

## EPISTLE FROM A JUDGE ON CIRCUIT

THE HONOURABLE MR JUSTICE J.B. THOMAS\*

Dear Editors,

Your invitation to write an article for your special issue on the judiciary arrived on the eve of my circuit to a far north-western town. It occurred to me that an account of what a judge thinks and does in the course of an inland circuit might be of interest to some of your readers, although it will contain much mundanity and little erudition.

Although these observations are personal, and many variations are to be found between different circuit areas, I do not think that the experiences of Circuit Court Judges vary much according to whether they are members of the supreme court or the district court; and I suspect that some experiences are common to all states, although, in an inland context, it may not be safe to include Tasmania.

Sadly, a circuit visit these days is something of a non-event in the town. For a start, it is no longer safe for a judge to assume that he will be met by anyone upon his arrival. Some may feel a nostalgia for the golden era when the arrival of a judge was a big event. In the last century sometimes a train or a ship would be chartered to transport the judge and his retinue. There would be a virtual procession upon arrival, official receptions from the mayor or other dignitaries, and sometimes a presentation of gloves. Cooper J. (as he was in 1888) was so incensed at the non-arrival of a police escort to bring him from his ship to the Normanton Courthouse that he censured a policeman publicly for "disobedience, misconduct and insolence".<sup>1</sup> Cooper was a man who had been indiscreet enough to complain publicly about the inadequacy

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1 Queensland Reports of Parliamentary Proceedings: Votes and Proceedings (1888) (I) 851.

of expenses allowed to judges on circuit. The policeman's conduct and the judge's comments were duly raised in Parliament. Predictably there was little support there for the judge's outrage, but statements were made vindicating the police officer and asserting that he had not neglected his duties.<sup>2</sup>

There is of course always a small flurry from the local profession which busies itself to administer the listed cases, and a few court officials, including the local bailiff, crank themselves into gear with varying degrees of enthusiasm. The local registrar is usually an agreeable fellow who is unsure of what to expect from the judge from the big city. In case the term "Registrar" suggests an experienced full-time official, it must be remembered that the local clerk of petty sessions doubles as registrar of the superior courts and he wears his registrar's hat only a few times a year. If he is lucky enough to be acting as stipendiary magistrate at the time, he will be able to delegate his task to someone further down the line. Many have little training in the needs of circuit work and approach circuits with trepidation. It is therefore not always safe to assume that all necessary arrangements have been made. It is safer to have your associate make special requests for transport, or make your own arrangements. The days of Cooper J. are long gone.

Nowadays "court control" of cases is attempted in circuit towns, although only a limited level of control is possible in the absence of a resident judge. There is therefore a deal of preparatory work before the circuit starts, in the making of arrangements with prosecutors and defence in criminal matters, and in the arranging for special callovers for civil matters to ensure that the lists are full and that cases will be ready to proceed. Despite the best laid plans, civil lists have a habit of miscarrying on circuit, and it is not uncommon for a spate of last-minute settlements to open up a substantial gap even in a running list. The criminal cases are more likely to follow their appointed course. Of course it is still as important as it ever was to ensure that the local jails are delivered.

In contrast to the days when judges engaged elderly associates and retained them for many years, most of us now employ young associates who are seeking experience on the verge of a legal career, retaining them for one or two years only. The price of this idealistic practice is often very high for the judge, who is more or less constantly training associates. Their deficits appear most acutely on circuit. We are never far away from the travails of Heavyside J. who had problems with his faithful clerk:

[i]t was when Heavyside, J., Travelled on Circuit that the Doings of the Faithful Clerk became Particularly Infuriating. The Faithful Clerk could never Remember at what Hour the Train Started, and he was Liable to Confuse St. Pancras with Waterloo and Euston with Paddington. Also he Made it a Practice to Lose the Tickets and Leave the Depositions Behind.<sup>3</sup>

Times have not changed all that much.

2 *Id.*, 853.

3 "O" (Theobald Mathew), *Forensic Fables* (complete ed. 1961) 251, first published in 1926.

Circuit life affords few opportunities for normal exercise. Apart from court work and judgment preparation, all one tends to do is to eat, drink, read or watch country television from one's motel room, not necessarily in that order. To compensate for this lack of physical activity it is common for a judge to walk the streets of the circuit town to shake down the dinner or otherwise exercise the body. The problem is that he does not know the locality very well or the safe areas from the seedy. For this reason it is customary for the associate to accompany the judge on his perambulations. It is a constant source of fear to an associate that his/her judge may be "mugged" whilst in a circuit town, and it is impressed by word of mouth passed down from generation to generation of associates that they are responsible for the safety of their judge. This is an onerous obligation for the associate who may prefer to be drinking with more contemporary companions, or engaging in something more stimulating than walking the judge.

The fear of the unknown removes some of the joy from these walks. Apart from the pain of physical attack I do not think I could afford to lose more neurones than those that slip away through natural causes. And worse still, press reports that "Mr Justice Heavyside was bashed in a country town" will in all probability produce an uncharitable response from the majority of readers that the judge has been up to no good, that he has placed himself in a compromising situation, or that it serves him right anyway for being in a seamy area. Such inferences are as likely to be drawn by one's clever friends as by one's detractors, and it would be surprising if a journalist failed to report it in such a way as to leave open the most discreditable inferences. It has occurred to me that such fears verge on the paranoid, but successive associates have assured me that the risks are real. So the escorted after-dinner walks will continue.

On occasions my associates have complained of being bored whilst on circuit. When my children said they were bored my wife would say "I don't want to hear that word; I don't know what it means." It was very effective, like a tribunal declining jurisdiction on the ground that such a complaint is not one that it can entertain. But of course my wife's words are far more effective than my paraphrase. I will have them ready when my next associate complains of boredom. I have sometimes thought of using them on counsel but have not yet given in to the temptation.

There are lonely patches in circuit life, especially the longer circuits that last for three weeks. Home hospitality has largely disappeared from circuit towns. This is partly due to the fact that provincial towns large enough to attract a circuit are no longer isolated and there is little novelty in visitors. It is hard enough these days for the working spouse to persuade the home spouse to put on a dinner for any guest, let alone for a judge who is hardly likely to be a ball of fun. Whatever the reasons, home hospitality is a fairly rare benefit.

The "circuit dinner" is an English tradition, and in any event it is viable only if there is a resident local bar. That is a rarity in most Australian inland circuit towns. However, to my knowledge, one enterprising visiting counsel

occasionally organises a “circuit dinner” by making use of an outdoor barbecue at the motel at which he is accommodated, and by inviting all available shorthand reporters, members of the profession and judge and associate. Such functions, or local variations thereof, tend to be in the best Australian traditions of a Dimboola wedding. They can fill a social gap in circuit life. On the Australian inland circuit one cannot ask for more.

You may wonder whether a judge drinks in hotels on circuit, and if he does, whether he ought to be doing so. I have addressed this topic recently in a study of a relatively new subject which can conveniently be called “judicial ethics”. I am sure there is no objection to a judge having a drink in a hotel in a circuit town with counsel or solicitors, or indeed with any respectable person, subject of course to avoidance of situations of controversy. Such situations are readily avoidable by keeping away from the wrong hotels and by the exercise of moderation.

There are however substantial inhibitions. It is not right for a judge to fraternise unduly with one particular practitioner. Another practitioner may fear differential treatment in court if there is an apparently close relationship between the judge and his legal opponent. Such constraints tend to isolate the judge. Certainly his social contacts do not compare with those of the free-wheeling barrister on circuit.

Although it used to be traditional for police to assist a Circuit Judge with his transport requirements (witness the days of Cooper J.), most judges now realise that they should not accept lifts or other favours from the police, especially during a Criminal Circuit. It may be that in some areas the practices continue, but I think the stage has been reached where such conduct could be identified by the accused or his advisers as acceptance of favours from the opposite party. Of course circumstances alter cases, but generally speaking the practice seems undesirable.

In the course of criminal work one sees a cross section of the local people in the form of juries. The attitudes and indeed the looks of juries vary considerably from town to town. In some capital cities the judge may regard a male juror as not being properly dressed if he does not wear a tie. That battle has long ago been abandoned in most country centres. In the town in which I am drafting this letter, which is a very hot town in summer, not long ago there was a time when the main problem was identified as the minimum requirements for a juror’s footwear. It is now insisted upon that juries have *some* footwear, and that its calibre must be at least equal to thongs. I am not deceiving you. When you are in Rome, you do as the Romans do. Who am I to say that a juror is not properly dressed if he is acting according to the prevailing standard? I do not imply that most jurors here turn up in thongs, but there are some who do. What rapport will there be between jury and a judge who identifies himself as a foreigner and who treats their customs as unacceptable? I take the jurors as they are, although I must remember to be severe on persons in bare feet.

In civil work, fortunately, there is not a great deal of commercial litigation. The absence of library facilities makes it difficult to deal adequately with cases

of complexity. When they arise it usually becomes necessary to reserve judgment and do the necessary research later in the capital city.

Most courtrooms are now air-conditioned, although noise from air-conditioners has brought its problems. It compounds the already acute problem of hearing the evidence of the whispering witness, a problem commonly in court arising with an Aboriginal. Attempts to remedy the problem by placing a microphone in front of the witness have in my experience succeeded only in increasing his fear and in decreasing his overall volume. Progress is the exchange of one nuisance for another.

It may also be reported that on circuit counsel tend to handle their cases with greater despatch than they do in the capital city. Why this should be so is difficult to imagine, but it is true that in the country they tend to cross-examine without undue repetition and to address with commendable conciseness.

The local press usually reports a substantial part of the cases that are heard. These days it is a pleasure to find any press coverage of cases that is prompt, fairly accurate and detailed. The coverage in the country far exceeds that in the capital cities where the journalists some time ago lost the habit of reporting anything unless it is sensational and can be gleaned from a short sojourn in court. Generally speaking country reporters seem to be interested in reporting what actually happens in court. It is not a difficult discipline. Little more is required than having an interest in the truth and in being prepared to sit and listen during the day. In many circuit towns the reporters still have these qualities. The negative side is that occasionally there appears a report of a *voir dire* and a trial is aborted. Nothing comes without some cost.

The State Government pays a judge's actual expenses on circuit, or a daily allowance, at the option of the judge. Although this sometimes leads to dispute with bureaucrats who apply their own version of the "actual and reasonable" test, the position is fairly well understood, and there is little point in saying more about it here. There is however a distinct nuisance value in obtaining vouchers for all expenses, especially small ones. I have no difficulty in going to a luncheon bar to order my sandwiches, or to the "Star", "Rose" or "Prince" cafe, but I sometimes blush when asking for a receipt.

There is a wide variation in the attitudes of individual judges to spending weekends in circuit towns. Most circuits are of two weeks or longer. A great number of Circuit Judges fly out at the earliest possible moment on Friday, and return to work on the following Monday. This is understandable although it may be thought by some to be a little undiplomatic. It is sometimes seen as an assertion that the judge cannot get out of the place quickly enough. Sometimes that is the unhappy truth. However, apart from occasions when domestic commitments require a return home for the weekend, I have never found it difficult to find diversion in a country centre. It is the judge's loss if he fails to take advantage of what a particular district has to offer. It may take a deal of organisation to plumb the glories, but it can be very rewarding. The circuit joys that I know are achieved from time to

time include excursions (private or package), inland fishing, duck shooting (in season), local resort accommodation, station hospitality, golf, tennis, racing, sporting spectacles, testing local restaurants and even relaxing.

On occasions I have assisted in organising sittings in such a way as to permit the charter of a small aircraft to take a group of counsel, solicitors, associate and shorthand staff from an inland centre to an island in the Gulf. These occasions have been perhaps the happiest circuits I can remember. A good deal of organisation was involved, and care was necessary to ensure that there would be no-one associated with a case to be heard in the following week unless his opposite number was also there. It is not always possible to arrange such events, but I think that judges should be encouraged to become involved in circuit activity with others if it can be arranged.

If you find this letter a humdrum account of routine procedures and experiences, it is because that is how it is. This stems largely from a certain degree of remoteness that a judge must maintain on circuit as well as at home. This remoteness is not the product of snobbery on the part of the judge. It is an essential discipline which protects the profession and the litigant. Most practising members of our discipline-orientated profession appreciate and understand the need for it. I may say that some of us acutely feel the social loss that results.

It would be a pity if these disciplines were permitted to obscure the human face and figure of the judge. So, when you are next in a circuit court, please stifle any natural feelings of envy or resentment towards the robed figure for whom you are expected to rise. Spare a thought for the little digger, or Heavyside, or whoever is inside the robes, who is waiting to remove them, who has problems of his own, and who, when he sheds his regalia, will not even stand out in the empty streets of the circuit town.

Yours truly,

**J . B . Thomas**