

Medical Aspects of Greed

by

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and

His Honour Judge Lewis

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The Chairman of the meeting was the President
Dr. A. H. Atkinson

Professor Smallwood

Greed may be defined broadly as 'the quality of wanting more than one's share', or 'eagerness for gain or wealth'. I am going to use a narrower definition, appropriate to the medical consequences of over-indulgence in food. I am, in effect, going to equate greed with gluttony, which the Oxford Dictionary defines simply as 'excess in eating'. I do not wish to discuss gluttony in a perjorative sense as one of the seven deadly sins, thereby implying gross excess in eating. I imply merely excess, and the question then arises: 'On what basis do we accept that an "excess in eating" has taken place?' It's quite simple: we get fat, so that the issue boils down to how we define fatness or obesity. It is about obesity, then, that I propose to speak, even if honest misjudgment or simply carelessness is the cause, rather than a conscious and determined policy of sustained overeating.

Obesity is a condition of excess body fat, but it is usually defined by measuring weight in relation to height, and not by measuring body fat directly. The Body Mass Index (or BMI) is one of the common indices used, and this is calculated by dividing weight in kilograms by the square of the height in metres. The BMI has been shown to correlate quite well with body fat. The range of normality is defined by actuarial analyses which show the weight range for each height which is associated with the lowest mortality. This weight range is then the standard or optimal range. Obesity is defined as a body weight 120% or more of the standard range, which corresponds to a BMI of greater than 30.

Overweight (you will notice that overweight is now a noun as well as an adjective) represents the range up to 119% of optimal, or a BMI of >25 , ie. 26–30. Morbid or massive obesity usually refers to a weight that is more than twice the upper limit of the standard range.

'Morbid' obesity has a nice ring to it, and presumably refers to the ill health, or morbidity, that attends such grossness, or perhaps the state of mind which prevails when one is encased in such a burdensome straightjacket. Of course, a number of historical figures were morbidly obese, including royalty. Vitellius, Roman Emperor from Jan–Dec AD69, was called 'The Glutton', Alphonso II of Portugal was known as 'The Fat', as were Charles III and Louis VI of France. How Queen Ann escaped some similar

appellation is something of a mystery. I understand she was 150cm high and 130kg. For those of you who cannot quite visualise from those numbers whether Queen Ann was a beanpole or sphere, I will translate: she was 4'11" and over 20 stone, so that makes her nearly spherical. Her portraits and statues hardly do her justice — the last and plumpest of the Stuarts.

My first attempt to cope with a morbidly obese patient was years ago when I was an intern on a country rotation, and an enormous hulk was brought up to the ward by three orderlies. The patient was suffering from a badly scalded and infected knee. He was 40 stone and too fat to lie on any hospital trolley or sit in any wheelchair: he just fitted onto a bed. He was unable to turn in bed, since he had to lie on his back, keeping his centre of gravity precisely in the midline to ensure that he did not roll right out of bed.

When the inevitable happened and he did roll out, he hit the floor with such momentum that he was unable to breathe and had to be resuscitated.

This man set me thinking: how could someone achieve such adiposity? Surely no one could simply eat themselves into this state: there must be some other factor. I changed my view one morning when I saw him eat 23 bananas as a morning snack — iron rations indeed. I found myself at one with Dr. Samuel Johnson, who, on seeing a fat man walking by, stated quite unequivocally 'He eats too much'. Boswell, by contrast, thought things were not quite so straightforward. He had observed that some eat a lot and yet remain thin, while others, eating much less, remain fat. Those of us who tend toward the portly would, on reflection I feel sure, take Boswell's part, and, taking the thinking further, would seek to know what it is that makes one individual prone to put on weight, while another is seemingly immune, even though the two eat an equivalent amount. What are the other factors, besides overeating or lack of exercise, that decide whether a person becomes overweight? The answer isn't simple, but there are several possibilities.

There is evidence from the study of twins that weight is in part genetically determined. For example, there is a remarkable constancy in the weight of identical twins, whether they are brought up in the same or different environments. The same constancy does not apply to non-identical twins. It is also well established

that there is a familial clustering of overweight individuals, but here it is often difficult to be sure whether you are dealing with nature or nurture.

There is a vast literature devoted to the metabolic basis of obesity, over and above the simple notion that fat people eat more and exercise less. It would seem that some people do have a different, defective if you like, energy metabolism that predisposes them to gain weight easily, but the precise mechanisms involved are difficult to pin down. You can understand why when I tell you that an increase in metabolic efficiency, which reduces energy expenditure by as little as 1% below energy intake — the smallest of imbalances, not really detectable by present methods in short term experiments — would lead to a 50kg weight gain throughout the 40 years of adult life. The fact that this rarely happens speaks volumes for the precision with which our energy balance is normally controlled, whether we are over or underweight.

Energy (or calories) that we consume must be either expended or stored. The law of conservation of energy must be obeyed. We have three main ways of expending energy:

- (1) by keeping going a whole variety of metabolic processes in the resting state — our basal metabolism. The basal metabolic rate (BMR) comprises up to $\frac{3}{4}$ of total energy output. Is the BMR reduced in obesity? Paradoxically, BMR in obese people appears to be normal, or somewhat raised, depending on how you calculate it.
- (2) by physical activity. It is a commonplace observation that fat people exercise less, but many careful studies have failed to establish any clear difference in the level of physical activity in fat and thin individuals.
- (3) by what is known as 'regulatory thermogenesis', i.e. we homeothermic mammals keep our body temperatures between 36 & 37.5°C. One might readily imagine that sluggish thermogenesis, i.e. a reduced 'wastage' of energy as heat, in obesity might alter the energy equation and lead to greater storage of energy as fat. And there is evidence to suggest this may be the case. The metabolic response to cold, for example, does seem to be damped in the obese. However, there are 15–20 candidate biochemical mechanisms for normal regulatory thermogenesis, so you can imagine how difficult it is to identify what the precise abnormality might be in the obese person, and whether

any abnormality found is enough to account for the observed increase in body fat.

In considering our Conservation of Energy Equation, therefore, we have gained little insight into why some get fat and others don't, unless of course, there is covert, excess energy intake, or hidden, unmeasured energy expenditure. Some researchers set considerable store by the importance of energy expenditure due to unconscious movements — the fat move with economy of effort, the thin are constantly leaping about and twitching — but this is more in the realm of opinion than experimental observation.

The other difficulty, of course, is the confounding effect of obesity itself. It may well be that what are you trying to measure, eg. the BMR, has altered from what it was before the individual became obese. Any difference between those with a propensity to become obese and the perpetually lean and hungry might no longer be evident once the former have reached their new, rotund, steady state.

I am sure you are all familiar with the oft made pronouncement, about a particularly fat individual, that 'It must be his glands!' Well, must it? What evidence is there that hormonal disorders cause obesity?

Lack of thyroid hormones can certainly lead to obesity, most often due to reduced energy expenditure, but this is a very uncommon cause. For the great majority of obese patients, there is little to suggest that subtle changes in thyroid hormone levels, or tissue responsiveness to thyroid hormones, play any part. Cushing's Syndrome, due to an excess of cortisone-like hormones from the adrenal gland is an even rarer cause of obesity. In fact, doctors cause Cushingoid changes much more commonly than occurs *de novo* when they treat patients with cortisone for their asthma or arthritis.

Insulin may prove to be central to our understanding of the metabolic abnormalities leading to obesity. There is at present great interest in what has been termed 'Syndrome X'. Here the chief concept is that, in this syndrome, the body's cells are resistant to the action of insulin — in other words a higher level of insulin is required to produce a particular effect, such as the movement of glucose from the blood into the cells of various tissues. This leads to more insulin being produced, and the argument then

goes that hyperinsulinism modifies metabolism in a way which enhances fuel storage. So we become fat, and not only fat, but the line of reasoning can be taken further to include as consequences of insulin resistance increased lipids in the blood, high blood pressure, and diabetes.

This is in many ways an attractive hypothesis which links mechanistically a number of conditions which go together clinically. However, a lot of research needs to be done before Syndrome X can be accepted as an established entity, with all its putative mechanisms proven beyond reasonable doubt.

The cost of obesity to our community is considerable. Insurance statistics, among other data, make it clear that being overweight increases the risk of a range of disease, with a consequent increased risk of illness and premature death. Sir John Falstaff was well aware of this:

‘I have more flesh than another man,
And therefore more frailty’.

How common, then, is obesity in Western societies such as ours? A reasonable estimate is that approximately one third of the adult population is overweight or obese, and that they are likely to have an increased risk of coronary artery heart disease, of high blood pressure and its complications, of diabetes with all its ramifications, of gallstones, of arthritis, and of various sorts of cancer. Excessive weight is particularly a hazard if there is a family history of one of these conditions (or some other risk factor), and by and large the risks are greater the fatter you are, and the older you are. So it behooves us all to watch our weight as the years go by.

Recent evidence suggests that the distribution of excess body fat has a bearing on the health risk. It seems that a paunch is not a good thing.

One measure of fat distribution that has been used in a number of studies is the ratio of the circumference around the waist to that around the hips. To have a high waist to hip circumference ratio (WHR) is to be at increased risk of mortality from all causes, but particularly from heart attack and stroke. Quite why this should be the case is not clear, but I am convinced enough by the observation to try to do something about my spare tyre.

What can we do about being overweight? How can we return to a normal BMI and prevent obesity from leading to illness?

From the community's point of view, it is arguably more important to reduce morbidity in the large number of people who are moderately overweight, than to worry about the few who are seriously overweight. Modest reductions in weight can markedly improve blood glucose levels, cholesterol levels and blood pressure, particularly if reduced energy intake is achieved by reducing fat and sugar in the diet, and there is an associated increased level of physical exercise and fitness. In fact, we should probably not focus exclusively on body weight, but rather consider also adiposity. One way an individual can assess the amount of body fat is to do the 'pinch' test; that is to pinch up a fold of abdominal skin between thumb and forefinger. Anything greater than 2.5cm (or one inch) constitutes obesity. Alternatively, it is very simple to measure abdominal girth as an good index of fatness. Perhaps the bathroom tape measure should complement the bathroom scales.

In our community in recent years, numerous health bodies, from the NH&MRC and Heart Foundation to the Victorian Government's Health Promotion Foundation, have done much to educate the public about a healthier lifestyle. Given the large number of overweight adults, it is clearly perfectly appropriate for health authorities to try to adjust the dietary habits of the population. Such a campaign could not but be cost-effective were it to succeed, even partially, in returning the mild to moderately obese to normal.

But what of those at the other end of the overweight scale — the morbidly obese? Physicians and psychiatrists have failed dismally in their attempts to induce this 'too, too solid flesh to melt, thaw, and resolve itself into a dew'. What might be broadly termed the 'behavioural' treatment of obesity has been called into question. The validity of some of the assumptions underpinning clinical approaches is not established, and the outcome of treatment is uncertain. Behavioural therapy encompasses the strategies devised to try to induce better eating behaviour, together with increased physical activity. Behavioural therapy has at times been complemented by drug therapy to suppress appetite, but several studies have indicated that there is little added benefit in the longer term. One example of a strategy that used to be popular was

the so-called 'stimulus control intervention'. This approach was designed to eliminate external food cues, such as the sight of food left lying about in the kitchen, on the grounds that obese people respond to external food cues rather than internal, physiological needs.

Present evidence indicates that people who respond to external cues are found at all weight levels, and that the obese are no different from normal. Emphasis also used to be put on changing eating style, since it was averred that fat people ate quickly and took larger bites. When this assumption was critically examined, it did not stand up. Those who gobble their food are represented at all weight levels.

Very low calorie diets (<500 calories per day) have fallen somewhat into disfavour. There were a number of sudden deaths some years ago in severely obese patients. These deaths were probably related to the absence of high quality protein in the diet, producing electrolyte disturbances and hence fatal cardiac arrhythmias. Although, with proper supervision and adequate high quality protein, this alarming outcome is now no longer seen, and despite the short term weight loss being gratifying, there is a high drop out rate, and most who do lose weight initially put it back on again over the ensuing months. Moreover, swings of weight, from alternate strict dieting and bingeing, appear to lead to a higher mortality than simply staying fat.

Psychological therapy is based on one or other of the psychosomatic theories of overeating. I think the thing that has to be remembered is that the psychological well-being of the patient does not necessarily correspond with the successful attainment of normal weight. Some very fat people are very well adjusted, which may not be the case when they lose weight. Julius Caesar understood this:

'Let me have men about me that are fat,
Sleek-headed men, and such as sleep o'nights'

The efficacy of the various modes of psychological therapy (eg psychotherapy, psychoanalysis, group therapy, hypnotherapy) is patchy, and one might argue that while obesity is a bad thing, a person obsessed with weight and diets may be worse. Psychological therapy might perhaps best be considered as an adjunct to other forms of therapy in suitable cases.

Surgeons have shown great ingenuity in devising operations to help the grossly obese. In the 1950s and 60s, one or other form of intestinal bypass was popular. These operations were tantamount to excluding most or all of the small intestine, where most digestion and absorption takes place. Thus what was ingested passed directly through to the colon and out, with no opportunity for assimilation into the body tissues. The problem with these operations was frequent, disabling diarrhoea and a number of severe, longer term complications such as liver failure. In an attempt to contain overeating, patients have in the past had their jaws wired together, or their abdomens circled with a band. More recently the surgical approach has been directed toward the stomach, and the current, most widely used operation is what is known as a 'vertical banded gastroplasty'. This is simply a way of cobbling the stomach up so that its capacity as a reservoir is greatly diminished, and the individual has a feeling of satiety soon after starting to eat.

The results of gastroplasty are perhaps more encouraging than any other form of therapy in the management of the enormously obese, but some of these patients are still able to develop eating habits which can defeat the operation. Patients have been known to burst the staples used to cobble up their stomachs, and I well remember one woman who kept her weight at 25 stone, despite her gastroplasty, by continuously drinking milkshakes.

Treatment of obesity, then, can be a frustrating exercise for all concerned, but there are occasional remarkable successes. For those who would like a little extra stimulation to help lower their BMI, may I commend the following remarks by Henry V.

'Make less thy body hence, and more thy grace,
Leave gormandising: know the grave doth gape
for thee thrice wider than for other men'

Perhaps you could put them on the refrigerator door.

Obesity has not always been regarded as a health issue. People's perceptions of ideal weight have, over the centuries, been largely culturally determined. In cultures where food was scarce, obesity was often a mark of wealth and power. In women, fatness used to be associated with femininity and fertility. Renaissance painters such as Rubens saw beauty where we would see grossness: one of his models weighed over 90kg. Even in our time perceptions of female beauty have changed for the thinner. The weights and

measurements of Playboy centrefold models have steadily diminished over 20 years. Madame Tussaud's used to have an annual poll concerning the most beautiful female figure on display. In 1970 it was an ample Elizabeth Taylor: by the late 1970's it was Twiggy.

There is evidence that the present health and fitness culture, and the requirements of our social milieu, are setting a standard of desirable thinness which is actually suboptimal. People are trying to be thinner than Life Insurance tables would indicate is the optimal level, and many young women, in particular, who are in the optimal weight range, see themselves as fat.

What are the psychological and social consequences of obesity? This is an important question, and it probably won't surprise you to know that the obese are stigmatised and are the victims of discrimination. There are many studies which attest to this, and examples that have been cited include discrimination in employment, in admission to Universities and in treatment by the medical profession. The harsh social consequences of obesity inevitably take their toll, in the sense that fat people often come to see themselves as bad, morally turpid, weak, gluttonous and lacking in all virtue. It should be abundantly clear that such stigmatisation, whether by fat people themselves or the moral majority, is wholly unproductive.

How much, then, of our community's obesity problem is determined by sheer, unadulterated greed? Probably very little. For most of us, body weight is governed by a complex amalgam of genetic, social, cultural, and physiological influences, which allows the majority to stay in reasonably healthy equilibrium, but which determines that a significant minority will become unhealthily overweight. The degree to which these influences can be changed to improve further the health of our community is uncertain, but it remains a question of the greatest importance.

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His Honour Judge Gordon Lewis

Mr Chairman, I am sorely troubled by two aspects of this responsibility of representing the lawyers' side of this topic.

My first concern, as always, is about myself.

In March of this year I spoke to the West Australian Institute of Anthropologists on the subject of professional incompetence.

By May I was in South Australia pontificating on the subject of Cheats, lawyers and the all Australian way.

And here tonight I score the trifecta, Medical and Legal Aspects of Greed.

And all this had led to the inevitable question, *why me?*

Is it a case that someone who remembers my style and standard of practice in Hamilton in Western Victoria has been dropping my name about?

Have they belatedly audited the Hamilton Firm's Trust account for those halcyon years from 1962 to 1975?

Have they gone through some of those old personal injuries files and worst of all and perhaps most relevantly to this discussion, have they examined some of the bills I used to send out with zeros scattered around like salt and pepper?

In any event the choice of me as the legal speaker on this topic caused considerable hilarity amongst my colleagues and some remarks like, '*who¹ better?*' or '*always consult the poacher when you want to make some rules for the game keeper*' and similar comments seem to indicate that your Committee has chosen someone who has been doing practical field work in this area for a number of years.

My second concern was the topic itself — medical and legal aspects of greed.

The title suggests that greed is either a newly discovered illness or by inference at least, partially illegal.

I may add that it wouldn't be the first time a surprising new disease has come to light.

The Judge who has adjoining chambers to mine looked exceedingly ill in June and I asked him what was the trouble? He said he thought he was suffering from Alice. I asked him what it was and he said that he wasn't too sure but he knew Christopher Robin went down with it.²

I spoke to Richard Smallwood and he was kind enough to tell me of the approach he proposed to adopt. However I thought that reading out the names of fat barristers commencing with Lord Lunchalot³ from the Bar Roll or corpulent solicitors from the Law Institute Journal lists might only result in a gradual walkout of the legal members present during this paper.

A telephone call to the President straightened me out and the topic was clarified. He advised me to say something incredibly learned early on, to reassure the sober members present that I had done exhaustive research on the topic to honour the occasion. Above all else he urged me not to be flippant.

He said that quotations from the Bible, Charles Dickens and Lenin were much admired.

Well, the sad truth is that there is an overwhelming number of quotations which link greed and lawyers.

The late Fred Rodell, controversial law professor at Yale, in his book 'Woe unto you Lawyers'⁴ remarked that only the law 'insists on making a party out of a single person'.

Reading the Oxford Dictionary the other night, as I do most nights before I slip off to sleep, I was struck by how frequently 'lawyer' is associated with most unattractive flora and fauna. One which caught my eye was the lawyer vine which apparently has stems and leaves studded with sharp thorns which continually cling to you and draw blood.⁵

More relevantly in New Jersey the black-necked stilt is called the 'lawyer bird' because of its long bill⁶, and in the United States generally, the expression 'lake lawyer' is a name given to two different types of fish in an allusion to their voracity.⁷

And finally by way of historical background on the topic of legal aspects of greed, I came across a cartoon published in Punch close to the turn of the century which shows two equity silks walking away from Courts of Chancery, one saying to the other, 'Just imagine all that money left to be frittered away by those beneficiaries.'⁸

Turning to the local scene, in considering legal aspects of greed I should make it clear that being greedy is not a pre-requisite to practising law in Victoria.

Indeed the pre-requisites do not mention competence, compassion or charging restraint either.

To get into the legal profession in this State you only have to be

fit and proper which I suppose means being a well mannered jogger.

If excessive charging is the ultimate measure of greed then in my view there are greedy lawyers in Victoria. Although to set objective tests for greed is not always easy.

Take the situation for example of your typical struggling Queen's Counsel living in a housing commission flat in Collingwood with 10 children at the meal table waiting to be fed and a spouse demanding maintenance arrears. Who would blame him or her for marking the next brief with an extra zero?

Must greed be measured against financial pressure?

Is that Queen's Counsel's plight and fee to be distinguished from the solicitor living in Toorak who is the senior partner in a multinational firm and who has two Rolls and a Mercedes in the triple garage and a Turbo Porsche semi abandoned outside on an overgrown nature strip, if indeed he sends out accounts at the rate of \$600 per hour for his time.

I think it is fair to say that many young lawyers begin their professional careers with a firm conviction that the system owes them something. Often they are 22 or thereabouts and their first salaries as law graduates are likely to be less than \$25,000 per year.

Invariably their emotional partner is earning more than they are, sometimes twice as much. They could be excused if they did make a calculation of the duration of their likely working lives and expect their chosen profession which has set high standards of entry, to give them something back, and quickly.

I suppose that that really is the question. What is fair remuneration for the highly trained graduate and the particular expertise of a select few who are able to provide skilled specialist services?

If I may transgress across the line into the medical profession for a moment, how much is it worth to obtain the services of the first surgeon capable of performing a brain transplant? At what point is that surgeon being greedy in nominating the fee for his or her services?

I suppose much would depend on whose brain you were going to get.

A brain from the deceased back seat passenger in a government car involved in a fatal accident in Canberra would presumably be

on discount while the brain of a hirsute TV Public Affairs Presenter might cause nausea and headaches as it rattled around inside the skull of the average citizen.

Back with the legal profession, if there were a barrister who had never lost a murder trial, never had an accused convicted, a barrister with an hypnotic manner able to charm any judge into agreement, or any jury into submission, at what point would he or she be greedy in fixing a fee for his or her services?

Here I am reminded of another famous Punch cartoon which shows a judge sentencing a particularly sleazy looking accused. 'Ernie Pringle, alias Ernie the Hypnotist, you have been found guilty of 127 counts of fraud. It is with a heavy heart that I sentence you to spend 5 years in the Bahamas staying at the Hilton Hotel, all expenses paid'.⁹

And so Mr. Chairman my premise is that skill will always find its own level of recompense and professionals with special skills should be compensated accordingly.

However, in making that statement I acknowledge that the legal profession is continually under the microscope of public opinion, and accused continually of being greedy.

The cost of litigation and some other services provided by lawyers is now well beyond the reach of the average citizen unless he or she is eligible for legal aid, has union support or a lawyer who is prepared to take a chance on the ultimate success of the litigation.

Certainly the financial expectations of some members of the legal profession have brought all lawyers to a point where sections of the so-called lawyer monopoly have the shakes and we should be considering whether we are really worth the hire.

A most difficult problem faced by the solicitors in this state where costs and charging rates are the subject of continuing criticism, is the disease of the hourly rate. The hourly rate or time costing has provided kerosene to fuel the fire of greed if that is a synonym for over-charging.

Many solicitors today charge out their services on an hourly rate ranging from \$300 to \$600 per hour.

In my view, contrary to its original purpose, time costing is an invitation to inefficiency, a cancer that is spreading through the solicitors' side of our profession.

When that hourly rate is combined with a loading for specialisation and responsibility, the question is how can greed be avoided, how much more will the clients, other than the big corporations, tolerate?

As one Melbourne lawyer said 'We factor into our fees the complexity of the deal and the amount involved in it. There's a difference between a deal of \$5 million and \$500 million and the risk of making sure that advice is accurate.

When you look at the size of these deals our fees are often petty cash. We also look at how creative the deal is. Could our clients get this sort of advice anywhere else?'¹⁰

Let me share with you one example of the problem which says it all.

There was this firm of simple country solicitors practising in Western Victoria. They had a client who had supplied four Merino stud rams to a breeder in New South Wales. A drought intervened and the breeder didn't pay. Legal proceedings were commenced in Victoria, and a judgment was obtained without any real resistance from the defendant.

As in most of these situations the judgment was not the end of it, the real problem was to enforce the judgment. This required the registration of the judgment in New South Wales and the issue of further proceedings in an endeavour to enforce payment.

These simple solicitors in western Victoria chose a lawyer at random from the New South Wales Law Gazette and sent off instructions for that lawyer to register the judgment on behalf of their client Mr. Warren.

They eventually received a reply which went something like this:

'Dear Mr. Lewis,

I apologise for not having responded earlier but I have been out of the office for eight weeks.

Thank you for offering me the opportunity to enforce the judgment on behalf of your client Mr. Warren but I must decline.

Without sounding pretentious my current retainer for cases is a flat \$10,000 with an additional charge of \$1000 per hour. Since I specialise in international trade and geo-political relations between South East Asia and Australia my clientele is very

limited and I am afraid I am unable to accept other work at this time.

I am returning the papers which you sent to me and I thank you for your instructions.

Very sincerely,
Charles G. Reed'

When they received that reply this group of simple country solicitors decided to write back. If I can take a moment of your time I'll read you sections of the letter which I believe is still relevant to the topic tonight.

'Dear Chuck,

Thank you for your letter regarding the enforcement of the judgment on behalf of Mrs. Warren.

Chuck I've got news for you, you can't say you charge \$10,000 retainer fee and an additional \$1000 an hour without sounding pretentious. It just can't be done, especially when you're writing to someone in country Victoria where you're considered pretentious if you wear socks to Court or drive anything fancier than a VW. Hell Chuck all the lawyers in Hamilton put together don't charge \$1000 an hour.

Anyway my partners and I have been sitting around the office chatting and we decided that you've got a really good thing going in Sydney. We would like to come and join you in Sydney where evidently people can get away with just about anything. Therefore the four lawyers in our firm intend to join you in the practice of international trade and geo-political relations with South East Asia.

Now Chuck I guess you are probably thinking that we don't know anything about South East Asia but I think you'll be pleasantly surprised to find that is not the case. My partner Hal Brown once went for a 10 day holiday to Hong Kong, and he's still got the video player that never worked.

Although I have never been out of Australia myself, my sister just returned from a vacation in Tasmania, while my junior partner Mark Jones has a Singaporean wife who has done her best to introduce some culture into his life.

Another thing you should know, Chuck, is that the firm has an extensive foreign language background which I believe would

be useful to you. Hal took Latin in high school although he doesn't use it much in everyday conversation here in Hamilton.

My partner Bruce has mastered Chinese by frequently ordering food from the Chinese takeaway in Thompson Street — you may have heard of it, its called the Gung Wah.

My French is a bit rusty and I've forgotten the equivalent for such words as international and geo-political (which I confess I'm not too familiar with in English anyway) but I can still hail a taxi or find a toilet.

Chuck, let us know when we should come to Sydney to join you so that we can begin doing whatever it is you do.

In anticipation of our move we've all been practising trying to say we charge \$1000 an hour with a straight face but so far we haven't been able to do it. I suspect it will be easier once we get to Sydney, where we're told even poor people drive Mercedes Benz.

In any event because I'll be new to the area of international trade and geo-political relations I am thinking of only charging \$500 or \$600 an hour to begin with. Will that be enough to meet our overheads?

We look forward to hearing from you before you go away again for another eight weeks.

Sincerely

Hal, Mark, Bruce and Gordon

P.S. Incidentally we have advised our client of your hourly rate. She is willing to pay you a \$1000 per hour to collect this judgment provided it doesn't take you more than 14 seconds.'

As some of you may know I was Director of the Law Institute of Victoria for quite a few years and as such I was the recipient of all complaints about solicitors. I became exposed to some extraordinary examples of professional greed by solicitors and there are two cases which come to mind.

The first is the case of the typist with the flickering finger and the second is the case of the churlish copper.

The flickering finger case arose when a disgruntled plaintiff who had settled a County Court action for the sum of \$19,000 wrote to

the Law Institute and asked me whether it was right for her solicitor to deduct \$14,000 for legal costs.

Even in this enlightened age of proper professional remuneration, it struck me as a lot. When the solicitor was quizzed about these costs he wrote back and a portion of the letter reads as follows:

'I can only ascribe the error to the incompetence of a very junior typist in my office who inadvertently typed in an additional 0. A further cheque for \$12,600 has been despatched to the plaintiff to adjust the matter.'

Well, so far so good. But this girl must have been irrepressible because within two months she was up to her old tricks again.

This time the uncontrollable little finger struck again on exactly the same key to increase the costs deducted by the same solicitor in a \$12,000 settlement from \$700 to \$7,000. Again a complaint was made and the question asked and again the explanation was the same but this time I was assured that she had been dismissed.

The much maligned Law Institute was totally dissatisfied with this explanation and when someone who must have been the newly dismissed junior typist's twin sister struck again to ensure that the plaintiff in a third case paid the solicitor all the damages in costs, we moved in.

Some five months later my flickering finger called the solicitor's practising certificate.

The churlish copper involved a policeman who was really very hard to please. He engaged a solicitor who insisted that he had to pay a fixed fee for his services. The fee in question was \$10,000 and was the subject of an agreement signed by all parties at the time that the solicitor was instructed to act.

When the policeman's claim for damages for personal injuries was settled for \$10,887 some three months after it was commenced he naively thought that the split up of \$10,000 to the solicitor and \$887 to the policeman constituted a gross example of professional greed.

He complained to the Law Institute but before the Law Institute could do very much about it, he had a change of mind and resorted to self help.

As a consequence of his own actions he received a cheque for \$10,000. The solicitor no doubt spent the greater part of the remaining \$887 on hospital and medical bills.

These two examples make an interesting comparison with the case of English solicitor Glanville Davies, who in the early 1980s while a member of the Council of the British Law Society after acting in a commercial case submitted a bill of costs to a client for £198,000.

After the client complained to the Court the bill was reduced to £68,000 with a finding that it was based on fictitious attendance notes containing false times, false dates and often duplicating, triplicating and even quadruplicating the same event.

Mr. Davies blamed his lack of authenticated records on a leaking roof which is the first of two references I will make to a leak in this paper.

In an impartial commentary in his book 'Lawyers can Seriously Damage your Health', Michael Joseph (who is also the author of 'The Conveyancing Fraud', which as you may guess is a dispassionate consideration of lawyers' involvement in conveyancing) said this

'If a tradesman tries to overcharge his customer by \$130,000 by submitting a bill based on palpably false records it is a Fraud. If a solicitor does it, it is misconduct. Ordinary men make mistakes, professional men make errors of judgment.'¹²

Barristers

I had hoped that at this stage my time would have run out and that in turn would have saved me the ordeal of detailing the contribution barristers have made to aspects of legal greed.

For on reading the membership of this society and noting the names of the barristers who pay their dues, I felt that any reproach of them for overcharging was equivalent to popping along to the coliseum in 200 A.D. to give the lions a ticking off for not putting in.

Actually there is an odd coincidence for me in the title of this paper, if '*aspect*' is a synonym for '*view*', then a view by a barrister and professional greed are sometimes closely linked.

One example comes to mind. In the early 1970's I acted for the plaintiff in a Supreme Court action in the Hamilton Court

involving an intoxicated driver who failed to realise that the bridge over the Emu Creek at Skipton required a preliminary and subtle manoeuvre before a car could be driven across it.

A combination of alcohol, fog, real or imagined and a degree of optimism, for I suspect no car had ever been driven along the parapet of the bridge before, resulted in an horrendous accident in which it was established once and for all that unlike the late Sir Henry Bolte, a Holden sedan didn't float in the Emu Creek or any other creek for that matter.

The estate of the deceased passengers all sued the insurer of the deceased driver. I engaged a silk to appear, and on their way to Hamilton along the Glenelg Highway, he and his junior were required to drive through Skipton and across the very same bridge, although hopefully not along the parapet.

This they did, successfully, the case settled and soon after I received a bill for \$600 for a view of the bridge by the silk and \$400 from his junior. I thought it was a bit hot but the other side agreed to pay the fees so it really didn't trouble me.

A year later over a drink I said to the junior. 'You know that fee for that view of the bridge at Skipton was a bit rough, wasn't it?'.

And to his credit he didn't look up from his glass but said, 'Yeah. It wasn't the best. We did stop there though, we had a leak into the creek'. He agreed on reflection that at \$600 and \$400 a go respectively they were two very expensive leaks.

However on a strict interpretation of this topic I don't believe any barrister has ever been guilty of greed. If greed can be defined as a desire to acquire in excess of immediate needs, there is no barrister I know who would qualify. Because irrespective of how busy they are and how high their fees, all the barristers I know seem to need every cent they can lay their hands on.

Barrister are great spenders.

All of them seem to have two or three husbands or wives or both, multiple slow race horses, huge houses in the best suburbs, huge mortgages, swollen overdrafts, negatively geared farms where even the sheep walk backwards and anti-social aggressive bank managers. In the light of that who can blame them for throwing in an occasional 0 here and there when they are marking up their fees.

Indeed in this computer age, most senior counsel no longer

mark a brief at \$3,000 or \$3,500 or whatever. Briefs are now marked in K's. Barristers now put 4K, 5K, 6K or so forth on the back sheet.

Sadly too, unnecessary bureaucratic interference has led to a marked reduction in double or multiple briefing.

That was where the real money lay, in times which have seemingly passed.

The days when on the same day one barrister held four briefs in Supreme Court juries, all in different Courts, one in the County Court, one in the Magistrates' Court at Dandenong, and perhaps a Family Court matter on the side.

They were the days of big incomes.

It was common for a solicitor to have a brief handed back by a barrister who had failed to settle all these actions overnight and who with a waive of the hand at 10.25 a.m. would announce, 'I'm jammed'.

One barrister became famous for finding himself at Prahran Magistrates' Court with a brief for the complainant and the defendant in the same action.

With proper regard for the ethics of the problem he settled the case.

He was heard to say later that appearing for all parties did facilitate settlement and promote reason.

For hundreds of years we, together with the rest of the other common law jurisdictions, tolerated a system where a Queen's Counsel took along a buddy who automatically charged two-thirds of the fee of his leader.

In medical terms this was akin to the theatre sister receiving two-thirds of the surgeon's fee for wiping away the sweat from the brow of that incorporated body as it performs an operation.

It is to the credit of the Bar in Victoria that these practices have now been moderated or completely done away with.

Leaving the Bar alone for the moment the most recent proposal by solicitors to introduce the famous or infamous American concept of the contingency fee seems to me to have considerable potential for abuse.

The so-called 'contingency fee' is no more nor less than a speculative agreement.

A fee may be contingent in one or both of two senses.

First a lawyer may agree not to charge for his or her services

unless the client is successful. In this case payment for the services will be contingent on the outcome of litigation.

Secondly, the agreement may be to charge a proportion of any amount recovered. In this sense the fee is contingent on both success and the sum actually recovered. Such arrangements are normally only relevant to settlement of a claim by the client for monies or other valuable assets.

Essentially the argument about the propriety of contingency fees reflects differences in attitude to the concept of professionalism.

In its rawest form the charging of contingency fees carries a danger that the client will be over-reached by greedy lawyers charging exorbitant fees.

The client is in a weak bargaining position, especially in personal injury litigation where he or she may be severely injured and in great need of the money.

The lawyer may abuse his position to charge excessive fees — especially since the very concept of contingency fees involves a gambling element that would entitle the lawyer to charge more than the usual rate to compensate him for the fact that he gets nothing if he loses.

With the introduction of contingency fees being contemplated in Victoria the answer to that problem seems to me to be relatively simple, that is to regulate the fees or percentages that can be charged as is done in many of the states in the USA.

In New York for example all contingency fee arrangements have to be notified to a designated regulatory body, giving the details of the agreement in terms of compensation. The rules set out a sliding scale of maximum percentages.

If we have any enthusiastic supporters of contingency fees in this audience then I refer them to the best authority of all, that is the movies.

Go and see Paul Newman as the drunken derelict lawyer Frank Galvin in *The Verdict*, see how he reacts when the defendant makes a substantial but utterly inadequate offer of settlement. His share of the settlement as I recall it would have amounted to \$100,000.

I am sure that those of us here who are drunken, dissipated and down on our luck would well appreciate the temptation that such an offer constituted for him.

Finally Mr. Chairman at a time when legal costs are spiralling let me make two suggestions which may be of assistance in retarding their growth.

For the first I am indebted to the well known Auckland barrister D.F. Dugdale.

It was he who made the suggestion that Queen's Counsel should be required to pay to the Crown a substantial annual franchise fee in return for the privilege of so describing themselves¹³.

As he argued it when a barrister is appointed a Queen's Counsel that fact receives publicity.

There is publicity attaching to his or her swearing in.

Thereafter the description of Queen's Counsel is displayed as a sort of good housekeeping seal of approval.

As marketing promotions of the individuals concerned these arrangements could hardly be bettered.

He felt that in New Zealand those who lent on these state supplied crutches could henceforth be required to pay a market rate for the privilege. In an extension of that argument he said that if a man wishes to promote his selling of cooked pieces of domestic chook by invoking the hallowed name of Colonel Sanders he will no doubt be required to pay substantial sums for the licence to do so.

Why then shouldn't a barrister, who seeks to pedal his or her services with the aid of the name of our sovereign the Queen be required to pay a comparable franchise fee?

No doubt it will be argued that there are differences. It is not with finger-licking that one associates the rise of ambitious barristers.

The quality control of the Kentucky Fried Chicken people may be very much better. But it is my contention that despite these distinctions a compelling analogy remains.

I think I can hear some of the Queen's Counsel present whispering what rate of franchise fee should be payable.

No doubt there is some new school leaver in Treasury whose views the Government will accept as gospel. It may however be helpful if I record my own suggestion which is 20% of gross professional earnings payable quarterly, with (to discourage slacking) a minimum annual obligation of \$300,000 which figure shall be subject to an inflation adjustment.

If the objective of raising funds for the Attorney-General's

Department is to be achieved then the matter should not stop there. There should be a determined campaign to persuade those barristers who are not Queen's Counsel to immediately apply for silk.

In any event desperate straits require desperate measures and there are historical precedents, such as James I selling Baronetcies to finance the plantation of Ulster or knighthoods in Queensland.

Clearly it is a modest proposal and the details need to be sorted out. There should be provision for any Queen's Counsel dissatisfied with the new arrangement to elect to be dispatented (a process for which Sir Robert Megarry suggests that an appropriate colloquial term corresponding to 'taking silk' would be 'getting stuffed').

There may be grumbles. But what I have proposed seems a far more satisfactory method of financing government over-expenditure than *milking* unsuspecting home buyers of excessive duty and registration fees.

Finally Mr. Chairman I offer a suggestion to control time costing, the solicitors equivalent to being a silk, or wearing it. The primary vice of time costing is of course that it is unsupervised, and like several other activities that come quickly to mind, it is done primarily by oneself, behind closed doors.

The truth is that the client has no check on how long the work takes and whether the time charged has been reasonably incurred.

There is an answer and that is a requirement that all solicitors will provide their clients with a video tape of the activities which constitute their labours on behalf of the client.

What could be better? A close up video tape of the solicitor thinking, writing, telephoning, perusing and generally exhausting himself or herself on behalf of the client.

The client would be reassured that none of the time charged involved the solicitor chatting, betting on horses, arranging luncheon engagements, accepting instructions about what to buy on the way home, going to the toilet or arranging to have the car serviced.

The client would receive the bill together with a large parcel containing the video tapes. Occasionally to keep the clients interest, a surprise video tape could be thrown in by the solicitors,

and intermingled with videos of young solicitors slaving over *BHP v. Bond*, there could be *Debbie Takes Dallas* or *Deep Throat*. Perhaps these tapes could be inter-spliced onto the professional tapes to ensure the client's attention.

Well there it is Mr. Chairman, professional greed for the legal side of things. Perhaps we all tend to over-value our services, perhaps we have all been guilty of tailoring our bills to suit the client's capacity to pay. As Robert Aranson said in the American Bar Association Journal in 1982:

'The legal profession as a whole must ensure that the value of lawyers' services is determined accurately. It must be able either to defend its members' fees or to provide a valuation method that allows lawyers to price their services accurately and one which establishes an effective method of policing individual determinations.

As the means of access to our system of justice lawyers owe a special ethical duty to society to ensure that the value of their services is fairly measured. Despite all this, putting a dollars and cents price on legal services is an extraordinarily difficult task.'

Mr. Chairman, whatever the real topic for discussion at this meeting is, it could only be described as thought provoking.

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