ISSN 0709-5319

PRINTED IN BRANDON BY LEECH PRINTING LTD

PROVINCIAL JUDGES Journal

VOLUME 5, No. 3 SEPTEMBER, 1981

A PUBLICATION OF
THE CANADIAN ASSOCIATION OF
PROVINCIAL COURT JUDGES

The Provincial Judges Journal is a quarterly publication of the Canadian Association of Provincial Court Judges. Views and opinions contained herein are not to be taken as official expressions of the Canadian Association's policy unless so stated.

Editorial communications are to be sent to The Provincial Judges Journal, Box 531, Brandon, Manitoba R7A 5Z4.

EDITOR-IN-CHIEF
Judge Rodney Mykle

EDITORIAL BOARD
British Columbia, Judge C.C. Barnett
Alberta, Judge A.W. Aunger
Saskatchewan, Judge R.J. Kucey
Ontario, Judge Douglas V. Latimer
Quebec, le Judge Andre Duranleau
New Brunswick, Judge Blake Lynch
Prince Edward Island, Judge Gerald L. FitzGerald
Nova Scotia, Judge R.J. McCleave
Newfoundland, Judge Ronald L. Jenkins
North West Territories, Chief Judge James R. Slaven

contraire, il lui sera tenu rigueur d'avoir oublié certains incidents d'une importance tout-à-fait relative et dont il aurait précédemment fait était.

Lors de cette étape de la procédure pénale, le prévenu bénéficie d'un droit qui n'est point reconnu au témoin. Il s'agit de l'ordonnance de non publication. En effet, et à moins que le Tribunal n'intervienne, le témoin n'a point droit à ce que son identité, non plus que son témoignage, ne fasse l'objet d'une interdiction pour publication on diffusion par les média d'information.

Dès lors, et sans qu'il n'en ait été avisé au préalable, le témoin sera interrogé sur son passé et tenu de révéler sa participation à une offense criminelle quelconque.

Seul l'article 142, et pour les cas auxquels il réfère, permet à un témoin de pressenti cette référence à un douloureux souvenir de son existence.

Le témoins soumis à un contre-interrogatoire s'étonnera sans doute que l'on veuille lui faire réitérer ses affirmations et seule l'intervention du Tribunal lui permettra d'échapper à un harcèlement qui déjà s'est prolongé avant même qu'on lui prête assistance. Ajoutons que notre Code pénal ne prévoit point le droit au témoins de solliciter cette intervention alors qu'en toute bonne foi il s'applique à renseigner le Tribunal au meilleur de son habilité.

A l'issue de l'enquête, il sera informé de la tenue du procès par une nouvelle convocation et encore là, à une date pour laquelle il est rarement pressenti.

Ce sera donc la troisième occasion où il sera invité à reprendre son récit des faits tout en s'interrogeant sur le peu de crédibilité que l'on semble lui prêter.

Ayant rempli un devoir civique et s'étant par la suite soumis à son obligation légale et à moins qu'il n'ait été présent lors de la déclaration de culpabilité ou du prononcé de l'acquittement du prévenu, il arrive très rarement que le témoin soit informé de l'issue de la cause, de sorte qu'il ignore dans quelle mesure sa participation au système pénal a permis que justice soit valablement rendue.

Tout ce qui précède présuppose que la procédure s'est régulièrement déroulée, et que le témoin n'a pas été inutilement soumis à d'autres multiples convocations au cours desquelles il n'a eu droit à aucune intervention.

Toute ceci, me direz-vous, s'inscrit dans le cadre normal de la procédure normale en raison de l'impérieuse nécessité de mettre tout en oeuvre pour rencontrer les objectifs du système judiciaire dans l'optique des principes fondamentaux sur lesquels il repose. Telle est sans doute également la contribution que le témoin doit y apporter pour en favoriser son application et en assurer son efficacité, nonobstant les contraintes auxquelles il est appelé à se soumettre et dont la description qui précède demeure incomplète.

Or, c'est précisément cette situation qui devrait commander de tous les responsables de l'utilisation du système pénal, et dont nous sommes du nombre, un plus profond respesct pour le témoin. C'est là un objectif dont nous pourrions nous soucier d'avantage dans la mesure où notre pouvoir d'intervention est susceptible de s'y prêter.

L'autorité qui nous est reconnue et les pouvoirs qui nous sont conférés donnent sûrement libre cours à certaines initiatives de notre part pour apporter des mesures correctrices à certaines lacunes du système, et dont l'existence conduit parfois à une injustice sociale dont le témoin en est trop souvent le premier à en être victime.

Je pense que c'est là à tout le moins une préoccupation que nous partageons tous mais que le principe de la stricte neutralité qu'il nous faut observer nous empêche d'exprimer plus obtensiblement.

Pourtant, nous ne sommes pas entièrement démunis de moyens pour traduire au témoin toute la considération que nous lui portons.

Or l'une des manifestations les plus concrètes de ce manque de respect envers le témoins, consiste dans l'usage abusif de la procédure pénale avec la convocation inconsidérée d'un nombre effarant de témoins dont la présence devant le Tribunal devient purement vexatoire, alors qu'ils ne sont point appelés à jouer le rôle pour lequel ils sont convoqués.

C'est sans doute à ce niveau qu'il nous est davantage loisible d'intervenir dans l'application du système pénal, bien que sans doute votre expérience individuelle vous permet de concevoir d'autres moyens pour démontrer votre égard envers le témoin.

Si j'ai cru devoir aborder un tel sujet, ce n'est certes dans le but de vous convaincre de mes propos, mais plutôt dans celui de créer une occasion pour nous livrer à nos réflexions personnelles sur ce point.

Eyewitness Reports:

by Professor Elizabeth F. Loftus

PSYCHOLOGICAL FACTORS AND EXPERT TESTIMONY

Several years ago, *Time* magazine carried a story describing the plight of an Assistant District Attorney, William Schrager, whose car stalled one night in Queens, New York. Two policemen saw Schrager near his car, behaving in what appeared to them to be a suspicious manner, and so they approached him. They noticed that he fitted the description of a man being sought in connection with a series of sexual assaults, and when he failed to produce identification, they took him to the police station. Schrater was then placed in several line-ups, usually with policemen who were bigger than he was. To his horror, he was identified by four women who claimed that he had molested them. Fortunately, a similar-looking postman soon confessed to some of the crimes with which Schrager had been charged, and Schrager was released from custody. One cannot help but wonder what would have happened to Schrager had another man not confessed. What jury could resist the influence of four women's testimony – four women who were quite sure that Schrager was their assailant?

This example, and scores of others that could be provided, highlights the problems posed by evidence of eyewitness testimony. Such evidence is introduced into our courts of law on the assumption that witnesses can perceive and recall their experiences accurately. Yet this assumption has been widely contradicted by the findings of psychological research.

Psychologists have considered the possible causes of distortions in the recollection of witnesses, and have uncovered a good deal of information both about the nature of human memoryand about the factors which are known to influence the accuracy and completeness of an eyewitness account. After a brief discussion of these factors, I will provide a close analysis of one of the factors in order to illuminate the process by which psychologists study such phenomena as well as the depth of their analysis. I will examine the influence of the specific questions which are asked of a witness after the to-be-recalled event has passed, and show how these questions can dramatically affect a witness's memory. Additionally, I will show that the questions put to a witness in court can affect the behaviour of a juror who is overhearing these questions.

HUMAN MEMORY AND THE FACTORS AFFECTING THE RELIABILITY OF AN EYEWITNESS ACCOUNT

When we experience an important event, we do not simply record that event in memory as a videotape recorder would record it. Rather we store bits and pieces of information gleaned from our original perception. What we pay attention to and what is stored initially will depend upon our particular background, our prior knowledge and experiences, our prior biases and expectations. During the time between the event and our later recollection of it, we may be exposed to new, related information which will also affect the later recall. Finally, at the time we try to remember the event, we do not spew out a completely veridical account; rather our recollection will be bases upon information from the original perception, knowledge we have acquired prior to the witnessed event, and information presented or inferences drawn after the event. All of these become integrated into what we are used to calling a "memory".

Thus, a multitude of factors influence a "memory". These might be divided into two groups: factors inherent in the situation being witnessed and factors inherent in the witness himself.

Factors inherent in the identification situation itself are numerous. The retention interval, or the time between an experience and a subsequent test for recollection is one factor in this category. It is a well-established fact that people are less accurate and less complete in their reports after a long retention interval than after a short one. A second factor in this category is

the exposure time, or the elapsed period of time over which the observer has viewed the witnessed event. As early as the beginning of this century, psychologist G.M. Whipple noted that an eyewitness should be better able to recall an event when the event was observed and transpired over a longer rather than a shorter period of time. Recent research has provided strong experimental evidence for Whipple's early observations. Information provided to an observer after an incident has been witnessed can affect accuracy.

Factors inherent in the witness are equally important. One is the stress experienced by a witness; a person who experienced extreme stress and arousal during some incident will tend to report less accurately than a person under ordinary, nonstressful circumstances. The relationship between a person's cognitive abilities and stress or arousal is actually a bit more complex, and has been captured in what is called the "Yerkes-Dodson Law". Named in honor of the men who first noted it in 1908, the law states basically this: strong motivational states, such as stress or emotional arousal, facilitate learning and performance up to a point, after which there is a decrement. Yerkes and Dodson proposed their law on the basis of experiments conducted with mice as subjects, electric shock as the stressor, and performance on light discrimination task. However, the law has since been shown to hold with human beings performing a wide variety of tasks.

In addition to stress or fear, a witness's expections will affect his accuracy. This is perhaps most tragically seen in the numerous cases of hunters who, mistaken for deer, are shot and killed by companions. During the 1974-75 hunting season, hunting accidents took the lives of at least 700 people, according to the National Safety Council. Expectations undoubtedly played a role in most of these; a hunter who eagerly scans a landscape for a deer perceives a moving object as a deer. Someone expecting to see a person would perceive the same moving stimulus as a person. In addition to expectations, the personal biases and prejudices of a witness, his prior knowlege, his needs and motives, and his physical condition will all influence his ability to perceive and relate accurately.

Several recurring circumstances in the criminal identification situation involve the interaction between the situation and the witness. *Cross-racial identification* is an example. People are better at recognizing faces of persons of their own race than a different race. Further, contact with various ethnic groups does not appear to improve a person's ability to distinguish its members. A second example is the *photo-biased* line-up. If a witness views a photograph of a suspect, he is much more likely to "identify" that suspect in a line-up (relative to the case where no photo has been seen), even if the individual was not seen at the crime scene. Thus the photo has "biased" the line-up. Third, psychologists have observed the phenomenon of *weapon focus.* When a criminal carries a weapon, witnesses have a tendency to focus their attention on that weapon. This results in accurate recall of the weapon and its characteristics, but impaired recall of the person carying the weapon and reduced ability to recognize that person later on. Finally, the phenomenon of *unconscious transference* is relevant. Unconscious transference occurs when a person seen committing one act is confused with or recalled as the person seen committing a second act. Patrick Wall, in his book "Eyewitness Identification in Criminal Cases", provides an excellent demonstrative example. A ticket agent in a railroad station was held up at gun point and subsequently the agent recognized a sailor in a line-up as the culprit. The sailor had an iron-clad alibi, however, and was eventually released from custody. The ticket agent, who was later interviewed in an attempt to determine why he had misidentified the sailor, said that when he saw the sailor in the line-up, his face looked familiar. This was not surprising, since the sailor's base was near the railroad and on three occasions prior to the robbery he had purchased tickets from this agent. It appears as if the ticket agent mistakenly assumed that the familiarity related back to the robbery when it undoubtedly related back to the purchasing of tickets. An unconscious transference occurred in that the person seen buying tickets was transferred to or integrated with the act of armed robbery, an act that was actually committed by someone else.

To reiterate, there are many factors which affect the ability of a person to perceive and recall accurately. Some of these are inherent in all situations while others are inherent in the witness. In addition, a number of phenomena that recur in criminal situations have been examined in the laboratories of social scientists. To appreciate better the extent to which an experimental social scientist might investigate one of these phenomena, I now turn to some examples from my laboratory.

faits dont il a eu connaissance.

Les dispositions actuelles du code qui s'appliquent à son sujet définissent de façon précise les obligations auxquelles il est aussujetti, ainsi que les sanctions qui sont susceptibles de lui être imposées advenant son défaut de s'y conformer.

A ce point de vue, l'on peut à tout le moins reconnaître que le Code criminel ne montre pas d'égards particuliers à son endroit, sinon que de le mettre à l'abri, dans le cas où son témoignage pourrait lui être préjudiciable, alors que d'autre part, l'application irrationnelle et abusive de la procédure pénale peut engendrer une injustice à son égard.

Or, ce respect de la dignité humaine qui constitue l'un des principes fondamentaux à la base du processus pénal devrait tout aussi bien recevoir son application dans le cas du témoin.

De tous mes propos, c'est particulièrement de ce sujet que je me propose de porter à votre attention en vous invitant à examiner avec moi, à la faveur de votre expérience personnelle, le traitement que l'on réserve au témoin.

Parlons en premier lieu de la considération qui lui accorde le Code pénal dans sa rédaction actuelle.

L'article 107 du Code définit laconiquement le témoin comme une personne qui rend témoignage oralement sous serment dans une procédure judiciaire, sans lui reconnaître aucun statut particulier qui se distinguerait du prévenu qui serait lui-même appelé à agir comme témoin, alors que contrairement à ce dernier, il est contraignable.

Si sans le cours de son témoignage, il commet un parjure, l'article 121 du Code pénal le rende passible de la même peine d'emprisonnement imposable à l'acusé dans le cas où ce dernier serait l'auteur du même crime.

Un prévenu peut être appelé à comparaître devant le Tribunal sur simple promesse de sa part; le témoin, selon l'article 626, est sommé de comparaître par voie d'assignation.

S'il fait défaut de comparaître, la même procédure que celle prévue pour le cas du prévenu s'applique à son égard.

Suite à son arrestation, sa détention sous garde peut se prolonger pour une période n'excédant pas 30 jours, bien que la disposition concernée à l'article 635 ne comporte pas d'obligation stricte de faire procéder à sa comparution à l'une des journées antérieures à cette période, sauf sur requête du témoin, contrairement au prévenu en état d'arrestation et dont la comparution doit se faire dans un délai ultime de 24 heurs de l'arrestation.

S'il est remis en liberté, il peut être soumis à des contraintes identiques à celles imposées à un prévenu pour assurer sa comparution au procès, nous dit l'article 635.

Contrairement au prévenu qui bénéficie du droit au silence, le témoin peut être contraint à révéler sa participation à des infractions criminelles antérieures ainsi que l'existence d'une autre déclaration contradictoire à son témoignage.

Mais c'est surtous dans l'application de notre système de justice et de la procédure pénale qui s'y rattache que nous constatons l'entière dépendance du témoin.

Examinon ensemble l'adventure que traverse le témoin d'un incident se rattachant à la commission d'une infraction criminelle.

Son premier contact avec l'appareil judiciaire l'amènera à donner à un officier-enquêteur sa version des faits dont il croit honnêtement avoir eu connaissance.

Ou bien sa narration sera transcrite comme telle, ou bien le policier en dressera un compte rendu sommaire.

Dans l'une ou l'autre hypothése, et dans son ignorance des règles de preuve, il se peut que de bonne foi, il s'y glisse certaines affirmations qui s'apparentent avec ce qu'on appelle communément du oui-dire, ce dont il lui sera tenu rigueur dans le cours de son contre-interrogatoire alors qu'il est confronté avec cette partie de sa déposition.

Il va sans dire qu'à moins d'y avoir été initié auparavant, le témoin ignore les conditions dans lesquelles il sera appelé à répéter sa version des faits devant le Tribunal.

Quelques jours plus tard, sinon après l'écoulement de plusieurs semaines, il recevra un ordre formel de se présenter devant le Tribunal, à une date qu'on lui aura arbitrairement désignée, mais sur laquelle cependant les parties en cause ont eu l'occasion d'en convenir.

Sa seule façon d'obtempérer à l'ordre du Tribunal est de se rendre à la salle d'audience précisée et d'attendre les événements, ne sachant à la quel moment il sera invité à participer au processus judiciare, à moins que la partie qui a pourvu à son assignation ne l'instruise de la procédure qui va suivre.

Il apprendra alors qu'il s'agit de l'enquête préliminaire et non du procès lui-même.

S'il se permet de relire sa déposition avant d'être appelé comme témoin, la partie adverse s'appliquera à le convaincre que, sans cette lecture, sa mémoire des faits ne lui aurait point permis de rendre un témoignage aussi précis. Dans le cas

been present in court when there was a final decision in the case at which he testified, it is a rarity for the witness to be informed of the outcome of the case. Consequently he is left in ignorance as to what measure his participation in the penal system permitted justice to be validly dispensed.

All of what I have said so far is based on the assumption that the proceedings go on without complications and that the witness was not been subjected unnecessarily to a multitude of orders to return to the court for proceedings during which he has no right to participate.

You will tell me perhaps that all of this fits into the normal framework of normal court proceedings because of this imperious necessity of doing everything possible to meet the obligations of the judicial system in the perspective of the fundamental principles on which it is based.

Such, no doubt, is also the contribution that the witness must bring to facilitate its application and to ensure its effectiveness notwithstanding the contraints to which he must submit and of which the description above remains incomplete.

But it is precisely this situation which ought to demand from all those who are responsible for the application of the penal system which includes us a more profound respect for the witness. This in an objective with which we could concern ourselves more, insofar as our intervention could be applied.

The authority we have and the powers conferred upon us give free rein surely to take certain initiatives to bring corrective measures in aimed at closing certain gaps in our system, which sometimes lead to a social injustice of which the first victim is the witness.

I think it is in that area there is at least a pre-occupation that we all share, but that the principle of strict neutrality which we must observe, prevents us from expressing ourselves more openly.

Nevertheless, we are not entirely without means for providing for the witness all the consideration we feel for him.

But one of the most concrete demonstrations of the lack of respect for the witness is in the abusive use of the penal procedure in the inconsiderate calling of a bewildering number of witnesses whose presense before the court becomes purely vexatious when they are not called upon to play the role for which they were subpoenaed.

There is no doubt that at this level it is more possible to intervene in the application of the penal system, but your individual experiences would certainly allow you to think of other means to show your regard for the witness.

Although I thought I should raise this subject before you it was certainly not with the aim of convincing you with my remarks but rather to create an occasion to express our personal thoughts on the point.

L'on a, en maintes circonstances et à juste titre, affirmé aussi bien que reconnu, que nous étions dotés d'un système de procédure pénale favorablement comparable à tout autre système en existence. L'origine même de notre droit pénal, et les sages mesures qui ont présidé à sa confection, demeurent encore aujourd'hui le gage de la plus saine justice à laquelle il a été donné à l'être humain de concevoir.

L'on sait que le fondement de notre système pénal reflète trois préoccupations, qui en constituent en quelque sorte la pierre angulaire, et qui se traduisent par la recherche de la vérité, le respect de la dignité humaine et la protection contre le risque de condamner des innocents.

C'est également dans cet objectif ultime, et à la faveur de tels principes hautement reconnus, que l'on a cru devoir assurer à tout individu la plénitude de ses droits, en le faisant bénéficier de la présomption d'innocence, en imposant au poursuivant l'obligation à l'égard d'un prévenu détablir sa culpabilité, sans que ce dernier ne soit tenu de participer à cet impératif.

Bref, et sans plus nous y attarder davantage, l'on peut affirmer que les principes fondamentaux sousjacents à notre système pénal se concilient avec les objectifs recherchés, de telle sorte qu'il a amplement été pourvu aux droits de tout citoyen contre lequel pèse une accusation.

La société comme telle a elle-même été munie de certains mécanismes qui lui permettent de faciliter cette recherche de la vérité, dans l'optique de la protection et de la sauvegarde des intérêts à la fois particuliers et collectifs des membres dont elle se compose, par l'adoption de règles de procédure et de moyens de preuve qui en facilitent la réalisation.

Là encore, il serait superflu, en m'adressant à des juristes aussi avertis, d'en dresser la nomenclature.

Il est pourtant un participant au système dont le rôle est primordial et à l'égard duquel l'on n'a peut-être pas manifesté la même préoccupation dans l'élaboration de la procédure pénale.

Il s'agit, vous l'aurez sans doute deviné, du témoin que l'on invite à faire le récit des

ROLE OF QUESTION

Recall that a witness is less accurate in recalling information retrieved after a long interval than after a short one. Furthermore, the activities that go on during that interval will affect a witness's behaviour. It is clear that when a person witnesses an important event such as a crime or an accident, he is sometimes asked a series of questions about it. In order to illustrate how phychologists study the phenomena described in the previous section, I will provide a detailed analysis of one factor, the influence of questions. I will show first that the wording of questions asked of a witness can have a substantial effect on the answers given, and then show how the wording of these initial questions can also influence the answers to different questions asked at some later time. I will argue that questions asked immediately after an event can introduce new — not necessarily correct — information, which is then added to the witness's memory, thereby altering the memory.

Several years ago, I interviewed 40 people in Los Angeles about their headaches and headache products. These people were interviewed under the belief that they were participating in market research on these products. Two questions which I asked were crucial to the present discussion. One asked about products other than that currently being used, in one of two wordings:

(1) In terms of the total number of products, how many other products have you tried? 1? 2? 3?

(2) In terms of the total number of products how many other products have you tried? 1? 5? 10?

The 1/2/3 subjects claimed to have tried an average of 3.3 other products whereas the 1/5/10 subjects claimed an average of 5.2 other products. Somewhat more subtly, I asked a question about the frequency of headaches in one of two ways:

(1) Do you get headaches frequently, and, if so, how often?

(2) Do you get headaches occasionally, and if so, how often?

The "frequently" subjects reported an average of 2.2 headaches per week, whereas the "occasionally" group reported only .7 headaches per week. Thus, the question asked affected the answer a subject gave to a question about the subject's past personal experiences. The problem with this experiment is that it does not permit a full understanding of how question-wording is influencing answers. For example, one cannot say whether "frequently" is raising a subject's estimate or "occasionally" is lowering that estimate, for one does not know how many headaches these people actually get. For this reason, it is desirable to experiment by presenting subjects with an incident (e.g. a filmed event), so that the "truth" is known, and the effects of questions can be more fully understood.

In one experiment conducted in my laboratory, one hundred students viewed a short film segment depicting a multiple-car accident. Immediately afterward, they filled out a questionnaire which contained six critical questions. For half the subjects, all the critical questions began with the words, "Did you see a . . . " as in, "Did you see a broken headlight?" For the remaining half, the critical questions began with the words, "Did you see the . . . " as in, "Did you see the broken headlight?" Thus the question differed only in the form of the article, *the* or *a*. The results showed that witnesses who were asked *the* questions were more likely to report having seen something, whether or not it had really appeared in the film, than those who were asked *a* questions. The reason this happens is simple. A person uses *the* when he assumes the object referred to exists and may be familiar to the listener. Thus, an investigator who asks, "Did you happen to see it?" His assumption influences the witness's report. By contrast, the article *a* does not necessarily convey the assumption of existence.

These examples show something lawyers and others have known intuitively, that the wording of a question about an event can influence the answer that is given. I now turn to the more subtle finding that the wording of a question influences the answers to other questions asked some time afterwards.

ANSWERS TO SUBSEQUENT QUESTIONS

To explore these effects, experiments have been conducted in which subjects viewed films of complex, fast-moving events. Viewing of the film was followed by initial questions which contained information that was either true or false. Some time later a new set of questions was asked to determine whether the initial questions affected the answers to the later questions.

For example, in one experiment we showed people a film of a multiple-car accident in which one car, after failing to stop at a stop sign, makes a right-hand turn into the main stream of traffic. In an attempt to avoid a collision, the cars in the

oncoming traffic stop suddenly and a five-car, bumper-to-bumper collision results. The film lasted less than one minute, and the accident occurred within a four-second period.

At the end of the film, we asked each subject-witness a series of ten questions. The first question asked about the speed of the car that caused the accident in one of two ways which roughly corresponded to:

(1) How fast was the car going when it ran the stop sign?
(2) How fast was the car going when it turned right?

The last question, Question 10, was identical for all subjects; and asked whether the subject had actually seen a stop sign for the car that caused the accident. If the earlier question had mentioned a stop sign, 53% of the subjects reported later on that they had seen a stop sign. If the earlier question had not mentioned a stop sign, only 35% of the subjects claimed to have seen the stop sign when asked later on. Thus, by simply mentioning an existing object, it is possible to increase the likelihood that it will be recalled later on.

One can still ask about objects which did not exist. Could the same techniques be used to induce subjects to report having seen objects which they could not have seen?In other words, in the course of early questions, could we mention objects which were simply untrue, and find that these would emerge in the subject-witness's later reports? To investigate this issue, we conducted a series of experiments.

In one such experiment, we showed subject-witnesses a three-minute video-tape taken from the film "Diary of a Student Revolution". The incident involved the disruption of a class by eight demonstrators. After viewing the videotape, the subjects received one of two questionnaires containing one key question. Half of the subjects were asked. "Was the leader of the four demonstrators who entered the classroom a male?" Whereas the other half were asked, "Was the leader of the 12 demonstrators who entered the classroom a male?" The subjects responded by circling "yes" or "no" on their questionnaires. One week later, all subjects returned to answer a new set of questions. The critical question at this point in time was, "How many demonstrators did you see entering the classroom?" Those subjects who had previously been asked the "12" question reported having seen an average of 8.9 people when questioned one week later, whereas the subjects interrogated with the "4" question recalled an average of 6.4 people. This result shows that a question containing a false numerical presupposition can, on the average, affect a witness's answer to a subsequent question about a quantitative fact.

The next experiment shows that the same is true when "leading" questions make reference to an object which did not exist. Subject witnesses viewed a brief videotape of an automobile accident and then answered questions about the accident. The critical one concerned the speed of a white sports car. Half of the subjects were asked, "How fast was the white sports car going when it passed the barn while travelling along the country road?" and half were asked, "How fast was the white sports car going while travelling along the country road?" In fact, no barn appeared in the scene. All subjects returned a week later and answered a new set of questions about the accident. The final one was "Did you see a barn?" We found that of the subjects earlier exposed to a question which makes reference to a non-existent barn 17.3% responded "yes" when later asked, "Did you see a barn?' whereas only 2.7% of the remaining subjects claimed to have seen it. Thus, an initial question containing a piece of false information can influence a witness's later tendency to report the presence of the non-existent object corresponding to that information.

HUMAN MEMORY

Why does this happen? It appears as if the subject, upon viewing the accident, first forms some representation of the accident he has witnessed. We could call this "original information" since it emanates from the witness's original perception. The investigator, then, while asking, "About how fast were the cars going when they smashed into each other?, supplies a piece of new information, namely, that the cars did indeed smash into each other. When these two pieces of information are integrated, a witness has a "memory" of an accident that was more severe than in fact it was. Since broken glass is typically associated with a severe accident, the witness is more likely to think that broken glass existed.

The argument can be stated more broadly. Whenever we witness something extremely complex and fast-moving, there will be influences upon our memories which will tend to distroy those memories. The initial perception, in the first place, will be affected by our prior knowlege, prior biases

626, is summoned to appear by subpoena.

If he should fail to appear the same procedure as that followed in the case of an accused applies to him.

Following his arrest, his detention under guard may be prolonged for any period not exceeding 30 days even though the relevant Sec. 635 does not contain the strict obligation to proceed with his arraigment at any of the earlier dates of the period, except on a request by the witness himself. The accused, on the contrary, following his arrest, must be arraigned with 24 hours later.

Sec. 635 provides also that if the defaulting witness is released he can be put under the same restrictions as those imposed on an accused person to ensure his appearance at his trial.

Contrary to the accused who enjoys the right to remain silent, the witness can be compelled to reveal his participation in prior criminal offences as well as being called upon to disclose the existence of another statement which contradicts his testimony.

But it is above all in the application of our system of justice and the penal procedure that goes with it that we realize how completely dependant it is on the witness.

Let us examine together the experience that the witness of an incident concerning the commission of a criminal violation undergoes.

His first contact with the judicial organization will be with an investigating officer to whom he will give his version of the facts which he honestly believes he knows.

Either the account he gives of these facts will be taken down as he makes it or the police officer will draw up a summary report based on it.

In either case and is his ignorance of the rules of evidence it can happen that in good faith he has made certain statements which are associated with what is commonly known as heresay. In the course of cross-examination he may be held to these statements when he is confronted with his police statement.

It goes without saying that unless he has been previously initiated, the witness knows nothing about the conditions under which he will be called upon to repeat his version of the facts before the court.

Some days later, if not several weeks later, he will receive a formal order to go before the court at a date designated arbitrarily by agreement between the parties or set by the authority of the Court.

The only way in which he can comply with the order is go to the specified courtroom and wait. Unless he has been briefed by the party who caused the subpoena to be issued he does not know at what moment he may be invited to participate in the judicial process.

He will learn in due course that he is attending a preliminary hearing and not the trial itself as he had expected.

If he should re-read before being called to the stand the statement he had made to the police officer, the opposing party will apply himself to trying to convince the witness that without re-reading the statement he would not have been able to make such precise evidence from memory. In the opposite situation it will be suggested to him that he has forgotten certain incidents of only relative importance.

During this stage of criminal procedure the accused enjoys a right which is not given to the witness. I refer to the absolute right of the accused to obtain a non-publication order from the judge.

On the other hand, unless the judge is willing to intervene, the witness cannot ask that his identity or his testimony be protected by a non-publication and no-broadcasting order.

From then on, without ever been advised in advance, the witness can be interrogated on his past and required to disclose his participation in any kind of criminal infraction.

Only Sec. 142 of the Criminal Code and the cases to which it refers permit a witness to anticipate this reference to a painful memory in his life.

The witness subjected to cross-examination will no doubt be astonished that he is called upon frequently to reiterate the same statements, and only an intervention by the judge will allow his to escape a harassment which already had been drawn out before he was given any assistance by the court.

It should be added that our Criminal Code does not provide the right of a witness to demand this intervention, when in all good faith he has been trying to inform the court to the best of his ability.

When the preliminary hearing has been completed the witness will be informed of the holding of the trial by a new subpoena again at a date he rarely has expected.

This will be his third time he is so invited to tell his story wondering about the apparently scant credibility afforded him.

Having discharged a civic duty and satisfied a legal obligation, unless he has

Respect for the Witness

by Judge Jacques Lessard

The author is Past President of the C.A.P.C.J. This article is excerpted from remarks he made at the Annual Convention of the Provincial Court Judges Association of New Brunswick.

It has been in many circumstances justifiably affirmed and recognized that we have been provided with a system of criminal procedure that compares favorably with any other system in existence. The very origin of our penal law and the wise measures which governed its making, still remain today the guarantee of the soundest justice system that it has been given to the human race to devise.

It is well known that the foundations of our penal system reflect three pre-occupations, which constitute a sort of cornerstone and which express the search for the truth, the respect for human dignity, and the protection against the conviction of the innocent.

It is also with this ultimate objective and thanks to such highly regarded principles that we have believed it necessary to ensure for every individual his full rights by providing for him the benefit of the presumption of innocence, by imposing on the prosecution the obligation towards the accused to establish his guilt without obliging the accused to prove his innocence.

In short, without dwelling any further on the matter, it can be asserted that the basic principles underlying our penal systems are consistent with the objectives sought in such a way as to provide fully for the rights of all citizens against whom a criminal charge has been laid.

Society, as such, has provided itself with certain mechanisms which facilitate the search for the truth from the point of view of the safeguarding of the interests, both private and collective, of its members by the adoption of rules of procedure and rules of evidence which facilitate the achievement of the purpose.

In speaking to so well-informed jurists, there is obviously no need for me to over emphasize such measures.

Nevertheless there is a participant in the system whose role is all-important and towards whom we have not perhaps shown the same pre-occupation in the development of our penal procedure.

I refer, as you no doubt will have guessed, to the witness who is invited to recount to the court the facts of which he has knowledge.

The present provisions of the Code that apply to him define very precisely the obligations to which he is subjected as well as the sanctions which he is liable to have imposed on him, if he fails to comply.

From this point of view, it can be recognized at the very least that the Criminal Code does not show particular consideration for the witness, except to protect him in a case where his own evidence might prejudice him, while on the other hand the unreasonable and abusive application of criminal procedure may give rise to an injustice towards him.

But, the respect of human dignity which constitutes one of the fundamental principles at the base of the penal process ought to receive its application just as well in the case of a witness.

Let us in the first place talk about the consideration given him in the present text of the Criminal Code.

Sec. 107 of the Code defines briefly the witness as a person giving oral testimony under oath in a judicial procedure, without recognizing any particular status which would distinguish him from an accused who is called upon to testify. Consequently, the witness is compellable but the accused is not.

Further, if during his testimony the witness perjures himself under Sec. 101 of the Code he is liable to the same prison term as the accused in the case who commits the same crime.

An accused can be called to appear before a court on a simple undertaking to do so, but the witness, in accordance with Sec.

and prior expectations. But, even after the witnessed incident is over, the bits and pieces of it that we have stored memory are subject to deterioration or injury. Thus, if we witness an event, and we are subsequently exposed to information about that event, the new information can become incorporated into our memory. The new information need not be in the form of leading questions; it can be conveyed during a conversation, by exposure to a newspaper or magazine article, or in number of different ways. The important point is that once a memory is acquired, it does not remain intact as it would on a piece of videotape; rather it can be enrished, altered, and possibly even lost altogether.

SEMANTICS AND THE JURY

If, by asking questions which contain misleading information, it is possible to alter a person's memory for something he has actually witnessed, it seems reasonable to expect that one could alter the "construction" of an event in the mind of a person who has not witnessed that event. A juror, for example, must construct in his mind a crime which he has never witnessed, and must then reach a verdict based upon memorial constructions that he formulates from evidence presented to him. Perhaps leading questions contained in the testimony of a trial can bias a juror's construction of a crime, and thereby alter his verdict.

Lawyers have known for some time that different forms of a question can be designed to create certain impressions on a jury. In a 1974 grand jury hearing, in which Dr. Kenneth Edelin of Boston, Massachusetts was charged with manslaughter of a five to seven month old fetus, the prosecuting attorney used questions containing emotionally charged words such as "baby", "mother", and "alive", whereas the defense attorney tended to use neutral or scientific words such as "fetus", "patient", and "viable". Thus, a prosecutor might have asked, "Was the baby alive at the time of the abortion?" Could the differences in the words used have affected the construction of the incident in the minds of the jurors who listened to those words, and could the likelihood of conviction thereby be affected?

In one test at the University of Washington, the subjects who received the biased questions gave guilty verdicts more frequently than those who received unbiased questions. In the biased case, 41% found the defendant guilty, whereas only 22% found him guilty in the unbiased case. Apparently, the biased questions influenced the subjects to construct a more violent crime and ultimatley led to more guilty verdicts. It seems likely that leading questions are effective in this situation because they contain new information which can be incorporated into a juror's construction of a crime or other complex incident.

EYEWITNESS TESTIMONY ACCEPTED

Despite the overwhelming evidence to the contrary, jurors continue to believe in the testimony of eyewitnesses. This was shown rather dramatically in the following study.

Subjects who were asked to play the role of jurors, were given the following general description of a crime.

> On Friday, November 12, 1970 Mr. David Alpert, the owner of a small grocery store, was confronted by a man who demanded money from the cash register. Mr. Alpert immediately handed $110 to the robber, who took the money and started walking away. Suddenly and for no apparent reason, the robber turned and fired two shots at Mr. Alpert; he also shot Alpert's five-year-old granddaughter who was standing behind the counter. Both victims died instantly. Two and a half hours later the police arrested a suspect named George Watson. Watson was charged with robbery and murder and a trial date was set for February 3, 1971.

In addition, the subject-jurors were presented the following arguments from the prosecution:

(1) The robber was seen running into an apartment house — the same apartment house in which the defendant lived.
(2) One hundred and twenty-three dollars were found in the defendant's room.
(3) Traces of ammonia used to clean the floor of the store were found on the defendant's shoes.
(4) Paraffin tests used to indicate whether an individual had gun powder particles on his hands due to firing a gun, estimated that there was a slight possibility that the defendant had fired a gun during the same day.

In his defense, George Watson took the stand and claimed that he did not commit the crime, that the money found in his room represented his savings for a

continued on page 23

The Judge and Stress

by Isaiah M. Zimmerman

The author is a clinical psychologist working in Washington, D.C. This paper is drawn from material that Dr. Zimmerman presented at several U.S. Appellate Judges' Seminars and as a speaker at the 1980 Conference of Chief Judges in Anchorage, Alaska. The paper was first published in the Judges' Journal of the American Bar Association.

This is not an article on judicial misconduct, or about medical or psychiatric disability. Instead, it is about how much stress normal, hard-working judges endure and how they may reduce it even though their workload keeps inching up.

Stress is a nonspecific response to outside demands. It is the state of being "on duty". Even as we sleep we are responding to various demands of the body, the environment, and the mind (dreams). Thus, stress is a normal accompaniment of life. As demands increase, the body and the mind reorganize continually to cope with them. Eventually, under chronic conditions of overload, the efficiency of that coping process becomes marginal, and the quality of work and personal life is threatened.

While stress is ever-present, it must be kept within tolerable limits. However, the toll upon us may not be readily observable. It is a mistake to simply equate stress with tension or anxiety. They are merely indicators of stress. Often, we are unaware of other stress-related symptoms, which take their toll by altering our perceptual and intellectual vigilance, our body chemistry, hormonal balance, energy reserves, and individual susceptibility to illness.

Judges usually pay little attention to the demands posed by their career, stage in life, economic situation, professional and political affiliations, and by their family and friends. Stress is a concept with no "plus" or "minus" implications. It can be just as stressful to adapt to an unexpected vacation, as to cope with a family problem which arises suddenly. Each instance requires the body and mind to adapt generally as well as specifically. Both carry an organic and psychological price-tag.

Another reason for this diminished awareness to stress stems from cultural sterotypes. Judges, probably even more than chief exectives or religious leaders, have to live within the strictures of their public image. Judges tend to hold back from expressing fatugue, uncertainty, diminished recall, temporary depression, and other causes for anxiety. This is considered necessary to maintain their image and role, particularly at work. At home, the constraints on voicing vulnerability may sometimes relax. Over the years, however, many judges understandably seal off such awareness, even from themselves. Later, when under severe stress, they do not pick up warning signals early enough. This can result in irritability and inefficiency. Becoming more self-aware and recognizing the early warning signals can help prevent this.

In our culture, there is a commonly shared myth that no matter how heavy the demands are upon a highly responsible and prestigious person, he or she will continue to produce excellent decisions, maintain a high volume of work, and remain in reasonably good spirits. This is commonly achieved by working longer hours, evenings and weekends, and by postponing vacations. Another part of this myth assumes that this deprivation is temporary and that the judge's family accepts this.

STRESS INHERENT IN THE JUDICAL CAREER

Lonely Transition. Becoming a judge involves a lonely transition. Despite the existence of national and state judicial education programs, most judges initially enter their career with little guidance or preparation. Though as a group, judges are generous and willing to help each other, the new judge is usually chary of reaching out for help. An experienced court administrator observes, "The new judge keeps a low profile. He or she usually prefers to rely upon a secretary to learn the ropes, and will sometimes ask a friendly court administrator." An appellate chief judge

Eyewitness Reports

continued from page 5

two-month period, that the ammonia tracings could have been obtained at a different place since he worked as a delivery man, and that he had never fired a gun in his life.

Would you find George Watson guilty of murder?

In fact, we used this case in an experiment conducted at the University of Washington. Of the 50 subject-jurors given the above information, only 18% judged the defendant to be guilty.

In another condition of the experiment, the subject-jurors read that the prosecution had presented one additional piece of evidence: a store clerk's testimony that he saw the defendant shoot the two victims. Would you now find George Watson guilty of murder?

Of the 50 subject-jurors who were given the second "eyewitness" version of the case, 72% judged the defendant to be guilty. In a third version of the case, the defense attorney discredited the eyewitness: the attorney showed that the witness had not been wearing his glasses on the day of the robbery, and since he had vision poorer than 20/400, he could not possibly have seen the face of the robber from where he stood. 68% of the jurors who heard about the discredited witness still voted for conviction, in spite of the defense attorney's remarks. The experiment strongly points to the overwhelming influence of even a single eyewitness.

Whether an expert witness should be allowed to testify in court concerning the factors that affect the reliability of an eyewitness account is an issue which is receiving considerable attention. Expert testimony is needed because psychological research indicates that numerous factors negatively influence an eyewitness report, and yet jurors tend to overrate such reports, giving them undue weight.

The Judge and Stress

continued from page 10

psychology and leadership psychology. Judicial education departments should consider a special orientation course for new presiding justices. A mentor judge could be made available to each new chief for the first three months. Again, the principle advocated here is more support, more contact, and less loneliness at the top. Such a short course should include appreciation of transition psychology. As chief moves into authority, he or she provokes a rearrangement of the inherent infrastructure of the court. Later, as the chief steps down or prepares to retire, new stresses will arise in the composition of the court and in the new chief's own personality.

The assumption throughout this article has been that the work of a judge is usually profoundly satisfying. Unfortunately, the increase of workloads nationwide has reduced that satisfaction for many judges. Efforts by the profession to increase efficiency and improve organization are going on, and are, of course, essential. However, an ignored dimension has been the emotional and cognitive effects of stress upon the judge. Most judges have concentrated on logistics and system-improvement only. It may now be time to add to that effort the techniques of stress-reduction – through emotional self-awareness, behavior self-modification, and knowledge of group psychology.

Status Offenders

continued from page 12

became involved in one criminal act after another, and eventually was placed in containment. Can it be suggested the labelling of the youth as a juvenile was the catalyst that pushed the youth into a criminal form of behaviour: Can it be suggested if a different course of action was taken, this youth might not have turned to delinquency?

It cannot be denied that the so-called status offender is in need of help but the Juvenile Court is not the way to provide the needed assistance. Assistance by judicial decree for the unmanageable or neglected child traps the judge in a vicious circle. What is the value in a judge sending the child home with a warning to observe a curfew, go to school, obey the parents without proper assessment of the child and the home? Without proper therapy and counselling, the child will run again and before the Judge realizes what's happening, the so-called status offender is being dealt with in a similar manner as a delinquent offender, and before long ends up in containment, or the Judge gives up and sets the person free back into the community.

The status offender is a child in need of help because of various social, economic, physical and emotional factors stemming from a variety of causes. I am satisfied it is a serious mistake and one likely to push such a child into criminal misbehaviour if he or she is treated and dealt with as if he or she was a delinquent.

at least more esthetic to leave that ultimate determination entirely to those whom the law authorizes and requires to make it.

1.) Blackstone, *Commentaries,* Bk. 4, ch. XIV, at pp. 395-6
2.) Hale *Pleas of the Crown* (London, Professional Books Ltd., 1911) vol. 1, at p 34
3.)(1916) 1 K.B. 337
4.)K.B. at p. 341
5.)March, 1976
6.)L.R.C. Report 5, R.9, p. 43
7.) *R.V. Pritchard* (1836) 7 Car. & P. 303; 173 E.R. 135
R.V. Berry (1876) 1 Q.B.D. 447
8.)*R.V. Lee Kun* (1916) 1 K.B 337
9.)*R.V. Smith* (1936) 1 D.L.R. 717; (1936 1 W.W.R. 67; (1936) 65 C.C.C.231
10.) *R.V. Hughes* (1978) 43 C.C.C. (2d) 97
11.)(March, 1976) p. 44
12.)L.R.C. Report 5 (March, 1976) R. 14, p. 44
13.)L.R.C. Report 5 (March, 1976) R.17, p. 44
14.)ibid, R. 16
15.)(1975) 31 C.R.N.S. at 97

Visiting the Courts of Appeal

Continued from page 17

private dining room on the Tuesday during their visit.

It is an impressive thrill to meet with the Appellate panel in the Old Bailey Room on Wednesday afternoon and communications have been greatly improved between our Bench and the Justices of Appeal. The dialogue has been anything but one sided. The provincial Judges have not been hesitant to tell the members of the Court of Appeal that they do not appreciate "tinkering" with their sentences. They have also persuaded the appellate judges to comment on the appropriatness of the trial judge's sentence when they find it necessary to change that sentence on the basis of a post-sentence report.

At the same time the Provincial Judges have come to realize that the Court of Appeal does not appreciate irresponsible incompetence or flights of fancy in the decision of trial judges.

And both benches have come to appreciate the responsibilities and difficulties of each other in their respective roles in the administration of Justice.

I understand that Chief Justice Howland has visited the Provincial Court in Toronto to get a first hand understanding of the volume of work which a provincial judge deals with on a day to day basis.

There have been a number of interesting annecdotes told about these visits and one comes to mind which involves Sr. Judge Bob Hutton.

The Court of Appeal was dealing with a sentence appeal and defence counsel was pleading for an absolute discharge on the ground that the equities of the situation were such that his client would unduly suffer from acquiring a criminal record, a situation which crown counsel agreed would be avoided if an absolute discharge were granted.

It appeared to Bob that neither counsel nor the court was aware that the Police Association had brought pressure to hear on the Justice Committee not to change the Criminal Records Act and that a discharge was still a record. He had his copy of Martin's Code with him and he quickly found the relevant section of that Act and tugging on the Crown counsel's gown brought it to his attention. Crown counsel immediately advised the court.

The President of the court expressed his amusement at the Crown counsel's source of assistance and adjourned asking the Crown to have his "juniors" come to see him in the Old Bailey Room immediately after the adjournment.

The Justices of Appeal are unamimous in the view that they gain more from the visits than do the judges of the Provincial Court.

I would question that assessment, for in addition to the valuable experience which each provincial judge gains from each visit, the Provincial Bench in its struggle to gain recognition as an important trial court in the front line of the administration of criminal justice, has gained the respect of the Court of Appeal and formed a warm personal friendship with its distinguished members.

The visits have continued under the able direction of Judges Maurice Charles, Sid Harris and Charles Scullion and remain an important part of the continuing judicial education programme of the Ontario Association.

says, "The new member is usually amazed at the amount of work to be done, at the amount of administrative stuff there is and is also usually unprepared to delegate or divide up the workload properly . . . Probably new members feel they will not move up in the pecking order if they ask the others for advice." The demands of the new role and public office are clearly considerable. To go it alone, as most still appear to do, is unnecessarily stressful.

Social Isolation. As people grow older, making friends becomes harder for most. Existing commitments, family, and little leisure time limit the conditions under which a friendly and supportive personal bond can form. To my knowledge, judges are the only occupational group required to divest themselves of long-held personal associations at the peak of their career. If not divestiture, then at least dilution. Social life with members of the local bar, membership in associations and clubs, seats on boards, have to go or at least be reconsidered.

One state supreme court member said, "I miss the people I used to see at the board meetings. We now seldom see them. My wife and I miss the annual meetings which were always held in a beautiful spot. I am too busy to make new friends. It's sad." A rural judge writes, "The judge is acutely aware of public opinion; he or she may be concerned that the public would think mere social mingling would result in presumptive partiality in the courtroom." A trial judge cites "attorneys who cannot or will not separate business from pleasure" as a source of stress. Thus, judges are denied social interaction with people they have the most in common with.

A circuit judge comments, "The position is obviously more lonely than private practice. Also, are certain people only nice to you because of the position? You would like to discuss cases, but are prohibited by the ethical code. How close can you associate with the old friends who appear before you? Do you give the appearance of ruling in favor of, or against someone, because of former associations?Are you afraid to 'cut up' occasionally, in deference to the position?"

I do not mean to suggest that the Code of Judicial Conduct be softened. Rather, my concern is that the social deprivation attendant upon assuming the bench requires further emotional adaptation, leading to additional stress upon a judge.

Financial Pressure. Although our society often tends to equate success and income, most judges have good self-respect despite modest pay for people with their capabilities. However, this does not mean that consciously undertaken cuts in income do not continue for many to be sources of stress. After four years on the bench, a trial judge opines: "With legislative bodies reluctant to provide salaries commensurate with the position and the cost of living, one worries about how to educate one's children. Because of this, a judge entertains thought about quitting and returning to private practice." An intermediate appellate court member points to "paychecks significantly reduced to pay for governmental services that I neither need, want, nor will likely receive." A state supreme court justice said: "We live nicely . . . but I admit it was very difficult for the wife and myself to get to where we could live within my income, especially while the children were in college."

Lack of Feedback. Articles in the press and editorials aside, judges get very little objective feedback or constructive criticism in their daily work . Appellate review and an occasional seminar are usually not frequent enough to provide most trial judges with colleagial stimulation and support. One trial judge, speaking of his experience, said: "In single judge jurisdictions, it is almost impossible for the judge to observe and learn from (the) practices and procedures colleagues use . . . This can be ameliorated perhaps by just picking up the phone and calling one another, (but if) everyone is as busy as we think we are, even the time for phone calls, and time to answer them, is sometimes not available." Another cites "the limited availability of other judges with whom to discuss work-related or legal problems or their solutions." Courtroom behavior is only discussed if it becomes an issue. Appellate judges report more intellectual satisfaction from their conference interaction. It is a relief for a professional person to periodically allow a respected colleague or teacher to comment upon his or her conduct and written work. Constantly being alert to monitor one's own professional behavior is an undue stress if it is not occasionally relieved by objective peer review.

Information and Topic Overload. With the phenomenal growth in litigation and its attendant volume of administrative work, the information-processing capacity of the bench is often strained. Regardless of whether judicial rotation is involved, the amount of data to be absorbed, organized, and weighed is staggering. A circuit judge comments, "There is constant pressure to

schedule and dispose of an enormous volume of cases, including trials, motions and other hearings, pretrials, and decision writing . . . Time (is) grossly insufficient to dispose of litigation and properly educate oneself to be a credit to the position." Recalling a lengthy utility case, one judge said, "I never felt I understood the industry and the issues well enough . . . (I was) always uncomfortable that the attorneys knew so much more." In another area, the wearing impact of an unrelieved volume of domestic relations work, a judge exclaims "I cannot grind these cases out much longer . . . "

Midlife Passage Stress. Although there appears to be a trend toward the appointment of younger judges, the greater proportion of men and women in the judiciary experience the vicissitudes of a "midlife crisis" in the course of their tenure. This is usually the time when a person begins experiencing physical and emotional awareness of limits and mortality. It is a time of reassessment, interest in new relationships, and new work or specialization. There is a sense that "This may be my last chance." For the married, there is a temptation to seek extramarital relationships. Friendships become more sweet and poignant; there is a great awareness of how fleeting life is. Time and talk with one's children is precious. Thus, is is not at all a totally negative period, pushing middle-aged people into absurd behavior. It is a time of intense existential appreciation of one's oldest and dearest bonds, and of life's fragility and beauty.

One can appreciate how some judges (undergoing the stress of a midlife passage) can mistakenly assume they are disappointed in their work. Doubts about one's marriage can also be distracting and counterproductive. The spouse, if of about the same age, is also likely to be experiencing some aspect of the same phenomenon. This increases the likelihood of maritial difficulties coinciding with professional ones. Burnout prevention calls for heightened awareness when too many concurrent stresses impinge.

Little Control over Caseload and Clientele. Like the emergency room doctor, policeman or nurse, most trial judges have little control over the type of case they have to decide and the types of people that appear before them. The appellate judge's situation is somewhat better, with more limitations and control (as well as the crucial factor of not being alone when facing the incoming work).

Although in many jurisdictions it is possible or required to rotate courts, the emotional "net effect" still remains: judges perceive themselves as anchored in their courtroom, having to face whatever and whoever is put before them. I believe this is one of the most important factors contributing to the exhaustion of judges. When the workload grows steadily, a feeling in incipient dread and helplessness can come over even the most conscientious and hardworking judge; one simply connot get away.

Trial judges, like policemen and social workers, tend to see some of the most tragic, inadequate, and amoral of society's people. The days are not filled with challenging cases involving solid citizens and excellent lawyers. This can affect the judge who is overburdened. It is tempting to engage in withdrawal of empathy and respect for the litigants or the witnesses they summon. Some judges speak of being tainted and hardened by dealings with a steady stream of marginal people. Under a reasonable workload, this would not pose a problem. But under chronic overload, it is probably asking too much to expect a person to maintain a high internal standards of objectivity and a dispassionate attitude.

Stresses Inherent in the Judicial System. It is obviously impossible here to address all the stressful factors inherent in the judicial system. The following is a list of some of the major "system-level" sources of stress and how they overlap, placing persistent and unnecessary burdens upon judges.

- A widespread public impression exists that a judge's schedule is leisurely, punctuated by recesses and frequent postponements. The time a judge devotes to administration and special actions is usually not visible. There is a built-in dilemma of perception, whereby judges are taken too seriously when they request additional personnel, space, and funds. This is heightened by the ceremony and dignity usually maintained. It is hard for people in the court to understand that they may be looking at a harried, overburdened person. The point here is the incongruity between the judge's self-perception of being over-burdened, and the public's perception that the judge is underutilized. Such discrepant perception also heightens the judge's stress factor.
- The ideal of individualized justice often clashes with the procedures and techniques that are required to deal with massive caseloads. Computerized systems, the use of video and telephone contacts, standardized

accused is nevertheless a bad mental case, well, nothing prevents civil committal or any other proceedings under provincial mental health laws.

This recommendation seems to have been the most controversial of those dealing with the fitness issue, although it is not ely crucial to the package of reforms pounded by the Commission. Given the desire of us Canadians to live by laws which are fair and just, what to do about, and with, the unfit accused is a natural conundrum. The dilemma could be somewhat alleviated if the consequences of unfitness were not both automatic and indeterminate. In this regard, the Law Reform Commission formulated further recommendations to provide the trial judge with a sensitive range of possible orders only one of which involves mandatory hospitalization – and none of which would require "that the accused be kept in custody until the pleasure of the lieutenant governor . . . is known".

Conundrum or not, dilemma or not, the Law Reform Commission is directed by Parilament to try to formulate reforms of and the law. The Commission needs and gets help from many sectors of the people of Canada, not least of whom are the judiciary, the medical and legal professions. Despite the heat in the Commission's kitchen, occasionally a refreshing balmy breeze comes wafting our way. For the latest zephyr, we are indebted to Dr. Turner with the results of a small but significant survey of judges', crown counsels' and defence counsels' attitudes to the Commission's recommendations on fitness to stand trial. Except for the pushing of the postponement of trial of the issue to the end of the trial, as I mentioned, I'm pleased to be able to relate that most of the judges and lawyers sampled agreed with most of the Commission's recommendations.

That indication of general agreement augurs well for the possibility of getting the government to act upon recommendations for reform. After all, the issue of fitness is not a trivial one. Whether ultimately convicted, or not, an accused in a parliamentary democracy surely must have the right to defend himself as best as he can. No one in Canada advocates diminishing that right, as it is diminished in some authoritarian states, right down to the vanishing point. Also, we expect and demand that defence counsel representing the accused will perform in an ethically professional manner, which requires in many instances, if not at all, that there be some rational communication with the accused. But, in fact, many many accuseds are doing the very best with their right to defend themselves simply by being defended by competent, ethical counsel, without more. Indeed, it is more often counsel who instruct the accused as to defence tactics and strategy, rather than *vice versa.* In so observing, I do not mean to imply any failure of professionalism or ethics on the part of counsel – it is merely the natural order of things.

So, I think, in this issue one can perhaps de-emphasize the notion of being fit to instruct counsel in a literal sense, but one must not be oblivious to it. Certainly equally important is the notion of the accused's being a fit subject for criminal proceedings. In the grossest cases, the accused's unfitness will be obvious to all. Counsel will know whether the accused can make any sense. Less obvious cases call for psychiatric reports.

Basic to effective use of mental health expertise is an understandable report appropriate to the issue. At present, however, the Code not only does not specify what psychiatric reports should contain, it does not even require that such a report be rendered at all. This is a defect in the Code and it ought to be remedied, in my opinion.

There are, surely, two basic requirements for all psychiatric reports. First, the judge, if not the law, must clearly communicate to the mental health expert what kind of information is needed. Second, the mental health expert must communicate professional observations and opinion based on them to the judge, in a complete and understandable report. It is important, therefore, that the *Criminal Code* specifically state that psychiatric remands are for the purpose of observation *and* of preparing psychiatric reports. While that is the practice in most jurisdictions throughout Canada, it would do no harm, but probably would do some good, if the Code so provided specifically.

There are differences of opinion among law professionals, as I daresay there are also among mental health professionals, as to whether either a report of testimony should be expressed in legal conclusive terms. That contention may not bear any importance if, as the Commission recommended, the issue of fitness should always be determined by a judge alone. Judges are more impervious to experts usurping the determination of the central or ultimate issue than jurors are.

Still, the issue remains to be determined judicially and it is, in my view,

make it possible to raise the issue of fitness during the preliminary enquiry. The *Vaillancourt* case indicated, according to Justice Spence, the need for even earlier action.

He said:

"In the circumstances in the present case, the accused was confined in the Toronto Jail. I have been unable to discover any provision in the *Criminal Code,* R.S.C. 1970, c. C-34, or elsewhere which would authorize some court to give an order for his examination.

It must be remembered that these examinations took place prior to the preliminary inquiry and it would appear that in the opinion of the Crown councel it was necessary in the due administration of justice to have these psychiatric examinations at that time. Counsel for the appellant referred to ss. 465(c), 543 and 608.2 (en. 1972,c. 13, s. 54) of the *Criminal Code,* but reference to these sections indicates that they are all concerned with a later period when the accused was at preliminary enquiry, at trial, or before the Court of Appeal, and I am of the opinion that they are quite inapplicable to the circumstances in the present appeal.

At the present time, it would seem that all a court can do is to express regret that no court order had been obtained without being able to point out how such a court order could be obtained."

Mr. Justice Spence asserted that notice to an accused person . . . (in regard to an application for an order permitting such examination) would be a proper provision in the protection of the rights and interests of an accused. That same Bill C-21, in 1978, would have amended section 543 (1) by inserting after the words "A court, judge or magistrate may", the words "at any stage of the proceedings" and would have empowered a court to entertain the fitness issue as early as the first appearance. When one remembers subsections 738 (5) & (7) also deal with fitness to stand trial in a summary conviction court, one wonders why there is not a single provision for indictable *and* summary conviction procedure which would authorize a court to entertain the fitness issue "at any stage of the proceedings". That kind simplification of procedure is certainly within the scope of the Law Reform Commission's recommendations.

The provisions of subsection 738 (5) permit the summary conviction court to note there is reason to entertain the fitness issue "at any time before convicting a defendant, or making an order against him or dismissing the information, as the case may be . . . ". Subsection 738 (8) then requires the summary conviction court, if it directs the trial of an issue, to proceed in accordance with section 543, insofar as it may be applied. But subsection 543 (4) provides that where the issue arises before the close of the prosecution's case, the court, judge or magistrate may postpone directing the trial of the issue (only) until any time up to the opening of the case for the defence.

The Law Reform Commission of Canada (as well as the Butler Committee in the U.K.) recommended that the judge should be permitted to postpone the trial and determination of the issue, in appropriate circumstances, until after full adjudication of the merits of the charge – meaning, after having heard all the evidence and summations of both parties. In that case, as it now is in subsection 543 (7), if the accused be acquitted, the issue would not be tried. The other verdict is that the accused is guilty, if fit. Now, some folks thought the Commission was pushing things a bit too far, or postponing things a bit too long, with this recommendation. After all it does seem somewhat absurd to have an accused stand trial even until the close of the prosecution's case and then declare that the accused is unfit to stand trial! The seeming absurdity does not improve with pushing subsection 543 (4)'s postponement even further to the usual close of the trial.

TWO REASONS

There were two reasons for this recommendation. The first resides in the notion on fitness – not just "to stand trial", but also that the accused be "an appropriate subject for criminal proceedings" including the ritual denunciation of a 'guilty' verdict and the imposition of sentence – if there be the proper outcome of the proceedings. The second reason for pushing the discretionary postponement of the fitness issue right to the bitter end is sheer, unabashed, hopeful pragmatism – leaving the road open as far as possible to any and every legitimate opportunity to acquit the accused and get him legitimately out of the toils of the criminal justice system. If the acquitted

forms, all can blunt the satisfaction of individualized consideration of each litigant's case or appeal. Many judges express dismay at finding they have to "process" people because they have so little time to listen to them.

- Although the increasing use of court administrators has brought much order and relief to the operation of the courts, many judges and administrators still do not know, or have not worked out, methods of working well together. The authority that judges can delegate to administrators is often unclear, and sometimes judges suspect that administrators are creating an empire of their own and usurping some of the judiciary's prerogatives. The stress inherent in this situation is that a party which is supposed to be supportive and loyal is sometimes perceived as self-seeking and competitive.
- Fear of expressing need adversely affects the way judges treat each other. This is particularly unfortunate when combined with the ideal of the independence of each judge. Thus, although they profess to want to be supportive, judges tend to prefer to solve their problems in isolation. Not wanting to "lose face," a judge will be wary of asking for emotional support from a colleague. In matters of law or procedure, however, advice and help will be sought. But reactions to role and career stress will seldom be candidly verbalized for fear of appearing weak or indecisive. Away from the court or at a professional meeting, these matters may be discussed more easily. The stress involved in these circumstances is that a judge can start to feel bottled up when upset and isolated. Tragically, this may lead to the mistaken perception that colleagues are "adequate and capable under all circumstances" and therefore likely to be aloof and judgmental, if approached, when one feels emotionally vulnerable.

Early signs of Burnout. When the stresses of the judicial career, midlife passage, family life and the judicial system combine, a judge may begin exhibiting signs of what has colloquially been termed "burnout." These signs are highly individual and may affect each person in different degrees. Here is a list of the more typical symptoms, stated in terms of self-descriptive sentences:

"I feel tired most of the time."
"I am not very interested in discussing my work."
"I delay or never answer many of my phone messages."
"I somehow feel uninterested in my colleagues and their concerns."
"My attention wanders a lot, despite my efforts."
"After making an appointment, I sometimes don't write it down and can forget it entirely."
"Somehow, I seldom laugh these days."
"I am reluctant to be identified as a judge."
"I frequently feel cynical about the motives of others."
"I've let my correspondence and committee work slide."
"I am easily irritated and feel generally impatient."
"I feel strangely confident and uninquisitive."
"When others are emotional, I feel nothing for them."
"I increasingly want to sleep, drink, get away."
"Early in the day, I begin to think of trivial tasks I want to complete."
"When I meet lawyers and court staff outside the building, I may not recognize them."
"I have unexpected blanks in recall of cases before me."
"I keep glancing at the time a lot; I cannot wait for the day to end."
"Many cases have started to sound alike. I've heard it all before and I feel I have little to offer."
"It's been a long time since I've had an interesting discussion with someone."
"I've stopped fighting administrative battles. Let them do it their way. It doesn't matter to me."
"Cancellations or postponements give me almost physical relief."
"I sometimes cannot make out my own notes."

The above list suggests poor memory for recent events, a blunting of sensitivity and empathy for others, an unfounded egocentric self-confidence, a feeling of disconnection from others, general cynicism, and feelings of despondency and hardened pessimism.

There can also be physical symptoms. The more typical ones are: chronic fatigue, headaches, insomnia, excessive drinking, lowered resistance to infections, and reduced sexual drive.

COPING AND PREVENTION

Most authorities in today's prolific literature on stress and burnout appear to agree that coping measures most include the family, the workplace, and the body. It is not enough to just start an exercise or recreation effort. Single measures usually

cannot be sustained long enough to be effective. Since burnout involves the whole person, preventive and curative measures must involve the intellect, the body, and the social and professional network of the judge. If such measures are taken, then a synergistic effect is created, which sustains continued energy and positive motivation.

The Personal Burnout Prevention Plan on page 11 represents, in the author's opinion, the best thinking available on the subject today. It is practical, simple and can be carried out over a two-week period by most people engaged in sedentary and demanding jobs.

STRESS VARIATION AMONG JUDGES

There are certain additional dilemmas faced by judges due to their rank, the type of court involved, and its location.

The rural judge sometimes operates under a greater degree of isolation than his or her urban counterparts. The community is smaller and intrusiveness is higher. A circuit judge in the Midwest writes: "In rural countries the bar population might be between 15 and 30 practitioners . . . and are familiar (with each other and) on a first-name basis. This presents the judge with some difficult choices. For instance, it could be more difficult for a judge to impose costs for nonappearance, tardy appearance, or a court rule violation on an old and trusted colleague, than it would be on someone who is totally unknown. While this, in and of itself, is no excuse for favoritism, a judge to be true to court ethics and rules, is often in the position of financially or professionally hurting friends . . . The judge's actions (thus) have a more pronounced impact . . . (and) the resulting stress . . . is magnified . . . Social pressures increase because a judge in a single-judge jurisdiction may be very reluctant to mingle socially in public with members of the bar. There is blissful anonymity attendant to a magistrate in a large jurisdiction . . . In a rural jurisdiction everyone is likely to know who the "idiot" was who rendered the last unpopular decision. Forget tranquility or privacy (for the judge) in a rural jurisdiction . . . particularly (one) with young children, because they have no anonymity either."

Suggestions for stress reduction for rural judges include increased informal telephone contact with urban as well as rural colleagues for the purpose of emotional release and support. Some judges have a regular weekly chat with one or two neighboring colleagues. The children and spouse may need to vent their mixed reactions also in informal monthly meetings. The operative concept here is that when affirmation and support are not in sufficient supply despite good faith efforts, a judge and family have to reach out to other networks and form alternate bonds. Telephone conference calls between judges' families should also be tried.

The urban trial judge is probably the most likely candidate for burnout besides the chief justice of the state. To list the various concurrent sources of stress is probably not necessary for this audience. I would suggest that trial judges interested in reducing stress begin by using the Personal Burnout Prevention Plan every three months, rather than six. This should also include mandatory vacation time. (A remarkable number of trial judges report that they seldom take vacations due to workload.) Trial judges need massive peer contact and support, and should take every opportunity to have lunch with friends and colleagues and to make other casual and informal contacts. More frequent medical checkups are also in order, and physical fitness programs are a must for this embattled group. Some judges also report surprising benefits from visiting each other's courtrooms, followed by a chat over lunch or a drink together at the end of the day.

The appellate judge faces stress from the inevitable paradoxes and pressures of group psychology. Any small group of highly individual and motivated people develops cliques along ideological and personality lines. These can vie with each other in a generally creative way. However, this process gets lopsided periodically, and tensions arise sufficient to drain off considerable energy and to lower morale. It is not realistic to expect the presiding judge to be a consummate leader, always able to guide the group out of its impasses. However, the presiding judge, and his or her colleagues on the appellate court, could take a short course in the dynamics of small groups. They could learn more about the elements of . . . irrationality and competitiveness usually present in decision-making groups.

Chief or presiding justices, like trial judges, usually labor under incessant multiple stresses. They too, should take time off for recreation, no matter how heavy the workload, and have regular physical examinations for early signs of stress-linked illnesses. They would do well to study group

continued on page 23

PROBLEMS WITH THE CONCEPT

There are several problems associated with the concept of "insanity" when it is employed to describe unfitness to stand trial. First and most obvious the term bespeaks mental *illness,* and does not comprehend other mental and physical causes of unfitness. Secondly, and despite clear jurisprudence to the contrary, it is still confused with the "insanity" which is described in section 16 of the Code. Moreover, detaching it as one must from section 16, the term does not afford any real criterion or useful definition of unfitness – it gives no glimmer as to whether fitness is to be gauged narrowly or comprehensively.

Still, whether appropriately formulated or not, one must do one's best with the law as it is. Actually it seems that current practice corresponds with criteria similar to those which were proposed in the Law Reform Commission's Report 5, recommendation 13

> "A person is unfit if, due to mental disorder:
> (1) he does not understand the nature or object of the proceedings against him, or,
> (2) he does not understand the personal import of the proceedings, or,
> (3) he is unable to communicate with counsel." [11]

The emphasis appears to be placed especially on whether an effective counsel-client relationship can exist, as suggested by the third criterion. We are told that many courts will find an accused fit to stand trial when he demonstrates a capacity to instruct, and accept instructions or advice from, a competent counsel who agrees to act for him.

My colleagues and I have discussed and wondered about the utility and ethics of rendering an accused chemically fit – that is, apparently fit through sedation – so that he seems to be able to interact with counsel, or at least to avoid outbursts. We suppose that knowledge of the frequent consequences of being found unfit is what induces those who can, to administer sedative drugs to an accused whose fitness has been questioned. Is this a mischievous circumvention of the spirit, if not the letter, of the law? It frequently serves the purpose of having the trial proceed through to a verdict, but then, what? This is a practice which merits hard critical attention and ethical assessment.

In any event, the cricial test is always whether the accused can relate the facts as he knows them to his counsel and whether they can interact as lawyer and client. This, it would appear, is and ought to be the paramount criterion.

The Commission also recommended that the Code should specifically exclude lack of recollection alone as a cause of unfitness.[12] The Commission concluded that the fitness rule is concerned with *present* mental ability to communicate. If the accused is rational, and is able to tell his counsel that he does not remember any of the circumstances of the alleged offence, he should nevertheless be consisered fit to stand trial and, if such be the case, to be sentenced.

LEGAL CONFUSIONS

The principal provision dealing with fitness, section 543, is now found in Part XVII of the Code under the title "Defence of Insanity". One of the problems in this area, as I mentioned, is the legal confusions which result from the misapplication of the language of mental disorder. The word "insanity" or "insane" appears in about twelve different sections of the Code, importing at least four different meanings. Section 543 is one of those sections. One cause of confusion is the location of the fitness provisions. The other is a lexical or linguistic confusion, because unfitness is expressed as being "on account of insanity". This state of the law is hardly defensible even if one were not embarking of a thorough review. A clearer exposition of the rationale and criteria are needed.

The clarity and precision to be expected from such as exposition could be greatly agumented if the fitness provisions, together with related procedures, were gathered together in a distinct part of the Code under a more appropriate title. Some steps in this direction were taken by Bill C-21 (first read November 21, 1978) in clause 103 which would have consolidated in one section all of the relevant provisions. Be that as it may, more steps toward the kind of clarity and precision which I have mentioned, ought to have been taken.

It was no doubt because of the Law Reform Commission's emphasis on the issue of fitness being determined at trial[13], that the Commission also recommended that it be possible to raise the issue at any time from arraignment to verdict.[14] However, in the case of *Vaillancourt V. The Queen (No. 2)* [15], Mr. Justice Spence noted that the four corners of the law are not pegged extensively enough. It will be remembered that, in 1975, section 465 was amended to

Fitness to Stand Trial

By Francis C. Muldoon, Q.C.

The author is the President of the Law Reform Commission of Canada. These remarks were delivered at the Judges' Workshop co-sponsored by METFORS and the Ontario Provincial Judges' Association.

Blackstone asserted that the common law's rule against trying an accused who is unfit to stand trial is of ancient origin[1] Indeed, in Hale's *Pleas of the Crown* it is stated:

> "If a man in his sound memory commits a capital offence and before his arraignment becomes absolutely mad, he ought not by law to be arraigned during such his phrensy, but be remitted to prison until that incapacity be removed; the reason is because he cannot advisedly plead to the indictment."[2]

Probably, the historical basis for the rule was the common law's ban against trials *in absentia*.

In more modern expressions of the law, Lord Reading in the important English case of 1916, *R.V. Lee Kun*[3] stated that there must be very circumstances to justify proceeding with the trial in the absence of the accused.

> "The reason why the accused should be present at the trial is that he may hear the case made against him and have the opportunity . . . . of answering it. The presence of the accused means not merely that he must be physically in attendance, but also that he must be capable of understanding the nature of the proceceedings."[4]

In Canada this concept finds statutory expression in section 577 of the *Criminal Code*. Subsection (1) enunciates the principle (subject to some exceptions) that ". . . an accused . . . shall be present in court during the whole of his trial." Subsection (3) provides that: "An accused is entitled, after the close of the case for the prosecution, to make full answer and defence personally or by counsel." In order to give effect to these principles, there must be some exemption from trial based upon mental or physical disability whose severity precludes the accused from effective participation. The manner and means of effecting this exemption have generated much critical discussion and some jurisprudence. In Report 5, *Mental Dosorder in the Criminal Process*[5] the Law Reform Commission of Canada recommended much-written-about and much-discussed changes in the law of fitness to stand trial. The Commission was and is far from being alone in this call for reform.

The Commission posited that:

> "The proper rationale of the fitness rule is to promote fairness to the accused by protecting his right to defend himself and by ensuring that he is an appropriate subject for criminal proceedings."[6]

Assuming that Canadian criminal law will continue to provide an exemption from trial for unfit accuseds, one should ask if the present provisions are so adequate and useful that they ought to be retained unchanged, or whether the kinds of conditions and the degree of disability which can exempt an accused ought to be clarified and, if necessary, re-formulated.

The principal provisions of the *Criminal Code* dealing with such exemption are section 738, subsections (5) to (8) in summary conviction proceedings, and section 543 in indictable prodeedings.

Both sections 543 and 738 provide, in effect, that an accused who is unfit "on account of insanity" shall not stand trial, but they do not define "insanity" nor make explicit the reason underlying the fitness rule. Although an accused's perceived incapacity is often the product of mental illness, it may also be manifested where the accused: is deaf and mute[7]; is ignorant of the language of the place[8] where no translation was available; afflicted with severe subnormality[9]; or suffering from brain damage without retardation or mental illness[10].

Personal Burnout Prevention Plan

BY Isaiah M. Zimmerman

SELECT ONLY ONE ACTION FROM EACH TRACK: THEM UNDERTAKE ALL FOUR ACTIONS TOGETHER OVER A TWO-WEEK PERIOD .

I. PROFESSIONAL TRACK (Choose only one)

1. Discuss your thought and feelings about your work with your closest friend and your spouse.
2. Resign from one committee or board.
3. Read one book in a totally unfamiliar field or topic
4. Ask a respected law professor or colleague to critique a sample of your recent writing.
5. Tell several close colleagues that you are going through a period of important personal reassessment. Do not be apologetic, defensive, or humorous about it.

II PERSONAL TRACK (Choose only one)

1. Meditate, pray or simply relax, with eyes shut, for a brief period each day.
2. At home, finish one house-repair or gardening project.
3. By telephone, "visit" and chat with three friends you have not seen for a long time.
4. Ask your spouse to be the initiating and active partner in sex and affections for two weeks.
5. Go through your family photo albums. Think about the course of your life and discuss it with your family.

III PHYSICAL TRACK (Choose only one)

1. Do an alternating tensing and relaxing exercise for three minutes, twice each day.
2. After medical consultation, start light jogging, rapid walking, or swimming daily.
3. Arrange not to be disturbed, and take a short nap daily in the office, or as soon as you come home.
4. Cut out all sugar and salt in your diet, limit coffee, tea, and liquor to one drink a day.

IV. ADMINISTRATIVE TRACK (Choose only one)

1. Exchange your briefcase for a larger in-basket and take no work home.
2. Take an hour off each week to visit around your courthouse and get acquainted with the people who work there. Show an active interest in their jobs and problems.
3. At the end of each day, take 15 minutes to talk the day over with your whole staff and go over plans for the next day.
4. Find funds and time for a course or workshop not directly related to your work: a " mini-sabbatical."
5. Invite your administrative staff to two "brainstorming" sessions (one week apart) where no ideas will be criticized during the session.

It is suggested that the above program, or a similar concept, be carried out once every six months as a form of personal renewal and is an "early warning system." The value inherent in such an approach is that no matter how heavy work at the court gets, the quality and liveliness of one's personal life must not yield to the pressures involved.

Status Offenders

by Judge John B. Varcoe

The author is a judge of the British Columbia Provincial Court.

B.C. Judges who attended a recent seminar will recall discussions concerning the "status offenders" or the child who becomes involved in the Court System whose behavior is non-criminal. The child being discussed was the one who was unmanageable, unwanted, unruly and neglected, but is not involved in criminal misbehaviour. Many Judges were suprised and shocked to learn that in the United States, the so-called "status offender" was dealt with in the same manner as delinquents, and statistics seemed to show they were liable to stay in the Juvenile Justice System longer than those involved in criminal activity. I had the feeling we secretly congratulated ourselves that such a situation doesn't exist in British Columbia. . . . . or does it?

Section (65(1) of the Protection of Children Act reads as follows: 65(1) Where a complaint in writing is sworn

a) by parent of guardian or a child; or
b) by the Superintendent, or by a person appointed by him for that purpose, or
(c) by a Probation Officer,

that a child is beyond the control of his parent or guardian, a Judge shall hear the matter and, if he finds that the child is beyond the control of his parents or guardian, he may dispose of the matter under the provisions of the Juvenile Delinquents Act (Canada) as if the child had been adjudged to be a juvenile delinquent under the Act."

Without deciding whether the section is operative as proper Provincial Legislation, it seems to say that once a child is declared beyond the control of his parent or guardian he may be dealt with under the provisions of the Juvenile Delinquents Act (Canada) as if the child had been adjudged a juvenile delinquent. What does it mean to be "adjudged to be a juvenile delinquent"? The meaning of this word was referred to in *Morris V. Regina* (1979) 6CR (3rd) 36 at 52 as follows:

"In my opinion, therefore, the power of the Juvenile Court to adjudge guilt is equivalent to the power of an ordinary criminal court to convict, and I cannot see any essential differences between the power to adjudge a person guilty of an offence and the power to convict a person of the same offence. With respect, I find no merit in the submission of the appellant that a finding of delinquency should not be contrued as a conviction for the purpose of S 12 of the Canada Evidence Act." The essence of all this is that a child who is found to be beyond the control of his parents under Sec. 65 aforesaid, will be adjudged guilty of a delinquency which may be an "offence" haunting the young person even after entering the age of adulthood. I realize the *Morris* case restricted the meaning of "offence" as used in Sec. 12 of the Canada Evidence Act to violations of the Criminal Code, but it does seem apparent that a delinquency conviction is not a closed matter after the child becomes an adult.

This is not all that can happen to a child whose only fault is that he or she is beyond the control of his or her parents. Section 20 of the Juvenile Delinquency Act is presumably available to the Judge who could send the child to a detention home. Sec. 65(2) of the Protection of Children Act defines the limit of containment of a child who is detained or in custody by reason of a complaint under Subsection One. I understand in actual practice, these children are being detained in the same place as juveniles involved in criminal activity. In some cases these children may be subject to Juvenile Court intervention for long periods of time.

I was told of a case involving a 15-year-old child with no court involvement who started missing school and began to disobey his parents. The child was adjudged a juvenile delinquent under Section 65 aforesaid and placed on indefinite probation. Within one month of this adjudication, he

continued on page 23

Visiting the Court of Appeal

by "Woolsack"

"Woolsack is the nom de plume of a Provincial Judge who resides in Chatham, Ontario.

If you were reversed in the Court of Appeal
And you deem they were wrong, that you got a raw deal
You'll be able to tell them just how you feel
When next you visit the Court of Appeal
If you were upheld in the Court of Appeal
And your pride of accomplishments still very real
They'll be happy to hear from you, just how you feel
When next you visit the Court of Appeal
If you were explained by the Court of Appeal
And off of your back the hide they did peel
You should to your hideway quietly steal
Next year you may visit the Court of Appeal

Interest has been expressed by a number of judges in the orgin, operation and benefits of the Court of Appeal visitation programme, sponsored by the Ontario Provincial Judges Association, Criminal Division and at the request of our editor I'll try to tell you the story.

Some years ago when I was serving as the chairman of the Education Committee of the Provincial Judges Association of Ontario, Criminal Division, we held a seminar in Toronto at which the Honourable George A. Gale, who was then the Chief Justice of Ontario, was our special guest. At one evening reception my wife and I were having a chat with His Lordship and I excused myself for a moment to replenish our three glasses. At the bar I met the late Judge John Wheelton of Windsor who commented on the seminar and expressed the view that we, as trial judges, would benefit from a closer relationship with the members of the appellate bench. He suggested that the provincial judges should be allowed to sit in the court while criminal appeals were being heard and subsequently be permitted to discuss with the Appellate panel their disposition of the matters.

This idea appealed to me and when I returned to Marnie and His Lordship with their drinks I told them about John Wheelton's idea. The Chief Justice was most enthusiastic about it and I undertook to organize these visits.

I immediately sought and obtained the approval of Chief Judge Hayes and then prepared the details of the programme for financial approval.

The plan involved provided for about six judges to visit the Court of Appeal for the first three days of every week in which criminal appeals were scheduled to be heard. The only restriction was that if an appeal from any visiting judge was called, he would leave the court until that matter had been disposed of.

The judges of the Court of Appeal agreed that at the end of the hearings on Wednesday the panel would meet with visiting judges to discuss the cases disposed of.

Arrangements were made to have the Registrar of the Court of Appeal photocopy the briefs and factums in each appeal, which he expected to be reached during the visit and these were supplied to our judges on Monday morning before court opened.

It was an ambitious programme since we planned to arrange for the visit of every judge of the Provincial Court to the Court of Appeal within the first year. It was an expensive programme too and when there was a delay in getting the programme off the ground the Chief Justice called to enquire and promised to use his influence to get the necessary approval. Soon after this the expenditure was approved and the visits began.

Since the first year the programme has been changed to provide for a visit to the Court of Appeal by each Provincial Judge once in every three years and an added feature is an invitation from the Chief Justice to each visiting judge to lunch with the justices of the Supreme Court in their

continued on page 22

plan au Feuilleton à la fin des sessions parlementaires.

Les nouvelles propositions législatives se fondent sur les recommandations de la Commission d'enquête sur les plaintes du public, la discipline interne et le règlement des griefs au sein de la Gendarmerie royale du Canada, qui était présidée par le juge de cour de comté René Marin, et dont le rapport, le Rapport Marin, a été présenté au Parlement en mars 1976.

Le projet de loi contient une nouvelle procédure concernant l'étude des plaintes portés par le public à l'endroit de la GRC. Une fois le projet de loi adopté, le public aura le droit de présenter ses plaintes à un organisme indépendant de l'extérieur, la Commission des plaintes du public, qui se composera d'un président et de quinze membres à temps plein ou partiel nommés par le gouverneur en conseil. Dix de ces personnes seront choisies après consultation avec les provinces et les territoires qui ont conclu un contrat avec le Gouvernement fédéral pour obtenir des services de police. Elles auront pour tâche d'examiner les plaintes formulées au sujet de la conduite d'agents de la GRC qui fournissent des services de police provinciaux ou municipau en vertu d'un contrat.

Tout citoyen pourra se plaindre, qu'il soil ou non touché par l'objet de la plainte, auprès de la Commission elle-même, d'un membre de la GRC ou des autorités provinciales qui sont chargées de recevoir les plaintes protées par le public contre la police et de faire enquête. En règle générale, c'est la GRC qui enquêtera en premier lieu sur les plaintes. Toutefois, si le président l'estime dans l'intérêt du public, la Commission sera habiltitée à demander la tenue d'une audience publique au sujet d'une plainte, que la GRC y ait ou non donné suite. La Commission sera chargée de présenter des recommandations au Commissaire de la GRC.

Lorsque la GRC enquêtera d'abord elle-même sur la plainte, le pliagnant pourra, s'il n'est pas satisfait des résults, saisir la Commission de l'affaire, et celle-ci, à son tour, pourra pousser l'enquête plus loin ou tenir une audience ab initio. Quoi qu'il en soit, le plaignant et le Ministre recevront un rapport sur l'issue des choses, et un rapport annuel sera présenté au Parlement.

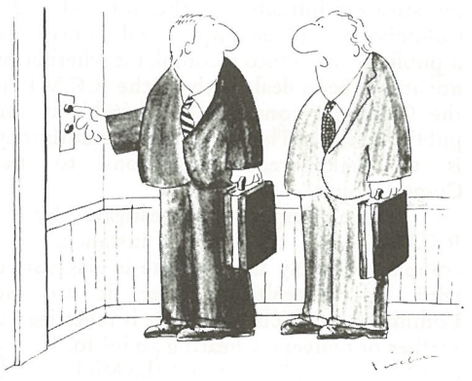
Le projet de lois contient également des dispositions modifiant les procédures relatives à la discipline et au règlement des griefs, lesquelles officialisent le droit des membres de la GRC dans ces domaines et prévoient la création du droit à un avocat. Il prévoit la création d'un comité externe d'examen, composé d'un président et de quatre membres à temps plein ou partiel, nommés par le gouverneur en conseil, et dont la tâche consistera à examiner les griefs, les manquements graves à la discipline et les licenciements ou rétrogradations. Le comité aura le pouvoir de faire des recommandations au Commissaire, à qui revient la décision finale dans tous les cas. En outre, chaque année, le comité fera rapport au Parlement des recommandations qu'il aura formulées.

Le principe qui veut que la discipline soit de nature corrective plutôt que punitive et que les supérieurs immédiats disposents de pouvoirs disciplinaires précis a été accepté. Par ailleurs, le projet de loi prescrit qu'un agent reconnu coupable d'une infraction ressortissant au service ne pourra plus être condamné à une peine d'incarcération.

La liste des infractions graves resortissant au service que l'on trouve dans la Loi actuelle sera abrogée et remplacée par des normes de conduite, que viendra compléter un code d'éthique qui figurera dans le Règlement établi conformément à la Loi. D'autre part, si la GRC envisage de licencier un membre en alléquant qu'il n'est pas celui qu'il faut pour le poste, il pourra demander que son cas soit étudié par un comité d'officiers et pourra comparaître devant ce comité.

La loi donnera aux membres de la GRC le droit à des audiences, des examens et des appels ainsi que le droit de demander que les cas graves soient portés devant le Comité d'examen externe et celui d'être aidé et représenté par un avocat.

En déposant ces modifications, M. Kaplan a souligné que tout a été mis en oeuvre pour assurer un équilibre, quelque précaire qu'il soit, entre l'équité qu'il faut assurer aux membres de la GRC et les intérêts du public.



"Except for the 'whereases,' 'hereinafters,' and 'aforesaids,' I seem to be losing my touch."

In Brief

REPORT RAPS SENTENCE INEQUITIES

A report tabled in the House of Commons has called on Canadian Judges to reduce inequities in sentencing, including the initial decision whether or not to imprison the defendant.

The 210 page report, commission by the Department of the Solicitor General, was prepared by a study team composed of professional members of the Ministry Secretariat, The Correctional Service of Canada and the National Parole Board. The document considers all forms of conditional release from federal penitentiaries, including temporary absence, day parole, full parole, earned remission and mandatory supervision.

Taken as a whole, the goals of the release system are, the report says, vague, outdated, difficult to measure and possibly of less importance than other functions and consequences of release which are not formally recognized. The objectives need to be re-ordered and more specific criteria developed.

The report supports the principle of early release, including release by remission, but the members of the study team were unable to agree on the question of mandatory supervision of non-paroled offenders.

Of the report's 73 recommendations, one says that, although violence is engaged in by only a small percentage of offenders on release programs, much more needs to be done to identify potentially violent persons and situations, and to prevent violent outcomes.

Of most interest to the provincial bench are the report's comments and recommendations with respect to sentencing, a summary of which follows:

CONFLICTS WITH SENTENCING

The study found that release systems are not well understood by the judiciary, and this can lead to disparities and to offenders serving more or less time in penitentiary prior to release, than was intended by the judge. Judges appear to rely heavily on the existence of release, however, to determine the precise duration of punishment, assess risk, and mitigate sentences set during the high pressure and visibility of the court process. Release also appears to serve sentence equalization ends which would be difficult to achieve through the courts. Many judges have, or claim to have, more faith in prison treatment than do prison officials.

SPECIFIC RECOMMENDATIONS

1. An annual publication should be prepared and mailed to all criminal court judges, explaining not only the formal workings of the system but summarizing (in far more detail than is available, for example, in current Annual Reports of the Ministry) the numbers of eligible persons who did and did not receive an early release in the year (including rates of remission loss), the average amount of time served prior to release and the average percentage of the sentence served, the length of the release (particularly for TA's and day paroles), some of the characteristics of those released and not released, and the outcomes of the most recent available "cohorts" of releases. Also to be included in this publication would be the more specific criteria for release and revocation which we recommended be developed by NPB and CSC. Finally, a brief factual description should be included of the types of programs available in every federal penitentiary, together with a statement of the number of inmates who can be accommodated in these programs. This should very definitely not be a "public relations" exercise, but a precise statement of what are very real and very tight limits upon the resources available for such programs and psychiatric and psychological assistance and industrial employment programs.
2. These publications should be supplemented by seminars and conferences attended by judges and parole officers.
3. We would urge that the Canadian

judiciary recognize and take action to reduce unexplained and unwarranted inequities in sentences, including the initial decision whether or not to imprision the defendant.

4. We recommend that as part of the federal government's *Criminal Law Review* exercise, serious study be made of numerical sentencing guidelines, projects and presumptive sentencing in California.

The Solicitor-General Robert Kaplan, has emphasized that this report should not be regarded as the view of the Department. In making the report public, he stressed that he hopes to have public reaction. "I want all interested groups and individuals to have an opportunity to comment before any major changes in the system are made," he said.

The Journal has no information as to whether the views of the C.A.P.C.J. or its members has been sought.

Fast Work by Ontario CO's

Correctional officers should wear running shoes to seminars so they'll be ready to chase escaped inmates who show up at the proceedings.

This tongue-in cheek suggestion was made by several COs following an incident at a three-day seminar for 150 Guelph area staff, about 100 of them COs from the Guelph Correctional Centre and the Wellington and Waterloo Detention Centres.

Seminar participants were listening to a speech in the local Royal Canadian Legion building when Bill Dick, a shift supervisor from Guelph CC, entered the building.

Bill was about to join his colleagues in the large meeting room when he spotted two men walking past the back door of the building. Aware that two inmates had escaped that morning from the nearby correctional centre, he went around the building to investigate.

Bill's suspicions were confirmed as soon as he got a good look at the pair's clothing – standard issue t-shirts and blue denems. For their part, the escapees did not recognize Bill as a correctional officer because a secondment to staff training had kept him out of the correctional centre for several months and he was not dressed in uniform.

When Bill asked the pair what they were doing, they replied that their car had broken down.

"That's too bad," Bill said sympathetically. "Can I help?"

"How about calling us a cab?"

"Certainly," said Bill politely. "Any particular cab company you perfer?"

"No."

Bill then invited the two gentlemen to follow him to the front of the building where he told them: "Now you wait right here. I'll have someone here shortly." (That turned out to be quite an understatement!)

When Bill opened the door into the seminar room, the 150 staff were listening to guest speaker Tony Wallen, western regional personnel administrator.

"I'm sorry to interrupt," Bill said, and all eyes turned toward him, "but I could use some help. I've got a couple of your 'go boys' standing waiting outside the front door."

Suddenly, Tony Wallen didn't have a audience any more and there was chaos in the room as willing and enthusiastic COs leaped to their feet and raced toward the front door.

"There was," Bill recalls, "no shortage of volunteers."

The sight of 40 COs bursting out the door stunned one of the waiting inmates – he never moved and was captured easily. The escapee had more presence of mind – he took off across the parking lot. The COs thundered in hot pursuit and quickly ran him to ground.

Dr. Paul Humphries, the ministry's senior medical consultant, arrived moments later to see panting COs all over the place. Addressing the seminar on the subject of 'Treatment,' he ventured his considered medical opinion that the two inmates would probably require a lengthy period of treatment to recover from the shock of suddenly seeing 40 COs rushing full-tilt toward them.

On seminar evaluations later, several COs suggested that future participants in courses should 'wear appropriate footwear for chasing 'go boys'." Another wit wrote that perhaps inmates contemplating escape should take a course in 'How to Recognize Off-duty Correctional Officers."

from Correctional Update

Amendments to RCMP Act

The Hon. Bob Kaplan, Solicitor General of Canada, has introduced in the House of Commons a Bill to amend the Royal Canadian Mounted Police Act. The Bill replaces Bill C-50 and Bill C-19 which were introduced in the House in April and November of 1978, respectively, but died on the Order Paper at the conclusion of those Parliamentary sessions.

The new legislative proposals are based on the recommendations of the Commission of Inquiry Relating to Public Complaints, Internal Discipline and Grievance Procedure within the Royal Canadian Mounted Police. The Inquiry was conducted under the chairmanship of Country Court Judge Rene Marin. The Marin Report was submitted to Parliament in March 1976.

The Bill contains a new procedure for the investigation and processing of complaints by members of the public against the R.C.M.P. The public will have the right to complain against the police to an external and independent authority, the proposed Public Complaints Commission, which will be composed of a permanent Chairman and fifteen full-time or part-time members appointed by Governor-in-Council. Ten of those members will be appointed after consultation with those provinces and territories under contract with the Federal Government for the provision of policing services. Members of the Commission for contract provinces and territories will be empanelled to review complaints against the conduct of members of the R.C.M.P. providing provincial or municipal policing services under contract.

Any member of the public, whether or not affected by the subject-matter of the complaint, will be able to make a complaint to the Commission itself, to any member of the R.C.M.P., or to the provincial authority responsible for the receipt and investigation of complaints by the public against local police. While complaints will normally be investigated initially by the R.C.M.P., the Commission will be empowered to institute a public hearing into a complaint whether or not it has been dealt with by the R.C.M.P. if the Chairman considers it advisable in the public interest. The Commission's authority is to make recommendations to the Commissioner.

If the complaint is investigated by the R.C.M.P. in the first instance, the complainant may if he or she is dissatisfied with its disposition, refer it to the Commission, which may have it investigated further or convene a hearing ab initio. In any event, the complainant and the Minister will be provided with a report on the outcome and an annual report will be submitted to Parliament.

The Bill also contains provisions for revised discipline and grievance procedures which formalize rights for Members of the Force in these matters including the establishment of a right to counsel. The Bill will provide for the establishment of an External Review Committee composed of a permanent Chairman and four full-time or part-time members, appointed by the Governor-in-Council, to review grievances, serious discipline cases and orders for discharge or demotion. The Review Committee will have the authority to make recommendations to the Commissioner, who retains the authority to make the final decision in any case. The Committee will also report its recommendations annually to Parliament.

The concept that discipline should be remedial or corrective in nature rather than punitive and that first-line supervisors should have specific disciplinary authority has been accepted. The Bill provides for removal of the sanction of imprisionment upon conviction for a Service offence.

The list of major service offenders contained in the present Act is being revoked and replaced by formal standards of conduct, to be complemented by a code of conduct which will be included in the Regulations made pursuant to the Act. In cases where a member is being considered for discharge as unsuitable, he will have the right to request a review by a Board of Officers and to appear before that Board.

The Act will provide members of the R.C.M.P. with the right to hearings, reviews and appeals as well as the right to request a review of serious cases by the External Review Committee and to be assisted and represented by legal councel.

In tabling these amendments, Mr. Kaplan emphasized that every effort has been made to achieve and protect the delicate balance between fairness to Members of the R.C.M.P. and the interest of the public.

L'honorable Robert Kaplan, C.P., député, Solliciteur général du Canada, a présenté aujourd'hui à la Chambre des communes un projet de loi visant à modifier la Loi sur la Gendarmerie royale du Canada. Ce projet de loi remplaces les bills C-50 et C-19 qui ont été déposés à la Chambre respectivement en avril et en novembre 1978, mais qui sont restés en