Book Reviews

EXAMINATION OF WITNESSES IN CRIMINAL CASES, by Earl J Levy, Q C, Carswell Company, Canada, 1987. xxxv + 263 (including tables and index).

CROSS-EXAMINATION IN CRIMINAL TRIALS, by Marcus Stone, Butterworths, London, 1988. xix + 224 (including tables and index).

Reviewed by Bernard Robertson*

There are two reasons for reading a law book written for another jurisdiction. One is to read the bits that are the same and the other is to read the bits that are different. The first exercise is directly helpful to the reader and the second is indirectly helpful in that it may cause him to reflect upon his own system.

In these books the bits that are the same are the "how-to" bits and the bits which are different are the statements of local law of evidence and procedure. Levy's book is entirely devoted to the Canadian scene and in that case the second aspect of the book is probably of less interest to the bulk of students and practitioners. One is forced to wonder however, at the rationality of a system which allows cross-examination of the accused as to his previous convictions regardless of any question of relevance (section 12 Canada Evidence Act 1970) but absolutely forbids any reference, even by the judge, to the fact that the accused has not given evidence (section 4(5)). Stone's book carefully avoids being too embedded in the English law though there are occasional references. It is obviously designed to appeal outside the United Kingdom.

The "how-to" parts of both books are wide in scope since the theme is not limited to cross-examination despite the title of Stone's book. Both involve discussion of the preparation and presentation of one's own case and provide the conclusions from experience of well-known criminal lawyers. There the similarity ends. Levy is a professional defender who lives in a world in which all prosecution witnesses are liars and every case a potential miscarriage of justice. Stone is now a Sheriff, ie a District Court Judge, and has discovered that defendants also lie and sometimes even intimidate prosecution witnesses. Stone is content that he and the system are engaged in the pursuit of truth and his conscience appears untroubled. Levy on the other hand seldom mentions the word truth and devotes pages instead to questions of professional ethics. These passages are remarkable for their sophistry.

There is discussion in both books of the techniques required when dealing with expert, police, child and even female witnesses. Expert evidence and identification evidence are examined at length. One or two matters that might have been helpful to the New Zealander are not dealt with. Section 12 of the Canada Evidence Act obviates

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the requirement for the chapter of law and practice on cross-examination of the accused as to his previous convictions which would be included in a similar book in this jurisdiction. Stone's book also omits detailed discussion of this as the rules vary from one jurisdiction to another. As to the cross-examination of rape victims as to their previous sexual history Levy's book merely notes that section 246.6 of the Criminal Code imposes restrictions which have been unsuccessfully challenged under the Charter of Rights. This must now be one of the most difficult of areas in witness handling and it would be interesting to have the authors' views on the law, on how they advise counsel to set about the matter and on what the practice is in Canadian and Scottish courts (research in England appears to indicate that the equivalent provision is widely ignored).

The material in Levy's book on how to approach various witnesses is based upon the "folklore" of the legal profession and much of it (eg "Children can often confuse fact and fantasy.... Their recall can be more faulty than adults" p 169) may be open to challenge as a result of psychological research. It is also odd that lawyers feel that they know so well how a jury thinks and reacts since lawyers are not allowed to serve on them. Stone's book on the other hand contains a much more reasoned approach including research evidence. The author is a psychologist as well as a lawyer and is well aware of both the uses and limitations of the science.

Both books are easy and interesting to read. Levy's book is illustrated with excerpts from recent Canadian trials and old classics such as *The Tichbourne Claimant.* Stone's book is written in a clear direct style using short sentences and a minimum of technical language.

Both books contain much of value both to practitioners, young and old, and to those such as experts and police officers who frequently find themselves giving evidence. Stone's book is however the more genuinely informative, the less rooted in local law and, I hope, more reflective of the ethos of New Zealand courts.

JUDGING JUDGES, by Simon Lee, Faber and Faber, London, 1988. x+218 pp.
Reviewed by Simon Gorton*.

Simon Lee's ability to express his arguments and analyse sometimes complex legal issues with a clarity of expression, is the striking characteristic of his latest book *Judging Judges.* His style is one surely to be welcomed if the debate concerning the role of judges (and in particular the "higher judiciary") in society is to encompass an audience far wider than, in Lee's own terms the "jurisprudential jetset".

From the outset, Lee acknowledges the increasing role judges are playing in deciding questions of moral and political importance, in England in particular. The English Court of Appeal and House of Lords have of late been called upon to decide issues as

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diverse as freedom of speech in the Spycatcher litigation[1], to the availability of abortion[2] and the sterilization of the mentally handicapped[3].

The remit he sets himself is not solely to unravel what the cases concerning these and other important issues have decided. On the contrary, the book is more concerned with why judges have determined issues in a particular way: the processes involved; the help judges are given in assessing such questions; and, most importantly, how judges should decide these and other important questions in the future.

The book is split into four logical parts. Part 1 is entitled "Theories" and not surprisingly is an analysis of three theories which attempt to define the role and purpose of judicial decision making. They are neatly classed by Lee as the "fairytale", the "noble dream" and the "nightmare".

The "fairytale" refers to the idea that judges do not make law, but instead simply apply the law by following the guiding rules of statutory interpretation and precedent. The "noble dream" refers to Dworkin's much vaunted theory of adjudication[4] in which the judge's task is to discover the principles underlying the law which will provide the single, and only, right answer to the questions he or she is posed with. The "nightmare" is the label Lee uses to refer to the theory that judges have complete freedom to make the law in a way they think fit and indeed use this freedom to further their own class interests. In particular Lee rounds on the work of John Griffith whose influential book[5] stirred quite a debate in the United Kingdom.[6]

The analysis of the three preceding views of the judicial role of society is throughout precise and clear. He avoids the academic pitfall of making point after point. Instead, Lee draws the respective theories' limitations to our attention and then proceeds to view them as merely providing one view of the picture which exists, but not the whole picture.

The question of judicial decision making is suggested by the author to be a fluid concept, not strictly influenced by the "nightmare nor the noble dream". Instead, he intimates the whole process needs to be opened - not just to the public at large, but also to judges themselves. He suggests that there are three major factors influencing judicial decision making:

1. Judges' view of the past law (precedents and statutes);

1 *Attorney General* v *Guardian Newspapers* [1987] 3 All ER 316.
2 *C* v *S* [1988] 1 All ER 1230.
3 *Re B (a minor)* [1987] 2 All ER 206.
4 Whose most up-to-date version may be found in *Law's Empire* (Fontana, London, 1986).
5 *The Politics of the Judiciary* (3ed, Fontana, London, 1985).
6 See Lord Devlin's reply to Griffith, entitled "Judges, Governments and Politics" (1978) 41 MLR 501.

2. Judges' evaluation of consequences of options before them (present and future);

3. Judges' view of their own role (judicial role).

These are more often than not intellectually squeezed by judges into No 1. However, Lee is adamant that factors 2 and 3 are always at work and therefore judges need to be more open about this.

The adoption of these factors by judges will, in Lee's analysis, improve the quality of law making. In essence, he suggests that judges come out of the shadow cast by judicial precedent and statute and instead operate and thrive in an open environment more conducive to well-rounded decision making.

Part 2 of the book is an attempt to show exactly how some judges go about trying to fit their judgments into factor No 1 of the "openness equation", while exposing through an analysis of ten of the most important British cases in the last decade, how many judges are at present unwittingly subscribing to Lee's equation of openness. This part of the book is worth reading if only for Lee's quite brilliant summary of what the cases he discusses concerned, the argument made, and the tensions existing which directly fed into the respective judgments.

Part 3 is an attempt by the author to take a more personal perspective of the agents involved in judicial law-making: the judges. Five leading British Law Lords are profiled in the hope of giving "a flavour of how judges think of who they are and what they do". Lords Denning, Scarman, Devlin, Hailsham and Mackay are all profiled in a highly readable and very interesting style.

The final part of *Judging Judges* is an attempt to draw together the threads of what Lee has developed throughout the book. It is split into three parts. The first is an enlightened discussion on the question of the introduction of a Bill of Rights.

The second part is an extension of the first in that it focuses on the role of the judge and what it will become (and what the role could develop into) if such a Bill of Rights is enacted. Lee cites the acrimonious debate concerning the nomination of Robert Bork to be a United States Supreme Court Justice. His account of the debate is thorough and rigorous. Most of all it leaves one with the lasting impression that if a Bill of Rights were enacted, whether in the United Kingdom or in New Zealand, not only would the role of the judge be more sharply in focus, the whole question as to what judges represent and the way they will decide issues relating to the Bill of Rights will be brought into the open.

The author makes a strong case in arguing that the lessons of the Bork affair will need to be addressed if a given society is disposed to introducing such a Bill of Rights.

The conclusion to *Judging Judges* attempts to build a framework on which to hang future judicial decision making. The framework must be in the open and subject to full debate and scrutiny. The Bill of Rights question is hedged by Lee in favour of adopting

a constitutional committee convened in the form of the Privy Council, whose composition will not strictly be judicial.

Perhaps more cogently, Lee goes on to suggest a series of measures which will not only acknowledge the judge's role in modern society (that of law-maker) but also help them in deciding issues of social and moral import in a more appropriate manner than hitherto has been the way.

Lee suggests judges should openly adopt his "equation of openness". To complement this, when a higher court is deciding a case which has social and moral dimensions it should be allowed to received arguments which transcend the interests of the parties to the litigation by, for example, the filing of amici curiae briefs. When judges are assessing the consequences of their decisions (No 2 in Lee's equation) their task could be helped by counsel presenting American style "Brandeis Briefs" which would provide "detailed economic and social information to the judges so as to provide them with the facts on which to base their conclusion".

Lee goes on to suggest that senior judges should be provided with law clerks to help them with their research. More controversial is the suggestion that appellate courts be the subject of radio and TV coverage, in the same manner as Parliament, as recognition of the role in developing the law. Law Lords could give press conferences explaining their judgments in cases of major importance. Judges could perhaps be appointed from the ranks of non lawyers - in particular from academics who have proven themselves competent.

I have avoided until now any critical assessment of what has the potential to be a controversial addition to the debate on judicial law-making. The critique has been postponed as recognition of the fact that Lee is constantly developing and expanding ideas and arguments, in a sense "bouncing them off" the reader, until the very last page of his book. I feel it is appropriate to attempt to do justice to his arguments before offering any of my own views of *Judging Judges*.

On a practical, concrete plane, Simon Lee's suggestions are bold. Their implementation deserves serious attention. In the United Kingdom in particular, some of his points (for example TV and radio coverage), would most certainly require a deformalisation of the judicial process and perhaps even more significantly a deformalisation of judicial attitudes.

Judicial reaction to Lee's "equation of openness" as I have termed it, will be crucial. Will the judiciary, with their conservative traditions and jealously guarded "independence" really be disposed to adopting Lee's three point equation? For surely by accepting their role as law-makers, are they not entering rather shaky constitutional ground vis-à-vis Parliament? Although they may accept it in a de facto manner, as some already do, this is a world away from Lee's call for more open law-making which he regards as a prerequisite for more informed decision making.

Ironically, the very agents Lee seeks to rely on may well be the very last people willing to adopt his suggestions. Indeed judicial reluctance, which is indistinguishable

from conservatism, could well scupper many of Lee's other remarks: the wider perspective to be taken on cases (facilitated by the introduction of amici curiae and filing of Brandeis Briefs) may well be short-circuited if judges fail to acknowledge that their remit is wider than the parties' interests before them in litigation.

One can imagine a scenario whereby Simon Lee is addressing the House of Lords on this very matter, when he is interrupted by a forthright Law Lord who states:

> Surely Mr Lee, what you suggest is a two tier system of Law: adversarial litigation for some clients; and adjudicative assessment for others. What has become of equality before the law?

The inconsistency of the author's thesis within an adverserial system is worth pondering.

On a more theoretical level, it is my opinion that Simon Lee's arguments are deficient in their emphasis. Throughout he is at pains to dispel, and rightfully so, the idea that judges are automatons of their class: deciding and favouring the establishment at every turn. In reality, as Lee points out, the question is a little more sophisticated.

However, in rejecting the more class oriented view of society (and adopting a perspective which Lee himself admits is somewhere between the "noble dream" and the "nightmare") and instead focusing on the procedures necessary for enlightening the judicial law-making process, Lee effectively passes over the "political input" of judicial decision making.

Let me give this example. The nomination of Robert Bork to the Supreme Court focused not on Bork's ability as a lawyer (which was undoubted even by his most ardent critics) but rather on the colour of his political views - in particular his view that judges should not legislate. Bork is an advocate of the theory of "original intent", the essence of which suggests the United States Supreme Court should only give effect to the intentions of those who originally drafted the constitution.

Robert Bork, upon appointment as a justice, would have had a law clerk to help him with his research and Brandeis Briefs and amici curiae to focus on the wider implications of the question in front of the Court. He may, at a push, have accepted Lee's "equation of openness". Who knows, he may even have been disposed to reading his judgments to "prime-time" TV.

However, one is inclined to believe Bork's judgments would have accorded more to his own views and prejudices, especially on the *Roe* v *Wade* abortion issue, rather than alluding to Lee's model of openness. The simple point I am making is that Lee in rejecting the "nightmare" has in effect ignored the "political input" in judicial decision making, which may not always correspond to class interests but is nevertheless still a factor to be taken into consideration.

Indeed, a disappointing lacuna in *Judging Judges* is the author's failure to analyse to any significant degree the role of British judges in interpreting and formulating British

labour and employment law - particularly in regard to strike action. Surely it is in this field that class conflict is most sharply focused and if such a class view of judicial decision making is to be rejected then a more thorough analysis of judicial attitudes in this area would have been desirable.

Notwithstanding the points I have mentioned, *Judging Judges* is a thoroughly stimulating and challenging read. I recommend it strongly.

THE SPYCATCHER TRIAL, by Malcolm Turnbull, William Heinemann Australia, Richmond Victoria, 1988. 228 pp. Price A$29.95. Reviewed by J Stephen Kos.*

April 1989 marked the tenth year of the Thatcher Ministry. In generally gracious tributes paid her in the British press, few commentators omitted a reference to the "Spycatcher" debacle as one of the few political blemishes on an otherwise charmed period of leadership.

By the time in October 1988 when the House of Lords discharged injunctions restraining publication in the United Kingdom, the lady may well have wished that she had turned in her pursuit of Mr Peter Wright and his publishers. As this book, by Mr Wright's Australian solicitor, shows, the then United Kingdom Attorney-General was offered an early opportunity to review the unpublished manuscript and direct the excision of objectionable passages. The offer was refused. In the result, the unrelenting and ultimately unsuccessful pursuit of proceedings in Australia, New Zealand, the United Kingdom and elsewhere damaged the credibility of the Attorney-General, his Cabinet and Prime Minister, and the British Security Services.

Ironically, the Security Services themselves had indirectly initiated the fiasco. In March 1981 they provided the Prime Minister with an incorrect brief from which to respond to a question in the House of Commons relating to the former Director-General of MI5, Sir Roger Hollis. Mr Wright, convinced Hollis was a Soviet spy, was outraged by the answer given and *Spycatcher*[1] followed. That work, a tedious, immodest and ill-written exercise in self-justification, said little that was new. As Mr Wright admitted to his solicitor, the only material in it was not previously published was "some of the stuff about my methods of detecting illegal radio transmitters and receivers".

Given this lack of novelty in the publication, the Attorney-General's proceedings were founded on the premise that the absolute silence of its security officers, current or retired, was essential. Lamentably, the premise proved flawed. As research and cross-examination swiftly established, the the United Kingdom Government had assisted the publication of confidential information from such sources where it had suited its interests to do so. Such appeared to be the case with Chapman Pincher's book *Their*

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1 Wright *Spycatcher* (Viking, New York, 1987).

Trade is Treachery,[2] based on information provided by Mr Wright. In other cases the government had failed to take steps to restrain the publication of such material, notwithstanding prior notice. In 1984, for example, Mr Wright had given a television interview in which were made the same allegations as were later published in "Spycatcher". Despite several hours' advance notice, the Government took no steps to restrain transmission.

In such circumstances, one might well wonder how Mr Wright's Australian publishers came to spend $200,000 on legal advice telling them they had no chance of success in applying to rescind interim injunctions restraining publication, obtained by the Attorney-General in September 1985.

Heinemann then turned to Mr Malcolm Turnbull, as "lawyer of last resort". He was then 31. His reputation was built on the spirited defence of his then employer, Kerry Packer, before the Costigan Royal commission. The work of Mr Turnbull and his team in preparing, and his in conducting, the cross-examination of the Cabinet Secretary, Sir Robert Armstrong, laid the foundation for the ultimate failure of the Government's case in Australia, New Zealand[3] and the United Kingdom.

Mr Turnbull has brought to bear, as both counsel and author, certain qualities not unknown in the Australian people. One is what he describes as "a cantankerous and sceptical distrust of authority". Another, a talent for rather partial self-appraisal:

> The tension of the lengthy cross-examination was becoming palpable. Armstrong seemed to have shrunk. He flinched at the questions. It was a ghastly experience for him ... I felt a growing warmth for Armstrong. There is a basic thrill of the hunt as you harry a witness, but I could not help feeling that I was destroying a man for no good reason.

Sir Robert, who spoiled a brilliant retirement by doing his duty and giving the Government's evidence, must surely have shared the latter view.

Mr Turnbull's book contains extensive extracts from the transcript of his cross-examination of Sir Robert. His technique has been described elsewhere as "circuitous" (the judge intervened at one point to let him know that he was retiring in thirteen years' time), but was unquestionably effective. The extracts demonstrate the benefit of confronting an ill-prepared witness with the results of careful research. Also of the importance of taking the utmost care in framing answers to interrogatories.

Mr Turnbull's credentials as an author are perhaps less secure. Although he gives the Treasury Solicitor a wigging for lecturing him "as though he were an irritated university tutor and I a particularly dense undergraduate", not thirty pages earlier Mr Turnbull recounts the following autobiographical anecdote. It concerns his dealings

2 Sidgwick & Jackson, London, 1981.

3 *Attorney-General for the United Kingdom* v *Wellington Newspapers Limited* [1988] 1 NZLR 129.

with the difficult Anglican cleric who was disinclined to marry the Presbyterian Turnbull to his Catholic fiancee:

> "Your petty sectarian approach is unconstitutional, Vicar," I responded. "The Church of England is the religion of the state. You are the servant of the Crown, not materially different from an ambassador or admiral. It is your constitutional duty to prevent fornication in your parish and marrying us is a good start."

Pity not only Sir Robert. Nonetheless, apart from some rather stilted attempts to recreate dialogue, in marked contrast to the cross-examination, the book is eminently readable. Both Wright and Turnbull's books are potentially interesting for the fact of their inside information, but Mr Turnbull's is the more rewarding of the two. It is thoroughly recommended.

In the course of the trial, Mr Turnbull criticised a 1985 commission of inquiry by Lord Bridge, discounting allegations that MI5 had engaged in illegal telephone tapping. It is ironic, therefore, that the most articulate description of the implications of the Government's proceedings is contained in Lord Bridge's ferocious dissenting speech concerning an interlocutory stage of the English proceedings:[4]

> Freedom of speech is always the first casualty under a totalitarian regime. Such a regime cannot afford to allow the free circulation of information and ideas among its citizens. Censorship is the indispensable tool to regulate what the public may and what they may not know. The present attempt to insulate the public in this country from information which is freely available elsewhere is a significant step down that very dangerous road. The maintenance of the ban, as more and more copies of the book "Spycatcher" enter this country and circulate here, will seem more and more ridiculous. If the Government are determined to fight to maintain the ban to the end, they will face inevitable condemnation and humiliation by the European Court of Human Rights in Strasbourg. Long before that they will have been condemned at the bar of public opinion in the free world.
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> But there is another alternative. The Government will surely want to reappraise the whole "Spycatcher" situation in the light of the views expressed in the courts below in this House. I dare to hope that they will bring to that reappraisal qualities of vision and of statesmanship sufficient to recognise that their wafer thin victory in this litigation has been gained at a price which no Government committed to upholding the values of a free society can afford to pay.

The late Lord Atkin would have approved. And one doubts he would have objected to the course adopted by one newspaper regarding the three Lords of Appeal in the majority. Their photographs appeared, upside down, beneath the headline "You Fools". Quite right.

4 *Attorney-General* v *Guardian Newspapers Limited* [1987] 1 WLR 1248, 1286.