

ETHICS - THE ADVERSARIAL SYSTEM AND BUSINESS PRACTICE*

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[This article is an edited version of a lecture delivered in November 2004 to Melbourne University Juris Doctor students. It takes as its starting point the argument that the ethics of the adversarial legal system ill accord with the norms of society and that we should discard it in favour of the inquisitorial system. That view is contrasted with the school of thought which takes the ethical superiority of the adversarial system as given and with the idea that increasing commercialisation of the legal profession may be leading us away from the nobler traditions of the adversarial system.]

Most of the things that I write and say these days are directed more or less precisely to issues defined by the parties. My role is simply to decide which of two competing views of the facts or law is to be preferred. By and large the exercise consists of applying everyday forensic techniques and established legal principles to the task at hand. It is seldom that I need venture into the area of academic analysis. It also adds to the challenge of the occasion that it was suggested that I speak to you on a matter concerning legal ethics. It is a subject upon which views tend to differ. I hope that you will not think me presumptuous in expressing some of my own.

In 2003, Professor Bagaric of the Deakin Law School and Ms Penny Dimopoulos, published a paper¹ in which they argued that the body of knowledge of which we

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¹ Mirko Bagaric & Penny Dimopoulos, *Legal Ethics is (Just) Normal Ethics: Towards a Coherent System of Legal Ethics*, 3(2) QUEENSLAND U.T. L.J.J., 367 (2003).

conceive as legal ethics is so lacking in overreaching rationale that it should be thought of merely as a body of rules. That is hardly a novel conception, however, for when Sir Owen Dixon addressed the law students of this great university more than 50 years ago he began with the observation that when one speaks of legal ethics you have in mind rather the habits and customs of the profession than any notions about honest dealing that you suppose to be peculiar to the profession.²

Yet whereas Chief Justice Dixon spoke of legal ethics as implicitly reflecting the ethical standards of society, Bagaric's and Dimopoulos' thesis is in part that the legal rules which we call ethics now so diverge from the norms of society that society has lost or is losing faith in the legal profession. Bagaric and Dimopoulos are not alone in their concern about the state of contemporary legal ethics. Other commentators like Professor Kronman³ in the United States and Sir Daryl Dawson⁴ in this country have noted the increasing commercialisation of legal practice and the consequent adoption of business ethics to the exclusion of nobler traditions.

But in conceptual terms Bagaric and Dimopoulos and Kronman and Sir Daryl Dawson and their fellow thinkers are poles apart. The Bagaric and Dimopoulos contention, which is grounded in what they term an hedonistic act utilitarianism analysis of societal norms, is that the adversarial system is ethically moribund, and that it should be replaced with what they conceive to be the ethically superior continental inquisitorial system; and that certain of the impedimenta of the adversarial system, like the cab-rank rule and professional work pro bono publico, would be better done away with. Contrastingly, the Kronman/Dawson school of thought takes the ethical superiority of the adversarial system as given but laments that an increasingly commercial and entrepreneurial approach to the practice of the system has led to a decline in idealism and professionalism, a crisis of morale, and growing doubts about the capacity of a lawyer's life to offer fulfilment to the person who takes it up.

Thus here there appears to be something of a paradox. Business ethics – or the ethics of profit maximisation – are surely the paradigm of hedonistic act utilitarianism. And yet while Bagaric and Dimopoulos contend that the legal profession faces a crisis of credibility due to ethics that ill accord to the dictates of hedonistic act utilitarianism, the lament of the Kronman/Dawson school of thought is that the profession's increasing preoccupation with business ethics leads us away from noble traditions.

Of course in one sense the paradox is only apparent, because each group is to some extent talking about different things. But in another and more fundamental sense the paradox exists because each camp makes assumptions about the adversary system and the inquisitorial system which the other camp treats as inherently flawed. Bagaric and Dimopoulos are sufficiently persuaded of the intrinsic ethical superiority of the inquisitorial system that they would gladly abandon what others conceive to be noble traditions of the adversarial system. The Kronman/Dawson

² PROFESSIONAL CONDUCT (Judge Woinarksi ed., 1965)

³ ANTHONY T. KRONMAN, *THE LOST LAWYER – FAILING IDEALS OF THE LEGAL PROFESSION* (1993).

⁴ Daryl Dawson, *The Legal Services Market*, 5 *JOURNAL OF JUDICIAL ADMINISTRATION* 147 (1995).

school of thought is so concerned with the effects of increasing commercialisation upon the adversarial system that they do not stop to consider the fundamental ethics of the system.

Which is more important? A logical starting point for consideration of that question is what it is about the inquisitorial system that Bagaric and Dimpoulos regard as morally superior to the adversarial system. The essence of it lies in what they call the fundamental ethical precept of truth telling. They argue that if an accused has in fact committed the offence with which he or she is charged, there is no ethical difference between the accused going into the witness box and falsely swearing that he or she is innocent, and the accused standing in the dock and pleading not guilty. They contend that either way there is a breach of the fundamental ethical precept of truth telling and thus that to escape conviction by a false denial of guilt is just as morally reprehensible as escaping conviction by false testimony. Their shibboleth is that it does no credit to our adversarial system of jurisprudence that it persists in a specious distinction between positive lies and permissible silence; it is they say contrary to the norms or fundamental ethics of the society which the profession exists to serve. They conclude that the continental inquisitorial system would provide a better means of justice, because the judge rather than the parties gathers the evidence and questions the witnesses, and the system has as its object the investigation of truth.

In relative terms that is a radical suggestion. For those of us who have grown up with the adversarial system, its superiority is a doctrine of faith. Our creed is encapsulated in the opening paragraph of Gleeson CJ's judgment in *Doggett v The Queen*⁵ [which was a case about Longman and Crampton warnings in trials for sexual offences]:

In our system of criminal justice, a trial is conducted as a contest between the prosecutor (almost always a representative or agency of the executive government) and the accused (almost always an individual citizen). In the case of a trial by jury for an indictable offence, the presiding judge takes no part in the investigation of the alleged crime, or in the framing of the charge or charges, or in the calling of the evidence. Where the accused is represented by counsel, the judge's interventions in the progress of the case are normally minimal. The prosecution and the defence, by the form in which the indictment is framed, and by the manner in which their respective cases are conducted, define the issues which are presented to the jury for consideration. Those include not only the ultimate issue, as to whether the prosecution has established beyond reasonable doubt the accused's guilt of the offence or offences alleged, but also the subsidiary issues which, subject to any directions from the trial judge, are said to be relevant to the determination of the ultimate issue. Such a system, sometimes described as adversarial, reflects values that respect both the autonomy of parties to the trial process and the impartiality of the judge and jury. (My emphasis)

⁵ *Doggett v. The Queen*, [2001] 208 CLR 343, 346 (High Court of Australia, 2001).

But that said, the relative advantages and disadvantages of the adversarial system have of late received a good deal of attention in this country, and not all of it has been favourable. Furthermore, while in the past most of the criticism of the system has come from people who know a good deal about the content of the law but not much about its practice, in recent times some of the criticism has come from sounder sources. Thus, speaking at the 17th Annual AIJA Conference in August 1999,⁶ Sir Anthony Mason said that it was no exaggeration to say that there has been an erosion of faith in the virtues of adversarial justice as exemplified in the system of court adjudication and that the principal reason why the European inquisitorial system has attractions for some critics of the adversarial system is that control lies more in the hands of the judges, and because European courts are said to have as their object the investigation of truth. As has already been noticed, the function of the courts in adversarial systems is not to pursue truth, but to decide on the cases presented by the parties. Sir Anthony was therefore of the view that the inquisitorial system is probably rather more successful than the adversarial system in finding out the truth.

The author and some time academic, Mr Evan Whitton, dealt with the subject more flamboyantly in his 1998 Murdoch Law School Address.⁷ According to Mr Whitton's version of legal history the existence of the adversarial system is the result of a tiny cartel of lawyers and amateur judges, who were mainly interested in money and status, effectively deciding in the 13th century that truth does not matter. And, he said, in the 18th century the same cartel, of whom he describes "the lying Lord Mansfield" as a member, turned the law into a game by inventing a truth-obscuring adversary system: giving lawyers control of civil and criminal trials and concocting a series of truth-defeating rules for concealing relevant evidence.

There is some difficulty in identifying the events which Mr Whitton thus described. There is mention of an unidentified occasion in November 1215, obviously not Magna Carta, which may have been the decision of fourth Lateran Council to forbid clergy from performing any religious ceremonies in connection with ordeals. Apparently that created a need for a new form of trial and eventually that led to imposition of jury trial in criminal cases by the Statute of Westminster of 1275. But it was hardly the work of the lawyers. Pope Innocent III was responsible for the decisions of the Council and the imposition of jury trial was the response of executive government to the consequent loss of public confidence in the trial system.⁸ Mr Whitton's references to "the lying Lord Mansfield" and the 18th century are equally problematic. Conventional wisdom has it that it was the judgment of Vaughan CJ in *Bushels Case* in 1670⁹ that defined the position and duties of the jury substantially as we now understand them. And so far as I have been able to ascertain, the only significant contribution of Lord Mansfield to the jurisprudence of adversarial procedure was to hold in 1757 that equity would

⁶ *The Future of Adversarial Justice*, 17th Annual AIJA Conference, Adelaide 7 August 1999

⁷ Evan Whitton, *Justice or Money? How to Save the Law from Contempt*, MURDOCH U.E.J.L., 5(4) (1998).

⁸ PLUCKNETT, THEODORE, *A CONCISE HISTORY OF THE COMMON LAW* 110-119 (3d ed. 1940).

⁹ *Id.* at 124.

relieve against unjust verdicts of juries by giving a new trial and that common law courts felt bound to follow their lead.¹⁰ Today the justice of that decision seems obvious¹¹ and by the standards of the day it was inspired. Why the lawyers are blamed for what happened in the 18th century is also something of a mystery. Counsel was allowed in trials for treason by the statute 7 William III c 3 of 1695, but it was not until the nineteenth century in 1837 that counsel was allowed in cases of felony: 6 & 7 William IV c.114.¹²

However that may be, Mr Whitton's thesis was that the result and perhaps the intention of the adversarial system is that hard working senior members of the cartel can make a lot of money at the Bar before retiring to the status and relative sloth of life as an untrained judge, while 80% of known serious criminals get off, and one percent of prisoners are innocent. At first blush that sounds impressive. But like Mr Whitton's version of legal history there is some difficulty in identifying the facts on which it is based. I desist from comment upon the accuracy of Mr Whitton's views upon the relative sloth of life on the bench. But contrary to the idea that the adversarial system results in 80% of known serious criminals going free, the latest published figures in Victoria are that of the criminal matters presented for trial in the Supreme Court and County Court, 68.1% result in a plea of guilty before trial, a further 5.7% result in a plea of guilty at trial and 60.7% of contested trials result in conviction. Consequently, the guilty outcome as a percentage of total cases in Victoria is 86.6% and the acquittal outcome as a percentage of total cases is only 8.4%.¹³ Those results are matched across the country. In 2002-3 more than 80% of defendants in higher criminal courts across Australia were proven guilty (ie. pleaded guilty or were declared guilty at trial) and only 6% were acquitted.¹⁴ There is reason to think that those results are roughly similar to the rates of conviction achieved in the continental jurisdictions.

A more serious contribution to the adversarial system debate is to be found in the commentary on Mr Whitton's paper which was delivered by M. Hean-Marc Baissus, the former President of Peronne Tribunal d Grand Instance.¹⁵ He offered that the modern common law and continental procedures are both "adversarial", in the sense that a liberal judicial process is based on the opposition of contending parties, be it in civil or penal matters; with the obvious consequence that the position of the judge, in both systems, remains that of an independent arbitrator. Furthermore, whereas Mr Whitton castigated the adversarial system as one which is "truth obscuring", M.Baissus said:

As seen from the continental side of the Channel, one does not necessarily subscribe to this appreciation. On the contrary, I would tend to consider that truth can only be obtained through the organisation of a confrontation of

¹⁰ *Bright v. Eynon*, (1757) 1 Burr 390, 393-4 (Eng. Rep. 1757)

¹¹ *Reg. v. West Sussex Quarter Session, Ex parte Albert and Maud Johnson Trust Ltd*, [1974] 1 QB 24, 35.

¹² Other than to argue points of law.

¹³ PUBLIC PROSECUTIONS ANNUAL REPORT, APPENDIX A, 21 (2003).

¹⁴ AUSTRALIAN BUREAU OF STATISTICS, AUSTRALIAN HIGHER CRIMINAL COURTS (1998).

¹⁵ Jean-Marc Baissus, *Common v Continental: A Reaction to Mr Evan Whitton's 1998 Murdoch Law School Address*, 5 MURDOCH U.E.J.L (1998).

positions in the legal arena. There is no better way than putting the parties in a position to state their argument as fully as they wish. So the essential rule of the 'game' is the same in both common-law and civil-law procedures.

G.L. Certoma of the Sydney Law School expressed similar ideas in an article published in the *Australian Law Journal* some years before.¹⁶ He wrote that:

Both systems have advantages and both have defects. However, in general, the accusatorial system seems to be more sensitive to the liberty of the citizen whilst the inquisitorial system places more emphasis on ensuring the punishment of a guilty party. It is clear that a zealous pursuit of the inquisitorial approach would erode the freedom of the citizen. It is the delicate balance between discovery of the facts at any cost, on the one hand, and considerations for basic and fundamental rights of the citizen on the other, that explains why a pure inquisitorial or accusatorial system is not to be found.

Still it cannot be denied that there is substance in some of Mr Whitton's criticisms of the truth obscuring qualities of the adversarial system. As Professor David Luban demonstrated in a remarkable essay on adversarial ethics published in 1999,¹⁷ a number of features of the adversarial system of litigation are indeed calculated to achieve the suppression of significant aspects of the truth. Quite apart from such of the rules and procedures of the system as are explicitly aimed at exclusion of aspects of the truth, particularly the rules of evidence, the system as such makes little allowance for inequalities of skill among advocates; the compressed time-frame of a trial; the prejudices and frailties of judges; tactical manipulation by lawyers; and burden of proof rules that in some circumstances bear no relation to reasonable epistemology.

Moreover and more importantly for present purposes, as Professor Luban illustrated in his essay, the adversarial system of litigation implies a vision of legal ethics which combines extreme partisanship with moral non-accountability (a phenomenon which he termed "non-accountable partisanship"). It means that the system requires an advocate to advance his or her clients' partisan interests with the maximum zeal permitted by law and it insists that the advocate is not morally responsible for the ends pursued by the client, or the means of pursuing those ends, provided that both means and ends are lawful.¹⁸ And that, said Luban, is profoundly troubling as a moral ideal governing lawyers' behaviour. In Macaulay's words¹⁹ it implies that an advocate with a wig on his head and a band round his neck will do

¹⁶ G L Certoma, *The Accusatory System v. The Inquisitorial System: Procedural Truth v. Fact?*, 56 AUSTRALIAN L.J. 288 (1982).

¹⁷ David Luban, *Twenty Theses on Adversarial Ethics*, in BEYOND THE ADVERSARIAL SYSTEM 140 (Helen Stacy & Michael Lavarch ed., 1999).

¹⁸ Cf. *Munster v. Lamb*, (1883) 11 QBD 588, 603 (Eng. C.A. 1883).

¹⁹ THOMAS B. MACAULAY, THE HISTORY OF ENGLAND FROM THE ACCESSION OF JAMES THE SECOND (1861).

for a guinea what he would otherwise think it wicked and infamous to do for empire.

Hein Ktz, Dean of the Bucerius Law School in Germany, has written to similar effect:

Can it be right to allow or even require a lawyer to arm his client for effective perjury? ...It is all very well to say that cross-examination is, in the words of John Wigmore, "the greatest legal engine ever invented for the discovery of truth" and that it is a most effective weapon to test dishonest witnesses and ferret out the truth. But isn't it a weapon equally lethal to heroes and villains? There is no doubt that all procedural systems aim at an intelligent inquiry into all the practically available evidence in order to ascertain, as near as may be, the truth about the facts. But suppose a business man were to decide whether or not to build a new plant: Would he think of obtaining the needed information by subjecting his informants to the experience of standing as a witness at a common law trial? Is there no more business-like method to unearth the relevant facts?²⁰

Evidently, these ideas accord with Bagaric's and Dimopoulos' thesis that the ethics of the adversarial system deviate substantially from everyday morality; that ethically there is no difference between a denial of guilt and a claim of innocence; and that judged by the standards of society the distinction is casuistry. They challenge us to consider whether the adversarial system which we have for so long accepted as superior may indeed be ethically deficient in critical respects. Why should an accused man or woman have the right to deny guilt and through their advocate do all short of telling overt lies to discredit the Crown case, even when it is true? Why should a defendant to civil proceedings who has wronged the plaintiff be permitted to escape liability by similar means?

But if I may say so with respect, it is not as straightforward as Bagaric and Dimopoulos would have it. Ethically a denial of guilt cannot be equated to a false averment of innocence unless there is an ethical obligation to admit guilt. And while the precepts of the major religious codes that underpin our legal system are strongly inclined to the rectitude of confessing one's transgressions,²¹ as a society we are inclined to recoil from the suggestion that we are bound to secular authority by obligations of that kind. In our society it goes without saying that until and unless Parliament intervenes in a given case, we have the right to remain silent.

So to say of course does not answer the question of whether it is ethical to adopt that stance. While it may be convenient, and while many of us may think it desirable, the convenience and popularity of the right to silence does not necessarily mean that it is ethical. How then is one to judge whether it is ethical?

As a stand alone proposition it probably requires no great leap of faith to be convinced that the maintenance of personal freedom is ethical. But for some it may

²⁰ Hein Ktz, *Civil Justice Systems in Europe and the United States*, 13 DUKE J. COMP. & INT'L L. 61-78 (2003).

²¹ It is a recurrent theme throughout the Old and New Testaments.

prove more difficult to accept that it is ethical to put the maintenance of personal freedom above the social utility of detecting and convicting criminals. And for others it may present as obviously unethical that a large corporation responsible for wide ranging pollution or disease can escape liability by employing the best legal resources money can buy to destroy the case presented for plaintiffs by a significantly less well funded and less talented legal team.

Is it really ethical so to value the freedom of the individual that we will tolerate that the guilty as well as the innocent may stand mute when charged? Is it ethical that those who are guilty of crime or delict may escape liability by attacking the case against them? Or are we as a society ethically bound to forgo personal freedoms, at least to the extent of answering allegations, for the benefit of the society of which we are part.

These questions are intractable. Many have essayed them, and others will continue to do so; and I dare say without much consensus. The answers which each of us would give to them are likely to depend as much upon our perspective as upon our moral suasion. For those who are the victims of crime, it may appear iniquitous that an accused can cause his victim to be subjected to the further torment of trial without exposing himself even to interrogation. The sort of case that comes readily to mind is one of a serious sexual offence. For those, like investigating police, who know of the past misdeeds of a recidivist and the undoubted effect that their revelation would have upon the minds of the jury, it is sometimes beyond rational comprehension that evidence apparently so relevant can be kept from public view. On the other hand, for those who are charged with a crime of which they are innocent, but in respect of which all the evidence seems to point against them, the right to silence may appear as the very least to be expected of a tolerant and humane society. As Professor Luban put it:

Liberal political thought argues that the state's power to punish will often be abused, particularly given the drastic imbalance in power and resources between the state and the accused. Historical experience as well as political theory teaches us that even in liberal and democratic regimes, power-holders are tempted to use the criminal law against their opponents, and police will invade rights in the name of crime control. In addition, of course, criminal cases alone place the defendant's physical liberty in jeopardy. The traditional remedy is not just protecting but over-protecting the rights of the accused (safeguarding the individual's rights when the threat of abuse is remote or fanciful as thoroughly as when it is very real). The non-accountable advocate, whose devotion to the client is at a maximum regardless of the case or the defendant, serves as the keystone in the arch of over-protections. Hence Lord Brougham's often-quoted rhetoric seems uniquely appropriate in the context of criminal defence. 'An advocate... knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, amongst them, to himself, is his first and only duty.'

When it comes to civil litigation the problems are even more intractable; for self evidently our concerns about the possibility of the abuse of state power are seldom a relevant consideration in civil proceedings. Again to quote Professor Luban:²²

In most private litigation, liberal concerns about the abuse of state power are absent, and thus the criminal defender's justification for non-accountable partisanship disappears. Sometimes, of course, state agencies are parties in private litigation, and when that occurs, some of the liberal concerns undergirding the criminal defender's role remain. In these cases, however, the state agency is more like a private corporation than a wielder of the police power. Perhaps this analogy suggests liberal concerns about David-and-Goliath litigation between large corporations and individual litigants; and perhaps in these matchups echoes of the criminal defender's role can be heard. But without the state's power to punish and stigmatise, reflected in the criminal process, the keen edge of the liberal argument of overprotecting rights through non-accountable partisanship is blunted. Thus some other defence of adversarial ethics must be found, or else the theory should be abandoned.

I add that, while we are naturally inclined to think first in terms of criminal litigation, the ethical problems to which civil litigation give rise are apt to be just as significant as those in criminal proceedings. In April 1997 the Australian Law Reform Commission published an Issues Paper on the federal civil litigation system²³ in which it was suggested that, although the ethical conduct of lawyers is governed as much by duties to the court²⁴ as by duties to the client²⁵, and that duties to the court are meant to take precedence over duties to the client, the effects of the adversary system have been that in practice the interests of the client are frequently given greater weight or at least that duties to the court may be interpreted narrowly so as not to restrict a lawyer's ability to present the best possible case for their client. Examples given included the distinctions which are made between fabricating evidence and not disclosing evidence; the deliberate suppression of relevant but unfavourable evidence; the selective presentation of part of the evidence; the promotion of biased expert evidence; the unwarranted failure to admit the truth of the facts asserted by the opposition; the use of cross-examination to suggest the falsehood of a matter known to be true; and the use of tactical attacks on

²² Luban, *supra* note 17, at 124-43.

²³ AUSTRALIAN LAW REFORM COMMISSION, REVIEW OF THE ADVERSARIAL SYSTEM OF LITIGATION: RETHINKING THE FEDERAL CIVIL LITIGATION SYSTEM, ISSUES PAPER NO 20, APRIL 1997.

²⁴ Covering matters such as honesty — not knowingly misleading the court, or assisting clients to commit an illegal act; and fairness — not pursuing hopeless cases, or causing unreasonable expense or delay, not making unsupported allegations

²⁵ Duties to the client are concerned with the need to act always in the best interests of the client. They include duties of loyalty, confidentiality, competence and to inform, advise and obey.

the credibility of witnesses to suggest that the witness cannot be believed on oath, even though their evidence is known to be true.²⁶

What then if anything I am able to offer you on the question of whether we would be better served by an inquisitorial system. Regrettably I suspect not much that you will not have thought about already and certainly nothing that is original. But for whatever they may be worth I offer you these thoughts:

- First, to adopt and adapt the words of Gleeson CJ and Hayne J in *R v Carroll*²⁷ [the double jeopardy case], history has taught us that whatever system of jurisprudence is adopted, a criminal trial is an accusatorial process in which the power of the state is deployed against an individual accused of a crime and thus that the rules by which our criminal trials are conducted should reflect a concern that the resources of the state as prosecutor are much greater than those of the individual accused and that the consequences of conviction are very serious.²⁸
- Secondly, so far as I am aware, no other system of jurisprudence in the western world, be it inquisitorial or otherwise, conceives of the accused as having a moral or ethical obligation to confess guilt. In France, the presumption of innocence is enshrined in the Code Civil and the accused is entitled to remain silent and refuse to answer questions.²⁹ Why should we be any different?
- Thirdly, and to borrow from the ideas of Professor Jolowicz³⁰ concerning civil litigation:

²⁶ AUSTRALIAN LAW REFORM COMMISSION, *supra* note 23, ch 11.

²⁷ *R v. Carroll*, (2002) 213 CLR 635, 643 (High Court of Australia, 2002).

²⁸ See, further: The Hon. Justice Vincent, *Human Rights and the Criminal Law* – Presented as the 14th Sir Leo Cussen Memorial Lecture, 16 October 2003.

²⁹ Antoine J Bullier, *Evidence in French Criminal Procedure: A Short Note*, 26(8) BRIEF 12 (1999).

³⁰ J A Jolowicz, *Adversarial and Inquisitorial Models of Civil Procedure*, 52 INTERNATIONAL.C.L.Q. 281-295 (2003).

If parties to a dispute are to be persuaded to submit to the non-violent dispute settlement process of a court, is it not reasonable to suppose that such a process will prove the more acceptable the more it is constructed so as to allow each party to fight his own corner so that, in effect the court becomes a non violent substitute for the duelling ground? The parties present their respective cases to the judge or judge and jury, who act as a kind of referee or umpire and decide which of them has carried the day.

...

A procedure that uses the common law type of trial as a distinct and separate episode in the proceedings has the great advantage that it effectively ensures the automatic observance of the basics of procedural justice – of paramount importance to the success of a dispute resolution process, for the purposes of which, what really matters is that that at the end of the day, the parties – and especially the losing party – shall feel that they have had a fair hearing.

- Fourthly, and whatever the short comings of the adversarial system, there is a lot about inquisitorial systems that is probably not much better and a fair amount that is a good deal worse than what we have already.³¹ In any event, when it comes to civil litigation, as opposed to criminal proceedings, the principal continental systems decide cases on the basis of the cases presented to them by the parties much like we do. A German court, for example, attempts to find what it “believes to be true having regard to the evidence placed before it by the parties”.³² French courts too are limited to deciding the case based on the factual matters put in issue by the parties.³³ Indeed it has been said that on paper the two systems [of common law and continental law] when applied to civil rather than criminal proceedings look remarkably similar.³⁴
- Finally, and most importantly, in the words of Sir Anthony

³¹ See the Hon. Justice Sackville, *Reforming the Civil Justice System*, in Stacy and Lavarch (ed), *Beyond the Adversarial System*, 1999, 34 esp at 46-50; The Hon. Justice Sheppard, *The Issue of the Inquisitorial System of Justice*, 31 AUSTRALIAN JOURNAL OF FORENSIC SCIENCES 19-28 (1999)

³² Ktz, *supra* note 20, at 67.

³³ Jolowicz, *supra* note 30, at 176.

³⁴ Garry Downes, QC, *The Movement Away from Oral Evidence: How Will This Affect Advocates?* in EDUCATING LAWYERS FOR A LESS ADVERSARIAL SYSTEM 77 (Charles Sampford, Sophie Blencowe, & Suzanne Condlin eds, 1999).

Mason:³⁵

It would be a grave mistake to assume that transplanting the European model to Australian soil would necessarily result in a performance by that model uninfluenced by our traditions, our culture and our expectations of litigation.

The adversarial system of justice is grounded in our traditions and culture.³⁶ As a society we expect, nay, demand procedural fairness of an order that continental lawyers are only beginning to comprehend.³⁷ We have been doing so more or less since the barons sat down with the King at Runnymede. The ethics of "truth telling" notwithstanding, that is unlikely to change.

What then of the lament of the Kronman/Dawson school of thought that the profession's increasing preoccupation with business ethics is leading us away from the nobler traditions that once were the hallmark of the adversarial system.

Some years ago, Mr Justice Brooking wrote in his judgment in *Fry v Oddy*³⁸ of the increasing commercialisation of the law in these terms:

...the last half century has seen a transformation in the practice of solicitors. The mega-firm will be courted as the prospective tenant of a block of floors in the latest skyscraper. The wasted space of the atrium - a form of conspicuous consumption - emphasises by way of advertisement the firm's standing and success. Sponsorships will be used. Less oblique forms of advertising are commonplace: in newspapers and journals; on television; by public relations exercises; even by the "shopper-docket" offering one free will. Discounts are in terms offered by some firms on a variety of products. Old Gradman wrote everything by hand. Now the pen has been replaced by the word processor, if not by voice recognition software. The new technology is used both for communication and for the management of information and activities. With technological change, no large firm could now prosper without its computer on every desk, its giant photocopiers (themselves a source of revenue), its computer notebooks, its fax machines and answering machines, its mobile telephones and pagers, its dictation equipment, its video conferencing facilities. Its library will be to a considerable extent in electronic format. Its drafting will be done with the aid of artificial intelligence. Its requirements in terms of human resources will range from caterers to librarians. Outsourcing may be used. The firm will need a managing partner or general manager or office manager to carry the cares of the practice. It may be so large that some partners hardly know one another. A service entity will provide services to the practice at a profit. It will have

³⁵ *The Future of Adversarial Justice*, 17th Annual AIJA conference, Adelaide 7 August 1999.

³⁶ See the incisive comments of Brian Apeskin, *Comment: The ALRC's Issues Paper of the Federal Civil Litigation System*, 8 PUBLIC L. REV. 139 (1997).

³⁷ See further RACHEL S. TAYLOR, *A TALE OF TWO SYSTEMS*, INTERNATIONAL JUSTICE GLOBAL POLICY FORUM, 23 JULY 2004.

³⁸ *Fry v. Oddy*, [1999] 1 VR 557 (Supreme Court of Victoria, 1999).

complicated financing arrangements with its banker and others. It will train its staff by means of continuing professional development courses or seminars. It will make provision for the supply of floral arrangements and potted palms. Its staff will be legion; many of them will have quotas to meet and will charge their time in small units. Charge rates per unit of time will be determined for the various categories of employee and the productivity of employees will be monitored. It has been said that legal partnerships use "leverage through people", and that the large Australian firms do this more than the smaller ones, having 5.5 fee earners to each principal: Stein and Stein, *Legal Practice in the 90s*, p.4. Competition will be a major consideration in relation to pricing. Partners and senior staff may be headhunted ruthlessly. Clients may be poached.³⁹

That description of current day practice could hardly be thought of as flattering. In its detail it is accurate to a fault. Yet in its totality the effect is to present the profession as a group of self seeking individuals who, more than ever before, have as their only or principal interest the generation of profits out of the misfortunes of others. Are these really the ethics of the contemporary legal profession?

Certainly, there are now a significant number of practitioners who would say that those are and should be the ethics of the profession. They reject the idea that there is anything wrong with increasing commercialisation of legal practice. To them it is axiomatic that what is good for business is good for the country. And they view the law as business. Nor are they alone in that respect. These days governments of most political persuasions are convinced of the inviolability of market forces. As Sir Daryl Dawson remarked in his article on the Legal Services Market, those who would direct the future of the legal profession have their eyes firmly fixed on the market place. They want to increase the forces which the market can bring to bear upon the practice of the law. Their view is that more, not less, competition is needed and competition necessarily involves an emphasis upon the material rewards that success can bring.⁴⁰

Yet for others in the profession it seems that there is something very unsatisfactory about a professional ethic that puts money first. They remain of the view, long held by most, that the aim of the professions in general and of the legal profession in particular is to provide a quality service. And despite what is said by governments and others about the efficiency of the market place and competition, most members of the community, if asked, would likely also be of opinion that there is something very unsatisfactory about legal ethics that put money first.

Why is it so? Why do members of the profession and members of the broader community perceive as unsatisfactory the dominance now accorded to business principles in some areas of the practice? Why should not the law be regarded as like any other business? Why should not lawyers be entitled and indeed expected to

³⁹ Fry v. Oddy, [1999] 1 VR 557, 567 (Supreme Court of Victoria, 1999)

seek to maximise their profits just like any other businessmen? What if any ethical impediment stands in the way of it?

In the article to which I referred at the outset, Professor Bagaric and Ms. Dimopoulos posed and answered those questions in terms that there are no ethical considerations which should prevent the profession acting in a purely mercantile manner. As already observed, it is one of the tenets of their thesis that our willingness to act other than for profit is socially counter-productive. According to them it results in the half-hearted and inadequate provision of assistance to those who are in need, whereas if the profession did not provide its assistance in that way governments would be obliged to provide services that are adequate. Thus they argue that the pursuit of business principles is as much in the interests of society as in the interests of the lawyers themselves.

I for one, however, do not find that analysis convincing. I doubt very much that governments could ever fund an adequate replacement for the work which is daily performed pro bono and, even if they could, and were willing to do so, I am unable to accept that the ethics of business is wholly suited to the practice of the law and of unqualified benefit to the public.

When Justice Michael Kirby essayed similar questions at a Forum on Ethical Issues held at the St James Ethics Centre in July 1996 he used the words of Chief Justice Rehnquist of the United States Supreme Court to explain the nature of the problem:

Adam Smith, of course, would be pleased with all these developments. There is nothing like market capitalism to bring economic efficiency to any operation. But in the past the idea of a profession was subtly different, in both self-congratulatory respects, and in other more important respects, from that of a business. There was a personal relationship built up among lawyers in the same firm which meant that income producing ability, though a very important factor, was not the sole basis on which the status of a partner depended. It also meant that between clients, and law firms with whom the client had a long-term relationship, there was an element of trust and understanding which may be diminishing today. Clients regarded lawyers as supplying a sort of service different in kind from that supplied by their vendor of office supplies or raw materials. But if the law firm simply counts the number of hours spent and sends a bill for that amount, perhaps there isn't a great difference between the law firm, on the one hand, and the office supply vendor who simply counts the number of pencils furnished and sends a bill for that amount, on the other."⁴¹

⁴⁰ Dawson, *supra* note 4, at 152.

⁴¹ The Hon. Justice Kirby, *Legal Professional Ethics in Times of Change*, Forum on Ethical Issues, Sydney 23 July 1996, at .5, citing W H Rehnquist, Remarks of the Chief Justice, Catholic University School of Law Commencement, 25 May 1996 at 4.

Justice Kirby went on in his own words to point out there have been concerns about the increasing commercialisation of legal practice for more than a century and that in each generation they have been expressed in terms remarkably similar to those of the current debate. His Honour counselled too that one needs to avoid nostalgia and exaggeration and that some change is inevitable and some perhaps is even for the better. Yet the point of his address was that unless a culture of loyalty and self-respect can be restored, the mercantile values of ruthless self-interest may in the end come to destroy the ethos of firm loyalty and client loyalty that has existed until now. His Honour concluded that we are unlikely to restore the culture of loyalty and self-respect so long as we maintain a purely economic view of the law. Rather, he urged, we must maintain our idealism. We must continue to prize the nobility of the search for individual justice. We must regard as the reason for practice the essential dignity of each human being and the vital necessity of providing the law's protection. And we must be prepared to make the sorts of sacrifices that others before us have made.

Surely Justice Kirby was correct. Self evidently, the law is not just another business. It is a noble profession - and with its nobility comes a large measure of responsibility. As Lord Maugham put it, lawyers are the custodians of civilisation and there can be no higher or nobler duty than that. Perhaps in these days of competition principles and time costing that sounds old fashioned and high-flown, if not misconceived. But in truth it is the essence of the matter. The law exists to maintain social order and thereby to serve society. Those who are called to practise the law are called to serve the law and thus society. Their role as custodians of civilisation is informed by the ethic of public service. Ethically they are bound to put public interest before selfish interests, where the two conflict. In words which were recently spoken by a great Australian of another noble profession, it is a duty to be embraced; not a job to be endured.⁴²

Consequently, it is neither inaccurate nor an exaggeration to say of those who are in it just for money that they are there for the wrong reason. Nor is it surprising that they should from time to time experience some dissatisfaction about their position. One of my brother judges put his finger on the point at a ceremony for the admission of barristers and solicitors not long ago.⁴³ He told the applicants that just as there is not much point in studying medicine unless you are interested in healing the sick there is not much point in qualifying as a lawyer unless you are interested in justice. Justice Kirby also made the point in the address at the St James Ethics centre to which I referred a little earlier: a purely economic or mercantile view of the law is indifferent to the nobility of the search for individual justice, the essential dignity of each human being and the vital necessity of providing the law's protection to all.

No doubt when one is in practice, particularly practice as a solicitor, it is sometimes very difficult to put precepts of that kind into practice. For those who are in practice

⁴² Lt. Gen. P. J. Cosgrove, AC, MC at an address in Melbourne on 21 October 2004.

⁴³ Callaway, J.A., upon the occasion of applications for admission to practise as a barrister and solicitor, 31 March 2003.

on their own account there is often neither time nor resources to do so. Staff must be paid, rent must be found and mouths must be fed. When one is employed by another, there are budgets to be met and, if they are not met, other candidates wait in line who are anxious for a chance to meet them. It is a lot to ask of a practitioner, particularly a young practitioner that he or she put notions of justice and fairness before the pull of self interest. It is more than is asked of some others who call themselves professionals and certainly more than is expected of others who are not professionals. Why should you as a lawyer be expected to do more?

Sir Owen Dixon once gave an answer, in another context, which I think to be convincing:

Experience has shown in every age that a profession cannot proceed without high professional standards. Special knowledge is always suspected by those who do not share it. Unless high standards of conduct are maintained by those who pursue a profession requiring great skill begotten of special knowledge, the trust and confidence of the very community that is to be served is lost and thus the function itself of the profession is frustrated.⁴⁴

In conclusion, however, may I be permitted to say that it strikes me those who graduate from the Melbourne JD program are in many ways representative of what is admirable about the increasingly mercantile face of the practice of the law. Each of you has been selected after experience in other walks of life - many of you are from business - and I dare say that each of you has made considerable sacrifices to come here and to stay here and succeed. Your experience is such that you are also likely to have assessed that sacrifice in advance of your commitment to the course and concluded as the basis of your commitment that the sacrifice would be outweighed by the benefits to be derived. For those of you who made that assessment in terms of a commitment to the law, I need say nothing more.

For those of you who made the assessment in terms of financial return, the position may be different. The idea of a professional ethic that puts public service before self interest might not seem appealing. At least I can well understand why that would be so. Not for you the luxury afforded to me and to others of my era of study of the law as an undergraduate with all which that afforded.

But even allowing for those differences, principles stay the same. So, if money be your primary motivation, this may not be for you. Of course you would not be the only member of the profession for whom financial reward is the primary concern, and you might turn out to be one of those of that mindset who make a financial success of it. But it is to be doubted that they make much of a contribution to the profession as such, or whether the ethical qualities, which you must have in order to have come this far, would allow you much to enjoy it.

⁴⁴ JESTING PILATE AND OTHER PAPERS AND ADDRESSES (Judge Woinarski ed., 1965).