# A tippy path to the bar – an alternative approach

By Jason Donnelly*

> There is nothing quite so hierarchical as the law, more so than the army, even the navy. In strict order of seniority they entered. Their tipstaffs stood behind their chairs, like pathfinders who had already reached their destination, and needed to guide their elderly charges to their target…. It took some time for them to be suitably seated. Tipstaffs adjusted chairs. Flasks of water were brought and glasses filled. Morgan on the left wing was tilted slightly to the right. Anxiously his tipstaff righted his chair… They were ready. They were composed.[1]

## Introduction

This paper seeks to achieve two things. First, to provide an analysis of the functions and duties of the modern tipstaff, and, secondly, to explore the question whether undertaking a position as a tipstaff to a judge is useful in preparing for a career at the bar.

## Historical development of the modern tipstaff

Historically, the office of the tipstaff is thought to have been established in the 14th century. One of the earliest references dates from 1570: 'The Knight Marshall with all hys tippe staues'.[2] The name 'tipstaff' originated from the early law enforcement officers who would apprehend a person intended for arrest, if necessary through the use of a tipped staff or stave.[3] The staff was made of metal or wood or both, topped with a crown, which unscrewed, was removed to reveal a warrant of arrest inside the hollow staff.[4] In more modern times, however, a tipstaff does not have enforcement duties, and, in particular, the staff is now mainly used for ceremonial purposes, such as for the swearing in of a new judge of the Supreme Court. However, the staff is sometimes carried by a tipstaff into court on the request of his or her judge in normal cases heard before the court.

From about 1830 the judges of the Supreme Court of New South Wales were supplied with personal staff.[5] In 1846, Stephen CJ wrote:

> up to the year 1843, three Tipstaves, (one for each judge) at 2/10 per diem each with a fee of 2/6 on each civil trial shared between them. Their duties were, as in England and Ireland, to attend on the judge whenever required by him, and especially when he was sitting in court: - to take his books and papers to and from the court, to carry letters and messages for him; bring refreshment, fetch his cloak or a carriage; keep his books and retiring room clean, and so on. When not required for any of these purposes, the Tipstaff was usually employed in the judge's household, receiving as remuneration, either money, or board and lodging in lieu. But in 1843 the Legislative Council thought fit to abolish the salaries of these attendants.[6]

In December 1844 the Sheriff's special constable agreed to act as well in the capacity of joint tipstaff to all judges.[7] That arrangement was found to be very inconvenient, and, so, in 1846, the judges proposed that court messengers be dismissed if necessary so that a tipstaff could be appointed for each judge.[8] Stephen CJ stated: 'Without the assistance of these persons, we shall scarcely be able to keep the court open'.[9]The governor decided that the judges must make the best of sharing between them one messenger and one tipstaff.[10] This system was suffered for a year with much complaint by the judges who said that they would no longer tolerate it.[11] Consequently, each judge was given the service of one clerk associate and of one tipstaff, a system which continues to this day.[12] The modern function of a tipstaff has changed in some respects.

In times gone by, until quite recently, a tipstaff was not legally trained, and therefore the nature of work a tipstaff provided to their judge was more of an administrative nature and personal assistant. Indeed, in this respect, tipstaffs, until recently, were usually returned or retired servicemen in the army, navy or from a similar military background.[13] The last 10 years in particular has seen the development of practice in which a tipstaff to a judge of the Supreme Court is legally trained, and equipped with research skills.[14] Another notable development is that, prior to the last ten or so years, a tipstaff occupied such an office permanently, and in that sense was often a tipstaff for the same judge for many years. Now, a tipstaff to a Supreme Court judge occupies the office for a year.

A tipstaff is a member of the personal staff of a judge with the function of assisting the judge and retrieving legal materials required by the judge,[15] who provides support to the judge in procedural and organisational matters in court and may provide research and administrative support outside of court.[16] Legal tipstaffs provide support to judges in the Equity and Common

Law Division and to judges in the Court of Appeal.[17] Legal tipstaffs conduct often complex legal research on behalf of judges which generally involves a detailed analysis of case law and an examination of legal developments in areas where precedents may not be well defined.[18]

### Assisting the judge

There is no doubt that one of the most fundamental duties of a tipstaff is to assist their judge as directed.[19] Interestingly, a review of the authorities suggests that tipstaves have been utilised for quite a wide variety of functions, some of which no doubt arguably provide exceptional experience in preparation for the bar. For example, in *Australian Securities and Investments Commission (ASIC) v Rich*,[20] Austin J made clear that a tipstaff could be beneficially utilised in chambers to assist 'shuffling through innumerable lever-arch folders' of transcript. In *R v Ian Ferguson*,[21] his Honour had impressed on the jury at every opportunity that they could take breaks, and should not overstrain themselves. In this context, it was observed that the 'tipstaff had been assiduous in making sure that they followed this advice'.[22] In a similar fashion, a tipstaff is readily utilised for summoning their judge back to court should they be required.[23] A tipstaff is also useful in leaving court to make copies of particular documents for the judge and the relevant parties as so requested,[24] bringing the judge relevant books,[25] attending 'a view' with their judge,[26] obtaining summaries of cases referred to by Judicial Commission statistics[27] and calculation of compound interest.[28]

In *Varga v Commonwealth Bank of Australia*,[29] Young J (as he then was) interestingly noted a significant role his tipstaff had played:

> despite not having been given any assistance by the solicitors who appeared in the matter apart from the reference to Ryder's case, I fortunately have been able, with the assistance of my tipstaff, to make a full and hopefully thorough examination on the meaning and effect of the legislation.

In another case, Young J recorded his indebtedness to Santow J's tipstaff, who had provided him with a key reference that had not been referred to in current Australian or English textbooks.[30]

A tipstaff also has been known to discharge a number of other functions in assisting their judge. For example, a tipstaff is required to leave court at times and chambers to provide their judge upon direction with relevant material (such as a copy of the Commonwealth Law Reports or relevant Rules of the court),[31] take notes in court,[32] summon a doctor for a jury member who requires urgent medical attention,[33] provide the judge with relevant academic arguments in the area being considered[34] and authorities in preparation for hearing of a matter in court.[35]

Interestingly, although not expressly put, the following statement by Justice Allsop seems to implicitly suggest that a tipstaff provides a level of emotional or psychological support to their judge in preparation for the judgment writing exercise:

> One of the loneliest feelings in the world is finishing a long case having had the assistance of the teams and platoons from both sides for weeks, or months, then hearing the court door close behind you and realising that the thousands of pages of transcript and of exhibits are now yours, and yours alone, to understand, to distill and to deploy in a synthesised way to reach an answer. Your only friend may be the associate or tipstaff who has been with you during the case.

### Function in court & promoting the administration of justice

Apart from the direct personal assistance a tipstaff provides to their judge or indeed other judges in the court room, the authorities suggest that the function of a tipstaff goes further than just assisting judges; it is extended to the proper regulation of affairs in the court room. In *R v Peter Norris Dupas (No 3)*,[36] a tipstaff was directed to hold up a coloured jacket by counsel when evidence was being considered. In *Goldberg v Walter*, a Victorian case, a tipstaff gave an outline of rights to a self-represented litigant, which sets out their rights with respect to the conduct of the case.[37] In *Terry v Johnson*,[38] the tipstaff operated equipment in the County Court.

There are a number of other functions which a tipstaff has been required to undertake.[39] These include trial counsel speaking with a tipstaff in court with the view to relaying a matter that he wished to speak about with

her Honour,[40] providing copies of a pre-sentence report to counsel in court,[41] moving technological equipment to the jury room from court,[42] receiving documents from counsel in court which were to be handed back to the judge,[43] providing a party with a copy of a decision of the judge,[44] ensuring a place in the court was always available for a particular person,[45] swearing a witness in to give evidence in court,[46] and oddly enough, waking up an applicant who had fallen asleep in the court room on several occasions.[47]

The ability of a tipstaff to experience firsthand in a practical sense the work of advocacy by barristers presenting their cases to the court, equips the tipstaff in question with the opportunity to not only draw out the strengths and weaknesses of various barristers, but to gain a fundamental appreciation of the procedural underpinnings of the common law system in Australia. Furthermore, like an advocate who communicates with the bench, a tipstaff can gain a vital understanding of what the court thinks about the submissions which are being put before the court. And, like a process of osmosis, the art of advocacy is slowly learnt in one respect by valuing the mistakes of others, remembering hopefully not to make the same errors of another.

In a number of respects, a tipstaff has quite directly promoted the administration of justice in giving evidence against those seeking to undermine such a principle. In *Registrar of the Supreme Court of South Australia v Moore-McQuillan*,[48] a tipstaff deposed in an affidavit that in the course of proceedings the respondent accused the judge of being 'corrupt'. In part, it was this evidence of the tipstaff along with the court reporter and associate which led the respondent accused to be held in contempt, with the comment made being viewed by the court as an insult of the worst kind designed to impair confidence in courts and judgments. Similarly, in *R v Hirini Taurima (No 2)*,[49] a tipstaff gave vital evidence that the accused struck the informant as he was seated and landed on his upper left thigh within the vicinity of the courtroom. Again, such evidence supported the contempt finding against the accused.[50] Elsewhere, Justice Allsop has also commented on the function of a tipstaff, which provides a useful summary for the aspiring tipstaff:

> One of the privileges of being a judge is the opportunity to hire and work with a young graduate every year as an assistant – an Associate in the Federal Court and a Tipstaff in the Supreme Court. They are intimidatingly bright. All in their own way are ambitious; but they all have their own sense of idealism about the law. Almost all are wary of aspects of future professional practice. None fears hard work, all wish to do well, but all wish to have a sense of fulfilment from their life in the law. The task of the profession, including the Academy, is to see that fulfilment is achieved, not by money, but by the participation in a service to the public, by the development and maintenance of a fine legal system, helping to support a free civil society in Australia and in our wider region. Drive the idealistic young from the profession by perceived venality and exploitative drudgery and they will be replaced by others content to pay the price in order, later, to pluck the goose.[51]

Despite the foregoing, it is to be appreciated that at times a tipstaff has inadvertently caused difficulties in promoting the administration of justice. One such example of this is the case of *R v Gae*,[52] where a tipstaff incorrectly and improperly advised the jury that a majority verdict was sufficient for a finding of guilt in relation to the accused. The judge redirected the jury as to the need for a unanimous verdict within thirty minutes. On appeal against the appellant's conviction, a key issue for the court to consider was whether the circumstances of the case of the unauthorised communication by the tipstaff to the jury was a material irregularity that infected the root of proceedings. In dismissing the appeal, the court held that the error of the tipstaff was not such as to lead to a miscarriage of justice. The case is significant in that it highlights quite directly what can happen when a tipstaff does not effectively discharge their function in an appropriate manner.

In a more positive light, an affidavit of the tipstaff in the case of *Prothonotary v Wilson*[53] provided evidence that led to the defendant being convicted of two counts of contempt. In that case, a question arose as to whether the defendant's conduct interfered with the administration of justice or was calculated to do so. The defendant had thrown bags of yellow paint at the judge on handing down of judgment. The court held that the physical assault on the judge constituted serious contempt, and was conduct likely to interfere with the administration of justice and undermine the

authority of the court.[54]

### Tipstaff Relations With the Jury

In *Sarah Martin v R*,[55] the day after the jury had delivered its verdict, the judge's tipstaff found seven pages of material apparently downloaded from the Internet in the jury room. The pages revealed that they were downloaded several days before the jury retired to consider its verdict. Although there was no evidence as to the provenance of the pages, the inference can scarcely be avoided that a juror downloaded the material in the course of the trial. In this respect, the work of the judge's tipstaff in recovering the impugned material led to an appeal against conviction, although the appeal was dismissed in that the irregularities did not require that there be a new trial. The case is important in that it highlights how the work of a tipstaff can reveal unlawful conduct by jury members, which may not have otherwise been discovered.

In a similar fashion, recognising the important role of a tipstaff, Gibson DCJ in *Hunt v Radio 2SM Pty Ltd (No 4)*[56] noted,

> Supreme Court judges have a tipstaff who can assist with the jury. This is not possible here, and this means that my court officer has to look after a jury as well as be a court attendant. There are other burdens, and indeed I question whether it might not be appropriate for defamation jury trials generally to be heard in the Supreme Court, where there are better facilities.

It seems to be the practice at times for jury members to communicate with the tipstaff about matters related to the trial. That communication may be for the purposes of merely confiding in the tipstaff or so that a message may be passed onto the tipstaff's judge. For example, in *R v Stretton*,[57] a juror had indicated to the tipstaff, at an early stage in the trial, that he thought he knew one of the accused and knew one of their fathers, and that the juror felt biased already. It appeared that the stated bias related to ethnic grounds and that the remark may have been 'semi-flippant'. The tipstaff passed this information on to the trial judge. An analogous occurrence took place in *R v Peter Allan Sharp*,[58] where during a jury trial, a juror left the jury box and went to the jury room for no apparent reason. Subsequently, after a brief conversation with his Honour's tipstaff, the juror handed him some notes for forwarding to the judge. Further, in *R v Juric, Ruling (jurors, Less Than Twelve)*,[59] the judge was told by their tipstaff that a member of the jury had informed him immediately after court that she had met with a Crown witness in the case in 1997 in company with her now deceased brother, although she had not seen the Crown witness since.[60] The cases of *Stretton*, *Sharp* and *Juric* are important in outlining the simple but important role of a tipstaff's dealings with the jury.

Despite the foregoing, it is to be appreciated that there is authority for the proposition that a tipstaff should not have any conversation with members of the jury.[61] In the same case, similar comments were expressed by another judge in the case, Kaye J, where his Honour said:

> …it is highly inappropriate for the tipstaff or keeper to be used as a conduit between the jury and the Court. If there is a matter which has been raised in the way that occurred during this trial, the tipstaff should not indulge in an examination to find out the nature and extent of bias, intimidation or any other matter disclosed by the juror.[62]

However, there appears to be conflicting authority on this point. In *The Queen v Anthony Piggin*, Crockett J (King and Vincent JJ agreeing) held that in the course of a criminal law trial, the responsibility of the tipstaff starts and finishes with their obligation to act merely as a conduit, passing on messages from a juror to the judge, or to pass on to the judge, without comment, observations that he may have made, or draw the judges attention to any matter that he thinks the judge should be made aware of in relation to what may be happening, particularly out of court.[63] The view supported in *Piggin* does not seem to have gained the support of Justice Eames, writing extrajudicially, who suggested that members of the jury should not talk to the tipstaff about the case.[64] His Honour suggested if the jury had a question for the judge, the question should be put in writing and given to the tipstaff to give to the judge.[65]

It is suggested the better view is that expressed in *Stretton*, supported by Justice Eames, namely that it is not appropriate in any circumstances for a tipstaff

to have conversations with the jury, especially acting as a messenger between jury and judge of verbal communications.[66] This practice has the ability to cause disagreements in the nature of what was said between jury and tipstaff, and, worse still, create the possibility of a miscarriage of justice of inadvertent advice from tipstaff to jurors regarding the case.

## Conclusion

There is no doubting the view that good practical experience as a lawyer is excellent training in preparation for being called to the bar. Exposure to various forms of legal work, such as drafting legal documents, dealing with clients, briefing counsel, and appreciating the long hours required of members of the legal profession can guide a practising lawyer in the right direction for work at the bar. However, it is suggested that work as a tipstaff in the court system is another suitable alternative path to the bar. A tipstaff has ongoing exposure to the courtroom, has the opportunity to learn from some of the most experienced and well-developed legal minds in the country, assist their judges in dealing with the countless cases that come before the court and develop contact with fellow tipstaffs who may become lifelong friends.

That the work as a tipstaff is valued as meeting prescribed practical training requirements in the law was recognised in the case of *Juratowitch v Solicitors' Admission Board; sub nom*,[67] where a tipstaff's application for exemption from prescribed practical training requirements for admission as a lawyer was recognised by the court.

In summary, a tipstaff is versed with various functions. Some administrative, others more legal in nature. It should be appreciated, however, as the broad range of roles undertaken demonstrate, the function of a tipstaff is very much at the discretion of their judge, who, like all of us, have particular characteristics which no doubt influence the work of such an office. And, although the role of the tipstaff has changed to meet the modern legal world, which includes direct legal assistance to the judge in a variety of ways, the role of tipstaff continues the more traditional function of administrative and personal assistance to their judge.

## Endnotes

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