'What's Wrong with Lawyers?'

by

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A rhetorical question to which I suppose the polite answer is 'Not much!'. Why is it then that for centuries lawyers as a group have not been widely admired in the community? It is, I believe, important in trying to reach an understanding of this unfortunate state of affairs to consider briefly the development of the profession as we know it today.

After the Roman legions left England about 400 AD, the elements of Roman law imposed during the military occupation virtually disappeared. About 200 years later, King Ethelbert of Kent set down in writing laws for his subjects called 'dooms' or judgments. The officers who enforced these dooms were probably the first Anglo-Saxon lawyers, and like most persons set to enforce the law, they were undoubtedly extremely unpopular. Even today, all lawyers are officers of the court and, as a precondition to admission to practice, must take an oath of allegiance to the Crown. Thus the whole legal system has developed as an organ of the Crown and of government, although nowadays it is supposedly well insulated from the direct interference of government.

Let us now look briefly at the way in which the traditions, professional organisation and training of the men, (because until relatively recent times there were only male lawyers), who practised in the Kings Courts came to take shape.

By the 15th century between Westminster and the City of London there were four great Inns of Court; Gray's Inn, the Inner and the Middle Temple and Lincolns Inn which were the homes of practising lawyers and students of the law. With them were several lesser Inns of Chancery. The Inns were self-governing, and a product of the mediaeval spirit of corporate organisation which produced the guilds. Their collegiate organisation and discipline made them like the mediaeval universities. They were also, of course, elitist and largely the province of the rich and privileged. Fortescue in his 'De Laudibus Legum Angliae' has described the vigorous life of the Inns, their courses of study and their moots. It will come as no surprise to you to learn that the students, and I quote, 'learn singing and all kinds of music dancing and other such accomplishments and diversions as are suitable to their quality and such as are usually practised at court' — nothing has changed. He added, 'At other times out of term the greater part apply themselves to the study of the law. Upon festival days and after the offices of the Church are over, they employ themselves in the

study of sacred and profane history.' Legal studies at Oxford or Cambridge were of little use except for those wishing to practise in the Ecclesiastical Courts. It was not uncommon though, for sons of the nobility and gentry first to study arts at the great universities. It seems that great numbers of the nobility resorted to the Inns, and as Fortescue would have it 'not so much to make the laws their study much less to live by their profession, but to form their manners and preserve them from the contagion of vice.'

Sir Walter Raleigh was at Middle Temple. Shakespeare has placed Shallow and Falstaff at Clements Inn, a Chancery Inn, where they were apparently not greatly protected from vice.

Feasting, and very expensive feasting, was very much a part of the life and whether or not feasting singing and dancing eventually won the day, the Inns had completely lost their original purpose by the end of the 17th century. Thereafter and until comparatively recent times, students qualified for admission to the Bar by keeping terms or more simply eating dinners. Of course, in addition, they accompanied their Masters to Court and worked in their chambers. It was therefore indeed an elitist profession and the education of the country nobility and gentry at the Inns greatly strengthened the common lawyers in their battles against the Stuart Kings and later against the early Hanoverian monarchs.

The first real professionals were the Serjeants (literally 'servants') who first emerged in an organised form during the reign of Edward the Confessor in the 13th century. The church had forbidden clerks in holy orders to appear as advocates in secular courts, and there emerged a learned lay order who pleaded the causes of others in the royal courts. By the end of the 14th century they were a close and well organised society, the members of which were appointed by the Crown. They adopted the coif, a tight fitting cap, as their distinctive dress and their office was a public office. Until 1846 they had an exclusive right of audience in the Court of the Common Pleas, and as soon as the practice of appointing ecclesiastics and Crown servants to the bench was abandoned, judges were always appointed from the ranks of the Serjeants. Until 1877 in England any barrister who was to be elevated to the bench had first to be made a Serjeant, and not unnaturally a very close association existed between the advocates and administrators of justice in this tight little legal community.

Barristers or pleaders who were not of the rank of Serjeant were originally known as apprentices-at-law — probably because they were readers with or apprentices of the Serjeants. Gradually the amount of work coming before the court and the demands of litigants for advocates led to the Inns (exercising powers to have been delegated by the King's judges) by custom having the right of calling members to the bar of the courts, and thereby giving them the right to practise in the courts.

Contemporaneously with the development of the barristers came the attorneys. Early law demanded that all parties had to be present in person before the court — there were sacramental phrases to be stated, and in early times trials by ordeal, compurgation and battle which demanded personal participation.

When carrying out some research in relation to this paper, I realised that I had forgotten how trial by compurgation was conducted, and therefore it is possible that some of you are in a similar position. The trial was conducted by the doomsmen or judges in the moots, who required a party to litigation to swear to the justice of his cause and procure a number of others to do the same. This at first glance looks like a requirement of corroboration by witnesses, but the compurgator or oath helper was not a witness. He needed no first hand knowledge of the facts. His duty was simply to support the party's oath with his oath. He did not swear that the story was true. He swore, in accordance with the rigidly prescribed formula, words which he strictly had to follow that the party's oath was clean. If these requirements were successfully fulfilled and the party produced the proper number of compurgators and all solemnly swore in the proper form with no slip of the tongue and no unnecessary word or gesture, then the party would have made his proof and won his case. It seems a strangely ineffective way of arriving at the truth of disputed facts, but all the time this mode of trial was in vogue, all men had a real dread of the supernatural and a real belief in the direct intervention of providence in human affairs. Moreover an oath in itself was an extremely serious thing. It is interesting to compare the significance placed upon the oath in early times and the almost cavalier way in which persons take an oath or affirmation today. (In the rules of one of the Inns, there is an interesting annotation that an oath of an Englishman was counted as more valuable than that of a Welshman.)

It was gradually recognised that litigants might be represented by an agent or attorney to whom they attorned or transferred the duty to appear at the trial. (This was probably highly desirable in the case of trial by battle!).

Unlike the barristers, the appointment of attorneys was solely the function of the judges. As the personal representatives of the clients, the attorneys were distinct. For a time attorneys were permitted to have membership of the Inns of Court, but gradually this was whittled away. By the 17th century Holdsworth tells us that the benchers of the four Inns of Court declared that 'there ought always be preserved a difference between a counsellor at law, which is the principal person, next unto serjeants and judges; and attorneys and solicitors which are but ministerial persons and of an inferior nature'.

The Bar continued to insist upon the lowliness of attorneys and was even more emphatic in the mid 17th century when attorneys were described not as 'ministerial' but as 'immaterial'. Undoubtedly during the 17th, 18th and 19th centuries, attorneys were as a rule persons of considerably less education and humbler social position than barristers. The position in the United Kingdom was for the most part preserved in Australia in the various Australian colonies, but with the passing of the Judicature Acts in England on 1st November 1875, 'every attorney woke up a solicitor'. One commentator is alleged to have observed that 'a crocodile is not improved by calling him an alligator'. For the past 100 years or so in Australia, graduates who have completed a period under articles have been admitted as barristers and solicitors, but for the most part the division between the branches of the profession has remained, particularly in the eastern States.

I have endeavoured to summarise the development of the various branches of the profession, and to illustrate the 'closed shop' nature of the profession, particularly the associations between the Bench and the Bar. The royal courts were certainly not the province of the common man, except in the exercise of the criminal jurisdiction, and unfortunately the cost of litigation has to a substantial degree placed the senior courts of today beyond the reach of the ordinary citizen.

I now wish to examine why it is that the legal profession has seldom attained any real level of confidence or admiration in the community. I have located some quotation references which to a

degree reflect the community opinions of the law and lawyers as they have existed from time to time.

ROLAND BARTHES
French Academic. Mythologies 1957.
"The Law is always prepared to lend you a spare brain in order to condemn you without remorse and . . . it depicts you as you should be, not as you are."

SYBILLE BEDFORD
British Writer Esquire 1965.
"To compress, to shape, to label the erratic sequences of life is the perennial function of the judges."

LENNY BRUCE
American Comedian.
"In the Halls of Justice the only justice is in halls."

WARREN E. BURGER
Chief Justice of the American Supreme Court 1972.
"Civility is to the courtroom what antisepsis is to the hospital."

LORD DEVLIN
British Lawyer 1976.
"In general the law that was made before 1914 is useful only to the remaining institutions of the nineteenth century."

RICHARD DU CANN QC
British Lawyer The Listener 1979.
"A lot of people make the terrible mistake of believing that a criminal trial is an investigation into the truth. It is not. It is an investigation into the truth insofar as the evidence will permit one to investigate the truth.
The accusatorial system . . . may be a civilised kind of warfare."

LORD FISHER
British Clergyman.
"The long and distressing controversy over capital punishment is very unfair to anyone meditating murder."

ROBERT FROST
American Poet.
"A jury consists of twelve persons chosen to decide who has the better lawyer."

JEAN GIRAUDOUX
French Playwright.
"No poet every interpreted nature as freely as a lawyer interprets truth."

LORD CHIEF JUSTICE GODDARD
British Lawyer The Observer 1955.
"No one has ever yet been able to find a way of depriving a British jury of its privilege of returning a perverse verdict."

LILLIAN HELLMAN
American Playwright.
"Nobody outside of a baby carriage or a judge's chamber can believe in an unprejudiced point of view."

MR. HILLS
Queensland Politician 1970.
"It is worth recalling that law and order was a favourite catch cry of Hitler's Germany."

JUDGE JULIUS J. HOFFMAN
American Laywer at The Chicago Eight trial, 1969.
"Let's have no talk of constitutional rights in this courtroom — the constitution sits up here with me."

J. EDGAR HOOVER
American Law Enforcer.
"Justice is incidental to law and order."

RICHARD INGRAMS
British Journalist The Guardian 1977.
"When laywers talk about the law, the normal human being begins to think about something else."

JUDGE H.C. LEON
British Lawyer The Observer 1975.
"I think a judge should be looked on rather as a sphinx than as a person — you shouldn't be able to imagine a judge having a bath."

GROUCHO MARX
American Comedian 1954.
"There is one way to find out if a man is honest — ask him. If he says 'Yes', you know he is crooked."

BILL MAULDIN
American Cartoonist in 'Loose Talk' ed. Linda Botts 1980.
"Law and order is like patriotism. Anyone who comes on strong about patriotism has got something to hide, it never fails. They always turn out to be a crook or an asshole or a traitor or something."

JUDGE ELLEN MORPHONIOS
American Lawyer 1978.
"I have a saying — there's no justice in the law."

JOHN MORTIMER
British Lawyer and Playright 'Voyage Round My Father'.
"No brilliance is required in the law. Just common sense and relatively clean fingernails."

THE ONION FIELD
Avco Embassy 1979 screenplay by Joseph Wambaugh, based on his book.
Franklyn Seale
"Guilty is what the man says when your luck runs out."

RT. HON. SIR MELFORD STEVENSON
British Judge The Listener 1979.
"Starting off (a trial) with a completely open mind is a terribly dangerous thing to do."

ROBERT TOWNSEND
American Businessman 'Up the Organisation' 1970.
"Lawyers take to politics like bears take to honey."

GORE VIDAL
American Writer 1975.
"To the right wing 'law and order' is often just a code phrase, meaning 'get the niggers'. To the left wing it often means political oppression."

MAE WEST
American Film Star 'Every Day's a Holiday'.
"It ain't no sin if you crack a few laws now and then, just so long as you don't break any."

VICTOR YANNACONE
American Sportsman Sports Illustrated 1969.
"Litigation is like a club, it's got to be used or it becomes a deadweight."

YEVGENY YEVTUSHENKO
Russian Poet 'A Precocious Autobiography' 1963.
"Justice is like a train that's nearly always late."

SAMUEL GOLDWYN
"A verbal contract is not worth the paper it's written on."

May I further illustrate my point by several anecdotes which are told against lawyers. There is the story of the judge in Wyoming U.S.A., who is alleged to have called Counsel to his Chambers before a trial commenced to express his outrage that the plaintiff had offered him $15,000 and the defendant $10,000. 'Gentlemen', he said, 'this is a Court of Justice. I propose to return $5000 to the plaintiff and allow this case to proceed on its merits.'

Punch published a cartoon many years ago of 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'.

On the subject of sentencing, there is the story of the judge who sentenced an 85 year old man to 15 years imprisonment for fraud. The defendant pleaded with the court, saying 'Your Honour, I cannot possibly serve such a long sentence at my age'. Whereupon His Honour responded, 'Well, you must serve as much of it as you can'.

Apropros of nothing at all, there is the story of the judge who was about to deliver sentence and asked the defendant if he had anything to say. 'Bugger all', said the defendant. 'I beg your pardon; what did you say?' said the judge. Whereupon Counsel for the defendant said '... he said 'bugger all', Your Honour.' 'That's funny', said the judge; 'I could have sworn he said something'.

Q. What is the difference between a duck and a solicitor?

A. There is no difference; they can both shove their bills ...

I believe there are a number of reasons why the bulk of the populace regard lawyers with suspicion. Firstly, but not necessarily most importantly, it has been my observation that the Courts are

for the most part run firstly for the convenience of the judges who preside in them and the Court officials; next, for the convenience of the members of the Bar; next, for the convenience of the solicitors who are instructing the barristers, and lastly for the convenience of the witnesses and those who resort to them for justice. This statement is not intended to be a criticism of any particular branch of the profession. It is largely a legacy from the past, and I believe steps are gradually being taken to alleviate the position of the unfortunate witnesses, litigants and/or defendants. But there is still a lot of ground to be covered.

Secondly, considerably less than 50% of the persons who resort to the civil courts for a legal remedy come away satisfied. The majority who are dissatisfied, whether by reason of the size of the verdict, the cost of the trial or the verdict itself, usually remain considerably embittered by their experience. There must inevitably be very few cases where both parties come away from the legal arena well satisfied with the result. This is particularly the case in the Family Courts where I am informed that the 'no fault' division of property almost inevitably engenders considerable bitterness between the parties and towards the court and the legal advisors. It is hardly necessary to observe that those who resort to the courts at the bidding of Her Majesty have very little regard for the law or the processes. It is a paradox that a number of criminal trials only increase the crime rate they are intended to reduce, as the accused or his friends are wont to 'do a few jobs' to raise the legal costs of the defence.

Thirdly, the law is still shrouded in hocus pocus and costumery which the layman finds difficult to understand, and which the members of the profession do very little to explain. I can recall the puzzled look on the face of a litigant who heard the presiding judge announce that his case was adjourned sine die, and when I explained that this was simply a latin phrase which meant that the case had been adjourned without a further day for hearing being fixed, he remarked, 'Then why in the hell didn't he say so'. I have spoken on a previous occasion of dress adopted by judges and barristers. It suffices to say that in my view costumes which date back to the 16th or 17th century and which were worn in a cold climate, are not particularly relevant to the 20th century in a country where the climate is mostly hot. There have been suggestions from time to time that wigs and robes give an aura of majesty

and dignity which instils into defendants and litigants a degree of respect which might otherwise be missing. I remain unrepentantly of the view that if, in these days of universal education and high technology, people need to dress in fashions of several hundred years ago in order to uphold the dignity of the court, there is something wrong with the courts.

Fourthly, lawyers, although they are generally hard-working and honest, have a reputation for incredible slowness, and every now and then an occurrence such as the recent Bryant affair, encourages a community view that there is a substantial degree of dishonesty. The profession pursues and punishes dishonest barristers and solicitors with a vigour which is probably more severe than that applying in any other profession. However, defalcations, malpractice and dishonest acts do occur, and they usually receive the maximum degree of publicity. Delays, on the other hand, are usually inexcusable, and probably form the bulk of complaints which are made against the members of the legal profession. I well remember during my term as a member of the Statutory Committee of the Law Institute, a man appearing to complain about the lack of progress of a Supreme Court action which he had brought in respect of injuries suffered when he was knocked from his bicycle by a motor car at the age of 13. He was, at the time of his application to the Statutory Committee, aged 35, and the action had not proceeded beyond the pleadings stage. Psychiatrists probably have an explanation for the condition, but there are a number of lawyers who inexplicably spend more time concealing the fact that they have not progressed a client's affairs, than it would take them to deal with the matter in the first instance.

Fifthly, the cost of litigation and some other services provided by the law are now beyond the reach of the average citizen, unless he or she is receiving legal aid, has union support, or a solicitor who is prepared to chance his arm on the ultimate success of the litigation. The charges in the Supreme Court of Victoria can amount to up to $10,000 a day, and of course the litigant is exposed to the risk that if he or she is the losing party in a civil action, there will also be a substantial proportion of the costs of the other side to be met. The cost of litigation has not been reduced by the electronic age and devices such as copying machines and word processors which were not available 20 or 30 years ago. When documents could only be copied by hand or by a very expensive

photographic process, there was a careful selection of documents which were presented to Counsel and to the court. Nowadays it is the custom to photocopy everything in sight two or three times, with the result that in large commercial actions, computers are needed to control access to those documents without causing further serious delays.

Sixthly, as Robert Townsend has observed, a great number of lawyers take to politics as a bear takes to honey. As a general rule, politicians enjoy an even lower level of popularity than lawyers, and I have no doubt that this helps to reduce even further the popularity rating of lawyers in general. The training of a lawyer and the very nature of his practice, make it relatively easy to move into politics, and yet to maintain an interest in the profession. I believe lawyers have made and are continuing to make a very substantial contribution to the political life of this country. However, it is difficult to remain in an influential position in politics and at the same time to enjoy popularity.

Today the legal profession is once again under the microscope of public opinion. Senior members of the profession have been the subject of allegations of impropriety. It will take a sustained effort by all lawyers of whatever category to lift the public image of the profession and the courts.

It must be possible for lawyers as a profession to speed up the resolution of disputes, to deal promptly with the problems of clients, to streamline outmoded practices, to treat litigants and other clients as equals and to dress in a manner which is calculated only to identify rather than to terrify. There is probably a substantial argument for widening the field from which members of the judiciary are chosen. I realise that to many members of the judiciary such a suggestion is repugnant, but I question whether it is not better to decide disputes promptly perhaps with a slightly larger margin for error than to have defendants and litigants waiting years in some cases for a decision. It might then even be possible to use existing court facilities for eight hours a day instead of the present four.

There are presently in existence a great number of committees and bodies working towards reform in the legal profession. However reform in the law is necessarily a slow process, made even slower by the diversity of opinion as to the direction any reform should take. Many volumes of reports on reform have been

produced, directed mostly to the machinery rather than the heart of the problem which is the legacy of the past. Most of these reports are gathering dust in the archives. The reformers are almost all members of the profession, and one can observe a certain lack of objectivity as, for example, in the objections of the profession to nearly all aspects of the proposed reforms of the Workers Compensation Act and the opposition to the move towards no fault liability in cases of personal injury. What we do is tinker with the existing system instead of examining the suitability of the system to cope with the problems of today.

I have but touched on the subject matter, but I hope that we lawyers will move quickly into the structure of modern society, remembering the words of Dr. Samuel Johnson who said:

> 'I hate to speak ill of a man behind his back, but I believe the man who just left my chambers was an attorney.'

In closing I leave with you the thought that perhaps the financial expectations of the members of the legal, medical and other professions have perhaps brought us all to a stage where we should be considering carefully whether we are really worth the hire. Is money the root cause of the current difficulties in both the medical and legal professions?