

Law Libraries – Places of Power and Danger

The Hon Chief Justice Robert French, High Court of Australia

The librarian's occupation is readily stereotyped in popular culture as benign and helpful. Incidental to that stereotype is its characterisation as marginal to the mainstreams of social, political and economic activity. But in some imaginative fiction and film, libraries are often depicted as places of power and danger. A recent example of libraries as places of danger appeared in an episode of *Doctor Who* which was set in the biggest library in the Universe. Nobody who saw that episode and what happened to his companion, Donna Noble, would ever again stand easy in the shadows of a library stack.

Imagination is not necessary for the conclusion that libraries are places of power. Important and complex decision-making in today's world requires information literacy. This term has been defined, in the literature of librarianship, as the capacity "to recognise when information is needed and ... locate, evaluate and use selectively the needed information".¹ The informed selection and arrangement and persuasive presentation of information is an important element of much decision-making. The contemporary arts of advocacy and judgment in the Courts rest upon information literacy so understood. It is necessary to the persuasive presentation of a case. It is necessary to its persuasive disposition. The concept of information literacy also seems to me to overlap with that of knowledge management which I notice is the subject of discussion in contemporary literature relating to law libraries.

The literacy which is indispensable to advocacy and judgment in the law means, among other things, knowing how to use law libraries which includes knowing how to ask the right questions. Knowing how to ask the right questions is one of the most important attributes of a user of library resources whether it is by interrogation of a data base or just

¹ Kirton, J, Barham, L and Bundy, S, 'Understanding of Information Literacy in Australian Government Libraries' (2008) 57 *Australian Library Journal* 237 at 240.

asking the librarian. You will remember that the importance of getting questions right was highlighted in *The Hitchhiker's Guide to the Galaxy* when a gigantic computer Deep Thought, was asked the answer to the Ultimate Question about life, the universe and everything. After seven and a half million years it offered the answer "42". The computer was then asked – what is the Ultimate Question? Its first response, as I recall, was "tricky!" The story ends up producing, after many further millennia, as the Ultimate Question – "What is six times nine?" That question apparently fits the answer if all numbers are chosen using base 13.

In this talk I want to say something briefly about the history of libraries and the interaction of law libraries, legal information and judicial decision-making. The depth of the history of libraries says something about their social significance and their ongoing importance, even in the age of the Internet.

The notion of libraries as places of power is supported by serious scholarship. In the fourth edition of his *History of Libraries of the Western World*, published in 1995, Michael Harris writes of the emergence of a large body of work supporting the anthropologist Claude Levi Strauss's insight that books and writing have always been linked with power. Harris suggests that students of library history should be aware of the extent to which library development is linked with power, and quotes Mary Beard's observation that –

Libraries are not simply the storehouses of books. They are the means of organising knowledge and ... of controlling that knowledge and restricting access to it. They are symbols of intellectual and political power, and the far from innocent focus of conflict and opposition. It is hardly for reasons of security that so many of our great libraries are built on the model of fortresses.²

The connection between libraries and power is reflected in their historical links to law and religion. The Code of Hammurabi which was created around 1760 BC and conveniently inscribed on a 2 metre tall stone pillar was probably compiled with the aid

² Harris, M, *History of Libraries in the Western World*, 4th edn, (1995) Metuchen, NJ: Scarecrow Press Inc at 6 citing Beard, M, *London Review of Books*, February 1990 at 11.

of a law library of some kind.³ Assurbanipal the Assyrian king maintained a library of over 30,000 tablets which dated from the first millennium BC. Although it covered every conceivable topic and included religious texts it also had a division concerning laws and legal decisions. Babylonian temple libraries included histories of the gods, the texts of rituals, hymns, incantations, invocations and prayers and sacred epics and scriptures.⁴

Although not so directly connected with political power, save that he was tutor to the young Alexander the Great, Aristotle's Peripatetic School of Philosophy, established in the fourth century BC, was associated with the development of a library comprising hundreds of volumes and used by his students. It was enlarged by his successor, Theophrastus. Later in the first century BC, and much diminished, it was incorporated into the great Alexandrian Library. Julius Caesar planned a public library even greater than that of Alexandria, but died before its realisation. A public library was established, however, with books collected from the spoils of war by the literary patron G Asinius Pollio. Pliny said of him –

Ingenia hominum rem publicam fecit – He made men's talents a public possession.⁵

Religion in the early centuries AD drove the development of libraries further. Monastic communities made books part of spiritual life and created replicas. In some cases the secular public could borrow books if security was given. Monastic libraries came to an end in England during the Reformation of the 16th Century under Henry VIII. In the reign of Elizabeth I, the Archbishop of Canterbury and collectors such as Sir Robert Cotton and Sir Thomas Bodley recovered the remnants of monastic libraries. These formed the early collections of libraries such as those of Corpus Christi College at Cambridge, the British Museum and the Bodleian Library at Oxford.

The evolution of law libraries in England was generally driven by the requirements of the practicing profession. The Inns of Court in London, which trace their origins back to the

³ Ibid, 18-19.

⁴ Ibid, 19.

⁵ Cited in "Libraries", the *New Encyclopaedia Britannica* 22nd edition (1994) vol 22 at 948.

14th and 15th centuries, each developed a library for its members. The Inner Temple Library which came into existence in the early 16th century was not well established until the early 18th century when William Petyt who was its Treasurer in 1701-1702 bequeathed his collection of books and manuscripts to the Inn.⁶

In the United States, law libraries also started with small, private collections which consisted largely of English material. Ten to twenty volumes was thought to be a good library.⁷ They were dominated by English law books, and particularly *Blackstone's Commentaries*. *Coke's Institutes* were popular in the early stages of the development of the American legal profession. Christina Brock, in an interesting paper about law libraries and librarians in the United States, wrote –

Blackstone was the core of the new nation's legal system: his works were absolutely necessary for anyone who read law at that time, as Coke's had been for a century before.⁸

Institutional libraries, formed by Law Societies and Bar Associations, were as much for socialising as for study.⁹ Brock observed that the Bar Libraries of the 19th and early 20th century were run like private, and sometimes luxurious, clubs. In the 1920s in the library of the Bar Association of New York a lawyer researching a legal point would have at his side an electric bell and the speaking tube or telephone. If he made an inquiry about a particular book, it would come down a chute on to a table by his side. A person using the library reading room at that library had only to push a button on a desk and an attendant would appear to deal with the request. Similarly in the Massachusetts Bar Library the boast was no patron ever had to use a card catalogue. Everything required would be brought to the reader's desk, if the librarian were given a subject.¹⁰

⁶ Blunt, A, 'Historical Manuscripts of the Inner Temple Library' (1992) 23 (2) *Law Librarian* at 57.

⁷ Panella, D S, *Basics of Law Librarianship*, (1992) NY: Haworth Press at 1.

⁸ Brock, C A, 'Law Libraries and Librarians: A Revisionist History; or More Than You Ever Wanted to Know' (1974) 67 *Law Librarians Journal* 325 at 327.

⁹ Panella, op. cit. at 2.

¹⁰ Brock, op. cit. at 329-330.

As these libraries in the United States grew in size the need for specialist librarians arose. Staff of early law libraries were generally trained in the law, rather than library science.¹¹ Brock essays an interesting social history around the qualification required of a law librarian. In the 1950s there was a view that the best law librarian was a lawyer who qualified as a librarian. On the other hand there was a view that it was better to have a librarian who had studied law than a lawyer who studied library science. One commentator wrote –

Your lawyers are a chesty crowd; you may think that somebody else knows something but you won't admit it. Therefore, when the lawyer starts to study library science he approaches it with the wrong attitude. He feels that he is lowering himself and that he is doing something for which he should apologise.¹²

There was also an interesting history of discrimination against women as law librarians.

Since the times described by Christine Brock, things have moved on in terms of the gender of law librarians and the qualifications which, in Australia, are predominantly in library science rather than in law.

The modern law library is found in a variety of settings: in the academy, the courts, the practicing profession and the public sector. Its holdings are both hard copy and electronic through access to national and international databases. The law library of a major court or university is required to provide manageable access to a vast range of information. In Australia this includes the ever changing statutes and delegated legislation of the Commonwealth and the States and Territories and the judgments reported and unreported of their Courts, major reference works, loose leaf services, monographs, essay collections and the never ending torrent of journal articles at various levels of excellence, competence and mediocrity. When one adds to these the judgments and statutes of other countries relevant to Australia, the task of information management

¹¹ Ibid, 332.

¹² Brock, op. cit 354; quoting remarks of Price, M in 'Proceedings – Round Table on Library Problems' (1939) 32 LLJ 47 at 71.

seems immense. The nature and content of global electronic databases is of such complexity and scale that even the most adept judge's associate or research assistant may require the assistance of an experienced librarian to map the informational landscape. Quite apart from the principal common law jurisdictions to which Australian lawyers have regard, including the United Kingdom, Canada, the USA and New Zealand, there is a growing body of jurisprudence which crosses national boundaries in such areas as human rights, competition, intellectual property, admiralty law and international trade. The interpretation of international conventions around the world may be of relevance where terms used in such conventions are replicated or adopted by domestic statute. In the area of commercial law, common form international contracts such as those generated by UNCITRAL¹³, will attract their own body of jurisprudence across national boundaries. The body of information is so great that the advisor, advocate or judge who has resort to it should also be able to deploy selection techniques which will prevent information overload and decisional paralysis.

Against that background I want to talk a little about the interaction between the courts and the management of information by reference to what is involved in the judicial function. This is something about which I know a little more than the techniques of knowledge management.

The core business of judging was described by the High Court in 1983 as –

... the quelling of ... controversies, by ascertainment of the facts, by application of the law and by exercise, where appropriate, of judicial discretion.¹⁴

That description implies a syllogistic model of decision-making involving –

1. The identification of a rule of law applicable to a class of fact situation.
2. Determination of the facts of the case.
3. Application of the rule of law to the facts of the case to yield a conclusion

¹³ United Nations Commission on International Trade Law

¹⁴ *Fencott v Muller* (1983) 152 CLR 590 at 608.

expressed in terms of the rights and liabilities of the parties before the Court and to which remedies may or may not attach.

The syllogistic model is simple but the process of fact finding and decision-making does not always follow its tidy sequence. Sometimes, in the course of a case, the issues in dispute will shift or be redefined. Questions of law which appeared to be critical at the outset of a case may become irrelevant having regard to the way the facts fall out. Secondary or alternative positions may be taken by the parties and require consideration. Sometimes the applicable rule of law may only be identified with precision when the facts have been found. But whatever complexity attends the implementation of the syllogistic model, its essential logic remains intact. The first two elements of its logical framework involve information management. The first requires the management of evidence, its assessment and the making of inferences based upon it. The second requires the management of information relevant to the identification of the applicable rule or rules of law.

In some cases the evidentiary information is relatively simple. Take the example of a traffic accident. The essential question – what happened? – is answered by reference to eyewitness accounts, out of court admissions by a defendant and perhaps expert opinion based upon physical evidence such as the position, length and direction of skid marks and the location of impact damage on the vehicle or vehicles involved.

In more complex areas such as commercial litigation, fact finding may involve the processing and consideration of large volumes of documents, including hundreds or thousands of emails, to reconstruct a sequence of transactions and communications between parties upon which rights or liabilities may depend. In some cases the numbers of exhibits may run into the thousands.

The management of the discovery process which involves identifying and disclosing documents, electronic or otherwise which are of relevance to the case, is a major challenge to the profession and the courts. Discovery can be a significant expense in the

pre-trial preparation of commercial litigation. Neither the courts nor the profession seem to have found a satisfactory way of making it substantially more efficient and focused. So far as electronic documents are concerned it may be that one answer is the use of sophisticated search engines which can interrogate commercial or organisational databases and identify key words, authors, addresses and dates to extract those documents most likely to be relevant.

At another level of complexity in the fact-finding process the Court may be required to form opinions based on expert testimony coupled with a consideration of scientific or other literature.

In some cases scientific issues arise which require a review of scientific literature received as part of the evidence. By way of example, a patent for an invention may be challenged on the basis that the claimed invention did not involve an inventive step when compared with what is called the prior art base existing before the priority date afforded by law to the claim. The test is whether "the invention would have been obvious to a person skilled in the relevant art in the light of the common general knowledge as it existed in the patent area before the priority date of the relevant claim".¹⁵ Consideration may have to be given to publicly available information through documents or related documents which a skilled worker could reasonably be expected to have ascertained, understood and regarded as relevant to the work in the relevant art in the patent area. This hypothetical skilled person could be expected to carry out literature searches using research facilities including online databases.

I do not wish here to expound the law on 'inventive step' but rather to indicate the kinds of things a judge must do to decide that issue. In the case of advanced technologies and particularly in areas such as biotechnology the judge may be required to consider and assess, in the light of expert evidence, whether disclosures made in prior scientific literature are such that the state of common general knowledge renders the claimed invention not obvious. And if it is in effect covered by prior disclosures then there will

¹⁵ *Patents Act 1990* (Cth), s7(2).

be a question of whether it lacks novelty. It is not unusual in cases of this kind for the court to be exposed to a significant range of scientific literature said to be relevant to the state of common general knowledge at the time that the claimed invention was developed. Intellectual property is not the only area in which such exercises have to be undertaken. In cases involving issues of professional negligence in technical fields including medicine and engineering the state of knowledge in the field may be relevant to the question of liability.

It is not necessary to multiply examples of other circumstances in which courts have to assess the state of scientific or technical knowledge at a particular time. However, even before the court undertakes the business of ascertaining the relevant law it may be required to consider the significant volumes of complex information in published form. This is not an area in which the law library is of particular assistance. It does however indicate that in judicial decision-making information literacy and the ability to extract the essentials from a mass of written material without necessarily reading it word for word, is not limited in its application to the determination of legal principle.

In identifying the applicable law a judge may have to consider both common law and statute law. The common law is the judge-made law developed case by case over many years and in some cases centuries. There are various analogies applied to the process of the development of the common law. It could be thought of as a kind of genetic evolution. It proceeds through a myriad of accidents, they being the cases which present for decision. Out of these cases organising principles may emerge which are fleshed out and developed further. Using another analogy the development of the common law is “the sluggish march of the glacier rather than the catastrophic charge of the avalanche”.¹⁶ The history of common law rules may therefore be of importance in deciding whether further development in a particular direction is consistent with their historical logic and policy.

¹⁶ Winfield, P H, Jolowicz, J A and Rogers, W V H, *Tort*, 14th edn, (1994) London: Sweet & Maxwell, 17.

In many cases the relevant common law principle will be known to the judge and applied to the facts without a need for significant legal research. In the superior courts however cases generally do not go to trial or appeal unless there is dispute or uncertainty about either or both the facts and the law. When there is a dispute about the law it may be because it is sought to apply the common law to a novel situation. In such a case the application of the relevant principle may require judicial determination and at the appropriate appellate level, a formulation of the rule adequate to encompass a class of case to which it had not previously applied. This may sometimes amount to a development of the rule.

The application and adjustment of the common law in novel or disputed applications requires an understanding of its content and history. A court facing this task will need to access case law relevant to the history of the rule. It may look to the decisions of other domestic or foreign jurisdictions which have had to grapple with a similar problem. It may consider textbook writings and articles in law journals which may offer insights of assistance in deciding how to resolve the issue before it. All of this requires a manageable access to, and selection from, a potentially vast body of legal information, of that which is most likely to be useful. The judges, their associates and research assistants have a part to play in effecting that access and selection albeit they should have been provided with most relevant materials by competent counsel. The skill of all actors in the use of law library facilities is important. So too is the assistance and suggestions which law librarians can provide. In this context it may be that the law librarian who combines education in the disciplines of the law and library science is at something of an advantage.

In *Cattanach v Melchior* (2003) 215 CLR 1, the High Court had to decide whether the parents of an unintended child, born as the result of negligent medical advice, were entitled to compensation for the cost of raising the child to the age of majority. This raised a novel question for the common law. Could the birth of a child be regarded as a legal harm or injury for which damages could be awarded? Counsel referred to decisions of a number of overseas jurisdictions including the United Kingdom, the United States

and Canada. The Court split 4/3 in favour of compensation for the cost of raising the child. In the judgments there was extensive reference to decisions from other jurisdictions, the Second Restatement of Torts in the United States and numerous journal articles as well as cases dealing with the role of public policy in the development of the law. The case took the judges into territory uncharted in Australian law but their consideration was informed by a significant body of overseas jurisprudence and academic discussion.

Similar challenges in accessing written information arise in the interpretation of statutes and delegated legislation. Many if not most statutory words, like language generally, offer interpretive choices. Language is not like algebra. In interpreting a statutory provision the court goes first to the ordinary meaning of its words. It has regard to their context and the purpose of the provision so far as it can be ascertained from its text and by reference to statutory statements of purpose, permitted extrinsic materials including explanatory memoranda, second reading speeches and official reports. The court may also have regard to the legislative history of the particular statute and how a provision evolved. It may be apparent that a particular provision was inserted in an Act by way of amendment to overcome a deficiency exposed by a judicial decision.

The court may also have regard to whether the words of the relevant statute have a history in earlier statutes within the court's geographical jurisdiction or other domestic or foreign jurisdictions. For example, some parts of some Acts of Parliament may be traced back in Australia to colonial times and to Acts of the British Parliament from which they were borrowed. The history of such provisions may involve a body of case law interpreting them over the years in particular ways. Again, the task of the court in application or interpretation of such provisions will necessarily require marshalling information relevant to their history both legislative and interpretive. The task of the level of information literacy required in such cases may be no less complex than that required in exploring novel applications or developments of common law rules.

In a case which went to the High Court in 2005 on appeal from the Full Court of the Federal Court, the question considered was whether 'mod chips' inserted in Sony Playstations to facilitate the use of copied CD ROMs were 'circumvention devices' within the meaning of s116A of the *Copyright Act*. There was reference in the intermediate appellate judgments to the history of international negotiations and committee reports underlying the enactment of the provision. The High Court discussed the background of the *Copyright Amendment (Digital Agenda) Reform Act 2000* (Cth), which introduced the concept of circumvention device and the related idea of a 'technological protection device' into the *Copyright Act*. It included reference to the *World Intellectual Property Organisation Copyright Treaty* which was referred to in the Explanatory Memorandum. Reference was made to the Congressional Commerce Committee of the US and its consideration of the *Digital Millennium Copyright Act 1998* (US). All of this converged upon the interpretation of the word "prevent" embodied in the definition of "technological protection device". The case illustrates nicely the amount of research that may be necessary particularly in areas involving international agreements or international model laws, to properly interpret domestic statutes which give effect to them.

Another case involving historical inquiry which had a constitutional dimension was the first instance decision in *Highstoke Pty Ltd v Hayes Knight GTO* (2007) 156 FCR 501. A company called Highstoke sued a company called Hayes Knight GTO on behalf of debenture holders for damages for alleged breach of its duties as trustee for those debenture holders. Highstoke obtained authority from the Australian Securities and Investment Commission to apply to the court for the issue of a summons under the *Corporations Act* so that it could examine Hayes Knight to see whether that company had a professional indemnity policy and would be able to satisfy any damages awarded against them. A summons was issued by a Judge of the Court. One of the questions which arose was whether the *Corporations Act* actually authorised examination of a company not under external administration and if so whether such authority was constitutionally valid. This required, first of all, properly construing the relevant section of the *Corporations Act*. In that connection it was helpful to go to the legislative ancestry of the power and also to examine cases which had been decided on analogous antecedent

provisions. That legislative history went back to the first bankruptcy statute in England in 1842 and the first such provision in the company laws of the United Kingdom in s15 of the *Joint Stock Companies Winding Up Act 1844*. The widening of the power of examination and judicial decisions about it were reviewed along with references to textbook writings explaining the history. Reference was also made to journal articles about the application of the examinations power in Australia. The legislative history in Australia was tracked with reference to the individual companies of the Australian states, the *Uniform Companies Act* adopted by each of the states in 1961 and the successive legislative schemes for the regulation of corporations. The 1992 amendments to the Corporations Law were discussed including their purpose as indicated by a report of the Australian Law Reform Commission in its *General Insolvency Inquiry Report*, No 45. Passages from the Explanatory Memorandum were mentioned and then a number of cases dealing with the examination provisions so enacted. The scope of the powers was then examined in the light of that history. The conclusion reached was that the weight of authority supported the proposition provisions were applicable to companies in administration and not to companies generally.

The judgment then went on to consider whether the conferring of a power of examination of a company not under external administration would be a valid exercise of the judicial power. That reduced to the question whether there was any historical basis for characterising the broad view of the examination power as judicial in character. The judicial power involves at its heart the authority to decide controversy between subjects or between government and subjects. However it has been taken to indicate things which have historically fallen within the jurisdiction of various courts of justice in English law.¹⁷ The conclusion reached was that it did not extend to a power to examine corporations not the subject of external administration. That conclusion, be it correct or otherwise, was based upon a consideration of the historical background to the

¹⁷ *R v Davison* (1954) 90 CLR 353 at 368.

examination power and its exercise by courts in England and the Australian colonies before federation.¹⁸

The two cases to which I have referred in connection with statutory interpretation and constitutional law are illustrative of the way in which historical perspectives on both legislation and case law relating to it have a part to play in its interpretation and necessarily require the substantial assistance of library resources.

The use of the law library in common law and statutory decision-making is important to the exercise of judicial power. Law libraries are properly described as places of power. The real danger lies in not making full and effective use of them.

¹⁸ In this regard generally see *Dalton v The New South Wales Crime Commission* (2006) 227 CLR 490 at 507-508.