an accused was given the right to be represented by counsel where he was accused of a felony. It appears that from much earlier times there was a right to be represented on misdemeanours. By some astonishing logic, the more serious the charge the less the need for a lawyer. It had been argued by Coke that in capital offences an accused would only be dealt with on the clearest evidence so there was no need for defence counsel. In any event, the Bench would assist the accused to defend himself. Murphy J, in ***McInnis***, highlights the difficulties that presents and they are also discussed in the individual judgments in ***Dietrich***.

I now turn to Ned's trial. In this connection I immediately acknowledge that the source of the material which now follows (and ***The Trial*** itself) comes from the book by John H Phillips, now Chief Justice of the Supreme Court of Victoria, ***The Trial of Ned Kelly*** (Law Book Company, 1987). I am indebted to His Honour for his personal permission to use his book for preparation of these introductory remarks and the playlet itself.

Ned Kelly was tried in Melbourne on Thursday 28 October 1880. Even then, it was regarded as the trial of the century. It was conducted at the old Court House in Russell and Latrobe Streets.

In October 1878, Police Sergeant Kennedy and Constables Scanlon, Lonigan and McIntyre, armed with arrest warrants, were searching for the Kelly gang. The warrants were in respect of horse stealing and attempted murder. On the evening of the 25 October they camped at Stringy Bark Creek near Mansfield. The next morning Kennedy and Scanlon rode off in search. Lonigan and McIntyre stayed at the campsite during the day. None of the police officers were in uniform.

Late on 26 October the Kelly gang came up to the camp. Lonigan was shot by Ned Kelly. McIntyre was then held prisoner for a short time. Kennedy and Scanlon rode up to the camp and McIntyre was sent to tell them to surrender. They did not, shots rang out and in the melee McIntyre mounted a horse and made his escape. He was aware that Scanlon was shot as he was leaving. Late the next day McIntyre made his report at Mansfield and the bodies of Kennedy and Scanlon, together with Lonigan, were subsequently recovered.

Kelly was arrested following the famous gun battle at Glenrowan in June 1880, twenty months later. He was charged with the murders of Lonigan and Scanlon, but not Kennedy. His committal took place at Beechworth in August 1880. Charles Smyth and Arthur Chomley prosecuted. David Gaunson, a leading solicitor advocate of the time, appeared for Kelly. Gaunson some years later was to be John Wren's solicitor. Gaunson apparently did a fairly competent job at the committal but was to conclude his cross-examination of the eyewitness McIntyre with the somewhat needless taunt *I will leave the witness to be turned inside out by a better man in the Supreme Court.* This turned out to be somewhat ironic.

The trial was originally fixed for the Assize Court at Beechworth but the Crown made an early application for its removal to Melbourne and it was fixed for hearing on Friday 15 October 1880. Kelly therefore had two months notice of his trial.

A great deal of trouble was encountered by the defence in finding the necessary funds for the defence. The preferred counsel was Hickman Molesworth who was a leading member of the Bar with some 16 years experience. His fees apparently were 50 guineas for the first two days and 10 guas. thereafter. Those funds were never to be found. Sir Redmond Barry was appointed to try the case. He was then aged 67.

On Friday 15 October 1880, Molesworth appeared before Justice Barry to seek an adjournment. The real basis of the adjournment was to seek time to get the necessary

funds. The judge granted the adjournment only until the following Monday, 18 October, when, he said, *the trial will begin.*

Early on that Monday morning, at about 9.00 am, Gaunson approached Henry Bindon. Bindon was then aged 37. He had been admitted to practice in Victoria for less than twelve months (although he had been admitted a year earlier in the English Inns of Court). He was, however, a Victorian in the sense that he had been brought up and schooled in Victoria where it had taken him three attempts to pass his matriculation. He had never, at that time, appeared in the Supreme Court of Victoria. Gaunson took him across to Molesworth's Chambers and introduced him. They asked Bindon to apply for an adjournment of the case for one month. There were no funds available and it was said that extra time would be needed to prepare the case. Bindon was then taken up to the Supreme Court by horse and carriage and had to fight his way through a large crowd to get to court. He made his application for the adjournment which the Crown formally opposed but, in the circumstances, indicated they would consent to one week being granted. At least one of the proposed Crown witnesses was from New Zealand.

The judge, on the basis of the Crown consent, did adjourn the case not for one week but for ten days as he had some other commitments during the following week. The trial was therefore adjourned to Thursday 28 October 1880. On the previous Friday (15 October) Gaunson had approached the Crown for assistance with funds. The Crown authorities were only prepared to agree to a fee of 7 guas. for counsel and 7 guas. for the solicitor. This compared very unfavourably, of course, with what Molesworth was seeking and the fees that were being paid by the Crown for its prosecutors, namely 32 guas. for Smyth and 26 guas. for Chomley.

Molesworth had plenty of better offers at the time and went off to the Assizes the following week. He was not prepared to be involved in *pro bono* work it seems.

Late on the Monday 25 October, less than three days prior to the adjourned trial date, Gaunson still had no counsel for Kelly. He again went to Bindon. It was decided that Bindon would once again apply for an adjournment on the Thursday morning but, realistically, both knew that the trial had to proceed. Bindon had the brief. He had two days to prepare. The Crown had been preparing for at least two months.

The trial started on the Thursday morning and eight witnesses were heard during the day. The following morning the trial resumed at 9.00 am and eight further witnesses were called before mid-day when the Crown closed its case. Bindon sought time over the luncheon adjournment to consider the defence position. At that time an accused man could not give sworn evidence so the real question was whether he would be giving unsworn evidence. As it turned out, Bindon needed the time to work on some submissions he proposed to make to the judge on a point of law and to complete the preparation of his final speech. In 1880 there was no system of appeals by leave to a Court of Criminal Appeal such as presently exists in Victoria and elsewhere. At that time a trial judge might reserve any question of difficulty in point of law which arose in a trial for consideration of the Full Court. This was usually done on application by counsel for the accused and the trial judge had a discretion whether or not to grant the application. If he refused to do so his decision was not reviewable. The judgment of the court would be postponed until the matter had been considered and determined in the higher court. There was a separate right of review by the Full Court where the trial procedure was accompanied by irregularity such as gross misbehaviour on the part of the jurors or the like.

Bindon made his application at the end of the luncheon adjournment. It was refused. He called no evidence. Both he and the prosecutor then made their final addresses and were followed by the judge's summing up. The jury verdict was delivered late on the Friday. This was then followed by the fairly memorable exchange made between the trial judge and Kelly, some of which will be reproduced in ***The Trial of Ned Kelly***.

Did Kelly get a fair trial? John Phillips thinks not, mostly because of the incompetence and/or inexperience of his counsel. There was then no relief of the kind which nowadays might be granted in respect of the professional sins and omissions of an accused's counsel!

Would Kelly have done better without counsel at all? The theme of this conference is *Parliament to prison: Lawyers - who needs them*? Ned Kelly may well have thought the same!

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Darwin 17 June 1997

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