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LJE Semester 2 2007

Question 1b

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The Cab-Rank Rule as set out at rule 85 of the Barristers Rules (BR) is a principle that has been born out of the issue of access to justice and a right to representation. Advocacy is an area on which the legal community still has a monopoly (cf. conveyancing) and therefore further adds to the importance of unbiased representation as well as access to the system. Despite these factors there are some arguments against the principle, however, I would argue that these do not outweigh the benefits of the cab-rank system. [tick] Furthermore the particular skill of advocacy and the differences in the duties of barristers and solicitors, I would argue, justify the cab-rank rule only applying in relation to barristers, rather than to all lawyers [Good explanation of argument at outset]

THE RULE AND PRATICAL EFFECT

Rule 85 of BR's states that a barrister must accept a brief from a solicitor in a field which the barrister practices if

- (a) barrister has skill
- (b) is available to work
- (c) fee is acceptable
- (d) Rules 87, 90, 91 (the exceptions) don't apply

[Good specific]

The NSW Law Reform Commission stated that the practical effect of the rule is not to force barristers to take unpopular cases but rather to reduce criticism of barristers who do take the cases [tick]. The simple truth is that if lawyers, especially barristers, who are most often the 'public face' of a client may choose not to represent 'undesirable'

clients. [tick] The outcome of such discretion, if it existed, would be the very antithesis of what the legal community stands for in the administration of justice. By this I refer to the right of representation as part of access to justice.

THE RIGHT TO REPRESENTATION

The right to representation (especially in criminal cases) has been outlined in various decisions of the court, of most significance being Dietrich v R. [tick] Although establishing a principle of no legal right to legal aid, the case held that there is a legal right to a fair trial and in cases of serious criminal offence where there is no legal representation, there may indeed be a miscarriage of justice in a fair trial not being carried out.

It is important, however, not to analogise this right to fair trial as meaning a right to 'Rolls Royce representation' [tick]. AG v Milat established this principle and held that 'adequate' representation was sufficient for a fair trial. [tick] Other cases such as R v Joyce and R v Phung support such propositions and add the weight of the importance of representation in the legal system. This furthers the importance of the cab-rank rule in facilitating such representation for even undesirable clients as well as guarding themselves against criticism.

Despite these important factors, there are still those who argue against the rule, and the rule is not immune from abuses.

ABUSES OF THE RULE

ACRD v Hampson was a case where the plaintiff (a wealthy client) briefed all the main legal talents in a field so as they were unable to then provide advice to the opposing party [tick]. This case in Qld, Mackenzie J held that this was an acceptable course of action [tick] and disqualified the QC acting for the defendant because he had been briefed by the P.

Furthermore in NG v Golding the clients deliberately gave the barristers in a particular field confidential information in order to prevent them from ever appearing against them [tick]

There is also the double-booking clause which allows barristers to sit on briefs. This is abused sometimes by barristers by waiting until a better case comes along, or doing a lesser job on one brief as opposed to another (Gould example). [tick]

Ipp has also argued that the exceptions contained in the BRs 87-92 are so long and comprehensive as well as discretionary in cases of BR 91-92, that they render the cab-rank rule redundant.

DEFENCE OF THE RULE

From James Sabharwal's lecture on practising as a defence lawyer it was clear that the principle of the rule is still strong. [tick] He spoke of the many 'undesirable' clients he had represented and strongly advocated the need for the cab-rank rule to facilitate access to justice for such clients while protecting himself. [tick] In addition

he stated the principle of only 'guilty in the sense of the law' [tick] also from Tuckier v R. The character of a client, guilt or not, is not a matter for the barrister. [tick] Their job is to facilitate legal proof of such guilt. The cab-rank principle helps to continue thinking in such a sense rather than having to make value judgments on the client in order to take the case. [tick]

It is these argument on advocacy and the special skill and immunity from negligence that I would argue the cab-rank rule to only apply to barristers not solicitors.

BARRISTERS AND SOLICITORS

The seminar exercises have taught the importance of rapport with a client, so as they trust you to give all the facts. These initial meetings are with solicitors who may become attached or know the client personally.

The judgment of the solicitor from their proximity with client may be tainted – almost making it a relief to hand over to a barrister. For the same reason clients should be able to choose their solicitors to feel comfortable with them as they in turn will instruct the barrister.

Therefore it is important that cab-rank rule only apply to barristers for these reasons.

[Very very good first part. Conveys a good knowledge of the literature, good essay technique. Weaker on solicitor and cab-rank rule]