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COMPENSATION COURT OF NEW SOUTH WALES

SYDNEY, 16 MARCH 2001

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EARLY DAYS

This occasion marks the approaching retirement of Ray Burke. When, at last, he lays down judicial office, things will never be quite the same, absent his mercurial personality from the Bench of New South Wales. The High Court of Australia will also miss his grand remonstrances about the errors into which he feels we have sometimes led compensation law. It falls to me to honour him because I have known him for longer than just about anyone in the law.

Despite my academic career (which only my legendary modesty restrains me from describing as brilliant) I found it difficult

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** Justice of the High Court of Australia.

to obtain articles of clerkship. Busily, my Aunt Lillian typed out applications for employment on my behalf. Having no connection with the big families or the legal establishment, I was rejected by all the large firms. To this day the scars are remembered for I share with Ray Burke an ancestry traced to Ireland, where grudges are carefully nourished and never gratuitously thrown away.

Another Irish-Australian, Barry O'Keefe, was tutoring me in criminal law to supplement the lectures on that subject given (with barely concealed disgust) by Mr Vernon Treatt QC, a part-time politician. Barry O'Keefe suggested that I had made a mistake by applying to the lawyers of the top end of town. Instead, he proposed that I start afresh at the other end of the law's anatomy. And that is how I found Ray Burke.

The year was 1958. So he was of the tender age of 28. I was beginning the third year of an Arts/Law course at the University of Sydney. Because my birth date was exactly ten years and a day behind his, it was never difficult to track our ages. I was 18 going on 19. A solicitor aged 28 seemed decrepit. And the principal of the firm, Maurice Arthur Simon, seemed positively prehistoric.

Mr Simon (I never got to call him Maurie) was a small plump man who huffed and puffed like a steam engine. He had a bristling moustache, which added an unconvincing debonair touch to his otherwise furious appearance. Mr Simon was Jewish. Ray Burke,

on the other hand, was Roman Catholic. Until I reached university and bumped into young Murray Gleeson, I had never really met a Catholic. Ray Burke was to be my master solicitor, for Mr Simon already had his quota of articulated clerks. He had Frank Marks, for example, and wanted no more.

So it was that I was accepted into employment at the grand starting salary of £6 a week. My father and I had to sign the articles of clerkship. For his part, Ray Burke promised to teach me all the law he knew. For my part I promised not to steal the postage stamps or the stationary. My father bound himself to accommodate me and to pay for my clothing and healthcare. I still have the document. It was to be the key that opened the door to my life in the law.

The firm was M A Simon and Co. Ray Burke was the "and Co". He was Mr Simon's only business partner. Indeed he was the only other solicitor in our small office. We were housed in premises that can only be described as art deco rustic. The building was owned by an insurance company which must have fallen upon hard times or, being Scottish, economised on the décor. There were pale yellow tiles everywhere. They ran from the front door into the toilets. They brought a vomit-coloured quality of gloom to the place. But I was soon to find the gloom broken by the bolts of lightening which M A Simon and Ray Burke sparked off each other, off clients and (when they noticed us) off the trembling articulated clerks.

Amongst his many saintly qualities, one which I could not honestly attribute to Ray Burke was trappist silence or lovable patience. He did not have that quiet whispering capacity that I was later to cultivate assiduously for myself as I adapted to a life of inaudible dialogue with senior counsel of the equity and commercial Bars. Neither Ray Burke nor M A Simon were quiet retiring types. Neither had ponderosity or gravitas. Each seemed constantly to be looking for a reason to shout and scream at the other. In between this ongoing drama, each, in his own separate way, looked after the interests of the clients entrusted to his charge. But M A Simon kept clients to an absolute minimum.

The work of the firm basically came from the Labor Council of New South Wales. I can still see the letterhead introducing each new client. The logo was a relic of the nineteenth century. It conjured up heroic images of Marx, Engels and Lenin and storming the ramparts. At the bottom of the page was the signature of Mr Bill Ritchie. He was the mysterious triage officer who handed out the work to M A Simon and the other law firms on the Labor Council list. How Maurice Simon came to be on that list is something of a mystery. Never once in my presence did he display the slightest intellectual or emotional sympathy for the working class. Ray Burke on the other hand, was in those days a stalwart supporter of the workers. These were the times when the worker's house was divided. The Anti Communist Labor Party had arisen in the wake of

the failed referendum to ban Communists, that took place fifty years ago this year. Later that party was renamed as the Democratic Labor Party (DLP). I was never quite sure whether Ray Burke embraced allegiance to that party. At the time, it seemed likely to me that he did. Just as Catholics saw Masons under every stone, Protestants, like me, saw DLP-ites 'round every corner.

In a desultory way I would tackle him from time to time about the errors of the Church of Rome. But he would have none of my heresies. These were the days, long before ecumenism. Either you were a Catholic or you were condemned to eternal hell fire. Simple as that. Our one-sided debates on theology led me to the opinion that Ray Burke was perhaps willing to concede that I might make something of my professional life. But it was ultimately utterly pointless, because, as a Protestant, I was condemned to eternal damnation anyway.

This was not a particularly sound foundation upon which to establish a warm personal rapport between a master solicitor and a clerk. But it was part and parcel of the attitudes of that time. Eugenio Pacelli was the Pope. Norman Thomas Gilroy was the Cardinal. In the New South Wales Labor movement, St Mary's Cathedral was "headquarters". In this map of the world there was not much room for a Luther-admiring Protestant of the Anglican tradition.

Looking back, it seems astonishing now that sectarian bias reached so late into the century in Australian life. So it was probably very good for the soul of the future Judge Burke that he was required to spend three years in the austere company of a Protestant articled clerk. It was certainly good for the articled clerk. Mind you, the experience must have been so traumatic that no similar experience was thereafter tolerated. John Woodward, Pat Grimes, David Coleman and Michael Fawkner came straight out of "headquarters". Indeed, the only exception was Frank Marks, my contemporary as an articled clerk, who Mr Simon selected, doubtless to give the firm a cosmopolitan and religiously tolerant illusion. Pat Grimes did not help things by setting up a branch office of the Federated Clerks' Union and displaying a big photograph of his heroes, Pope Pius XII and B A Santamaria, in his office.

Our premises were so small that we were thrown into uncomfortably close daily contact, one with the other. Three windows opened out into O'Connell Street. Across the street, in gold letters, was emblazoned on a window the name of a truly respectable legal firm, Windeyer Dive and Company. Sanity, I thought, as I shook my head, looking across the divide, at the neat lawyers at Windeyer Dive with their waistcoats, gold chains, eyeshades, cardigans and leasehold remainders on the other side of the street.

Sadly, number 26 O'Connell Street with its pale yellow tiles is no more: another victim to developers' dreams. Yet in my mind's eye I can see quite clearly my own little office which I shared with Frank Marks. It abutted Ray Burke's and there was no door between. As I interviewed my clients and learned the rudiments of the legal life, I could hear Ray Burke in the adjoining office talking to clients and shouting across the telephone at a barrister who had missed a mention before the fearsome Justice Manning or who had the temerity to press for his fees in a compensation claim that "he" had lost.

Most of the work we did in those three years was in the Workers' Compensation Commission. As I was to find, a busy day in the compensation list, with an adjournment, three mentions, a costs certification, two motions and four hearings was a splendid preparation for a special leave day in the High Court of Australia.

Occasionally at M A Simons, we would venture into the Supreme Court or the District Court. Probate and Equity were lost empires. Rare indeed were the visits to the Matrimonial Causes list. It was as if our corporate Roman convictions did not really approve of that type of work. Perhaps, more to the point, in those days, divorce, like crime, did not pay.

These were also days of a smaller, even tiny, legal profession. Old courtesies were still observed that have long since atrophied. In

my first days as an articled clerk, Ray Burke accompanied me to the Supreme Court to introduce me to Mr Deputy Prothonotary Cyril Herbert. At that time it was customary for a master solicitor to take the clerk on a courtesy call to symbolise the apprenticeship that articles of clerkship involved. I can remember walking up an endless flight of stairs to a tiny attic room in the old Supreme Court in King Street where Mr Herbert received his guests. He lectured me gently in the traditions of honesty, diligence and courtesy.

Mr Herbert's admonitions were reinforced by Ray Burke. He told me fearsome tales of solicitors with whom he had experienced terrible run-ins. "If you break your word", he said, "it soon gets around and nobody will ever trust you again". Images of a horrid exile from the newly entered kingdom of the law were conjured in my brain. Ray Burke was then, and has remained ever since, a person of total honesty. If, as a solicitor, he gave his word, he held steadfastly to it. And in those days a lot depended on oral agreement and memory. By the standards of modern time charging, we were doubtless very slipshod. But in terms of efficient and economical deployment of lawyerly time, we could beat the modern systems of management consultants hands down.

Not only was Ray Burke's office noisy. It was filled with smoke. In those unenlightened days there was no concern about the billowing effects of tobacco and passive smoking on poor clerks, denied a window. I remember vividly the day that his first child,

Judith, was born. I recall my own twenty-first birthday in 1960. My father still has the birthday card, emblazoned with a key, with the signatures of the other participants in our tiny office.

In addition to the gang from headquarters and the principal *dramatis personae*, there were the secretaries Pamela Hopkins (who worked for Ray Burke) and later Jean Auchterlonie; Priscilla Sawtell who worked for Frank Marks and me. And Marie Burke, an attractive deep-voiced sultry woman who tried to work, if that is the word, for Mr Simon. Whereas the rest of the firm had to get cases prepared, Mr Simon conceived of himself as a kind of legal entrepreneur. His was the task of ingratiating the firm with Mr Ritchie and the Labor Council. Nowadays he would doubtless be called a "managing partner". I thought of him as constantly circling for a takeover attempt on competitor firms. Watch out Dawson Waldron! Take cover Minter Simpson!. In all truth, M.A.S. did not seem to do much work at all, like most managing partners I suspect.

My greatest dread was when he would return from a liquid lunch with Mr Ritchie and confront me repetitiously with Polonian advice on my future progress in the legal profession (he was convinced it would be modest) or tackle me about the missing biscuits that I had "stolen" to keep body and soul together on the weekends as I laboured on the clients' files. I never allowed these rebukes to worry me too much for I was articted to Ray Burke. And I had read the fine print of my contract. I had made promises about

not stealing postage stamps and stationary. There was absolutely no mention of biscuits.

THE OLD COMMISSION

In the late 1950s and early 1960s the Workers' Compensation Commission was a special place. The building in which it was housed is still there in Hunter Street, Sydney. Its courtrooms were palatial by the standards of most courts of the State in those days. There were only four judges. The Chairman was Theo Conybeare, a punctilious stickler for detail. The "members" were Judge Rainbow, a robust pragmatist, Judge Dignam one-time Ambassador to Ireland and Judge Wall, a gentle, serious man with kindly eyes.

Judge Burke, who was eventually to succeed to a place on the same Bench was interested in the law. He instructed me, as he had promised, in the intricacies of the *Workers' Compensation Act 1926*. He took his law seriously. He appeared to revel in its ironies, inconsistencies and illogicalities. He taught me a lesson that I have never forgotten. Compensation law is about people. That is why it is so important. It is about the survival of families. It is where many ordinary citizens see our great edifice - the law - at close range. I have never been able to look down on this area of the law. And objectively it is more important (and more technical) than many of the fashionable parts of the law's mansion - such as the big

commercial cases that are often no more than glorified debt recovery.

As important as Ray Burke's instructions on the law, were his accurate assessments of the proclivities of the judges. For Theo Conybeare, the big point of every case was the onus of proof. Sometimes to us, who appeared in the interests of the worker applicant, it loomed like the globe which Atlas had to carry. I was also warned to watch out for cases against the Commissioner of Railways. The Solicitor for Railways had often briefed Conybeare at the Bar. If at all possible we had to try to get such cases out of his list to escape suspected lingering loyalties.

Alf Rainbow kept his feet firmly on the ground. But one soon got an impression that he was bored to death and had seen it all before. The key to winning a case before him was to find some peculiar, but interesting, feature of the facts or some aspect in the conduct of your client that made him or her appear a lovable rogue. Fortunately, with our clients, the rogue part was rarely a problem.

Bill Dignam, lately an Excellency, would brook no infractions upon the dignity of his court or his high person. Moreover, the applicant had to be cautioned to look him straight in the eye when the oath was administered. For Dignam this was a semi-mystical religious bond forged between the witness and the Almighty. Heaven help an articulated clerk who whispered or moved during the

administration of the oath. To this day I still hold my breath whenever I hear an oath administered in court.

Colman Wall was the workers' friend on the Commission. But once the worker was caught out in a lie, he was a friend no more. Even irrelevant lies proved fatal. In all of these idiosyncrasies I was carefully instructed by my master solicitor. No doubt we too are now the subject of such folk wisdom.

The inside knowledge of the personalities of the judges sometimes seemed far more important than the nuanced decisions of law in the cases. At law school, Julius Stone was hammering home his realist jurisprudence. This taught the inescapable influence of the judges' attitudes and personalities in the decisions of cases before the courts. Judging was not a mechanical task. Often there was no single right decision to a case. I had already received this instruction in bucket-fuls from Ray Burke. He was a true master in the *Realpolitik* of the Compensation Commission. We may sometimes regret the influence of judicial personality on decision-making. But it exists. No one has been able to invent a better system. And, generally, the right result is reached. The facts and the evidence control most outcomes. A knowledge of the law and of the attitudes, predilections and vanities of the judge was sometimes as important in bringing home the bacon. I did brilliantly in Julius Stone's class. He thought I gathered my wisdom from his book. I never had the heart to tell him that it was actually from Ray Burke.

Another lesson Ray Burke taught me was of the importance of choosing good barristers and of the impact which a conscientious and persuasive advocate could sometimes have in rescuing cases from the brink of doom. In those days we briefed many wonderful advocates from whom, with Ray Burke, I was to learn much about the art of persuasion and good time management. Frank McAlary, Frank McGrath, Noel Westcott, Tony Harrington, Neville Wran and Barrie Thorley were much in demand. They were pitted against big talent on the other side: Gordon Samuels, Ted Lusher, Jack Slattery, Jim Baldock, Tony Collins, Adrian Cook and the youthful Michael Campbell. Cedric Cahill, who had at one stage been in partnership with Mr Simon as a solicitor, was briefed if the case from our firm ascended to the Supreme Court. Sometimes he was led by Jim Staunton QC or by Tony Larkins QC, John Newton QC or Marcel Pile QC. These were barristers of the old school. They were nurtured in the days when jury trial was much more common than it is now. And if the case was truly big, Mr Eric Miller QC *himself* was briefed for his unerring skill in lifting each and every stone in the case. He unleashed a war of attrition against all defendants in which the motto was: "Take no prisoners".

Sometimes I accompanied Ray Burke to conferences. But generally he left his clerks to assume their own responsibilities. He was not a stern taskmaster. A life in the world of litigation was a happy and hectic experience working with him.

Very occasionally, as in *McLellan v Bowyer* (1961) 106 CLR 95, we ventured together into the mysterious world of the High Court, then housed in an annex to the court complex at Darlinghurst. To M A Simon and Ray Burke an appeal to the High Court was absolutely a last resort. It was a sign that all of their beguiling attempts to settle and compromise the case had come to naught. The insurer was being "bloody minded". And the main danger was not that the case might be lost. In those days a loss for a worker in a compensation or damages case in the High Court was absolutely no surprise. The real peril, as Ray Burke would explain it, was that you never knew how the High Court would confound the law and throw confusion upon uncertainty, wrapped in obscurity. It is fortunate, as I am sure you will agree, that things have changed so much since those far-off days.

ON THE BENCH

My first judicial appointment was in 1974, a little more than a decade after I had left M A Simon and Ray Burke. It preceded his judicial appointment by eight years. I therefore never had the pleasure (for that it would have been) to appear as an advocate before Judge Burke. When, after a sojourn in the Law Reform Commission and other places, I took my seat in the New South Wales Court of Appeal in 1984, quite often his judgments would come to that Court. As I read them, I could hear him speaking in his

own characteristic way. He disdained many of the tedious conventions of judicial opinions. Typically, he would rush straight to the essence of the matter in contest. Or he would reflect on the peculiarities of the case or the inconsistencies of appellate legal instruction on the point for decision. I have been told (I am sure that it is quite false) that he would deliver *ex tempore* reasons, staring at a pencil as if waiting for inspiration. After two weeks hearing a native title appeal, I long for that magic pencil.

As I would read Judge Burke's reasons, I realised that nothing much had changed in the interval since our professional parting of the ways. If I were to classify him, I think his judicial reasons were most similar to those of Judge Rainbow. They were direct, forcefully expressed and intellectually engaged. Unlike Judge Rainbow I never got the feeling that Ray Burke became bored with his life as a judge. To him the puzzles of judging continue to be just that. Puzzles of fact-finding. Ironies in resolving conflicting testimony. Dilemmas in elucidating uncertain principles of law. Wry humour revealed by the cavalcade of human foibles. Total honesty, above all, to himself. Reluctantly obedient to binding legal principle. But never excessive deference. And sometimes robust criticisms of the legal centurions put in charge.

If one word shone through his opinions it would be honesty. Honesty in a judge is a wonderful quality. It comes with the three essential elements of the judicial life. These are reflected in the

international statements of human rights. They are found in the principles of the common law. They are probably implicit in the Australian Constitution itself. They have been practised over eighteen years by Judge Burke. Professional competence and diligence. Independence. Impartiality.

FUTURE DAYS

Now, after a lifetime in the law, most of it devoted to the specialist field of workers' compensation, Ray Burke is about to lay down the judicial mantle. He will be missed. His life has been blessed with professional success. More importantly, he has shared it with a loving wife, Patricia, and with his family. His life has been touched with great personal tragedy that his friends have shared with him. But through it all he has been given strength by the faith he learned at "headquarters". More significant than his instruction to me about the law, about evidence, about client psychology and even judicial idiosyncrasies was the instruction he gave about the integrity that is central to our functions as lawyers.

In most countries of the world you cannot go to a judge and be sure that he or she is uncorrupted, is competent, independent and impartial. But in Australia these are still the norms. They are true of the best that the legal profession offers, not only on the Bench but through all its branches.

When he is freed from judicial restraints, Ray Burke will probably feel entitled (even more than in the past) to dissect the humble writings of his one-time clerk. And to blame the old gentlemen and lady of the High Court for mucking things up. Do so, Ray Burke. It is your entitlement as an Australian citizen. Until now, you have been under the disciplines of office, (although that burden was for you, I realise, light). Released from such disciplines you can set your lively intelligence loose on larger puzzles and greater mysteries. Frank McGrath on his retirement returned to history. John Williams, on his, pursued philosophy. Who knows where Ray Burke's imagination will take him?

Wherever that may be, his friends will be close by with helpful advice and criticism, just as lively as that which he dispenses. In the regular reunions of the M A Simon Old Persons and in the boisterous and ever-growing academy of lawyers trained in the demanding personal and professional disciplines of the Compensation Court, his name will long be honoured and his work acknowledged.

As his one-time articulated clerk, as a colleague in the law, as a fellow judge and as a citizen, I express thanks for Ray Burke's life of devoted service to the community. If I close my eyes it seems but yesterday that I was working with him in that little office in Hunter Street, living off the boss's biscuits but never stealing the postage stamps or the stationary.

Ramon Francis Burke. Judge and citizen. Servant of the law but of no man. An Irish-Australian who was basically agin' it. Who adapted himself to the law's ways. And who made sure that the law did a bit of adapting as well.