Bar News

The JOURNAL of the NSW BAR ASSOCIATION Winter 2003

Protecting our interests: The proper role of the Bar Council

Negligence and insurance premiums

A new role for the ABA in Asia?

Fixing the Crimes Act

The 'Dancing Man': Frank McAlary QC

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Cover

Frank McAlary, 'The Dancing Man',
in Elizabeth Street, Sydney, during victory
celebrations on VJ Day,
15 August 1945.
Photo: News Image Archive

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Editor's Note

This issue of *Bar News* commences with a message from the President, Bret Walker SC, on the topic of the role of barristers as part of the planned 'national legal profession' and continues with two strong opinion pieces. The first is from Anna Katzmann SC on the question of conflict of interest and the proper role of the Bar Council. A question she poses is whether the Bar Council should continue to be given the role of removing practicing certificates from delinquent barristers. Colin McDonald QC of the Northern Territory Bar raises a proposal that the Australian Bar Association — of which this association and all of the other independent Bars in Australia are members — should take a more active role in being an independent advocate for the rule of law and the strengthening of national institutions in the weak and disorganised states of the Asian and South Pacific region.

Features of this issue include Alister Abadee's article on the professional liability of barristers; Michael Joseph SC's thesis that the value of a lost cause of action should be measured by the likely settlement, not likely verdict, had the matter proceeded; and a punchy and constructive proposal by Richard Button, Andrew Haesler and Chrissa Loukas to fix the *Crimes Act 1900* (NSW).

As proof the Bar Association is not mired in the 19th century, the Bar Council has approved a pilot proposal advanced by the Equal Opportunity Committee for a child care scheme. It is outlined by Rashda Rhana. Rena Sofroniou continues her career as celebrity interviewer in a fascinating interview with Phillipa Gormley, and produces the answers on how a busy barrister juggles a burgeoning commercial practice, the raising of four children, part-time judicial membership of the ADT and multiple sclerosis. It should be noted by way of advance warning that Chief Justice Gleeson has agreed to be interviewed by Rena in the forthcoming Summer 2003 *Bar News* edition. Volunteers are called for to interview Rena after that 'interview' occurs.

The cover of this issue features the famous photo of Frank McAlary QC as 'The dancing man'. McAlary QC receives a further mention in this edition courtesy of Andrew Bell. David Ash provides us with clerihews for the High Court (and even explains what a clerihew is).

Bar sport contains the report by Lachlan Gyles on the defeat of the New South Wales Bar Cricket team by the Queensland Bar. Gyles ends with a stirring plea for younger members of the Bar to come forward and to continue the cricketing tradition set by original players such as the late Jack Hartigan. One can almost hear the older Gyles speaking!

LETTER TO THE EDITOR

Dear Sir,

Over the Christmas vacation, whilst the second Mrs Bullfry was in therapy, I followed with interest the media frenzy surrounding Biscoe QC's ejection from the Bondi Swimming Classic. As a contemporary of Biscoe's, all that I can say is that 'he should know better at his age'.

Bullfry QC

Biscoe QC is rescued by Forster SC.

Biscoe QC takes adip at Birchgrove.
Photo: Peter Morris/Sydney Morning Herald

The role of barristers in the 'national legal profession'

By Bret Walker SC

One of the satisfying tasks of the Bar Association is to help permit the members of the Bar to get on with their basic function of appearing for and advising their clients, without constantly dealing with broad political issues. But the trade-off is that the Bar Association is, like it or not, always involved in politics. For us, there are two major dimensions to this: true parliamentary politics, and the politics of the legal profession.

The former is always more obvious. In the last twelve months, one only has to reflect on the quick-and-dirty law reform (whether amelioration or the contrary) of tort law by our state – sure to be an example for the nation – with which our association has grappled. Some regard changes to the legislation governing sentencing and bail laws, at the state level, as even more grave. And the moves, still current, at Commonwealth level, to empower agents of the executive to detain and question non-suspects (including minors) in relation to terrorist offences are quite clearly much more important than the run of the mill issues in the so-called political cycle.

The Bar Association has, as it must, concerned itself with advocacy of principle with respect to all of these current controversies. We have tried to avoid any colour of bias, let alone in favour of miscreants, in these interventions, but are unashamed in our defence of liberty according to law in all these arguments. We believe that the section of the legal profession most acquainted with the structural inequality of the individual against the state – viz the Bar, defence or prosecution – is uniquely qualified to speak to legislators and the public about the implications (and dangers) of such proposals. Written submissions, and testimony to parliamentary committees, have been our tool, and volunteers have been our strength.

The Bar has also continued and deepened its disinterested role of rapid assistance to any member of parliament with questions concerning the administration of justice, across a broad range of topics, with the aim of ensuring, at least, that debate does not proceed without knowledge of the principled and technical questions which so often are obscured in the hurly-burly of daily political controversy.

These matters are undoubtedly of wide social import, and thus, so long as it remains scrupulously non-partisan, the Bar's institutional contribution should be vigorous and plain-spoken. Just as judges may entertain private opinions about the merits of laws – legislative or judge-made – even more freely should barristers disagree with each other about those merits. For this reason, at the Bar Association level, we try hard to convey views which eschew mere matters of opinion, and rather represent a commitment to the rule of law and of impartial justice. Of course, we proceed on the bases of the presumption of innocence and the need for adequate evidence before individual liberties are affected. In this, to date, we feel confident of the Bar's consensus.

The questions which are more sensibly seen as legal politics are somewhat different. For one thing, they are (mercifully, at present) scarcely of any wider public curiosity. Secondly, they are at once closer to our daily professional lives and also quite remote from the concerns of the barrister at work. Let me explain that seeming paradox, and its present relevance.

There is no better demonstration of the Bar's social contribution, and its vital importance, than our serious discharge of our individual duties as counsel in each brief. The contrast between stereotyped blackguarding of the legal profession on the one hand, and the glowing testimonials to individual barristers, efforts for their clients (not only so-called pro bono) received by the Bar Association and its members, on the other hand, speaks volumes for the preference we should have for the particular over the (spuriously) general. This manifestation of the value which robust, honest and honourable advocacy adds to the administration of justice on the daily level is the sure foundation of the Bar Association's attempts to protect the independent Bar – in New South Wales and nationally – against the various threats facing us.

These threats are not traditional. I don't expect they will long remain as they presently are. In the short term, we face the imminent crushing of nearly all personal injuries litigation of the familiar kind. It is, I believe, the single largest decrement to the work of the Bar that we have suffered since 1788 (or whatever later date to which we trace our real origins). We face it together with our solicitor colleagues, and by no means alone internationally, but it is real and will have serious and personal impacts. Given the vehemently bi-partisan parliamentary support these so-called reforms enjoyed in 2001-2002, and apparently (and electorally) still, they are a given.

On a slightly longer time-scale, maybe several years long, there are the almost unheralded changes which the Standing Committee of Attorneys-General seems to be fostering under the guise of a project to alter state and territory legal profession legislation, in order to advance the motherhood cause of the national legal profession. The Bar Association has been closely entrained in this process. Our senior members of staff have been prominent in guiding the national profession's response to the drafting exercise, and I have recently participated in the Law Council of Australia's reference group to settle and co-ordinate the policy response to the bureaucratic proposals. There is both good and bad – or, perhaps, foreboding – about this hitherto remarkably unremarked exercise.

As to the good, I think it is safe to record that the past conflictual relation between the referral Bars – of which we are the most numerous, in the most litigious jurisdiction – and the private solicitors, has no contemporary resonance at all. It is a considerable achievement of the last decade's Law Council that we have reached that position. Nor does there seem to be any atavistic state-of-origin rivalry in the discussions about these trans-generational issues. Again this rather indicates that the private practitioners are much closer to being a national profession than some politicians – especially the Commonwealth Attorney-General – have been prepared to acknowledge publicly.

Practically the whole endeavour concerns private solicitors, and really only in large or otherwise sophisticated firms – because it is about removing impediments to efficient, minimally regulated national (private) practice, such as

disparate admissions disciplining insurance trust account and fidelity fund requirements. So far as the true Bars are concerned, we have either virtually achieved national portability (with the combination of federal jurisdiction and travelling practising certificate régimes), or else the remaining difficulties affect very few of us. And beneficent laws as to the practice of foreign law, on the current New South Wales model, will help by promoting this country as the most liberal and welcoming venue for international arbitrations. So why should this national-profession project be of concern to New South Wales barristers?

I have no doubt that the probably irresistible alliance of about two decades of consumerism and one decade of competition policy means that mercantilism is the reigning guide to professional governance so far as the would-be reformers are concerned. The pre-eminence of personal ethics enforced by a corporate profession is already, and has long been, the lode-star of lawyers in Australia. The reformers are not basing themselves on that approach alone. If they were, the need for change would fade away. The push is for something new, however speciously. Using a constitutional analogy, this is all about sec 92, not secs 117 or 118.

Mercantilism, the drive for maximised profit, should not be seen as a sure guide to lawyers' virtue, even if it provides a pointed battering ram against protectionism and unjustified stuffiness. It will be, I think, a betrayal of legal ethics if it much longer remains the only impulse to the generally admirable drive towards a national profession. A better guide is a simultaneous recognition of a commonality between all lawyers in Australia, and of the functional divide amongst us.

The commonality is, or should be, axiomatic. All of us are in a common endeavour, of crucial social and national importance. It is none the less so – to the contrary – in light of the fact that we spend our days (and nights) working on the apparent minutiae of individual cases, at the Bar. Law students, their teachers, legal scholars, jurisprudes, solicitors, barristers, corporate lawyers, government lawyers, statutory office-holders (like our members the Solicitor-General, the Crown Advocate, crown prosecutors, public defenders, parliamentary counsel, etc), legal aid solicitors, and (especially) judicial officers, are all engaged in the same everyday, noble, project: the rule of law. This, I hope, is by now a commonplace. It remains a pity that there is no one body in which these different groups are all represented. Perhaps the Law Council should take on the daunting task of expanding its mandate accordingly.

But the functional differences are manifest. The most pressing, I believe, is the divide between those of us primarily concerned with the administration of justice and those for whom that is really not much more intimately connected with their usual work than it is for any citizen, corporation or person present in the jurisdiction who are, simply, subject to the general law.

I can foresee a time when a more organic, radical differentiation between different kinds of lawyers will see the Bar as part – maybe be the leading segment – of a recognizable cadre of lawyers whose function it is to minister to justice. Certainly, the business-services nature of a great deal of city solicitors' work, and the personal or household services equivalents in the suburbs and the country, are a long way removed from ideals of cab-rank (i.e. disinterested) forensic lawyering. And government lawyers, and corporate lawyers, are often necessarily well away from litigious concerns.

The Bar Association should therefore be ready, regardless of structural or nomenclatural changes, to urge and deepen its commitment to continuing the availability of skilled, fearless and detached advocacy and associated advice to those needing legal services. We must, and I believe will, resist absorption into a culture of purely commercial instruments of clients. For these reasons, while New South Wales barristers should applaud the move to a so-called national profession, we should markedly resist assimilation into a generalised view of 'lawyers in private practice'. We should also, therefore consider the prospect of alliances or associations with a body or bodies of our solicitor colleagues who are actually litigators, as opposed to those (i.e. the majority) for whom litigation never or rarely arises.

Protecting our interests: The proper role of the Bar Council

By Anna Katzmann SC *

Conflict of interest is antipathetical to barristers. We have rules that require us to refuse a brief or instructions to appear in cases of potential, as well as actual, conflict of interest. Yet, increasingly our professional association is being pushed in a direction where conflicts of interest may arise. At the same time, publicly, conduct that accords with or advances our interests is criticised or marginalised, if not ignored, because it is said to be motivated by self-interest. How do we reconcile our public interests with our private concerns? Does the present system of professional discipline afford the best protection for either?

...the proper role that the Bar Association has of protecting and promoting the interests of its members in individual cases is arguably at odds with the role its governing body, the council, now has in deciding whether its members are unfit to practice.

I have long been troubled by the public perception, fostered, if not created, by the popular media outlets, that the opinion of a barrister on a question of law reform is of little value because it is tainted by self-interest, for example where one outcome is to deprive or restrict the citizens' right of access to the courts or to receive legal advice. After all, no-one thinks twice about a builder who advises on rectification works that might be necessary as a result of another builder's activities although he has an obvious financial interest in recommending the works. The problem is exacerbated by the inclination of political parties to follow or pre-empt the views of the popular press.

Recently, in his contribution to the collection of essays published to coincide with the centenary of the NSW Bar,[1] the Director-General of the Attorney General's Department, Laurie Glanfield, insisted that a clear distinction must be drawn between 'issues which have no appreciable self-interest and those which have the capacity to give rise to a conflict of public and personal interests for barristers.' He cited such topics as mandatory sentencing, police powers and human rights and foreign policy questions as examples of the former and matters relating to fee scales, alternative dispute resolution and professional entry requirements as examples of the latter. He wrote that to the extent that lawyers are heard to speak more of the latter than the former then 'the impact of the lobbying is lost for the motives are automatically anticipated as being of self-interest.'

In spite of the public perception, however, the real problem for the Bar Association is not self-interest. There is nothing inherently wrong with individuals who have a common interest combining to advance that interest. Indeed, that is the essence of community and social organisation. Wherever the self interest of the association or its members accords with a wider community interest, the voice of the association is likely to attract greater attention. That stands to reason. Yet, merely because there will be other issues where self-interest is apparent, we should not feel inhibited from speaking out and otherwise acting in support of our members. It is likely, however, that the methods we use will differ according to the extent to which our interests coincide with the interests of others. Yet, the real problem is not self interest but conflict of interest.

At the conclusion of his speech at the 2002 Bench and Bar Dinner David Jackson QC questioned whether the association could adequately perform all the disparate roles it presently occupies. Justin Gleeson SC took up the issue in his last editorial in this journal. Undoubtedly the question has been raised in the context of the special powers conferred on both the Bar and the Law Society councils with the introduction in 2001 of Part 3 Division 1AA of the *Legal Profession Act 1987*.

This conflict of roles, however, is not new. From the outset the Bar Association has not been a mere 'trade union.' Indeed, until the establishment of an independent commissioner, all disciplinary matters were dealt with internally or via application to the Supreme Court with the association discharging the role of prosecutor. The difference in recent times is that the Bar Association is now required to investigate, prosecute and decide whether its members may practice. The 2001 amendments to the Legal Profession Act effectively transformed the council of the Bar Association into what Justin in his editorial aptly referred to as judge and jury.

The objects of the Bar Association are set out in detail in its constitution. They include promoting the administration of justice, maintaining and improving the interests and standards of local practising barristers, promoting 'fair and honourable practice amongst barristers' and suppressing, discouraging and preventing 'malpractice and professional misconduct,' assisting members and ex-members and generally doing all things that it is thought might assist local barristers.[2]

On their face there is no necessary conflict between these objects. However, the proper role that the Bar Association has of protecting and promoting the interests of its members in individual cases is arguably at odds with the role its governing body, the council, now has in deciding whether its members are unfit to practice. An association member falling on hard times may seek the assistance of the Benevolent Fund, the trustees of which are the Bar Councillors, the same individuals who may move to cancel the member's practising certificate that may have been actuated by the same circumstances that prompted the claim on the fund. The Bar Association provides legal assistance pro bono for those who can't afford it and association members advise and appear for others who are being

* Anna Katzmann SC has been a member of Bar Council from 1993 to the present. She was treasurer of the Bar Association in 2000- 2001 and secretary in 1998– 1999.

investigated and prosecuted by the Bar Council. Although no application has yet been made for a member of Bar Council to disqualify himself or herself from hearing a case because of apprehended bias, it is inconceivable that bias for or against a barrister will not intrude (whether consciously or not) into the deliberations of council members. This raises a real question about the fairness of the process. Yet, the government must have recognised that possibility by reposing decision making powers in the council.[3] All these conflicting roles would seem very peculiar to a lay observer.

In his speech on the appointment of the first SCs, in a passage which Mr Glanfield cited in the article I mentioned above, the then NSW chief justice Murray Gleeson AC averted to what he called 'the confusion as to what people expect of the legal profession': regulation and de-regulation, commercialism and professionalism, free competition and price control.[4]

... it is one thing to empower the professional bodies with the right to issue a certificate and impose conditions and quite another to enable them to decide whether an individual should be able to ... practise his or her profession.

That confusion is shared by our own members and promoted by government. Our members question why we devote so much time to investigating their behaviour and so little time protecting their businesses. Governments extol the virtues of competition and its concomitant business activity but cannot cope with the resultant and predictable increase in litigation and seek to shift to the profession the responsibility for outcomes of government policy that it dislikes. For example, parliament removed[5] the restrictions on advertising, MPs criticised the profession for failing to embrace the need for such a change and then complained when lawyers took advantage of the change and started to advertise.

Undoubtedly it is in our interests to achieve and maintain the highest standards of honesty, integrity and professionalism. Equally, it is in the self-interest of our members to maintain an internal investigatory system sympathetic to the demands and strictures of a barrister's life and practice. To the extent that a system that removed the professional associations from the process would put intolerable demands on the public purse it is also in the public interest to keep the professional associations involved. However, adequate protection of all these interests can be secured if the power to remove the right to practice were withdrawn.

The Bar Council's role and its powers in other disciplinary matters are different. Apart from council-initiated complaints, all complaints about a legal practitioner must first be made or forwarded immediately to the Legal Services Commissioner. At his discretion the commissioner may refer the complaint to the appropriate council. When the investigation is complete the council has no power to determine that the practitioner is guilty of professional misconduct and no power to remove his or her right to practice on that account. The power of the Bar Council is restricted to dismissal of complaints, administering a reprimand where it is thought appropriate but only where the practitioner consents and only in cases of unsatisfactory professional conduct but otherwise to referring the matter to the Administrative Decisions Tribunal where there is a possibility that the barrister may be found guilty of professional misconduct or unsatisfactory professional conduct.[6]

Under the scheme introduced in 2001 the Bar Council is not only empowered but required to refuse to issue, suspend or cancel a barrister's practising certificate in certain circumstances which it considers show that the holder or applicant is unfit to have one.[7]

The genesis of the problem I suppose is the power given to the councils to issue practising certificates which was introduced with the 1987 Act. That power includes a power to impose conditions.[8] The new provisions may seem like a logical extension of the existing powers.

However, it is one thing to empower the professional bodies with the right to issue a certificate and impose conditions and quite another to enable them to decide whether an individual should be able to ply his or her trade or, more correctly, to practise his or her profession.

The difficulties presented by the conflicting roles and the different public perceptions are matched, if not exceeded, by the disquiet and discomfort that council members feel about the obnoxious task of deciding the fate of our colleagues. In my opinion, that power should be removed.

I see no problem with the Bar Council continuing its role with respect to the issue of practising certificates, both conditionally and unconditionally, and with it continuing to supervise conditions attached to practising certificates. However, maintaining the council's power to determine unfitness to practice and to withhold or remove a practising certificate is another matter.

Either the ADT or the Supreme Court is better placed to make such decisions. Both fairness and transparency in decision-making are better served if those tasks were vested in an independent arbiter. The public is entitled to have greater confidence in the process. The barrister concerned need not fear that he or she will be the victim of any undisclosed prejudice. It might be said that the current appeal rights adequately cater for these concerns. However, an appeal with the inconvenience and costs it involves is a poor substitute for getting the process right in the first place. The council can still carry out its investigative role and make recommendations in the same way it carries out its ordinary disciplinary functions but it should be divested of the powers to make a final determination of unfitness to practice and to impose sanctions that prevent a barrister from practising.

1 *No mere mouthpiece: Servants of all yet of none*, edited by Geoff Lindsay and Carol Webster (Butterworths, 2002)

2 For a full account of the objects of the association see cl 3 of the Constitution of the Bar Association reproduced in full at http://www.nswbar.asn.au/Public/About%20us/Content_about.htm

3 The position of the Bar is more vulnerable to criticism than that of the Law Society because of the comparative sizes of the two branches of the profession. Because there are vastly more solicitors than barristers, there is likely to less familiarity between the council and its members and hence greater objectivity in the process of decision-making than there could ever be in the case of the Bar.

4 3 December 1993, cited in Lindsay and Webster, *op cit* at p 46.

5 Against our protests

6 See Part 10 *Legal Profession Act 1987*.

7 Part 3 Division 1AA.

8 See Part 3 Division 1.

The Lucky Boat and the future of the Australian Bar Association

By Colin McDonald QC[*]

As the sun set over Phnom Penh, Nhean Chanearyboth sang a haunting Khmer song of a return to her homeland, a smile on her face. Chanearyboth sang from the stern of a colonial French relic called the *Lucky Boat* as it chugged along the Mekong River. I felt relieved to be away from Australia and to be an invited guest on that evening cruise. It was late February 2003 and the political rhetoric about weapons of mass destruction and the need for regime change in Iraq was thick in the air. On this river of turbulent past, it was good to be away from the words of war. Yet, as I absorbed the memorable silhouette of Phnom Penh and felt the emotional strength of the song, I sensed even then that a war was inevitable.

The struggle to achieve even the semblance of the rule of law in Cambodia also goes on quietly in too many countries in Australia's immediate region.

The evening cruise on the *Lucky Boat* had been organised and paid for by grateful law and good governance students who had undertaken, or who were soon to undertake, sponsored overseas tertiary study. My host was a talented law student who had been given the opportunity for free tuition at the University of New South Wales Law School later this year. The students were saying thank you and were keen to abide by perceived national sensitivities: in addition to ample Khmer cuisine there was cognac and red wine for the French, a Mekong bourbon and Coca-Cola for the Americans and beer for the Australian. On the boat were gathered about thirty eager young Cambodians, idealistic, hungry to learn and keen to expand their intellectual horizons. The young men and women on the *Lucky Boat* were undoubtedly the future leaders of Cambodia.

The hearts and minds of these future leaders had been won over by good education, the promise of more such education, the power of reason and the professional example of their lecturers. Scholarships from enlightened universities and sensible governments gave these young men and women a reprieve from the poverty from which they all came and hope for the future.

These young Khmers on the *Lucky Boat* were living proof that education, values that withstand intellectual and moral scrutiny and practical relief from poverty are powerful tools in overcoming extremism, intolerance and violence.

All those on board knew the realities of contemporary Cambodia; they knew it was a country ruled by a selfish and corrupt elite which enforced its power by resort to the gun when perceived necessary or advantageous. By being on board the *Lucky Boat* all the young Khmers were demonstrating a commitment to new approaches at problem solving which did not involve the violence with which Cambodia has been afflicted for 30 years.

Former Khmer Rouge commander General Sam Bith appearing in a Phnom Penh court charged with the 1994 kidnapping and murders of Australian, British and French backpackers. *Photo: Cambodge Soir / Khem Sovannara / News Image Archive*

There was also something to be learned from the guests on board. They were all foreign lawyers who had in the past, in one way or another, been influenced to action by Cambodian refugees. The flight of Cambodian refugees to France, America and Australia in the late 1970s, the late 1980s and early 1990s had confronted some most unlikely persons with unexpected issues of commitment. All of the guests were back in Cambodia using their legal skills – teaching, advising, mentoring. They brought with them their legal expertise, their values and commitment to the rule of law and sought to pass them on. And here on the *Lucky Boat*, their commitment was being acknowledged by the young men and women who will lead the

* Colin McDonald is a former president of the Northern Territory Bar Association and a former member of the ABA executive. He is currently a board member of the Cambodian Legal Resource Centre in Phnom Phen. In addition to his Australian legal practice, he has practised in Indonesia, East Timor and Cambodia and had extensive dealings with judges, lawyers and government officials in the region.

new Cambodia.

Just how important this involvement of foreign idealistic lawyers is was brought home with the news on 23 April 2003 that Judge Sok Setha Mony had been assassinated. He had been the judge who sat and convicted ex-Khmer Rouge commander Sam Bith to life in prison for the abduction and murder of Australian David Wilson.

The assassination of Judge Sok Setha Mony was a reminder that the rule of law in Cambodia remains an aspiration, not a political reality. The assassination made events like the cruise on the *Lucky Boat* more important and demonstrated how difficult the future will be for those young lawyers on board.

The struggle to achieve even the semblance of the rule of law in Cambodia also goes on quietly in too many countries in Australia's immediate region.

Bipartisan policies of engagement with our region and various aid projects born of such engagement have been interrupted by the events of 11 September 2001 and, closer to home, the Bali bombing on 12 October 2002. Understandable anger, fear and vengeance has followed. Australia has drawn closer to the United States in a very public way.

...the Australian Bar Association can expand its role not just in the administration of justice in Australia, but also in promoting the rule of law at home and abroad.

The government has bolstered defence and security spending. The sense of foreboding I had on the *Lucky Boat* came to pass. It is a matter of history that Australia joined the 'coalition of the willing' and committed our military to war. In doing so, Australia opted for, and participated in a new and potentially dangerous pre-emptive theory of military intervention. War was not the last resort. UN sanction was ultimately not necessary. Sixty years of Australian diplomacy and participation in world institution building went out the door.

As lawyers, we do not necessarily adopt, endorse or criticise executive action. The politics of pragmatism, expediency and the ways of power have no role in the administration of justice. However, even in the quintessential executive act of going to war, lawyers may have a responsibility to speak publicly, especially on issues affecting the rule of law.

A current topical example of the responsibility for lawyers to question and to speak was raised in the political bombshell that was unleashed in the United Kingdom in *The Guardian* on 22 May 2003. The legal correspondent of *The Guardian* advised the world that the British Attorney-General, Lord Goldsmith, had in an opinion to his government some two months earlier, questioned the lawfulness of the occupation of Iraq. Lord Goldsmith was quoted as saying:

> The government had concluded that the removal of the current Iraqi regime from power is necessary to secure disarmament, but the longer the occupation of Iraq continues, and the more the tasks undertaken by an interim administration depart from the main objective, the more difficult it will be to justify the lawfulness of the occupation.

The Guardian legal reporter further commented:

> His opinion throws into doubt the legality of the efforts of the US-led Office of Reconstruction and Humanitarian Assistance to form an interim Iraqi administration. It shows how close to the wind the British administration was prepared to sail in its Iraq role.

As lawyers, we in Australia are entitled to ask what advice did the Australian Government receive about the legality of the occupation of Iraq. Lord Goldsmith's advice touched directly on the rule of law and executive action. It has passed without much comment in Australia.

Whilst the attack on the World Trade Centre and the bombing in Bali has drawn Australia closer to the United States militarily and politically, it has not changed our geography. Nor has Australia's close alliance with the United States changed certain realities in our region. Until the institutions of government in those fragile and disorganised countries to our north are strengthened and the causes of terrorism – economic, social and political - are successfully attended to, those countries will continue to be unwilling hosts or breeding grounds for terrorists.

Phnom Penh municipality judge Sok Setha Mony arrives in hospital after being shot five times. The judge later died of his wounds. *Photo: AFP / News Image Archive*

Engagement with our region in non-military ways, in institutional strengthening exercises, is more urgent than ever. It is here that the Australian Bar Association, to which all Australia's independent Bars belong, can play a part even in a modest way. It is here that the Australian Bar Association can expand its role not just in the administration of justice in Australia, but also in promoting the rule of law at home and abroad.

The Australian Bar Association plays an independent and pivotal role in the administration of justice in Australia. It has developed into a sophisticated national body representing the interests and views of barristers. The ABA is justified in

being proud of its achievements. The ABA organises and hosts excellent professional conferences in Europe and America. It has conducted advocacy courses in Bangladesh. However, in our region the involvement of the ABA has nevertheless been minimal. A perhaps unstated but prevailing view is that the ABA should confine itself to issues of advocacy and, in so far as the outside world is concerned, our contribution is made within the International Bar Association and the Law Council of Australia and that is enough. I am one who respectfully disagrees.

The events since the Bali bombing in October 2002 and Australia's reaction to the arrival by boat in its national waters of asylum seekers demonstrates a powerful case that the Australian Bar Association should develop its own capacity and a preparedness to involve itself in rule of law issues at home and in our region.

ABA conference organisers might consider a future conference in Hanoi, Phnom Penh, Bangkok or Jakarta. For the ABA it would be like moving from Menzies to Whitlam.

The precipitate manner that Australia opted for military unilateralism in Iraq, whatever its political advantages or disadvantages, must sound a caution that lawyers cannot accept in unquestioning fashion government action or the government's explanations on matters that affect rule of law issues.

A sign of maturity and a willingness to grapple with the issues of our time and our region could be the development of a committee of members whose task it is to identify and inform the ABA executive on issues related to the rule of law at home and in our region. There is no shortage of issues: Australia's treatment of asylum seekers, the ASIO legislation, the dysfunctional and crumbling legal system in East Timor, the extra-judicial killings in Thailand, the struggle for constitutionalism in Indonesia and the institutional collapse of the Solomon Islands are but to name a few.

Diplomacy so often involves symbolism. ABA conference organisers might consider a future conference in Hanoi, Phnom Penh, Bangkok or Jakarta. What messages conferences of the ABA in South East Asia would send to our colleagues in our region is speculative. It would be an excellent means of networking, developing contacts and showing support. The symbolic gesture of such conferences would nevertheless be powerful. For the ABA it would be like moving from Menzies to Whitlam.

The ABA could also endorse and facilitate scholarships for young, promising lawyers from impoverished places like East Timor, Papua New Guinea, Cambodia, Indonesia and our neighbour countries in the western Pacific.

As the Australian Government buys even more sophisticated weaponry which is designed to link into American defence strategies, non-military but independent bodies can help in the war against terrorism. They can help insist that what Australia does at home and abroad is lawful. The ABA can help, in a legal sense, in that hearts and minds struggle that was so evidently involved on that evening cruise on the *Lucky Boat*. Through being informed, it can act as an independent advocate for the rule of law and the strengthening of national institutions in the weak and disorganised states in our region. It can speak within Australia too, when Australia acts contrary to basic tenets of the rule of law. A committee to inform the ABA executive and identify issues is a step in that process. A resolution by the executive to engage more with our region in practical ways would herald a timely development and expansion in its role. Such a resolution would be an historical event in the life of the Australian Bar Association.

It is time for the ABA to develop new capacity and be in a position to contribute publicly and ethically to the debate about how the rule of law and the administration of justice is best promoted at home and in our region. The bombs going off around us must surely tell us the time has come for us to play our part.

Negligence and insurance premiums

Recent changes in Australian law

The following is the Spencer Mason Trust Lecture, delivered by the Hon JJ Spigelman AC, Chief Justice of New South Wales, in Auckland on 27 May 2003.

My invitation to deliver the Spencer Mason Trust Lecture was accompanied by a request that I develop aspects of an address I gave just over a year ago entitled 'Negligence: The last outpost of the welfare state'[1]. The basic thrust of that address was the recognition that the law of negligence in Australia, in its practical application, had become unsustainable. The subtitle was intended to suggest that, notwithstanding the fact that the system required proof of fault, the practical operation of the system appeared to find fault quite readily, perhaps too readily.

The judiciary cannot be indifferent to the economic consequence s of its decisions.

Other than in specific fields, for example, traffic accidents in Victoria, Australia never developed a no-fault system of accident compensation for personal injury of the character which has existed in New Zealand in an evolving form since the original Woodhouse Report of 1967 was adopted. The trade-off between universal compensation at some level and generous compensation for only some, has been resolved differently in Australia.

In my address last year I noted that, about two decades ago, there commenced a series of ad-hoc statutory interventions with the operation of tort law both in terms of liability and damages designed to limit the amount being paid out. Although these changes never displayed the degree of coherence that the distinctive New Zealand system does display, the necessity for frequent legislative intervention is not entirely dissimilar to what I understand has had to occur by amendment of New Zealand's scheme from its original form culminating in the *Accident Compensation Act 1982*, and thereafter further amendments culminating in the *Injury Prevention, Rehabilitation & Compensation Act 2001*.

Much of this, albeit by way of critical reaction, is a tribute to the ingenuity of the legal profession. This process has not yet seen its course in either of our countries.

When assessing the efficacy of statutory reform, I am reminded of the attempt by the City of New York to control its burgeoning litigation bill by adopting a law to the effect that the city could not be sued for a defect in a road or sidewalk unless it had had fifteen days notice of the specific defect. The plaintiff lawyers, or, as they call themselves, trial lawyers of New York City established the BAPSPC, the Big Apple Pothole and Sidewalk Protection Committee. The function of this committee was to employ persons to continually tour the streets and footpaths of New York to note each and every blemish and, forthwith, to give the City of New York precise details of each defect. Regular reports cataloguing the notices which had been given to the city were available for sale to trial lawyers[2].

At any one time the total cost of curing the defects of which the city had been given notice was several billion dollars. Needless to say the city has never successfully defended a case under the fifteen days notice law. I am confident that Australian and New Zealand lawyers lose little by way of invidious comparison with their American cousins on the scale of creativity.

Pressure on insurance premiums

In Australia the primary focus of attention with respect to tort law reform has been insurance premiums rather than the cost to the taxpayer. As a matter of substance the distinction between these two sources of revenue for purposes of compensating injured persons is not as strict as may first appear. I have expressed this on one occasion, if I maybe permitted the sin of self-quotation, in the following way:

The Big Rocking Horse of Gumeracha is closed due to the high cost of insurance premiums. *Photo: Darren Seiler / News Image Archive*

> The judiciary cannot be indifferent to the economic consequences of its decisions. Insurance premiums for liability policies are, in substance, a form of taxation (sometimes compulsory but ubiquitous even when voluntary) imposed by the judiciary as an arm of the state. For many decades, there has been a seemingly inexorable increase in that form of taxation by a series of judicial decisions, on substantive and procedural law.[3]

There is a further reason why the private/public distinction has become blurred. Even though no overriding system of the character administered by the Accident Compensation Corporation exists in Australia, in the major areas of litigation – involving motor vehicle and workplace accidents - some form of governmental underwriting has often emerged, administered by bodies similar to your corporation. Such bodies develop the same defendant's shop mentality as is common among litigators representing insurance

companies, with the peculiar advantage that they have a more direct route to influencing the legislative process.

By reason of the extent to which insurance is effectively underwritten by the taxpayer, there has emerged a new role for the state as 'insurer of last resort'. This role has expanded over recent years in Australia to include government underwriting of most of the obligations of one of our largest insurers HIH, which became insolvent; government guarantees of the major medical insurer when it became clear that it could not meet its obligations, now extending to a government supported national scheme for medical indemnity; guarantees by government after a major reinsurer withdrew from the market for 'insurance' with respect to building defects and insolvency of builders and proposals for government underwriting of risks associated with terrorism.

As I indicated last year, it took many years for the government role as 'lender of last resort' to take the institutional form of the contemporary central bank. The institutional form of the 'reinsurer of last resort' function is still developing, in Australia's case with all the usual contortions of federalism, which provide us with so much legal entertainment.[4]

Insurance companies had come to be regarded as a bottomless pit or even a magic pudding.

The distinction between private insurance and public taxes, as the source of revenue for compensation payments, is becoming increasingly blurred.

At the time I gave my paper last year there was already a discernible sense of crisis in certain areas of the law of negligence, particularly focused on public liability and the liability of the medical profession. In the months after I delivered my paper that sense of crisis reached something of a fever pitch, in the course of which there were virtually daily reports about the social and economic effects of increased premiums: the abolition of charitable and social events, ranging from dances to fetes to surfing carnivals, even Christmas carols; the closure of children's playgrounds, horse riding schools, adventure tourist sites, even hospitals; the early retirement of medical practitioners and their refusal to perform certain services, particularly obstetrics; the inability of other professionals to obtain cover for certain categories of risk led to similar withdrawal of services, for example, engineers advising on cooling tower maintenance could not get cover for legionnaires disease, building consultants could not get cover for asbestos removal, agricultural consultants could not get cover for advice on salinity; many professionals were reported to have disposed of assets so as to be able to operate without adequate, or even any, insurance.

A sudden explosion in insurance premiums or, in many cases, a refusal by insurance companies to offer cover on any reasonable terms or even at all, caused widespread concern. Many of the changes over the previous two decades had been explicitly determined by a desire to reduce insurance premiums.[5] Insurance companies had come to be regarded as a bottomless pit or even a magic pudding. The political will to limit the amounts required to be paid by way of premiums was reinforced by the direct calls on the public purse that had become institutionalised or implicit.

I am quite satisfied that the underlying cause was the practical application of the fault based tort system in the context of adversary litigation. This had produced outcomes which the community was no longer prepared to bear. What brought the issue to a head, however, were developments in the insurance industry.

There is a cyclical element to the insurance business, as there is in any industry. By 2002, what had for many years been a buyers' market in insurance had become a sellers' market. At an international level there had been a series of natural disasters which had drawn down the capital of insurance companies, particularly that of reinsurers. The events of 11 September 2001 in New York exacerbated this process. This coincided with the end of the share market boom which further reduced the capital available to insurance companies. Quite quickly, demand exceeded supply in the global reinsurance market. This was immediately reflected in premiums and in decisions as to what kinds of businesses to write and where.

Public liability insurance protests by tourist operators in Mansfield demanding action on public liability insurance premiums. *Photo: News Image Archive*

In Australia this development was accentuated by problems of our own making. One of the biggest general insurers, HIH,

particularly active in the professional negligence and public liability market, collapsed. It appears that one reason for the collapse was that HIH had been aggressively underpricing in a number of areas of insurance in order to increase market share. In a sense, the increased insurance premiums that should have emerged gradually over the course of a decade or so, came all at once when this particular insurer was removed from the market.

Acute pressures emerged in the professional indemnity insurance market as international insurers withdrew from, and others refused to enter, a market perceived by some as especially unfriendly towards insurance companies. These perceptions were affected by the breadth of liability arising from a literalist interpretation of the *Trade Practices Act 1974* (Cth). They were also affected by a similar approach to interpreting sec 54 of the *Insurance Contracts Act 1984* (Cth) which has rendered the restrictions inherent in a claims made and notified policy virtually irrelevant.[6] This is the traditional kind of policy offered to cover professional indemnity and they had become difficult to price or to make decisions about provisions.

The choice was often quite stark. In an obstetrics case, for example, litigation was always between an injured child and a bucket of money. It is no surprise to know that the bucket rarely won. Under its no-fault scheme, New Zealand has avoided the worst of this.

In the particular case of medical insurance, the old system of a mutual operation, in which reserves were determined on the basis that there was no contractual obligation to provide cover, notwithstanding the universal expectation that that would occur, was finally accepted to be inadequate. As a result Australia's largest medical indemnity insurer – covering some 50 per cent of Australian practitioners - was faced with insolvency and has been saved by the financial support of the Commonwealth Government. The government further assumed certain unfunded liabilities of all the medical insurers, to be recouped by a levy; it has assumed liability for 100 per cent of a claim above a certain amount – the blue sky factor; it has ensured the availability of run off cover for retired doctors – the long tail factor; the government will also subsidise premiums in certain fields of practice where the damages are large and the doctors never seem to win, like obstetrics.

These problems have been building up over decades. However, 2002 was the year in which quite a number of chickens came home to roost.

In judicial decisions over the course of three or four decades, there had been a discernible process of what Professor Atiyah described as 'stretching the law'[7]. There was, on occasions, an equally significant process which can be described as 'stretching the facts', a process not confined to jury decision-making.

The approach of some members of that generation of judges which came to maturity during the years of triumph of the welfare state was influenced, notwithstanding protestations to the contrary, by the assumption, almost always correct, that a defendant was insured. Many judges may have proven much more reluctant to make findings of negligence if they knew that the consequence was likely to be to bankrupt the defendant and deprive him or her of the family home. The ubiquity of insurance was a factor that, step by step over the course of decades, led to a progressive increase of the burden on those who had to pay insurance premiums. The choice was often quite stark. In an obstetrics case, for example, litigation was always between an injured child and a bucket of money. It is no surprise to know that the bucket rarely won. Under its no-fault scheme, New Zealand has avoided the worst of this.

In Australia the reaction began about two decades ago. For over a century judges had been universally regarded as conservative and mean and too defendant-oriented. This lead parliaments to expand liability, for example Lord Campbells' Act, the abolition of the doctrine of common employment, the abolition of the immunity of the crown, the creation of workers' compensation and compulsory third party motor vehicle schemes, provision for apportionment in the case of contributory negligence.

As more fully set out in my paper last year, from about 1980 legislative intervention in Australia reversed its character and proceeded on the basis that the judiciary was too plaintiff oriented. A generational change in the judiciary coincided with a change in the opposite direction in the social philosophy of the broader polity, which came to re-emphasise persons taking personal responsibility for their actions. There may be an iron law which dooms judges to always be a decade or two behind the times.

In almost all states of Australia, in different ways and at different times, new regimes were put in place, particularly for the high volume areas of litigation involving motor vehicle and industrial accidents. By 2001, New South Wales had also developed a special regime for medical negligence cases. Notwithstanding the new restrictions imposed from time to time, including in 2001 with respect to workers' compensation, the perceived crisis of 2002 has now led to further legislative intervention affecting virtually every aspect of the law of negligence.

The Ipp Report

In collaboration the Commonwealth and the states appointed a group to review the law of negligence. The panel was chaired by the Honourable Justice David Ipp, formerly a judge of the Supreme Court of Western Australia and now a judge and judge of appeal of the Supreme Court of New South Wales. His Honour's panel proposed a range of changes in its two reports. Ministers of the Commonwealth and of the states agreed to implement the recommendations and the process of doing so is well advanced. There was an express commitment to proceeding on a nationally uniform, or at least nationally consistent, basis. At the time of this lecture, that is not yet apparent.

It was evident even before this process got underway that the attitude of the courts had changed. A series of cases in the High Court of Australia in which, if the prior tendency to 'stretch the law', to use Professor Atiyah's phrase, had continued in existence, the plaintiffs would have won, resulted in verdicts for the defendant.[8] The trend was clear. However, the parliaments of Australia have taken the view that this process of

change did not meet the exigencies of the crisis that had arisen or, at least, was perceived to exist. Altering decades of judicial attitude is akin to turning an oil tanker. The political exigencies did not permit a measured approach.

Most of the changes that have been implemented in Australia by legislation and by the drift of judicial decision-making are not of significance for a New Zealand audience. Indeed the principal thrust of the change is directed at the limitation of circumstances in which damages can be recovered for personal injury and the quantum of damages that can be so recovered. The kinds of changes that have been introduced in this regard include the following:

- establishment of thresholds of a percentage of permanent impairment before a person may sue at all;
- establishment of an indexed maximum for the recovery of economic loss;
- establishment of a threshold and maximum for recovery of non-economic loss;
- restrictions on the recovery of damages for gratuitous services;
- fixing and in all cases reducing the rate of interest that can be awarded; and
- fixing and increasing the discount rate established by the courts for the determination of the present value of future loss.

I cannot see that 'reasonableness' has anything to do with a test that only excludes that which is 'far-fetched or fanciful'. The test appears to be one of 'conceivable foreseeability' rather than 'reasonable foreseeability.'

Furthermore, the Ipp Panel recommended legislation to abolish liability for failure to warn of an obvious risk. It recommended that a provider of recreational services should not be liable for injuries suffered by a voluntary participant in a recreational activity as a result of the materialisation of an obvious risk. It also recommended that the law as to voluntary assumption of risk should be changed so as to make it easier for that defence to succeed. There were also recommendations for limiting the liability of volunteers, of a good Samaritan, for restricting liability of persons who act in self-defence to criminal conduct and provision that an apology cannot constitute any kind of admission.

These recommendations reflect the fact that the terms of reference of the Ipp Panel were directed to personal injury. Nevertheless, as will appear, many of its recommendations were taken up and applied more broadly.

In this address I propose to focus on some only of the changes made to the law and practice in Australia. I have selected those which appear to have some relevance to the New Zealand situation, bearing in mind your comprehensive regime for dealing with personal injury.

Reasonable foreseeability

The language of reasonable foreseeability remains at the heart of the law of negligence. It is applicable in New Zealand outside the field of personal injury. Over the decades it is cases of personal injury that have attracted the sympathy of judges in such a way as to distort this principle.

In the paper I delivered last year I identified the commencement of the process of 'stretching the law' in this regard in the reasons of Lord Reid for the Privy Council in the *Wagon Mound [No 2]*.[9] The test of foreseeability there propounded has been applied in Australian law, both at the level of duty and of breach, in a formulation identified in the language of the High Court in *Wyong Shire Council v Shirt*[10] to the effect that a risk of injury is foreseeable, unless it can be described as 'far-fetched or fanciful'. I remain of the view I expressed last year that I cannot see that 'reasonableness' has anything to do with a test that only excludes that which is 'far-fetched or fanciful'. The test appears to be one of 'conceivable foreseeability' rather than 'reasonable foreseeability.'[11]

The application of this test had had the effect, accurately described by Justice Fitzgerald, when he was a judge of the New South Wales Court of Appeal, of: 'impermissibly expanding the content of the duty of care from a duty to take reasonable care to a duty to avoid any risk by all reasonably affordable means.'[12]

McHugh J expressed similar sentiments when he said late last year:

> Many of the problems that now beset negligence law and extend the liability of defendants to unreal levels stem from weakening the test of reasonable foreseeability. But courts have exacerbated the impact of this weakening of the foreseeability standard by treating foreseeability and preventability as independent elements. Courts tend to ask whether the risk of damage was reasonable foreseeable and, if so, whether it was reasonably preventable. Breaking breach of duty into elements that are independent of each other has expanded the reach of negligence law.[13]

His Honour went on to outline principles of negligence law which, if they had represented the majority of the High Court, may have averted the need for any legislative intervention at all. However, by the time this judgment was delivered, in September 2002, the process of legislative intervention was already well underway.

The Ipp Panel had an express term of reference to consider the issue of foreseeability of harm and the standard of care, albeit limited to cases of personal injury or death. The panel's report was critical of the 'far-fetched and fanciful' approach. My own preference had been to simply overrule the restriction inherent in the 'far-fetched and fanciful' test and allow the common law to reformulate the approach, perhaps by returning to the test of 'practical foreseeability' adumbrated by Walsh J in *Wagon Mound [No 2]* at first instance.[14] The Ipp Panel considered a number of options and eventually resolved to recommend that the far-fetched and fanciful test be replaced by statutory provision that a risk be 'not insignificant'.

The Ipp Panel also recommended that the legislation explicitly identify a number of factors, which were drawn from the case law, to be taken into account in determining breach: probability of harm arising, the seriousness of the harm, the burden of taking precautions and the social utility of the activity creating a risk. The report emphasised the need to avoid the bias of 20:20 hindsight, so that the burden of taking precautions should not only consider the particular causal mechanism of the case before the court, but also precautions that may be suggested by similar risks.

These changes have been adopted or are proposed in some

states[15] but not yet in others[16]. In the case of the latter a second stage of legislation appears likely.

I do not know whether the mischief of 'stretching the law', to which this particular statutory provision is directed, is present in the practical application of New Zealand tort law. Its principal source in Australia has been cases involving personal injury. The legislative change is not, however, restricted to that area.

Evidence by a patient that he or she would not have given permission for a particular medical procedure to be undertaken is almost impossible to cross-examine about or to verify. In the usual case it never rises above the level of self-serving assertion, with the full benefit of hindsight. Findings of fact in this regard are virtually unchallengeable on appeal.

Causation

Nothing is more calculated to excite a common lawyer, or exasperate the uninitiated, than a discussion on the subject of causation. Brushing aside the arcane speculations of philosophers, common lawyers have become accustomed to stating that the issue of causation is one of 'commonsense'[17]. Perhaps a more candid approach is to openly acknowledge that there is a normative element in deciding causation and what often occurs in practice is to ask whether, in all of the circumstances, the defendant should be made liable for the plaintiff's loss. Although this has been acknowledged in judgments,[18] in some Australian states this approach will now receive statutory approval in some cases.

The Ipp Panel acknowledged the 'commonsense' test applicable in Australian law but, nevertheless, founded its analysis of causation on the proposition that the basic principle was the 'but for' test, that is, 'the harm would not have occurred but for the conduct'.[19]

An issue to which the Ipp Panel directed particular attention was what has been identified as 'evidentiary gaps'.[20] This was a reference to the difficulties of determining causation where injury arises because of the cumulative operation of two or more factors, for example where a worker contracts mesothelioma as a result of successive periods of exposure while working for different employers, and where injury arises from the cumulative operation of two or more factors, for only one of which the defendant is responsible. Attempts to bridge such 'evidentiary gaps' have encompassed a test of whether particular conduct made a 'material contribution' to an injury[21] and if the conduct 'materially increased the risk'.[22]

The Ipp Panel described the issue in terms of when the 'but for' test should be relaxed. It said this raised a normative issue and required a value judgment about the allocation of the cost of injury. It recommended that, whilst the determination of such issues should be left to common law development, the normative character of the process should be made explicit in legislation. It recommended a provision that when deciding whether there was a material contribution or a material increase in risk, a court should consider whether responsibility for the harm should be imposed on the negligent party.[23]

The recommendation of the Ipp Panel in this respect has been adopted in some states.[24]

The legislation identifies two distinct elements in the determination of causation. The first, referred to as 'factual causation', is that 'the negligence was a necessary condition of the occurrence of the harm'. The second, referred to as 'scope of liability', involves a conclusion that it is 'appropriate for the scope of the negligent person's liability to extend to the harm so caused'. The legislation provides[25] that 'in an exceptional case' i.e. one in which there is an evidentiary gap and a factual 'necessary condition of the occurrence of harm' cannot be established, the court is obliged to consider 'whether or not and why responsibility for the harm should be imposed on the negligent party'.

One can anticipate a considerable body of litigation about the scope, meaning and application of this provision. These proposals arose from difficulties apparent from personal injury litigation. The provisions are not so limited. Their application to cases of property damage and pure economic loss may surprise us.

The panel noted that another means of resolving the problem of evidentiary gaps was the suggestion that the onus of proof on the issue of causation could shift from the plaintiff to the defendant, merely on proof of a duty to take reasonable care to avoid the risk and a failure to take the required care.[26] In order to overcome this suggestion, the Ipp Panel recommended an express new provision stating that the plaintiff always bears the onus of proving on the balance of probabilities *any* fact relevant to the issue of causation. This has been adopted in some states.[27]

Another matter that the Ipp Panel reviewed was the situation where an issue has arisen as to what a plaintiff would have done if a defendant had not been negligent. This is of considerable practical significance in view of the number of cases that turn on a failure to warn, notably affecting medical practitioners who have actually done nothing wrong as clinicians, but failed to warn their patient about certain remote risks.[28]

Evidence by a patient that he or she would not have given permission for a particular medical procedure to be undertaken is almost impossible to cross-examine about or to verify. In the usual case it never rises above the level of self-serving assertion, with the full benefit of hindsight. Findings of fact in this regard are virtually unchallengeable on appeal.

Causation turns on what would have happened in the individual case and the Ipp Panel accepted that the appropriate test of causation is a subjective one. The panel rejected an objective test, *inter alia*, on the basis that such a test would answer the question 'what should have happened', not the causal question 'what would have happened'. It also rejected what it identified as a Canadian test which asks objectively what a reasonable person would have done, but stipulates that such a person must be placed in the plaintiff's position and with the plaintiff's beliefs and fears. As the panel noted: 'A problem with this approach is that it may require an answer to the nonsensical question of what a reasonable person with unreasonable views would have done.'[29]

The Ipp Panel recommended that in view of the difficulty of

counteracting hindsight bias and the virtually appeal proof nature of the finding, whilst the subjective test should remain the rule in Australia, a statement by a plaintiff as to what he or she would have done should be made inadmissible. That has been enacted in some states.[30]

As litigation of this character is often national in an integrated national economy, the differences amongst the recent state Acts may become an additional burden in the litigation process. The identification of precisely where a national corporation committed certain acts is not something that is worth the time and expense that may well be required.

Professional negligence

One matter of longstanding concern, particularly in cases involving medical negligence, has been the preparedness of some judges and juries to find negligence in defiance of the balance of professional opinion, by favouring minority opinions and even 'junk science'. The English *Bolam* test[31] which, in substance, meant that it was not open to a court to find a standard medical practice to be negligent, was applied in some Australian courts until the High Court determined in 1992 that it would not apply[32] New Zealand case law had developed in the same general direction so that evidence of professional practice was admissible and helpful to indicate whether there had been a breach of a duty of care but it was not decisive.[33] Eventually the House of Lords also accepted that the *Bolam* test was not conclusive on the issue of breach.[34] There appears to be a certain degree of convergence in the approach to this matter amongst common law countries, but the English have not moved as far from *Bolam* as Australia, or at least, not yet.

In 2001, when the New South Wales Parliament passed special legislation changing the principles and practices with respect to medical negligence, the introduction of a version of the *Bolam* test was considered but, in the event, not adopted.[35] By 2002 the sense of crisis, particularly with respect to the liability of medical practitioners, accentuated as it was by the near collapse of the major medical insurer, had changed the environment. The way that some of the parliaments have responded to this issue has, however, extended beyond the medical negligence field and, accordingly, applies to cases not involving personal injury. This was a response to the across the board explosion in premiums for professional liability policies and the exclusion of many risks from cover.

The Ipp Panel directed its attention to the position of medical negligence and posed the question in terms of whether, and if so when, the courts should defer to a substantial body of expert opinion. It noted instances in which a strongly held and reasonable, albeit minority, body of opinion had subsequently been shown to lead to unacceptable consequences[36]. The panel recommended a modified version of the *Bolam* test to the effect that the standard of care in medical negligence cases should be that treatment is not negligent if it was provided in accordance with an opinion widely held amongst a significant number of respected practitioners. This would be subject to an ultimate ability of the court to intervene if it believed that even such an opinion was 'irrational'. During the course of the debate the example most frequently referred to was the use of electro-convulsive therapy on a systematic basis in a Sydney psychiatric hospital which led to considerable controversy a decade plus ago.

The Ipp Panel considered the possibility of extending the new principle beyond medical practitioners to all professionals or even to all professions and trades. It accepted that this was a political decision and raised the possibility that legislation would apply only to medical practitioners, leaving it open to the courts to extend the approach to other professions.[37]

Some states have enacted, or proposed[38] the substance of the recommendations although in different terms. Other states have not, or have not yet, done so[39]. Although the differences amongst the enactments do not appear major, they may lead to different results. In each state, however, the new test extends to *all* professions, not just medical practitioners.

Notably, no Act defines a 'profession'. The quest for 'professional' status has been a matter of great concern for many occupations, not traditionally regarded as 'professions'. This will now become a matter which requires determination by the courts in the full range of cases in which 'professional' status has been asserted, such as chiropractors, psychologists, teachers, journalists. Perhaps just as likely is a challenge to whether the clergy, that has historically had professional status, can continue to make the claim to such status.

The New South Wales formulation is that a professional does not incur liability, if it is established that he or she acted in a manner that was widely accepted in Australia by peer professional opinion as competent professional practice[40]. However, such peer professional opinion cannot be relied upon if the court considers it to be irrational. Furthermore, this restriction does not apply to liability in connection with the giving, or failure to give a warning or advice in respect to the risk of death or injury to a person. This last provision has the consequence that the actual decision in the seminal High Court authority, *Rogers v Whitaker* – which involved the failure of medical practitioner to give advice to a person with one good eye of the most unlikely, but nevertheless extant, risk of an operation leading to the loss of sight in that eye – would still be decided in the same way[41].

This is likely to be an area that will require some period of litigation to determine the precise effect of the changes. Unlike the new system of proportionate liability, the operation of which has been suspended, these provisions will forthwith apply to cases of alleged negligence by lawyers, accountants and auditors. The possibility that the standards applicable in this respect will differ from those determined by the courts to apply under the Trade Practices Act and its state replicas, is a further layer of complexity that only a federal system like ours can enjoy. As litigation of this character is often national in an integrated national economy, the differences amongst the recent state Acts may become an additional burden in the litigation process. The identification of precisely where a national corporation committed certain acts is not something that is worth the time and expense that may well be required.

New South Wales and Western Australia have legislation which provide caps on liability with a quid pro quo of regulation of professional standards including a risk management regime. The caps are of limited effect because of the option to sue under the Trade Practices Act. A uniform national approach, with attendant complementary Commonwealth legislation, has recently been agreed but the details are not yet known. The scheme may be extended to medical practitioners for the first time.

Proportionate liability

A change that has been considered over a long period of time is whether or not the traditional common law position of solidary liability should be replaced by some form of proportionate liability. The rule is that a defendant is liable to compensate a plaintiff for the whole of the harm suffered and liability is not decreased by the fact that some other person's tortious conduct also contributed to that harm.

This matter was considered in 1992 by New Zealand's Law Commission, which recognised that there were arguments in favour of abolishing the rule. The commission was not convinced that it should be abolished, but it was influenced by the fact that others who had considered this change had also rejected it[42]. That was the case in Australia where consideration was given to the same issue at about the same time and no change eventuated[43]. Insofar as the commission was influenced by this parallel development in Australia, as appears to have been the case[44], that position has now changed.

In my view it is by no means clear why one defendant, because it is wealthy or insured, should, in effect, become an insurer against the insolvency or impecuniosity of co-defendants, who have contributed substantially to the pecuniary loss in question.

At no stage during the course of the recent debate in Australia did anyone advocate the introduction of proportionate liability for personal injury. When I revived the matter in the context of the checklist of possible reforms I advanced in my paper last year, I limited the possible change to a situation of financial loss[45]. In my view it is by no means clear why one defendant, because it is wealthy or insured, should, in effect, become an insurer against the insolvency or impecuniosity of co-defendants, who have contributed substantially to the pecuniary loss in question.

My understanding of what had happened with respect to the proposals for change in Australia in the mid to late 90s was that they had foundered on opposition from the Commonwealth Treasury which had administrative responsibility for the consumer protection provisions of the *Trade Practices Act 1974* (Cth). There was, and is, no point in introducing proportionate liability for the tort of negligence when almost all such proceedings could result in parallel proceedings under the Trade Practices Act, and the application of that Act throughout the Commonwealth by the uniform fair trading Acts of the states.

The Ipp Panel considered the issue of proportionate liability in the context of its terms of reference, which were limited to personal injury. It recommended that in that context proportionate liability not be introduced[46]. No parliament has sought to do so.

Nevertheless, this issue has been taken up by the parliaments with respect to actions for economic loss and damage to property, whether in contract, tort or otherwise and, particularly, extending to contravention of the Fair Trading Act.

With respect to actions of this character, the Act or Bill in some states[47] provides that the liability of a concurrent wrongdoer is limited to an amount 'reflecting that proportion of the damage or loss claimed that the court considers just having regard to the extent of the defendant's responsibility for the damage or loss'. There are a number of consequential and ancillary provisions to implement the scheme which at this stage differ from state to state[48].

There is one fundamental divergence amongst the schemes enacted or proposed. In Queensland, the Act excludes claims for damages of less than $500,000. That is to say in Queensland, unlike other states, solidary liability will remain the case for property damage or economic loss claims below the $500,000 threshold.

Neither Pt 4 of the *Civil Liability Act 2002* of New South Wales, nor Ch 2 Pt 2 of the Queensland Act have been proclaimed to come into effect. This is because the parallel Commonwealth scheme has not yet been announced. This delay is also affected by the desirability of efforts to achieve national uniformity. In both Western Australia and Victoria the proposals are still at Bill stage.

The Commonwealth and the states have set up a working party to create a more harmonious regime. There is no publicly agreed model at this stage. However, all will strive to reach a situation in which, at least, the fair trading Acts of the respective states remain identical with the Commonwealth Trade Practices Act and with each other. The political will for uniformity in all respects appears strong. There is scope yet for the emergence of the lowest common denominator phenomenon, so commonly triumphant in federal systems. It appears likely that there will be a common regime although specific variations could be accommodated such as the Queensland $500,000 threshold.

When Australia promulgates a coherent scheme in this regard, it will have a dramatic effect on certain kinds of litigation. The search for deep pockets, often in the form of a professional who is insured - a legal practitioner, accountant, auditor or valuer - will become much less of a determinant of litigation, particularly with respect to economic loss arising from corporate insolvency. A number of cottage industries – amongst liquidators, litigation financiers, expert witnesses - will be threatened by this change.

The courts will have to deal with a new kind of decision-making process similar to, but not the same as, an apportionment exercise between co-defendants. The determination of who is responsible, and in what proportions, for an ultimate loss in a case of insolvency between, for example, directors on the one hand and auditors or advising lawyers on the other hand, will give rise to some very difficult and complex factual issues. The issue will have to

be determined even if some of the persons whose conduct contributed to the loss are not parties to the proceedings.

Litigation of this character will be transformed. The risks to plaintiffs and, increasingly in Australia, to their independent financiers taking advantage of the abolition of the doctrines of maintenance and champerty, will be considerably increased. I anticipate that many such proceedings will no longer be pursued when, on an objective analysis, it appears that outsiders, whether accountants or lawyers, have little real responsibility for the demise of the corporation, in comparison with the responsibility of insiders. Nevertheless, for those proceedings that are worth pursuing even for a proportion of the ultimate loss, one can expect that the cases, historically lengthy, will be even longer than they have traditionally been because of the new issues that must be determined, that is, the identification of the appropriate proportion to be borne by the defendants who are able sued.

Mental trauma

It is difficult to justify at an intellectual level a different treatment for psychiatric injury from personal bodily injury.

Another area in which legislation has intervened is that of liability for mental trauma. As I understand the position in New Zealand under the *Accident Compensation Act 1982*, recovery was permitted for cases of mental injury unaccompanied by physical injury[49]. However, as compensation for pure mental harm had become a burden on the scheme, the reforms of 1998, continued in 2001, excluded mental injury not consequent upon physical injury or from a criminal offence of a sexual character.

Questions arise as to the identification of circumstances in which compensation under the Act is denied, because mental illness was not consequent upon the physical injury but the mental harm is still found to arise *indirectly* out of a personal injury and, therefore, is within the statutory bar now found in sec 317 of the Act[50]. However, a case of pure mental harm is not caught by the bar and, accordingly, the common law will apply[51]. It has been held that the bar does not apply if mental trauma is suffered by a person who observes or, presumably, subsequently hears of, personal injury to another[52].

There are, therefore, as I understand the position, circumstances in which damages for mental trauma can be pursued at common law. Accordingly, the Australian position in this regard is potentially relevant to New Zealand.

It is difficult to justify at an intellectual level a different treatment for psychiatric injury from personal bodily injury. However, as Fullagar J once warned us, we should resist 'the temptation, which is so apt to assail us, to import a meretricious symmetry into the law'[53].

The courts have consciously adopted, from time to time, control devices to prevent the floodgates opening in this respect. One such device was the rule that recovery for pure mental trauma could only occur if a plaintiff had directly observed events which caused the trauma. So a parent who had only heard about an injury to a child could not recover. This led in England to the case law distinguishing between primary and secondary victims. Another control element that had been adopted was to confine recovery to situations that could be described as 'nervous shock', i.e. where there had been a sudden assault on the senses. Both these restrictions were swept aside by the High Court of Australia late last year in *Tame v New South Wales*[54]. However, the court affirmed one aspect of the prior position that recovery at common law was not available for any form of mental distress, but is restricted to a recognised psychiatric condition.

Another issue raised in the judgments in the High Court was the test of normal fortitude, that is, is recovery for this kind of injury limited to situations in which a person of a normal fortitude would be liable to suffer mental trauma? This matter was not so clearly determined.

The two factual situations before the High Court were as follows:

In one case, a woman suffered an acute mental disturbance upon realising that a traffic accident report had referred to her as the person who was under the influence of alcohol, rather than the other driver. In the other case a father had suffered a psychiatric disturbance after being informed by the defendant of his son's death, which had occurred in circumstances of a failure by the defendant employer to properly supervise the young man notwithstanding express prior assurances to his parents.

Of the two cases it was quite clear that the woman who had been wrongly identified as under the influence was not a person of normal fortitude (and she lost). However, the parent's reaction to hearing of the death of a son was the kind of reaction that one could expect from a person of normal fortitude (and the parent won).

The person of normal fortitude test was apparent in prior case law[55]. The English position was that normal fortitude was still required for what they had come to call 'secondary victims', but not for 'primary victims'.

In *Tame; Annetts* the High Court discussion of the person of normal fortitude test was expressed in different ways[56]. There was scope for further refinement at common law in these differences. That will continue to be the case in New Zealand.

The Ipp Panel concluded that the judgment in *Tame v New South Wales*:

> establishes … that a duty of care to avoid mental harm will be owed to the plaintiff only if it was foreseeable that a person of 'normal fortitude' might suffer mental harm in the circumstances of the case if care was not taken. This test does not require the plaintiff to be a person of normal fortitude in order to be owed a duty of care. It only requires it to be foreseeable that a person of normal fortitude in the plaintiff's position might suffer mental harm. In this sense, being a person of normal fortitude is not a precondition of being owed a duty of care.[57]

The Ipp Panel recommended that the majority opinion which it detected in the judgments should be enshrined in statute. In some states, but not elsewhere[58], this recommendation has been accepted. The possibility of further development at common law will now be set aside by the application of a statutory formula which categorically states that no duty is owed to a person, unless the defendant ought to have foreseen that a person of normal fortitude might suffer a

recognised psychiatric illness. This is to be determined in accordance with 'the circumstances of the case', which circumstances expressly include reference to sudden shock, direct perception of death or injury and the nature of the relationship between the plaintiff and any person killed or injured or between the plaintiff and the defendant.

In New South Wales and South Australia, the legislature has gone beyond the Ipp recommendations by restricting recovery for pure mental harm to persons who directly witnessed a person being killed or injured or put in peril or were a close family member of the victim[59].

Brodie v Singleton Shire Council identified an ability on the part of the highway authority to excuse its failure to remedy the defect on the basis of limitations of its resources and the identification of other priorities.
Photo: Peter Barnes / News Image Library

The Ipp Panel recommended that claims for consequential mental harm – harm associated with physical harm – should be subject to the same constraints as attach to claims for pure mental harm. There are many cases in which physical impairment is minor but has led to substantial continuing effects which are mental rather than physical. This has been enacted[60].

Liability of public authorities

In 2002, the Australian debate extended to the liability of public authorities. One of the terms of reference of the Ipp Panel was to 'address the principles applied in negligence to limit the liability of public authorities'. The panel identified two types of cases as having given rise to concern. The first is where an authority is alleged to have failed to take care of a place over which it has some level of control, such as highways and national parks. Concern about the frequency of litigation of this character has been particularly acute at the level of local government.

The issue came to a head in the decision of the High Court in *Brodie v Singleton Shire Council*[61] in which the court abolished the rule that a highway authority was not liable for non-feasance. The majority judgments in that case, however, identified an ability on the part of the highway authority to excuse its failure to remedy the defect on the basis of limitations of its resources and the identification of other priorities. This has given rise to a substantial amount of disputation about the resources and priority decision-making processes of particular local authorities[62]. Liability with respect to such matters is likely only to arise in the context of personal injury.

The second kind of case identified by the Ipp Panel is not so limited. It is directed to liability of public authorities in contexts in which the relevant decision-making process involves political, economic, social or environmental considerations. Australian case law has not always allowed such factors to justify a failure to remove a risk.

The Ipp Panel considered whether or not a 'policy defence' should be available to all public authorities[63]. It identified a category of cases in which the interests of individuals after materialisation of a risk had to be balanced against a wider public interest, including the taking into account of competing demands on resources of the public authority. These kinds of 'public functions', which the panel said should not be defined and, therefore, be allowed to develop at common law, should be excluded from liability. The panel's recommendation was that in a claim for damages arising from the negligent performance or non-performance of a public function, a finding of negligence cannot be supported where there was a 'policy decision' involved. This was identified as a 'decision based substantially on financial, economic, political, social factors or constraints'. In such a case liability should only arise if the decision was so unreasonable that no reasonable public decision-maker would have made it, that is, a *Wednesbury* unreasonableness test.

The Ipp Panel's recommendations were confined, in accordance with its terms of reference, to personal injury matters. The relevant legislative changes are not so confined. Some states have pursued the Ipp recommendation for a policy defence. There are, however, significant differences from the panel's recommendations[64]. In New South Wales the defence is stated in terms of principles for determining whether a duty exists or breach has occurred. These principles include the proposition that performance may be limited by financial and other resources that are reasonably available to the authority, that the general allocation of those resources by an authority is not open to challenge, and that the conduct of the authority is to be assessed by reference to the full range of its functions.

Furthermore, an authority may rely on evidence of compliance with its general procedures and applicable standards, as evidence of the proper exercise of its functions[65].

In the case of alleged breach of statutory duty, that is, not alleged negligence, some Acts provide that any act or omission of the authority does not constitute such a breach unless the act or omission was so unreasonable that no authority could properly have considered the act or omission to be a reasonable exercise of its function. This is the adoption of the *Wednesbury* unreasonableness test for breach of statutory duty[66].

The New South Wales Act alone provides that a public authority is not liable for a failure to exercise a function to prohibit or regulate an activity if the authority could not have been required to exercise that function in mandamus proceedings instituted by the claimant[67]. This may well come to test the limits of proceedings by way of mandamus.

The cumulative effect of these changes is likely to be substantial. This is a matter on which pleas for national uniformity are likely to appear less compelling.

Exemplary damages

Notwithstanding the restrictions on common law actions in New Zealand, proceedings for exemplary damages are permitted. The New Zealand jurisprudence on this subject has developed over a period, culminating in the decision of the Privy Council in *A v Bottrill*[68]. To some degree, one suspects, this case law may reflect an attempt to redress perceived inadequacies in the level of compensation provided under the statutory scheme.

By definition the award of exemplary damages serves social purposes other than compensation. Punishment for egregious conduct will serve as a deterrent and also as a vindication of a plaintiff's rights. By majority, the Privy Council overruled the Court of Appeal which had held that an award of exemplary damages should be limited to the case of intentional wrongdoing or conscious recklessness.

Recent Australian legislation has dealt jointly with exemplary damages and with aggravated damages, which are a form of compensatory damages relating, as they do, to the additional injury suffered by a plaintiff in the form of mental suffering due to the manner in which a defendant behaved. The award of exemplary damages in this context has generated different views over a long period of time[69].

In Australia at various times over the years, states abolished both aggravated and exemplary damages in their respective motor vehicle accident regimes. In mid 2002, prior to the Ipp Panel, Queensland abolished such damages in all cases of personal injury or death and New South Wales in such cases where caused by negligence. The Ipp Panel recommended that that occur elsewhere. Subsequently legislation to that effect has been passed in the Northern Territory[70].

I am unaware that there has been any empirical research with respect to this matter. The issue has been dealt with in a broad brush manner that any form of 'extra' damages was something that should be taken away, in the interests of reducing insurance premiums. Exemplary damages were rarely awarded. I doubt that their abolition has made any practical difference to insurance premiums. The speed with which the changes have been introduced and the focus on controlling premiums did not permit the consideration of the various social purposes, other than compensation, performed by the law of torts.

It may be that these new restrictions will lead to a revival in proceedings, at least in the alternative, for the intentional torts, which have been somewhat sidelined by the tort of negligence for the last half century or so[71].

Conclusion

The process of change in Australian tort law is not complete. In a number of crucial respects the overriding wish that there be national uniformity will require modification of some of the recently enacted provisions. I have concentrated on those changes which impinge to a significant degree on areas other than personal injury. It is by no means yet clear where, in many of these respects, Australian law will come to rest.

One thing is clear, by a combination of a major change in judicial attitudes, led by the High Court, and wide-ranging legislative change, the imperial march of the tort of negligence has been stopped and reversed. New categories of liability, which were a feature of recent decades are now less likely to emerge.

There is one occasion when a court refrained from extending liability in a novel case. This was a claim for damages by a landowner of the costs of protecting and reinvigorating a 'beautiful oak tree' into which an errant motorist had crashed his Chevrolet. This led the Michigan Court of Appeals to be moved to verse, in lament.

The court's judgment as reported was:

> We thought that we would never see
> A suit to compensate a tree.
> A suit whose claim in tort is prest
> Upon a mangled tree's behest;
> A tree whose battered trunk was prest
> Against a Chevy's crumpled crest;
> A tree that faces each new day
> With bark and limb in disarray;
> A tree that may forever bear
> A lasting need for tender care.
> Flora lovers though we three,
> We must uphold the court's decree.
> Affirmed.

This, I emphasise, is the *whole* judgment. The headnote was also in verse. For the doubters amongst you, the reported case reference is *Fisher v Lowe* (1983) 333 NW 2d 67. You may find some consolation in the fact that the reason the oak tree lost was because it was not covered by the Michigan system of no-fault liability.

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1 J J Spigelman, 'Negligence: The last outpost of the welfare state' (2002) 76 ALJ 432.

2 *The New Yorker*, April 21 and 28, 2003, at p101.

3 *Kinzett v McCourt* (1999) 46 NSWLR 32 at [97]; cf at [116].

4 Spigelman, above n 1, 434-435.

5 Spigelman, above at n1, at 440.

6 *Antico v Heath Fielding Australian Pty Ltd* (1997) 188 CLR 652; *FAI General Insurance Co Ltd v Australian Hospital Care Pty Ltd* (2001) 204 CLR 641; *East End Real Estate Pty Ltd v C E Heath Casualty & General Insurance Ltd* (1991) 25 NSWLR 400.

7 Atiyah, *The damages lottery*, Hart Publishing, Oxford, 1997, Chapters 2 and 3.

8 See *Agar v Hyde* (2000) 201 CLR 552; *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254; *Rosenberg v Percival* (2001) 205 CLR 434; *Liftronic Pty Ltd v Unver* (2001) 75 ALJR 867; *Sullivan v Moody* (2001) 207 CLR 562; *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460; *Derrick v Cheung* (2001) 181 ALR 301; [2001] HCA 48; *Ghantous v Hawkesbury Shire Council* (2001) 206 CLR 512; *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 77 ALJR 183; *New South Wales v Lepore* (2003) 77 ALJR 558.

9 *Overseas Tankship (UK) Limited v Miller Steamship Co Pty Ltd* [1967] 1 AC 617.

10 (1980) 146 CLR 40 at 47.

11 Spigelman, above n 1, at 441.

12 *Rasic v Cruz* [2000] NSWCA 66 at [43].

13 *Tame v New South Wales; Annetts v Australian Stations Pty Limited* (2002) 76 ALJR 1348 at [98].

14 See *Miller Steamship Co v Overseas Tankship (UK)* (1963) 63 SR(NSW) 948 at 958-959. See also Spigelman, above n 1, at 442.

15 *Civil Liability Act 2002* (NSW), Pt 1A Div 2; *Civil Liability Act 2003* (Qld), Ch 2 Pt 1 Div 1; *Law Reform (Ipp Recommendations) Bill* (SA) (introduced 2 April 2003), cll 31, 32; *Civil Liability Amendment Bill* (WA) (introduced 20 March 2003), cl 8 (s 5B).

16 The Australian Capital Territory, Tasmanian and Victorian legislatures have not sought to enact the panel's formulation.

17 See *March v E & M H Stramare Pty Ltd* (1991) 171 CLR 506.

18 See, eg, *Barnes v Hay* (1988) 12 NSWLR 337 at 339F-G and 353E-F.

19 Commonwealth of Australia, *Review of the law of negligence: Final report* (September 2002) at [7.26].

20 See, eg, Jane Stapleton, 'Lords a'leaping evidentiary gaps' (2002) 10 TLJ 276.

21 See *Bonnington Castings Ltd v Wardlaw* [1956] AC 613.

22 See *Fairchild v Glenhaven Funeral Services Limited* [2003] 1 AC 32. See also *Bendix Mintex Pty Ltd v Barnes* (1997) 42 NSWLR 307 and Jane Stapleton, above n 20.

23 *Review*, above n 19, at [7.33].

24 *Civil Liability Act 2002* (NSW), Pt 1A, Div 3; *Civil Liability Act 2003* (Qld), Ch 2 Pt 1 Div 2; *Law Reform (Ipp Recommendations) Bill* (SA) (introduced 2 April 2003), cl 34; *Civil Liability Amendment Bill* (WA) (introduced 20 March 2003), cl 8 (Pt 1A Div 3).

25 *Civil Liability Act 2002* (NSW), sec 5D(2); *Civil Liability Act 2003* (Qld), s 11(2); *Law Reform (Ipp Recommendations) Bill* (SA) (introduced 2 April 2003), cl 34(2); *Civil Liability Amendment Bill* (WA) (introduced 20 March 2003), cl 8 (s 5C(2))

26 *Review*, above n 19, at [7.34]. The matter arose from observations in *Bennett v Minister of Community Welfare* (1992) 176 CLR 408 at 420-421; *Chappel v Hart* (1998) 195 CLR 232 at [27]; *Naxakis v Western General Hospital* (1999) 197 CLR 269 at [31] and [127]. See also *Bendix Mintex*, above n 22, at 315-316 and *Seltsam Pty Ltd v McGuiness* (2000) 49 NSWLR 262 at 278-280.

27 *Civil Liability Act 2002* (NSW), sec 5E; *Civil Liability Act 2003* (Qld), sec 12; *Law Reform (Ipp Recommendations) Bill* (SA) (introduced 2 April 2003), cl 35; *Civil Liability Amendment Bill* (WA) (introduced 20 March 2003), cl 8 (sec 5D).

28 See, eg, *Chappel v Hart*, above n 26 and *Rogers v Whitaker* (1992) 175 CLR 479.

29 *Review*, above n 19, at [7.39].

30 *Civil Liability Act 2002* (NSW), sec 5D(3); *Civil Liability Act 2003* (Qld), sec 11(3). These provisions add to the recommendation of the Ipp Panel an exception for statements of the plaintiff against his or her own interests.

31 *Bolam v Friern Barnet Hospital Management Committee* [1957] 1 WLR 582.

32 *Rogers v Whitaker*, above n 28.

33 See Todd, *The law of torts in New Zealand* (3rd ed), Brookers, Wellington, 2001 esp at 402-403.

34 *Bolitho v City and Hackney Health Authority* [1998] AC 232.

35 See *Health Care Liability Act 2001* (NSW).

36 *Review*, above n 19, at [3.9]-[3.11].

37 *Review*, above n 19, at [3.30].

38 *Civil Liability Act 2002* (NSW), Pt 1A Div 6; *Civil Liability Act 2003* (Qld), Ch 2 Pt 1 Div 5; *Law Reform (Ipp Recommendations) Bill* (SA) (introduced 2 April 2003), cl 41.

39 The Australian Capital Territory, Victorian, Western Australian and Tasmanian legislatures have not taken steps to implement this aspect of the Ipp Review.

40 *Civil Liability Act 2002* (NSW), sec 5O. In South Australia, the protection from liability extends to professionals who act 'in a manner that…was widely accepted in Australia by members of the same profession as competent professional practice' and in Queensland 'in a way that…was widely accepted by peer professional opinion by a significant number of respected practitioners in the field as competent professional practice.'

41 All three jurisdictions exclude from the application of the 'accepted professional opinion' test, liability claimed in respect of the giving of, or failure to give, a warning, advice or other information as part of a professional service in respect of a risk of personal injury or death. In South Australia, the exclusion is limited to cases involving the provision of a health care service. In Queensland, the recommendations of the Ipp Panel regarding a doctor's duty to warn have been enacted (*Civil Liability Act 2003* (Qld), s 21; see *Review*, above n 19, at [3.35]-[3.70]).

42 See Law Commission of New Zealand, *Apportionment of civil liability*, Preliminary paper No 19, Wellington (1992) and Law Commission of New Zealand *Apportionment of civil liability* Report No 47, Wellington (1998).

43 See Davis, Commonwealth of Australia, *Inquiry into the law of joint and several liability*, Report of stage 2 (1995); NSW Law Reform Commission, *Contribution between persons liable for the same damage*, Discussion paper No 38 (1997); NSW Law Reform Commission, Contribution between persons liable for the same damage, Report No 89 (1999), esp Ch 2. See also Swanton & MacDonald 'Reform to the law of joint and several liability – Introduction of proportionate liability' (1997) 5 TLJ 109.

44 See Todd, *The law of torts in New Zealand* (3rd ed), above n 33, at 1157-1158.

45 Spigelman, above n 1, at 446-447.

46 *Review*, above n 19, Ch 12.

47 *Civil Liability Act 2002* (NSW), Pt 4; *Civil Liability Act 2003* (Qld), Ch 2 Pt 2; *Wrongs and Limitation of Actions Acts (Insurance Reform) Bill* (Vic) (introduced 20 May 2003), cl 3; *Civil Liability Amendment Bill* (WA) (introduced 20 March 2003), cl 9.

48 Those provisions include, in all states adopting proportionate liability, the abolition of claims for contribution between concurrent wrongdoers, the capacity for the plaintiff to claim against concurrent wrongdoers in subsequent actions provided the total recovered does not exceed the actual loss suffered by the plaintiff, provisions for the joinder by the court of concurrent wrongdoers not having been the subject of a previous judgment and the preservation of the operation of vicarious liability and the several liability of partners. In addition, in the Queensland Act, joint and several liability is preserved against a defendant who committed an intentional tort pursuant to a common intention, was the principal of a liable agent, was engaged to provide professional advice which failed to prevent a loss caused by another, committed fraud or engaged in misleading or deceptive conduct in trade or commerce. Of the additional categories in the Queensland Act, Victoria has proposed to include only fraud and principals of agents. Victoria has also expressly preserved the court's power to award exemplary or punitive damages against a defendant in an apportionable proceeding.

49 Todd, *The law of torts in New Zealand* (3rd ed), above n 33, at p73 esp fn 35.

50 See, under the previous scheme, *Brownlie v Good Health Wanganui Ltd* (unreported, NZCA, 10 December 1998).

51 *Queenstown Lakes District Council v Palmer* [1999] 1 NZLR 549; see G McLay 'Nervous shock, tort and accident compensation: tort regained?' (1999) 30 VUWLR 197.

52 Mullany 'Accidents and actions for damage to the mind – Kiwi style' (1999) 115 LQR 596 esp at 597.

53 *Attorney General (NSW) v Perpetual Trustee Co Ltd* (1952) 85 CLR 237 at 285.

54 *Tame v New South Wales; Annetts v Australian Stations Pty Limited*, above n 13.

55 See my consideration of the cases in the court below, *Morgan v Tame* (2000) 49 NSWLR 21 at [14]-[20].

56 Cf Gleeson CJ at [16], Gaudron J at [61], McHugh J at [109] et sec, Gummow & Kirby JJ at [196] et sec, Hayne J at [273] and Callinan J at [366].

57 *Review*, above n 19, at [9.13].

58 *Civil Liability Act 2002* (NSW), sec 32; *Civil Liability Amendment Bill* (WA) (introduced 20 March 2003), cl 8 (sec 5P); *Law Reform (Ipp Recommendations) Bill* (SA) (introduced 2 April 2003), cl 33. Tasmania, Victoria, Queensland and Western Australia have not enacted the recommendations of the panel in this regard.

59 *Civil Liability Act 2002* (NSW), sec 30; *Law Report (Ipp Recommendations) Bill* (SA) (introduced 2 April 2003), cl 54. The South Australian provisions possibly cover a person present at the scene of the accident when it occurred but not actually witnessing the occurrence.

60 *Civil Liability Act 2002* (NSW), secs 32(1), (3) and 33; *Civil Liability Amendment Bill* (WA) (introduced 20 March 2003), cl 8 (secs 5P(1), (3) and 5Q); *Law Reform (Ipp Recommendations) Bill* (SA) (introduced 2 April 2003), cll 33(1), (2)(b) and 54(3)).

61 (2001) 206 CLR 512.

62 This may be attenuated to some degree by a recent decision of the Court of Appeal of New South Wales in which attention was directed to the obligations under the *Local Government Act* upon all councils to incorporate in their Annual Report an outline of the public works required to bring public facilities up to a satisfactory standard and an estimate of the cost of doing so. As all councils in New South Wales have to produce such a report on an annual basis it appears likely that councils will be readily able to establish the defence envisaged by the majority judgment in *Brodie*. See *Roads & Traffic Authority of New South Wales & Ors v Palmer* [2003] NSWCA 58, esp at [159]-[173]. Contrary to the recommendations of the Ipp Panel, three states have reintroduced the non-feasance immunity rule for highway authorities: *Civil Liability Act 2002* (NSW), sec 45; *Civil Liability Act 2003* (Qld), sec 37; *Law Reform (Ipp Recommendations) Bill* (SA) (introduced 2 April 2003), cl 42. In South Australia the immunity will apply only in negligence actions. In New South Wales and Queensland, the immunity does not operate where an authority had actual knowledge of the relevant risk.

63 *Review*, above n 19, at [10.20]-[10.29].

64 *Civil Liability Act 2002* (NSW), secs 41, 42; *Civil Liability Act 2003* (Qld), secs 34, 35; *Civil Liability Amendment Bill* (WA) (introduced 20 March 2003), cl 8 (secs 5R, 5T, 5U). The contents of the Annual Report referred to in note 62 above will be relevant to the new policy defence.

65 The New South Wales, Queensland and Western Australian provisions are closely similar in this regard. All three states have applied the 'principles' to bodies specified in the Act, constituted under other Acts, or identified (in respect of all or specified functions) by regulation. The Western Australian Bill in addition proposes the policy defence with respect to 'public functions' as recommended by the Ipp Panel.

66 *Civil Liability Act 2002* (NSW), sec 43; *Civil Liability Act 2003* (Qld), sec 36. In contrast, the Western Australian Bill adopts the 'compatibility' test recommended by the Ipp Panel, *Wednesbury* unreasonableness being a defence to all claims for damages against a public body or officer: *Civil Liability Amendment Bill* (WA) (introduced 20 March 2003), cl 8 (sec 5V). See Review, above n 19, at [10.34]-[10.45].

67 *Civil Liability Act 2002* (NSW), sec 44.

68 See *A v Bottrill* [2003] 1 AC 449, on appeal from *Bottrill v A* [2001] 3 NZLR 622.

69 See, for example, H Luntz, *Assessment of damages for personal injury and death* (4th ed), Butterworths, Australia, 2002, at [1.7.9]. See also *Review*, above n 19, at [13.163], [13.164].

70 *Review*, above n 19, [13.159]-[13.167]; *Civil Liability Act 2002* (NSW), sec 21; *Personal Injuries Proceedings Act 2002* (Qld), sec 50 (the provision is now at *Civil Liability Act 2003* (Qld), sec 52); *Personal Injuries (Liabilities and Damages) Act 2003* (NT), sec 19. The Queensland provision excepts cases of unlawful conduct with the intention of causing personal injury and cases of unlawful sexual assault or misconduct.

71 See *TCN Channel Nine Pty Ltd v Anning* (2002) 54 NSWLR 333 at [152]-[169

Professional liability of barristers

By Alistmer Abadee [1]

This paper presents a survey of certain aspects of the liability of barristers, as affected by some recent appellate court decisions. It also seeks to draw out the implications of those decisions for practice at the Bar. It finally refers to some of the recent federal and NSW government recommendations and proposals for reform of the law of negligence that may impact upon barristers' professional liability.

Duties of care

Duty to instructing solicitor?

In modern litigation, solicitors are increasingly showing a willingness to defend actions brought by clients against them on the basis that they relied upon the advice of counsel...

A barrister's concern to 'protect' her negligent solicitors when advising her client on an offer of compromise was proven to be misplaced in *Moy v Pettman Smith* [2002] Lloyd's Rep PN 513. The barrister in this case was found negligent in the advice she gave to her client in a medical negligence suit against a medical authority. One of the difficulties was that the instructing solicitor had inadequately prepared the client's case. This meant that the barrister, when faced with an offer of compromise from the medical authority, had to weigh many factors, including her assessment of the likelihood that the trial judge would allow her to adduce additional evidence, but also her concern that the client might have a good claim against her instructing solicitor.

The barrister said she believed the client did have a good claim against the firm, but also believed she had a duty to the firm. The English Court of Appeal held that the barrister's belief about the client's claim against the firm should have been communicated to the client if it was relevant to the client's decision to accept the offer of compromise.

New South Wales Barristers' Rule 111 provides a procedure to deal with this type of situation. The barrister must advise the solicitor of his or her belief that the client may have a claim against it; and if the solicitor does not agree to advise the client of the barrister's belief, must seek to advise the client of that belief in the presence of the solicitor.

In modern litigation, solicitors are increasingly showing a willingness to defend actions brought by clients against them on the basis that they relied upon the advice of counsel (or, alternatively, joining the barrister in the proceeding commenced against them by the client). The times are now such that a prudent barrister, who gives advice as to the preparation of a matter for hearing (including advices on evidence) should:

- expressly and clearly communicate what steps he or she requires of the solicitor in preparing the case; and
- be ultimately prepared, in the event that those steps are not undertaken within a stipulated time period, to advise the solicitor that circumstances may arise whereby the barrister may:

  (a) conclude that the interests of the client and solicitor may conflict; and

  (b) require the solicitor to disclose to the client (in writing, copied to the barrister) the barrister's belief that a conflict has arisen; or, alternatively, to allow the barrister to directly advise the client that a conflict has arisen;
- where the barrister does not have the luxury of time, the barrister may have to disclose this belief (that the client's and the solicitor's interests conflict) to the client directly.

Duty to co – counsel acting for same client?

In *O'Doherty v Birrell* (2001) 3 VR 147 the Victorian Court of Appeal relied upon certain public policy considerations for holding that a barrister did not owe a duty of care to prevent another barrister briefed in the same matter from suffering financial loss. The case arose from a costs order visited upon two barristers, imposed as the price of an adjournment application. The barristers were briefed, at different times, to represent a group of companies sued by a liquidator of another company. One of the barristers sued the other for fees that he could no longer recover from the client. The Victorian Court of Appeal found the following considerations militated against the imposition of a duty of care owed by one co – counsel to another:

- a clear potential conflict of interest between the barristers' duties to the client and those owed to co – counsel;
- co – counsel were not, relevantly, 'vulnerable' to, or reliant upon the other, to prevent him or her suffering financial harm; and
- policy interests militated against the imposition of a duty, such as falling public confidence in the profession, and the encouragement to a spate of satellite litigation ([45] – [49]).

Scope of duty to advise beyond retainer

One difficulty arising out of the recognition of concurrent liability (in tort and contract) for which legal practitioners may be exposed[2] is that a client (or third party) may allege breach of duty in tort for the practitioner's failure to perform something not in the practitioner's retainer.

Under general law, barristers' liability to clients is in tort, but in *Heydon v NRMA* (2000) 51 NSWLR 1 an issue emerged whether the barrister, who was briefed to advise on specific questions raised in a brief from the solicitor, had a duty to advise on additional matters. Malcolm AJA described the issue as a 'nice question': at [148].

Since I refer to this decision several times in this paper, it is convenient to refer to some salient facts about this case, as summarized in the headnote. The case arose out of the highly publicised demutualisation of the NRMA companies, from companies limited by guarantee to companies limited by both guarantees and shares. Two firms of solicitors were retained. At various times, and in respect to various issues, senior counsel's advice was sought. One such issue was whether the corporate restructuring should take place by way of a scheme of

arrangement, or whether a special resolution passed by the members would suffice. Senior counsel indicated that the latter would suffice.

At the time senior counsel gave this advice, the High Court had granted special leave to appeal in the case of *Gambotto*. The *Gambotto* decision was handed down 18 months later. It is sufficient to record, for the purposes of this paper, that *Gambotto* radically reordered the law in relation to the expropriation of shares of minorities; thereby potentially restricting the efficacy of special resolutions.

At first instance, the trial judge found that senior counsel was negligent, essentially:

(a) for failing to advert in his advice to the grant of special leave by the High Court in *Gambotto*;

(b) failing to follow up the special leave application by obtaining a copy of the transcript of argument;

(c) failing to advise that if the *Gambotto* appeal was upheld, it might be on grounds inimical to the validity of resolutions in general meeting having the desired effect. The Court of Appeal overturned these findings. An application for special leave was refused.

... the possibility cannot be discounted that the courts will look beyond the express instructions, or retainer, in assessing the liability of a barrister in tort for advice.

With that background in mind, I return to the issue posed above concerning the circumstances where a barrister, who is briefed to advise on specific questions, may have a duty of care to warn of matters which, though relevant to such advice, were not raised in instructions. This question has been looked at in cases involving solicitors, where liability may be concurrent in contract and tort. In *Hawkins v Clayton* (1988) 164 CLR 539 at 585, Deane J found that a solicitor could be under a duty to take steps, beyond the specifically agreed task (in the retainer) to avoid a real and foreseeable risk of the client suffering economic loss. This reasoning was relied upon by a majority of the New South Wales Court of Appeal in *Waimond Pty Ltd v Byrne* (1989) 18 NSWLR 642 at 652 to hold that a solicitor may be under an affirmative duty to advise even in relation to matters not directly within the ambit of the solicitor's retainer.

Both in the House of Lords[3] and in the High Court of Australia[4], primacy was given to the contract as the instrument that defined the rights and obligations of solicitor and client. In *Heydon* McPherson AJA picked up this reasoning to postulate that in the light of *Astley*, *Waimond* was no longer good law; and that there was no longer any duty in tort on the part of the solicitor to advise on matters going beyond the ambit of the retainer: at [364] – [365]. Malcolm AJA agreed with this view: at [309].

But in another solicitors' negligence case, *Curnuck v Nitschke* [2001] NSWCA 176, Davies AJA (with whom Meagher JA agreed) did not interpret Astley as foreclosing the possibility that tortious liability may arise for failing to warn a client of a matter to which it was entitled to be warned; nor interpreted *Astley* to mean that *Waimond* was no longer good law: at [13]. *Waimond* was also cited approvingly by Buchanan JA (delivering the leading judgment for) the Victorian Court of Appeal in *McGee O'Callaghan Gill Pty Ltd v Deacons Graham James* [2001] VSCA 105; [2001] ANZ Conv R 614 at [18] and was approved in *May v Mijatovic* (2002) Aust Torts Rep 81 - 668.

There is, arguably, practical reason to differentiate between the liability of a barrister and solicitor in this context. A barrister briefed to advise on a question regarding the legality of a transaction will, more often than not, be in a position of disadvantage (compared to the solicitor) as regards investigation of all factual matters relevant to such advice; particularly where more than one lawyer is involved in supplying advisory services in respect to the transaction. Nevertheless, it is submitted that the possibility cannot be discounted that the courts will look beyond the express instructions, or retainer, in assessing the liability of a barrister in tort for advice. If this is right, then a prudent barrister, asked to advise, should expressly set out in an advice or opinion:

- the question/s or issue/s upon which the barrister has been asked to advise;
- the information supplied to the barrister to supply the advice; and
- a statement that the advice is provided on the basis of this information.

Where the barrister comes across an issue or question for which he or she has not been specifically asked to consider, the issue or question should be referred to, but the barrister may state that he or she has not been asked to, nor proposes, to consider it.

Instances of liability

Duty to follow up

Another feature of the first instance decision in *Heydon* that caused consternation amongst barristers was the proposition that a barrister might have to advise a client of its rights on the basis of putative changes to the law that might be made following a grant of special leave to appeal to the High Court. McPherson AJA (at [387] – [391]) and Ormiston AJA (at [563], [654]) rejected the proposition, and cited several reasons, including that:

- there was no evidence of any practice among barristers in 1994 to follow up special leave applications (or to obtain a transcript of argument on appeal);
- any such duty would require barristers to obtain and read applications for leave to appeal from courts anywhere in Australia; then to obtain transcripts of the appeal hearings themselves);
- consistency in principle would demand that practitioners follow up prospective legislative changes to the law (also across Australia);
- advocates are not required to read the minds of judges who engage in socratic dialogue.

As a matter of fact, the first reason may arguably no longer apply for a barrister in 2003. Transcripts of special leave applications and of appeals are readily available to legal practitioners on the High Court website and other Internet services. Bulletins (including descriptions) of cases before the High Court are also readily available in electronic form. Barristers, like solicitors, are under a duty to keep themselves informed of the law; and that certainly requires an appreciation of recent High Court decisions. It would be hard, for example, for a barrister to defend advice that is contrary to High Court

authority, even if the decision is very recent or has not yet been reported, and it may even be difficult to defend advice that is contrary to the authority of intermediate appellate courts across the country.

Barristers who practice in a particular specialty might also reasonably be expected keep themselves informed of cases that are *before* the High Court that touch upon their specialty; although even if that is correct it is difficult to see what use (in terms of advice) a barrister may put a transcript of special leave applications or appeals that touches upon an area of advice for which he or she has been briefed. To say that one's advice may be affected by a pending decision in the High Court, or that the advice may change in the event that a High Court changes the law, is not saying that much.[5]

To say that one's advice may be affected by a pending decision in the High Court, or that the advice may change in the event that a High Court changes the law, is not saying that much.

Heydon makes it clear that a barrister is not required to *predict* how the High Court may develop or change the law. The facts in *Heydon* showed why this was so: all judges of the New South Wales Court of Appeal agreed that *Gambotto* represented such a radical departure from existing law that no reasonably competent barrister with expertise in the field would have concluded that the client's proposed corporate restructure could reasonably have been affected by it. The barrister's duty is to advise the client on the basis of accepted principle; not to speculate on what the law might be.[6]

Advice on settlement

The decision in *Moy v Pettman Smith* [2002] Lloyd's Rep PN 513 was referred to above, in considering the barrister's duty to the client and how that may conflict with the interests of the instructing solicitor.

To reiterate, the barrister's client, the plaintiff in a medical negligence suit, received an offer of compromise. The barrister recommended that the offer not be accepted, having regard to her assessment of the likely quantum of the client's claim if *all* expert evidence was admitted. The trouble for the client was that, partly as a result of the negligence of the solicitor, the evidence had not fully been prepared. The barrister, on the morning of the trial, recognised that the prospects of obtaining the court's leave to fill in the evidentiary lacuna was no more than 50 per cent; and that if such leave was granted, it was likely that an adjournment would be necessary; with the client to bear the costs of the adjournment.

The offer of compromise was renewed on the morning of the trial. The question, which the barrister faced from her client on the morning of the appeal, was whether, in the barrister's opinion, the client could do better (if the trial proceeded) than the sum of money offered. It was found that the barrister could not have rated her prospects of persuading the trial judge to allow further evidence in at greater than 50 per cent and that even if the evidence was let in, it would be likely to be at the price of an adjournment for which the client would bear the costs. By accepting the barrister's advice, in effect, *not* to accept the offer since the client could be expected to obtain a better result by proceeding with the trial, the client suffered a loss for which the barrister was found liable in providing negligent advice.

Hopeless cases

Apart from the statutory[7] prohibition upon barristers providing legal services in respect to claims (or defences) for damages without a reasonable belief that the claim (or defence) has reasonable prospects of success, barristers may, of course be liable in the tort of negligence for failing to advise a client that their case is a hopeless one. The decision in *Kolavo v Pitsikas* [2003] NSWCA 59 is a recent example. That presents the potential scenario that a barrister may be exposed to a sizeable economic detriment in the event he or she acts for a client in a hopeless case: the barrister might be liable:

(a) to the client for damages for negligence, represented by the costs associated with a failed action; and

(b) to the imposition by the court of an order[8] that the barrister indemnify the client's opposing party for the costs of such action.

Liability under consumer protection legislation

A claim was leveled against a barrister in *Boland v Yates* (1999) 74 ALJR 209 that he had contravened the prohibition against engaging in misleading or deceptive conduct in trade or commerce. The factual context of Boland was, relevantly, that the respondent corporation lodged a compensation claim in the Land & Environment Court following the compulsory resumption of land. The claim went on appeal to the New South Wales Court of Appeal, where Handley JA observed that one basis – which had not been authoritatively recognised in academic works or judicial decisions concerning valuation law - for a 'special value' claim for compensation had not been pursued by the respondent. The respondent then sued the solicitors' firms and barrister for failing to identify and pursue this particular basis for the compensation claim.

The misleading conduct was put on two bases: implied representations and failure to disclose. As it happened, this statutory action did not add anything to the negligence action. The basis for that action was that the barrister failed to identify, and subsequently pursue, a special claim for the value of compensation. The trial judge found against the client on the statutory action since:

(a) the barrister's conduct was inadvertent, not deliberate; and was not misleading; and

(b) the conduct did not fall within the statutory definition of professional activities.

As a sidelight, it might be wondered how the barrister would have fared if he had pursued this cause of action. Gleeson CJ noted that no one, except for Handley JA, had discerned this particular claim before. Might the barrister have had reasonable grounds for believing that this claim had reasonable prospects of success?[9]

Barristers briefed to advise on complex matters by dint of specialist expertise may be wary of the dicta in *Heydon v NRMA* (2000) 51 NSWLR 1, to the effect that the expression of an opinion may carry with it an implied representation of underlying knowledge or expertise of the opinion giver, or that the advice or opinion was given in the exercise of reasonable care: at [330], [432] & [692]. This dicta extends the potential for liability under consumer protection legislation beyond what the trial judge held in *Yates*. Most barristers would, presumably, feel comfortable about the implication being drawn that their advice or opinion was being tendered with reasonable care. But in complex matters, a barrister who did not consider that he or she had particular expertise would, on the basis of *Heydon*, have to expressly indicate this to overcome an implication being drawn.

There are three further matters on the subject of the *Trade Practices Act 1974* (Cth) and barristers' liability that I wish to touch upon.

First, in *Boland v Yates* (1999) 74 ALJR 209, Gaudron J raised the spectre of an individual's liability under the Trade Practices Act, on the basis that its operation could extent to conduct involving the use of postal, telegraphic or telephonic services: at 229.

Secondly, in other professional standards schemes (solicitors and accountants), they do not limit liability for contravention of the federal statute.

Thirdly, barristers might, as an alternative means of limiting liability, seek to utilize sec 68A(1)(b) of the Trade Practices Act, by inserting in their retainers a provision to the effect that the barrister will resupply a service at no additional charge. This may be more difficult for a barrister to do when acting directly for a client, since a court may conclude that it was not fair and reasonable for a barrister to insert such a clause.

The imposition of costs orders against barristers for the conduct of litigation has become a very real feature of the landscape of barristers' liability.

Immunity

Crown Prosecutor immunity

In *Cannon v Tahche* [2002] VSCA 84, a member of the independent Bar in Victoria, acting as crown prosecutor, was sued, along with his instructing solicitor, for the tort of misfeasance in public office. The misfeasance was alleged to consist of a failure to disclose material information relevant to the accused's defence in a rape trial. At first instance, the trial judge determined, at an interlocutory level, that the barrister and solicitor not only acted as holders of public office, but that the immunity protecting them from suit for damages did not apply.

The findings that the barrister and solicitors each held public office were overturned on appeal. This made it unnecessary to consider the immunity issue. An application for special leave to appeal the decision to the High Court has been filed.

On the immunity issue, the judge at first instance equated the tort of malfeasance in public office with the torts of abuse of power and malicious prosecution. Smith J also found that the policy considerations underscoring the immunity that were recognised in *Giannarelli* did not apply to the tort of misfeasance in public office.

There are several difficulties with this finding on immunity:

- the court should not have dealt with the issue at an interlocutory level when the factual matrix was not settled: there was a real issue as to whether the information the accused said he was entitled to was disclosed by the crown prosecutor;
- the court might, with some plausibility, have found that the misfeasance complained of – failure to disclose information – did not have an 'intimate connection' with work performed in court. In this respect, the court equated the act with the failure to properly discover documents in civil proceedings;
- the finding on immunity may lead to the incongruous situation of a crown prosecutor being exposed to liability for misfeasance; whilst the defence's team of legal representatives continue to enjoy the immunity. This may have real practical consequences if the defence team obtained, but did not competently use, the information from another source. Issues of causation and contribution may be problematic in this context;
- there was little evidence to support the notion that judicial reinforcement was needed to reinforce the prosecutor's 'duty to disclose'; and
- the judge gave no consideration to the notion[10] that, because of the special nature of criminal trials, the participants should simply be subject to the court's inherent disciplinary powers.

Cannon is presently the subject of a special leave application to the High Court. Should the High Court grant leave and allow the appeal, it is likely that the matter will be remitted back to the Victorian Court of Appeal to deal with the immunity issue.

Costs

The imposition of costs orders against barristers for the conduct of litigation has become a very real feature of the landscape of barristers' liability.

Section 198N(4) of the *Legal Profession Act 1987* (NSW) creates a limited statutory exception to a barrister's duty of confidentiality to the client. The provision is triggered by a finding of the court – in any civil claim for damages – that the facts established by the evidence did not form the basis for a reasonable belief that the claim or defence had reasonable prospects of success (sec 198N(1)). That finding will result in a presumption that legal services provided on a claim or defence were provided without reasonable prospects of success.

Section 198N(4) permits a barrister, who seeks to get around the presumption, to produce information or a document, despite any duty of confidentiality in respect of a communication between the solicitor and barrister if:

(a) the client consents to its disclosure; or

(b) the court is satisfied that it is necessary for the barrister to produce the information or document in order to rebut the presumption.

The House of Lords' decision in *Medcalf v Mardell* [2002] 3 WLR 172 provides some further comfort for barristers who, when faced with an application brought against them for wasted costs, find it difficult to get the client to agree to the disclosure of confidential information. In *Medcalf*, the barrister alleged fraud and impropriety against the client's opponent. That opponent ultimately sought costs against the barrister personally, on the basis that the barrister did not have sufficient material to sustain those serious allegations.

Lord Bingham, who delivered the leading judgment, laid out a very careful sequence of steps for courts to follow when tempted to make wasted costs orders against barristers who are precluded from giving a full explanation for their conduct. Lord Bingham said that a court should not make a wasted costs order against a practitioner precluded from privilege from providing a full answer without satisfying itself that it was fair to do so. In particular, the court ('proceeding with extreme care') should be satisfied that:

(a) there was nothing the practitioner could say, if unconstrained, to resist the making of the order; and

(b) in all the circumstances, it was fair to make the order.

Legislative reform affecting barristers' professional liability

Finally, I want to address some of the reform proposals arising from the Ipp Panel's *Review of the Law of Negligence* and the NSW Government's *Civil Liability Act 2002*. The latter will apply, with certain exceptions, to any claim against a barrister for damages for 'harm' resulting from negligence, whether the claim is brought in tort, under statute or otherwise.[12] The concept of 'harm' includes economic loss.[13]

Peer professional opinion

The Ipp Panel's proposal to re – introduce a modified version of what was known as the *Bolam* test was, in terms, restricted to medical practitioners. Nevertheless, the panel contemplated that the courts would extend the test to other occupations. I have argued that it is likely that the courts across Australia will take up that invitation.[14] The New South Wales Parliament pre – empted this possibility, however, by legislating its own test for the standard of care expected of all professionals.

The standard of care for barristers in NSW has now broadly been brought into line with the Ipp Panel's recommendation...

The Ipp Panel's proposal, as applicable to barristers (as a 'service – provider'), is that it will *not* be negligent if he or she supplied the service in accordance with a practice widely held by a significant number of respected practitioners in the field, unless the court considers the practice irrational. The standard of care for barristers in NSW[15] has now[16] broadly been brought into line with the Ipp Panel's recommendation and is to the following effect:

1. A barrister will not incur a liability arising from the provision of a professional service if it is established that he or she was acting in a manner that (at the time the service was provided) was widely accepted in Australia by professional peer opinion as competent professional practice.

2. However, peer professional opinion cannot be relied on for the purposes of the section if the court considers that the opinion is irrational.

3. The fact that there are differing peer professional opinions widely accepted in Australia concerning a matter does not prevent any one or more (or all) of those opinions being relied on for the purposes of the provision.

4. Peer professional opinion does not have to be 'universally' accepted to be considered 'widely' accepted.

No doubt this defence will encourage the incidence of defendant barristers adducing expert opinion evidence on the issue of the standard of care in contested hearings, but defendants would do that anyway in cases where there was a serious issue of whether the barrister's conduct discharged the standard. A barrister the subject of a claim could, arguably, have previously adduced expert opinion evidence to the effect that his or her acts or omissions were in accordance with reasonably competent practice.[17] Where a credible barrister gives expert opinion evidence, based upon proved facts, that a barrister acted in a manner widely accepted by peer professional opinion as competent professional practice, it would be a rare case that the defendant barrister would be found negligent. Further, with court rules these days providing for joint expert conferences, it may become even less likely that a judge would have to adjudicate on conflicting expert evidence concerning practices 'widely held by respected practitioners' or 'peer professional opinion (of) competent professional practice'.

This legislative 'defence' goes one step further, however, by requiring defendant barristers to also establish that the relevant practice was 'widely accepted'. Presumably, this might be proved by the defendant barrister leading expert opinion evidence from a number of barristers (preferably those with stature and eminence) who will say the same thing: that, in their experience, the practice was as follows etc. They might also say that their view about whether a practice was 'widely accepted' was formed from conferring with barrister colleagues at seminars, or lunch – times in the Bar Association Common Room. A defendant barrister may even seek support from the practices of barristers in other parts of the country; if those practices vary, but that is hard to imagine.

The 'defence' has nothing to say about whether the barrister's conduct has caused loss and one might expect that a judge may still disbelieve, or place little weight on expert opinion evidence of this nature, having regard to the usual reasons why judges do not accept expert evidence: that the facts sustaining the opinion are not established; that the barrister does not fully elaborate the basis for the opinion; that the so – called 'expert' was not sufficiently qualified etc.

How might the defence work in practice? Let us go back to the *Heydon* case as an example of a situation where a barrister, with special expertise, is sued for alleged negligent advice on a special point in a technical area of the law. The defendant barrister says he had regard to the terms of the relevant statute, legal textbooks in the area, and specialist law reports. But the plaintiff (client) case is that there was some mention, during a special leave application, of a point that is relevant to the transaction upon which the barrister was briefed to advise; and the barrister did not advise as to the significance of that point, nor the grant of special leave. For the purpose of this hypothetical, let us confine the alleged negligence to the failure to advert to the discussion of the point in special leave argument (and let us not consider questions of causation).

The defendant barrister might lead expert opinion evidence, from a barrister in this technical field of the law, in effect, to indicate that other barristers in that field would have followed exactly the same steps as the defendant did in reaching the advice; and, further, lead evidence that there was no widely accepted practice that required a barrister to look up transcripts of special leave applications (generally, or at all). However, the plaintiff might lead expert opinion evidence, from a barrister with comparable expertise in the technical field, in response to indicate that it was a widely held practice that barristers, with particular expertise, briefed to supply advice in technical areas of the law, looked up transcripts of argument in special leave applications.

In this example, for the defence to apply, the essential question is whether what the defendant barrister did was in accordance with widely accepted opinion concerning competent professional practice. Assuming that the defendant's experts' evidence was admissible and had weight, then it might be expected that this defence would ordinarily apply; unless the plaintiff could effectively destroy the expert evidence (by proving that the defendant barrister did not act in accordance with widely accepted practice). In this sense, the defence will undoubtedly be to the benefit of the defendant barrister.

On the other hand, the judge (and let us assume the judge was, as a former barrister, very experienced in the field of law

the subject of the dispute) might think that the ready availability of transcripts on the web site makes it 'irrational' for specialist barristers, asked to supply advice in technical area of the law, to disregard them, in supplying the advice in the circumstances it was supplied by the defendant. I suspect that in professional negligence suits against barristers (and solicitors), judges may more readily conclude that a practice that exposes a client to a foreseeable and avoidable risk will be irrational, regardless of the fact that it was widely accepted.[18]

Proportionate liability

One reform, which, if implemented, might be expected to have substantial impact upon the liability of barristers, is the proposal that proportionate liability replace solidary liability. This proposal is contained in Part 4 of the Civil Liability Act. The proposal, in broad terms, applies to claims against barristers for economic loss, as well as claims for damages for contravention of the prohibition against misleading or deceptive conduct in the *Fair Trading Act 1987* (NSW).[19] For constitutional reasons, the proposal cannot extend to any claims against barristers under the Trade Practices Act,[20] although there are indications[21] that the Commonwealth may amend that legislation to allow the states and territories to effectively introduce the concept.

Time does not permit me to trace through in detail the legislative proposal in this paper. If enacted, the proposal will have clear application in cases where a barrister is joined as a defendant by a former client in a negligence suit against the client's solicitors; or even where the solicitor joins the barrister to the proceeding. The important aspect of the proposal is that the barrister's liability in an 'apportionable claim', as a 'concurrent wrongdoer', is limited to the amount that reflects that portion of the damage or loss claimed which the court considers just, having regard to the extent of the barrister's responsibility or loss; and the court may give judgment against the barrister for no more than that amount (sec 35).

Some of the concerns expressed about proportionate liability – including that the risk of insolvency of a defendant is transferred to the claimant – arguably, in this context, lose force. In most cases where a barrister is joined, as concurrent wrongdoer, to an 'apportionable claim' the other 'concurrent wrongdoers' (solicitors, accountants etc) would ordinarily be insured. This may explain why the New South Wales Government (and Ipp Panel) distinguished between claims for economic loss (and property damage) and claims for personal injury; and restricted the proposal for proportionate liability to the former.

Capping of barristers' liability

The achievement of statutory caps on barristers' liability under the *Professional Standards Act 1994* (NSW) would, in combination with the new standard of care and proportionate liability, amount to a trifecta of benefits to barristers, in terms of statutory limitations on liability. Solicitors already have a professional standards scheme. Walker SC has announced the Bar Association's intention to seek approval for a barristers scheme under the Act.

One cloud on this horizon is the Commonwealth's reservations on the concept of statutory capping of liability, expressed in CLERP 9.[22] Any benefits that would accrue to barristers from having a capped liability for claims in tort, contract and the Fair Trading Act would not shield a barrister from exposure under Trade Practices legislation.

Causation

I should conclude with a final word on the proposed test for causation, which will apply generally across the board to litigation, including claims against barristers.

The test is contained in sec 5D of the Civil Liability Act.

Plaintiffs bringing claims for loss against barristers will, henceforth, have to prove:

(a) that the barrister's negligence was a necessary condition of the occurrence of harm to the plaintiff; and

(b) that it is appropriate for the scope of the barrister's liability to extend to the harm so caused.

The legislation does provide some guidance as to the circumstances in which these elements may be proved (sec 5D(2) – (4)) and whilst the terms of the new test may alarm those concerned as to the potential uncertainty surrounding the intrusion of policy factors into assessments of what is 'appropriate' to the 'scope' of a barrister's liability, arguably, such factors were previously quietly subsumed under the former test for causation; with its notions of 'common sense' or 'material contribution'. The new statutory test is likely to force the courts to articulate more clearly these policy factors. The most difficult cases are likely to be where a barrister's negligence is one of multiple causes for a client's loss.

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1 This paper was originally presented as part of the Continuing Professional Development Programme of the NSW Bar Association on 18 November 2002, and was subsequently edited in May 2003.

2 See the discussion of concurrent liability by the High Court in *Astley v Austrust Limited* (1999) 197 CLR 1

3 *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145

4 *Astley v Austrust Ltd* (1999) 197 CLR 1

5 This might be an 'obvious risk', for which a barrister is under no duty to warn: secs 5F – 5G of the *Civil Liability Act 2002* (NSW).

6 per Ormiston AJA in *Heydon* at [460], [653]

7 *Legal Profession Act 1987* (NSW) s 198J

8 Under sec 198M of the *Legal Profession Act 1987* (NSW)

9 per *Legal Profession Act 1987* (NSW), sec 198J

10 see *Arthur J S Hall & Co v Simons* [2000] 3 WLR 543 at 620.

11 These exclusions are referred to in sec 3B of the *Civil Liability Act 2002* (NSW)

12 Section 5A of the *Civil Liability Act 2002* (NSW)

13 Section 5 of the *Civil Liability Act 2002* (NSW)

14 Walmsley, Abadee & Zipser, *Professional Liability in Australia* (2002, LBC) at [3.760]

15 Section 5O of the *Civil Liability Act 2002* (NSW)

16 In its original state, there was no 'judicial override' given to the courts. Further, the scope of the rule was previously expressly confined to claims against professionals in tort and contract, but not to claims under the Fair Trading legislation.

17 *Heydon v NRMA Ltd* (2000) 51 NSWLR 1. It would be difficult for the barrister's opponent to argue that this type of evidence was inadmissible as going to the ultimate issue: sec 80 of the *Evidence Act 1995* (NSW)

18 see, for example, the rigour with which the English Court of Appeal analysed a standard practice in the solicitors' negligence case of *Patel v Daybells (a firm)* [2001] EWCA Civ 1229 at [59].

19 Section 34 of the *Civil Liability Act 2002* (NSW).

20 *Boland v Yates* (1999) 74 ALJR 209 per Gaudron J at 229

21 In the Federal Government's CLERP 9 report.

22 By contrast, a Senate Economics Reference Committee report in October 2002 considered that the NSW (& WA) legislation had the potential to reduce the number of claims through pro – active risk management and through establishing procedures to resolve disputes at an early stage. The Senate committee suggested that the Commonwealth encourage states and territories to consider adopting similar legislation with a view to achieving uniformity: [4.54], p.71. Interestingly, the committee did not consider whether the Trade Practices Act should be amended so as to prevent claimants suing under this legislation. There have been press reports that the Assistant Treasurer, Senator Coonan, is enthusiastic of ushering in a national system of capping for lawyers: *The Australian Financial Review*, 30 October 2002, p 13.

Fixing the Crimes Act

By Richard Button, Andrew Haesler and Chrissa Loukas [1]

Introduction

Many articles have been written by lawyers calling for an end to higher rates of imprisonment, longer sentences, and all of the other manifestations of regressive and fruitless law and order auctions. This article focuses on a different kind of reform, namely technical changes to the relevant legislative framework in order to make the criminal law clearer and simpler, and the criminal justice system more efficient.

No citizen, without considerable training as a legal researcher, along with access to a law library that includes English statutes and cases that stretch back to the Middle Ages, could know with precision what the criminal law of New South Wales actually is.

Current position

The substantive criminal law of this state[2] is by no means easy to grasp in its entirety. In order to do so, one needs to understand:

- the common law principles of criminal responsibility;
- the statutory provisions regarding the principles of criminal responsibility;
- the common law offences that still exist;
- the offences created by New South Wales statutes; and
- the English statutes that still apply in New South Wales, by way of the *Imperial Acts Application Act 1969* (NSW).[3]

To make matters worse, the central criminal statute of New South Wales is, to put it bluntly, a mess. As Judge Woods QC has recently demonstrated[4], the *Crimes Act 1900* (NSW), far from being a well thought out piece of legislation when it commenced, was rather a collation of various pre-existing pieces of legislation overlaying the common law. Since its commencement over one hundred years ago, it has become far worse, in that it has been used as the repository of last resort for countless disparate pieces of criminal law reform.

The upshot is that, as things stand, the Crimes Act is an almost incomprehensible jumble of provisions old and new.

For example, we defy any lawyer who claims expertise in criminal law to explain, without a deal of research, the definition of 'cattle' in sec 4 (and why yaks are not included); or what on earth secs 11 and 12 are getting at; or secs 166 and 167; or sec 515 (stealing fences whether alive or dead); or why the offence of 'secreting' a library book in sec 525 needs to be in the Crimes Act.

As well, the rate of piecemeal reform is getting faster, not slower. Almost every perceived 'law and order crisis' leads to some form of legislative response directed to a particular set of circumstances. Without time for consideration of the overall structure, the result is that the Crimes Act is becoming more and more ramshackle.

We suggest that, if things proceed as they are, the criminal law will become unworkable and unknowable. The result will be that judicial officers and lawyers will be unable to apply it properly.

Nor is this just a matter of concern for those who trust that lawyers and the courts can be relied upon to get the law right. It is fundamental that citizens be able to know what behaviour is prohibited by the state and what is not. No citizen, without considerable training as a legal researcher, along with access to a law library that includes English statutes and cases that stretch back to the Middle Ages, could know with precision what the criminal law of New South Wales actually is.

All is not entirely bleak, however. Two facts provide grounds for optimism.

The first is that a Model Criminal Code for Australia exists that provides a template that can, at the very least, be seriously considered by anyone trying to achieve well-thought out criminal law reform.[5] An important aspect of the Model Criminal Code is that it contains not only a coherent set of principles of criminal responsibility, but also simple offences in a structure that makes sense. As well, it formed the basis of the *Criminal Code Act 1995* (Cth), which commenced in December 2001, so one is able to see how it works in practice. In short, one does not need to follow the Code slavishly to get a great deal of benefit from looking at it.[6]

The second is that, over the past few years, there have indeed been some worthwhile structural reforms of criminal law in New South Wales. The abolition of the archaic concepts of felony and misdemeanour and related provisions, the creation of the *Crimes (Sentencing Procedure) Act 1999* (NSW) and the *Crimes (Administration of Sentences) Act 1999* (NSW), and the removal of the procedural provisions from the Crimes Act to the *Criminal Procedure Act 1986* (NSW) all constitute steps in the right direction.

Furthermore, the offences relating to contamination of goods that were inserted in the Crimes Act some years ago are derived from the Model Criminal Code and are very clear and concise.[7] So are the new computer offences[8] and the new kidnapping provisions.[9] These new offence provisions show that incremental reform, in these cases directed towards a limited kind of criminal behaviour, is achievable and valuable.

Proposal

It is time for the problem of the New South Wales Crimes Act to be addressed. We are not so optimistic as to expect wholesale adoption of the Model Criminal Code, although we note that the ACT has recently adopted its principles of criminal responsibility.[10] Instead, we put forward a plan for improvement that can be effected in a number of discrete steps, commencing with the easiest (both technically and politically) and culminating in the most difficult. We urge the new government to commence to fix the problem, as follows.

Have a concept of what should be in the Crimes Act, and implement it rigorously

The Crimes Act should contain:

- however much of the general principles of criminal responsibility are in statutory form, including criminal defences; and
- all serious statutory offences, namely those capable of being dealt with on indictment.

Everything else should not be in the Crimes Act. It should be as focused as possible on those two aspects.

Of course, there will be some common-sense exceptions. For example, the *Drug Misuse and Trafficking Act 1985* (NSW) works well as a stand-alone set of offences, and one would not seek to have indictable drug offences put in the Crimes Act. As well, there may be some procedural provisions and wholly summary offences that are so bound up with certain indictable offences that they should remain in the Crimes Act. But basically, the Crimes Act should contain the statutory concepts of criminal responsibility that apply to all offences, the serious statutory offences, and nothing more.

Furthermore, once the offences in the Crimes Act are re-organised into more sensible 'bite-sized chunks', they will be more amenable to focused reform...

Move the police powers to a new Act

To be fair, this has been done by way of the *Law Enforcement (Powers and Responsibilities) Act 2002*. When the Act will commence, we do not know, but it should be as soon as possible. The result will be that Parts 10, 10A and 10B will be gone from the Crimes Act, along with the powers in secs 563 and 578D.

Move all of the summary offences to the Summary Offences Act

The whole of Part 14A should be removed from the Crimes Act, along with any other wholly summary offences in the Act, subject to the exception discussed above. It can be seen that there are still very many wholly summary offences in the Crimes Act. Many of them are very old, most are anachronistic, and some of them are ridiculous. Some seem to be there to paper over gaps in the common law. All of them should be moved to the *Summary Offences Act 1989* (NSW). A number of them will be seen to be clearly unnecessary at that time,[11] and should be deleted from the Crimes Act without being re-enacted in the Summary Offences Act.

Move the provisions relating to the Supreme Court in its summary jurisdiction to the Criminal Procedure Act

The provisions in Part 13B allow for a certain procedure to be adopted with regard to criminal offences. Therefore they should be in the Criminal Procedure Act. In light of the fact that they are very seldom used, consideration should be given to abolishing them altogether.

Move the provisions relating to review of convictions and sentences to a stand-alone Act

Although some of the provisions in Part 13A permit referral of matters to the Court of Criminal Appeal, other provisions are to do with inquiries into convictions. The regime cannot sensibly be fitted into the *Criminal Appeal Act 1912* (NSW). For clarity and logical recognition of its unique nature, this regime needs to have its own Act.

Move the domestic violence provisions to a stand-alone Act

In accordance with the initial concept, these provisions in Part 15A should not be in the Crimes Act. Because of the unusual nature of the AVO regime, the provisions should be in a stand-alone Act. Furthermore, it is appropriate for there to be a stand-alone Act in order to reflect the seriousness of apprehended violence. Of course, because the offences of stalking and intimidation contained in sec 562AB are indictable offences, they should remain in the Crimes Act.

Move the current provisions regarding the general principles of criminal responsibility to the start of the Act

Even though the principles of criminal responsibility are very substantially to be found at common law in New South Wales, there are nevertheless quite a few statutory provisions that deal with the subject directly or indirectly. They are currently scattered throughout the Crimes Act. Examples include Part 8A with regard to attempts, Part 9 with regard to accessorial liability, sec 407A with regard to the abolition of the presumption of the existence of the defence of marital coercion, Part 11A with regard to the effects of intoxication on criminal responsibility, sec 417 with regard to proof of lawful excuse, and Division 3 of Part 11 with regard to self-defence.

It is true that a recent effort has been made to tidy these up, by creating Part 11—Criminal Responsibility—Defences. But it makes even more sense for these provisions to be moved to the front of the Act and re-organised. The opportunity should also be taken to double-check that the general statutory principles are expressed to apply to all offences, not just the offences contained in the Crimes Act.[12] The result should be that the reader first comes across so much of the general principles as are in statutory form, including any statutory criminal defences,[13] and then the specific statutory offences.

Reorganise and renumber the remaining provisions.

If all of the foregoing were achieved, one would have an Act that would contain:

- so much of the principles of criminal responsibility as are in statutory form;
- a large number of statutory indictable offences of various kinds; and
- a few intractable bits and pieces.[14]

At that stage, all of the sections of the Crimes Act should be reorganised into sensible parts and divisions, and renumbered. The order of the *Criminal Code Act 1995* (Cth) should be generally followed, for ease of cross-reference. Repealed sections and section numbers should not be included in any way, thereby clearing out a great deal of clutter that is currently there. Furthermore, the section numbers should recommence with each new part or division, so that repeated re-numbering of

the whole Act would not be necessary every time the Act is amended.[15]

All of the above could be achieved without difficulty. The changes require almost no thought at all, in that they are almost completely mechanical. The definitions of offences and defences would not have changed at all. Nor would maximum penalties have been altered (although the obvious anomalies in the area will need to be addressed one day). And yet the Crimes Act would be far more accessible and make far more sense as a result. One would know where to find all of the statutory provisions regarding the general principles of criminal responsibility, indictable offences, summary offences, and procedural matters. Furthermore, once the offences in the Crimes Act are re-organised into more sensible 'bite-sized chunks', they will be more amenable to focused reform, of the kind that has already occurred and is discussed in the review of the current position above.

What needs to be done is to sort out precisely the nature of the offences that are applied by the Imperial Acts Application Act, amend that Act by deleting any reference to imperial offence-creating statutes, and then re-enact the offences in the Crimes Act as necessary.

But having achieved all of that, the government should not rest on its laurels.

Abolish the current property offences and replace them with a simple, coherent regime

Current secs 93J to 193 and 250 to 307 of the Crimes Act legislate for well-known and reasonably straight-forward offences such as robbery, burglary, stealing, fraud, forgery and so forth. That approximately one hundred and fifty sections are required to achieve that goal, without the common law having been abolished with regard to the topic, seems astonishing. When it is borne in mind that the Model Criminal Code covers the same field with only about thirty sections, the current state of affairs can be seen to be laughable.

What is worse, far from being coherently organised,
the current sections are a 'crazy quilt' of provisions that assume knowledge of the common law and proceed on the basis of it, provisions that seek to plug gaps in the common law, and provisions that seek to plug gaps in other provisions.
The result is a farrago that few lawyers can sincerely claim to understand. In short, there can be no doubt that the property offences are the portion of the Crimes Act in most urgent need of root and branch reform.

It is noteworthy that South Australia, another Australian jurisdiction that founds its general principles of criminal responsibility on the common law, has very recently enacted a new set of property offences based to some degree on the Model Criminal Code provisions.[16]

We are aware that reform of the property offences along these general lines had been under consideration during the previous term of the New South Wales government. What is now required is implementation this year.

Abolish all common law offences and replace them with statutory indictable and summary offences as necessary

Does the offence of incitement of an offence that is not committed exist at common law? Can it be committed when the offence that is incited is a wholly summary offence? The offence of false imprisonment does not appear in the Crimes Act, but does it exist at common law? If so, what are its elements? Can one falsely imprison a person who is consenting, for example a child? These are not mere theoretical questions about the parameters of the criminal law; indeed, circumstances leading to the need to answer them will commonly arise. And yet doing so accurately is not easy. It will almost always require recourse to the law reports of a foreign country, and often they will be reports of old and obscure decisions. By their nature, of course, the answers to questions about common law offences are not to be found in any statute of any jurisdiction.

There should be an end to common law offences in New South Wales. All indictable offences should be able to be found in the Crimes Act and all summary offences in the Summary Offences Act. Offences of the importance of conspiracy and attempt should be clearly defined in the Crimes Act. Very many of the common law offences have been superseded by statute in any event.

All of the common law offences should be identified,[17] abolished, and re-enacted as simple statutory offences only as necessary.

Repeal the *Imperial Acts Application Act 1969* (NSW) as it applies to criminal law, at least with regard to offence-creating provisions.

The offence of treason is perhaps the most serious known to law. Although it forms part of the substantive criminal law of New South Wales, it is not contained in any statute of this state. Nor is it a common law offence. Amazingly, it is contained in 25 Edward III st 5 c 2, a law of the Parliament at Westminster of the year 1351, as amended by countless subsequent Acts of the same parliament. To define the elements of the offence would take many hours of location and consideration of archaic provisions.

Those provisions are applied to our jurisdiction by a New South Wales Act, the *Imperial Acts Application Act 1969* (NSW).[18] So are other offence-creating provisions relating to piracy.[19]

That state of affairs is completely unsatisfactory. Again, it is not merely a theoretical exercise to try to understand what is said by the criminal law of New South Wales to constitute treason, or indeed piracy.

What needs to be done is to sort out precisely the nature of the offences that are applied by the Imperial Acts Application Act, amend that Act by deleting any reference to imperial offence-creating statutes, and then re-enact the offences in the Crimes Act as necessary.

The same Act also applies to New South Wales certain Acts of the Parliament at Westminster that have a constitutional

aspect.[20] Many of those Acts have an effect on our criminal law.[21] In a perfect world, these provisions would be looked at as well. But we accept that any amendment and re-enactment of any of these provisions will be politically very controversial and technically very difficult.

Proceed to grapple with Chapter 2

Adopting a new set of principles of criminal responsibility will be neither easy for the government nor popular amongst lawyers and judicial officers. But at the moment self-defence is a statutory defence[22] but the closely-related defences of duress and necessity are not; the provisions in the Crimes Act relating to accessorial liability are a confusing jumble;[23] 'maliciously' and 'possession' are (confusingly) defined in the Crimes Act[24] but 'voluntariness' and 'intention' are not; and the presumption of the existence of the common law defence of marital coercion is abolished, but not, remarkably, the defence itself.[25]

By the time parliament comes to this step, the provisions of the *Criminal Code Act 1995* (Cth) will have been operating for some time. So will the ACT provisions. It will then be time for New South Wales to end the inaccessibility of the common law and to get all of the principles of criminal responsibility written down and in a public statute where they belong.

Conclusion

The Crimes Act has drifted along for over one hundred years. Although it has been frequently tinkered with, it has been not been the subject of thorough-going reform in that time. Templates for reform have been developed and enacted by the Commonwealth and other Australian jurisdictions. Governments often wish to be seen to be serious about criminal law reform. We submit that the process of serious reform of the Crimes Act must begin in 2003.

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1 Each of the authors have served as Director of the Criminal Law Review Division within the Attorney General's Department of New South Wales. They are all barristers and New South Wales public defenders.

2 By which we mean the general principles of criminal responsibility and the offences that are built upon them, as opposed to the rules of evidence and procedure that are adopted in criminal courts.

3 Of course, to understand the whole of the criminal law that applies in the geographical area of New South Wales, one needs to understand the Commonwealth criminal law as well, but that is beyond the scope of this article.

4 In *A history of criminal law in New South Wales, the colonial period* (Federation Press, 2002) at chapter 29.

5 For the discussion papers and final reports of the Model Criminal Code Officers' Committee, see www.law.gov.au

6 We confess to having been involved in its development. But that has not affected our favourable view of it in the least!

7 See Part 3C of the *Crimes Act 1900* (NSW).

8 See Part 6 of the Crimes Act.

9 See Division 14 of Part 3 of the Crimes Act.

10 See the *Criminal Code Act 2002* (ACT).

11 For example, parts at least of sec 523 mentioned above.

12 That has been a point of confusion in the past; see, for example, the terms of sec 417.

13 The exception should be the partial defences that are specific to the crime of murder, and any other 'offence specific' defences.

14 These will include Part 12 (transitional sentencing provisions abolishing the death penalty), Part 14 (transitional provisions regarding the old system of summary disposal of indictable offences), and secs 578A and 579 (for which it is hard to find a logical alternative home). But these can be neatly tucked away in a Part for miscellaneous provisions.

15 *The Criminal Code Act 1995* (Cth) has this very useful characteristic as well.

16 See the *Criminal Law Consolidation (Offences of Dishonesty) Amendment Act 2002* (SA), which commenced very recently.

17 A useful discussion is in Watson, Blackmore and Hosking, *Criminal Law* (NSW) (LBC).

18 See sec 6 and Part 2 of Schedule 2 of the Act, and sec 16 of the Crimes Act.

19 See sec 6 and Part 2 of Schedule 2 of the Act.

20 By way of sec 6 and Part 1 of Schedule 2. Examples are *Magna Carta 1297* and *The Bill of Rights 1688*.

21 See, for example, *Jago v District Court* (NSW) (1989) 168 CLR 23 and *Deitrich v The Queen* (1992) 177 CLR 292; and the discussion of the continuing effect of sec 8 of *The Habeas Corpus Act 1679* (31 Car II Ch 2) in Howie and Johnson, *Criminal Practice and Procedure in New South Wales* (Butterworths) [8-s 310D.10]. For an interesting attempt to rely on the Bill of Rights in a sentence appeal to the Court of Criminal Appeal, see *R v Boyd*, NSW CCA, 18 September 1995.

22 Division 3 of Part 11 of the Crimes Act.

23 Part 9 of the Crimes Act.

24 Sections 5 and 7 of the Crimes Act.

25 See sec 407A of the Crimes Act and the discussion at [6-715] of Criminal Practice and Procedure in New South Wales, op. cit.

A new approach to sentencing

Chris O'Donnell reviews an address given by The Rt Hon the Lord Woolf, the Lord Chief Justice of England and Wales, on his visit to Sydney in April 2003.

In a recent address to an Australian legal conference Lord Woolf cited statistics which 'demonstrate that the criminal justice system in England and Wales is doing even worse than our cricket team in achieving its objectives.'

Many of the problems in the United Kingdom identified by Lord Woolf have parallels in New South Wales. In particular, his complaint about the developing UK trend towards an unhealthy level of political interference in and control of sentencing has echoes here. To further torture his metaphor, it is doubtful whether the Australian criminal justice system could live up to the standards set by our all-conquering cricket team.

Lord Woolf quoted Sir Leon Radzinowicz, 'the father of criminology' who, with the accumulated wisdom of 92 years, encapsulated the problem thus:

> no meaningful advance in penal matters can be achieved in contemporary democratic society so long as it remains a topic of political controversy instead of a matter of national concern.

In recent times the politics of sentencing have, according to a number of reports cited by Lord Woolf, led to an overemphasis on punishment at the expense of deterrence and rehabilitation. As a result, UK prisons are overcrowded (there are 139 people in custody per 100,000, more than any other EU country – the Australian figure is 116), expensive (the annual cost per prisoner is $100,000 on average) and fail to rehabilitate (60 per cent of UK prisoners re-offend within two ears of release; 75 per cent leave prison without a job; 30 per cent leave prison homeless; 50 per cent have poor literacy skills and 70 per cent poor numeracy skills).

Lord Woolf noted that:

> The effectiveness of a criminal justice system has to be judged by the extent to which it can deter crime and reduce the pattern of further re-offending. These questions should be at the centre of the system.

Whilst not ignoring the importance of condign punishment, particularly as it has a bearing on the sense of grievance felt by victims and their families, Lord Woolf noted that prison overcrowding is 'a cancer eating at the ability of the prison service to deliver' rehabilitation, especially for lesser offenders. 'It is now accepted on all sides that prisons can do nothing for prisoners who are sentenced to less than 12 months', he said.

Lord Woolf did not pull his punches in sheeting home the blame for prison overcrowding to politicians anxious to secure votes in the law and order auctions that are now so prevalent:

> There is now a continuous upward pressure, and very rarely any downward pressure, on the level of sentences. The upward pressure comes from public opinion, and the media, the government of the day and parliament.

One initiative singled out by Lord Woolf for particular criticism in this regard as a 'politician's knee-jerk reaction' is mandatory sentencing. The criticism should, but may not, cause sober reflection upon the New South Wales Government's *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002*, which commenced earlier this year. This requires a sentencing court to fix a 'standard non-parole period' nominated in a schedule for an array of serious offences unless the court determines that there are reasons for setting a longer or shorter period. Despite the assertion that the legislation does not enact a mandatory sentencing scheme, the legislation may have the effect of doubling the average non-parole period for some of these offences.

Lord Woolf called for greater use of holistic, problem solving approaches, such as that exemplified by the community court at Red Hook Community Justice Centre in New York:

> At Red Hook, they seek to solve the neighbourhood problems like drugs, crime, domestic violence and landlord and tenant disputes by using a single judge who has an array of sanctions and services at his disposal, including community restitution projects, on-site training, drug treatment and mental health counselling. But the court's reach goes beyond what happens in the court. It reaches out into the community and engages the community in achieving justice.

He also provided an interesting insight into a proposed UK system of setting sentencing guidelines, which may, instead of being another form of mandatory sentencing, form part of a new approach to sentencing that takes 'questions as to the level of sentencing out of the political arena'. *The Criminal Justice Bill 2002* will establish a new Sentencing Guidelines Council, chaired by the Lord Chief Justice, and otherwise comprising members independent of the government. A sentencing judge will be expected to take the guidance of the council into account. The council, when setting guidelines, must take into account:

- the need to promote consistency in sentencing;
- sentences to which guidelines relate;
- the cost of different sentences and their relative effectiveness in preventing re-offending;
- the need to promote public confidence in the criminal justice system; and
- the views communicated to them by the Sentencing Advisory Panel.

This proposal seems to have advantages over the present system in New South Wales, which allows for the Court of Criminal Appeal to hand down guideline judgments on its own volition or on the application of the attorney general. Because such an approach is not consultative and must await the arrival of a 'suitable vehicle', it is left open to criticism from political and community elements to a greater extent than the proposed UK system. A further defect is the inability of the New South Wales Court of Criminal Appeal to issue a guideline judgment in respect of a Commonwealth offence. A coordinated Australia-wide approach that de-politicises sentencing is called for.

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Settlement being the value of the lost cause of action

By Michael Joseph SC *

In circumstances where a lawyer has been negligent causing a client's personal injury claim to be statute barred or dismissed courts, to date, have primarily assessed the client's loss by, firstly, assuming that the lost claim would have come to trial, secondly assessing the prospects of a verdict being obtained and thirdly then multiplying the damages by the assessed percentage of that prospect. Perhaps such an approach has been encouraged by the High Court decisions in *Johnson v Perez* (1988) 166 CLR 351 and *Nikolaou v Papasavas Phillips & Co* (1988) 166 CLR 394. However, in each of those decisions it was agreed that there was no issue that the original cause of action would have succeeded and thus it was assumed that there was no reason for reducing the damages for the prospect of a loss (or settlement). Those decisions did not involve consideration of any alternative to the method outlined above as to how assess the damages suffered by the plaintiffs in such circumstances.

I would like to consider another method of assessing the damages suffered by a plaintiff at the hands of a negligent solicitor who has lost a cause of action. The reasoning is as follows:

1. Damages awarded for torts are essentially compensatory so that the plaintiff should be awarded that which but for the negligence he/she would have received.

2. As over 85 per cent of civil causes of action (the original cause of action) settle, it is the 'settlement figure' which would more often than not properly and fairly quantify the damage suffered by a plaintiff.

3. There is authority to support this approach and no authority that would exclude such an approach.

Authorities dealing with the principles of recovery for a negligently lost cause of action

In *Johnson v Perez* the High Court dealt at length with the nature of the claim for damages of cause of action lost by the negligence of a solicitor who failed to prosecute within a reasonable time.

Mason CJ (at 355) observes that: 'The guiding principle in the assessment of damages is compensatory'.

The object is to award the plaintiff an amount of money that will, as nearly as money can, put him or her in the same position as if he had not been injured by the defendant.

Wilson, Toohey and Gaudron JJ (at 363) refer with approval to the judgment of Lord Evershed MR in *Kitchen v Royal Air Force Association* [1958] 2 All ER 241, which concerned the negligence of a solicitor who allowed a matter to become statute barred stated. Lord Evershed stated (at 251):

> In *my* judgment, what a court has to do (assuming that the plaintiff has established negligence) in each such case as the present, is to determine what the plaintiff has by that negligence lost. The question is: has the plaintiff lost some right of value, some chose in action of reality and substance? In such a case, it may be that its value is not easy to determine, but *it is the duty of the court to determine that value as best it can* (emphasis added).

As Wilson, Toohey and Gaudron JJ observe *Kitchen v Royal Air Force Association* was a case in which it was by no means certain, the plaintiff would have succeed had the matter not become statute barred. Their Honours quote Lord Evershed with approval (at 364) where he stated:

> If, in this kind of action, it is plain that an action could have been brought, and if it had been brought that it must have succeeded, of course the answer is easy. The damaged plaintiff then would recover the full amount of damages lost by the failure to bring the action originally. On the other hand, if it be clear that the plaintiff never had a cause of action, there was no case which the plaintiff could reasonably ever have formulated, then it is equally plain that the answer is that she can get nothing save nominal damages for the solicitor's negligence.

Their Honours comment:

> Because in his Lordship's view, the case before him fell into neither category, it was necessary to make the inquiry to which he referred in his judgment.

They then consider the decision of the Supreme Court of South Australia in *Tutunkoff v Thiele* (1975) 11 SASR 148 where Bray CJ held (at 150-151):

> Mr Fricker, for the plaintiff, contended vigorously that I was only at liberty to assess the plaintiff's chances of success in the lost action on the basis of evidence before me. In principle I do not think this is so because what I have to decide is what has the plaintiff lost by the defendant's negligence and what he has lost is what a court would have awarded him in an action by him against his employer…

Both Bray CJ and Lord Evershed MR were faced with a dual inquiry, namely, what the plaintiff's prospects of success were had the action not been statute barred and an inquiry into the damages to which he was entitled to by reason of the solicitor's negligence.

However, in *Johnson v Perez* it was common ground that the respondent would have succeeded in each of the claims against his employers (at 364). The court was thus not concerned with valuing a chance or prospect that the respondent might have lost. The joint judgment therefore considers only the second component in the assessment of damages, namely the manner in which the court would have assessed damages where the prospects of success of the lost action would have been certain.

Brennan J in *Johnson v Perez* considers the issue of valuing such claims more generally. He, like Wilson, Toohey and Gaudron JJ, quotes with approval the dicta cited above from *Kitchen v The Royal Air Force Association*. His Honour then states that where the plaintiff's chance of success in the action against the original defendant can be estimated at a particular percentage, that is not to say that the plaintiff's loss is to be calculated as a corresponding percentage of what would have been the assessment of damages if he had wholly succeeded in a trial of his lost cause of action. His Honour continues (at 372):

> The value of the lost cause of action cannot be assessed as though there were a market for doubtful causes of action in damages for personal injury. The value of the lost cause of action is not what a speculator would be prepared to offer the plaintiff as a price of an

* Michael Joseph SC, Maurice Byers Chambers.

> assignment of the cause of action. The plaintiff's loss being whatever monetary compensation he would have received at the time he would have received it but for his solicitors' negligence, the court must find whether or not he has lost something of value…*if the action would have been compromised, he lost what he would have been paid in settlement at the time when he would have been paid* (emphasis added).

His Honour therefore considered it appropriate to consider the fact of settlement even in circumstances where the plaintiff had good prospects. He then goes on to consider those cases where it is doubtful that the plaintiff would have succeeded in the original cause of action. In respect of these, his Honour stated (at 372) that the valuation should still proceed even if it was probable that the action would not have been compromised by the solicitor's delay.

Brennan J returned to this issue when he stated (at 377):

> The damages which a court assesses in an action for a solicitor's negligence are not identical with the damages which the court would assess in an action for the tort which caused the plaintiff's personal injuries. In both cases, the court may have regard to relevant losses which have occurred prior to the assessment or which are then foreseeable. But in the former case, the relevant losses are the amount which would have been received as compensation by the plaintiff if his action for damages for personal injury had earlier been tried or compromised ... together with the losses of delay in receiving the amount…*The solicitor cannot be called upon to underwrite a deterioration in the plaintiff's condition which was not foreseeable or not wholly foreseeable at the time when the original action should have been tried or compromised* (emphasis added).

I think that the possibility of a reasonable compromise must not be forgotten in assessing the value of the lost right to bring an action.

It is submitted that it is clear from the judgment of Brennan J that the damage for a lost cause of action could well be the sum that would have been received on settlement.

The remaining judgments of the High Court, namely those of Deane J and Dawson J, neither add to (nor detract from) the general principles outlined above by the other members of the High Court.

In *Nikolaou v Papasavas Phillips & Co* (1989) 166 CLR 394 the High Court was also concerned with a personal injuries action lost by the solicitor's negligence in allowing the matter to become statute barred. In the joint judgment of Wilson, Dawson, Toohey & Gaudron JJ, their Honours stated (at 404) that the injured client's damages should have been assessed:

> by reference to the loss at that date of the right to claim damages. That loss would ordinarily be quantified by the trial judge taking a broad brush approach to the several matters that in a particular case may require to be resolved ... in order to arrive at a figure representing the loss suffered by the plaintiff when his action against the defendant was dismissed.

I am of the view that there is nothing in either of these decisions of the High Court which is in conflict with my thesis that that the settlement figure would be the damages that a plaintiff has suffered in respect of a lost cause of action. In fact, there seems to be much by way of general comment and in Brennan J's specific comments in *Johnson v Perez* which supports my thesis.

The judgment of the full court of South Australia in *Dolman v Penrose* (1983) 34 SASR 481 was referred to in the joint judgment in *Johnson v Perez* with approval. Although the reference was a different issue, no criticism was made of the judgment. In *Dolman* the full court considered the manner of assessing damages where the original action was an action under the *Inheritance (Family Provision) Act 1972* (SA) which had not been commenced within time.

Bollen J, with whom Wells J agreed (and who formed the majority), noted that :

> For what is he to be compensated? Put in a rough but convenient way it is the lost chance to litigate. More precisely stated it is that which might reasonably have been expected to gain by litigation. In the word 'gain' I include the fruits of a judgment or a compromise. But the compromise contemplated must be one genuinely made i.e. the compromise of a claim recognised as arguable. Nothing should be taken into account for 'nuisance value.

Later his Honour stated (at 494):

> Those cases demonstrate what it is that must be assessed in an action against a solicitor for 'letting a right of action die'. The chance of success and its value, as best can be determined must be assessed. *I think that the possibility of a reasonable compromise must not be forgotten in assessing the value of the lost right to bring an action* (emphasis added).

Zelling J, in a dissenting judgment (on an issue not relevant to these comments) (at 483) observed that 'a court must always consider the fact that the plaintiff might have settled out of court for a lesser sum than the court would ultimately have given'.

This decision lends significant support to my thesis.

In *Julie Phillips v Bisley & Ors* (New South Wales Court of Appeal, Unreported, 18 March 1997) the court was concerned with a claim against a solicitor who negligently allowed a matter against one defendant to become statute barred. The plaintiff had received a settlement against the other concurrent tortfeasor in the sum of $30,000. One matter the court had to consider was whether that sum or some other sum was the plaintiff's true loss assuming the solicitor had been negligent.

Mason P (with whom Meagher JA and Dunford AJA agreed) quoted with approval the passage of Brennan J's comment in *Johnson v Perez* (at 373) in which he referred to the need to consider the prospect of possibly compromising the lost cause of action. The President noted that in both *Nikolaou* and *Johnson* there was no dispute that the plaintiff had lost something of value. Mason P then summarised the law as follows:

> In *Johnson* and other recent cases, the High Court has emphasized the court's duty in cases such as the value of the plaintiff's lost chance. [See also: *Sellers v Adelaide Petroleum* NL (1994) 171 CLR 332 at 354 and 362]. The lost chance has value even if the court reviewing the facts with 20:20 hindsight assesses the plaintiff's prospects of less than 50 per cent: *Commonwealth v Amann Aviation Pty Limited* (1991) 174 CLR 64 at 119; *Allied Maples Group Limited v Simons & Simons* (1995) 4 All ER 906 at 916, 928. This is because the plaintiff may have lost, through the lawyer's negligence, *the prospect of the favourable settlement offer*. The critical issue, now not clearly addressed in the cases, is how to distinguish between the derisory or 'nuisance value' offer which Lord Evershed MR in *Kitchen* would disregard and the situation where a case has sufficient 'prospects' for the court trying the negligence claim to be able to say that the plaintiff would have been likely to have attracted *a valuable offer of settlement* (even if worth considerably less than 100 per cent of the plaintiff's actual loss); [See: *Yeoman's Executrix v Ferries* (1967) SLT332].

> Difficult and elusive though the distinction may be, the court trying the issue of the lawyer's negligence must proceed on the evidence before it ... it also involves looking at the likely response of the other party or parties in the lost proceedings. (i.e. those which would, but for the lawyer's negligence, have been prosecuted in a timely way). *Among other things this requires the court trying the negligence claim to make dual allowance for the fact that a less than well informed or overall cautious lawyer for the defendant faced with a claim in the lost proceedings might have made a valuable settlement offer.*

This passage was recently approved in *Feletti v. Kontoulas* (2000) NSWCA 59 at paragraphs 37 and 38). In my opinion the judgment clearly supports the view that the settlement figure (which in *Phillip's* actually been reached and received) was a relevant benchmark as to the value of the lost cause of action.

Turning to overseas case law, there is some support for my thesis. English authority includes the decision *Malyon v Lawrence Messer & Co* (1968) 2 Lloyd's Rep 539, at 544 where Brabin J considered that the plaintiff was 'entitled to the lost fruits of the action or settlement of that action...'. The fact that settlement was unlikely was considered in *Dickenson v James Alexander & Co* (1990) 6 Lloyd's Rep PN 205, at 207. The plaintiff obtained a disadvantageous settlement in divorce proceedings because her solicitors negligently failed to obtain full disclosure of the husband's assets. In the subsequent professional negligence action, Douglas Browne J assessed damages against the solicitors on the basis of what a court would have ordered the husband to transfer to her. It was argued on behalf of the defendants that the original action might have been compromised for less than the amount the court might have awarded. The judge considered that the husband was not a man likely to have settled the original litigation and that therefore there should be no discount to the assessed damages.

...in Australia and overseas, there are clear obiter dicta where the courts have regarded the question of settlement as relevant.

The Scottish courts have more consistently taken settlement into account. In *Yeoman v Ferries* (1967) S.C. 255 (Outer House of the Court of Sessions) cited by Mason P in *Julie Phillips*, the defendants failed to issue proceedings in relation to an industrial injury claim. Lord Avonside held (at 264):

> I am of the opinion that an employer would have been advised to make an offer (to the plaintiff) ... I am at a loss to see why, in the appropriate case, that factor should not be taken into account.

In *Siraj - Eldin v Campbell Middleton Burness & Dickson* (1989 S.L.T. 1242) the plaintiff was dismissed for taking alcohol onto a oil rigger and his solicitors failed to bring an action before the Industrial Tribunal in time. The Inner House of the Court of Session held that any action against the employers was bound to fail and that furthermore, on the evidence, there was no prospect of any settlement before a tribunal hearing. In *Kyle v P & J Stormath Darling* (1994) S.L.T.191(Inner House of the Court of Session) stated that:

> Factors that may be taken into account in arriving at the monetary value of the loss may well include ... the lost possibilities of a compromised settlement with the third party in the now lost negotiation.

In the USA, courts have tentatively been willing to measure the damages in a lost cause of action by recognising the settlement value of a claim. (See generally the article 'Damages for Legal Malpractice: An Appraisal of the Crumbling Dike and the Threatening Flood', Bauman (1988) Vol. 61 *Temple Law Review* 1127, especially at 1148)

In *Duncan v Lord* 409 F.Supp 687 (1976) a US District Court considered expert evidence which firstly assessed the damages in a range in which a juror would have given a verdict and then in a range in respect of "settlement'. Because of the plaintiff's age and the nature of the injuries, it was more likely than not that her case would have settled short of trial. Interestingly the juror verdict range tendered on behalf of the plaintiff was from $150,000 to $300,000 and on behalf of the defendant from $100,000. In respect of settlement, the plaintiff suggested $125,000, being a 'low jury verdict', as the settlement range and the defendant suggested from $60,000 to $70,000. Judgment was entered for $122,000 which was well below the plaintiff's suggested jury verdict range. These ranges are indicative of the difference between the conventional method and the method I am proposing for assessment of the lost cause of action.

In some cases in the USA the acceptance of the proposed approach has been rather enigmatic. For example, in *Whitaker v State* (382 N.W. 2nd 112 lowa (1986), the court rejected a malpractice claim against the state attorney-general in charge of the Consumer Protection Division of the Attorney-General's Office. This was done in part on the ground that the client had not shown that any judgment obtained by the attorney-general against the alleged fraudulent business would have been collectible (at 115). However, the court also upheld the verdict for the attorney-general on the additional ground that the plaintiff had not shown that the business would have agreed to pay, or could have paid an acceptable settlement had the state attorney more fully advised the plaintiff of the progress of settlement negotiations (at 117). The language seems to suggest that the court might have been receptive to the claim based on the loss of a potential settlement if the plaintiff had shown that such an agreement was in the offering and that the settlement amount could in fact be paid.

Conclusion

There are neither recorded nor unreported Australian cases of which I am aware in which the question of settlement has been held to be irrelevant in considering the value of a lost claim. Indeed, in Australia and overseas, there are clear *obiter dicta* where the courts have regarded the question of settlement as relevant.

In establishing the likely settlement figure and thus determining what the plaintiff has lost, the courts would be adhering to the general principles of compensation law and would be applying the broad brush approach approved by the High Court of Australia in *Nikolaou*.

Practical implications

Firstly, the fact that the original action would have settled rather than been heard by the court would make significant differences to the running of a professional negligence action in a number of ways which are of practical importance:

1. The focus of the inquiry would not be on what would have

happened at the notional trial, but on what evidence would (or should) have been in the possession of the parties and as how the parties (and not the court) would have responded to that evidence.

2. Forensic points available to either side in settlement negotiations may not be the same as those that would be relied on at the trial.

3. The approach to the valuation of the lost cause taken by the parties would be likely to be more broad brush, rather than the detailed approach used by the courts in their assessments.

4. It is likely that the evidence available would be more limited, as the trial processes and the trial itself cause evidence to amass.

5. Credibility of witnesses would be of less significance in settlement negotiations as it would be difficult to estimate how a witness would have performed.

6. Finally, the attitudes of the parties would be significant in ascertaining the potential for settlement. For example, a legally aided plaintiff might be able to obtain a better settlement because the defendant might perceive a difficulty in recovering costs even if he/she won the trial. Conversely, a non-legally aided plaintiff of moderate means might be averse to risk, so the settlement figure might reflect that fact.

Secondly, there is likely to be a significant difference between the value of an action which is settled and one that goes to trial. This is obvious where liability is seriously in issue. However, it is my experience that plaintiffs in particular will significantly compromise their claims, even where liability is not in issue. They will compromise not only the more esoteric heads of damages (e.g. *Griffiths v Kirkemeyer* and the 'new' *Sullivan v Gordon* claims) but also damages generally, for the following reasons:

1. to obtain a certain sum without the uncertainties of a trial and appeals;

2. to avoid the judicial lottery;

3. to avoid the possibility of being 'not reached' if the matter is listed for hearing;

4. to obtain judgment moneys earlier than they would if they had to wait for a 'reserved judgement';

5. to minimise legal costs particularly solicitor/client costs, especially if a lengthy trial might occur; and

6. to obtain an inclusive costs figure that generally benefits the plaintiff's lawyers both as to quantum and the fact that the monies are received earlier than a plus costs order and avoid often protracted arguments over the quantum.

Needless to say, notional defendants accommodate plaintiffs who are prepared to compromise their rights significantly for the reasons just outlined.

Thirdly, the value of a claim in the lawyer's negligence action may vary if the dates of notional trial and the date when settlement occurs differ. There are several factors to be considered, including the arbitration system and interest rates. Rates may be different and the period of entitlement to interest may be different as settlement would occur earlier than say a judgment. This outcome might be to the disadvantage of the negligent lawyer as the interest component would probably rise, although this would be assumed on a much lower base figure.

Evidentiary needs

I suspect that not much attention has been given to the proposed alternative method of calculation of the value of the lost cause of action because it possibly involves evidence additional to the conventional method of assessment. It is my opinion that evidence of the following matters needs to be considered by a court if it is to be proposed that the 'settlement figure' is the value of the lost cause of action.

1. What was the plaintiff's attitude to settlement?

2. What was the notional defendant's attitude to settlement?

3. What information did both the plaintiff and the notional defendant have in their possession on liability and damages at the notional date of settlement ?

4. What was the likely range of settlement offers which both the plaintiff and the defendant would make, given the information in their possession?

5. If the claim went to trial, what costs might the plaintiff have been at risk of paying if there was a verdict for the notional defendant?

6. What capacity did the plaintiff have to pay those costs?

7. What is the capacity of the defendant to pay a settlement verdict?

8. What legal advice would the parties have been given in the circumstances and what is the likelihood of that advice being accepted?

9. As large corporations or insurance companies are experienced litigants, unlike most plaintiffs, they would have available advice on matters such as settlement figures, independent of legal advisers. That such advice might need to be proven from such witnesses as claims managers and loss assessors including the likelihood of accepting legal advice.

Most of this evidence is of a non-expert kind. Some might consider it to be of such a kind as that of which a court would have 'judicial' knowledge. However, reports from experts would be required as to what legal advice would have been given to both parties given the state of the law and evidence. I doubt that 'general knowledge' as to the fact that most cases settle (a fact of which the courts themselves would have knowledge) would suffice in a given matter as to that matter's prospects of settlement.

Conclusion

It is submitted that the damage suffered by a plaintiff who has lost his or her cause of action because of the negligence of a lawyer can in fact be the loss of a settlement offer that the notional defendant was likely to have made and that the plaintiff was likely to have accepted. Authority would support this view.

The practical outcome is more likely than not for the verdicts in favour of plaintiffs will be less than is presently award in such cases.

Whether a court should prefer the conventional method of assessment or that proposed in this paper will depend of the state of the evidence before the court. However, the court in both events would be trying to predict the value of the 'lost chance', so there is the possibility of a court arriving at a compromise figure somewhere between the two outcomes.

Bench & Bar Dinner

On Friday, 16 May 2003 the Bench & Bar Dinner was held at the Westin Sydney. The Guest of Honour was the Hon Justice Dyson Heydon, Francis Douglas QC was 'Mr Senior' and Mark Leeming was 'Mr Junior'.

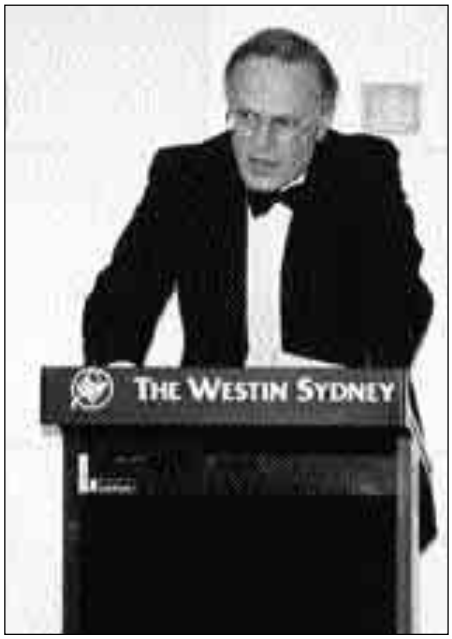
Mark Leeming

Bret Walker SC

Frank Lever SC, John Ireland QC, and Peter McEwen SC

The Hon Justice Michael Adams, the Hon Justice David Kirby, Chrissa Loukas and Domonique Hogan-Doran

Julia Quilter, Natalie Adams and Jacqueline Fredman



The Hon Justice Dyson Heydon

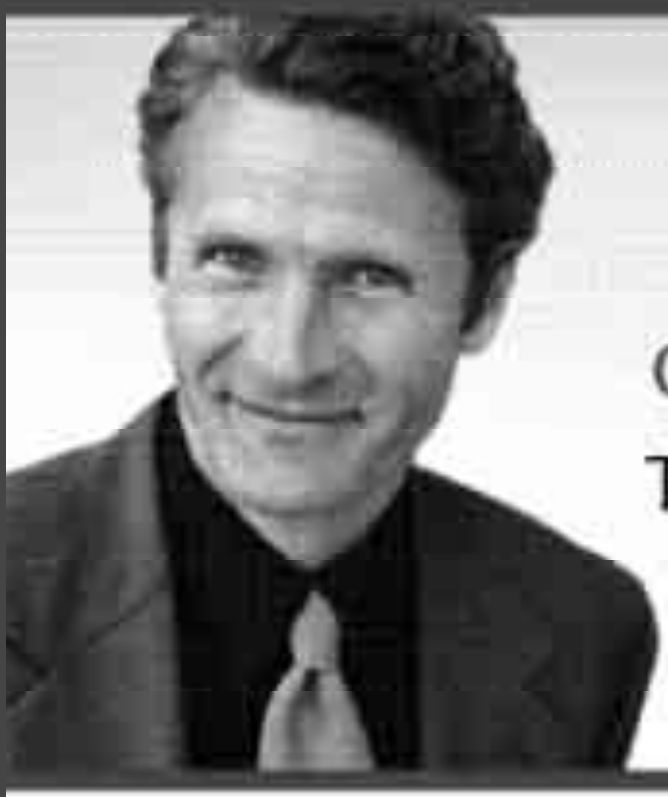
Senator, the Hon Helen Coonan and Michael Slattery QC

The Hon Justice Michael McHugh AC and the Hon Justice David Kirby

The Hon Justice Annabelle Bennett and John Sheahan SC

Francis Douglas QC

Felicity Rogers, Lee Aitken and Sara Lovett



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Court – ordered mediation: Is it undesirable?

By Robert Angyal *

Synopsis

Most New South Wales courts now have the power to refer proceedings to mediation whether or not the parties consent. Many barristers believe that this is undesirable because compulsory mediation is a contradiction in terms and is futile.

...many barristers believe that ordering parties to mediation against their will is futile because parties who are compelled to participate will attend grudgingly, merely go through the motions and do the bare minimum to comply with the court's order.

But, in practice, most mediations are voluntary only in an attenuated sense. And there is no necessary contradiction involved in requiring parties to participate in a compulsory process that might produce agreement between them. In practice, parties at 'compulsory' mediations behave in much the same way as at 'voluntary' ones. The statutory obligation to participate in court-ordered mediations 'in good faith' should assist this trend.

The two practical consequences for barristers are, firstly, that they should use their skills to attempt to ensure that proceedings are not ordered into mediation before they are suitable for mediation; and, secondly, that they should use their skills to prepare themselves and their clients for the mediation adequately, whatever the genesis of the mediation.

Background: The legal framework

All New South Wales courts now have the power to order matters to mediation with the consent of the parties: e.g. *Local Courts (Civil Claims) Act 1970*, sec 21M. The Supreme Court and the District Court now have the power to refer matters to mediation whether or not the parties consent: *Supreme Court Act 1970*, sec 110K(1); *District Court Act 1973*, sec 164A(1). If they do so, the parties have a duty to participate in the mediation 'in good faith': sec110L; sec 164B. While no statistics are available, anecdotal evidence indicates that both courts are using their power.

Various other NSW statutes provide for compulsory mediation before proceedings can be commenced, e.g., *Retail Leases Act 1994*, sec 68; *Farm Debt Mediation Act 1994*, sec 8. The Federal Court also has the power to refer matters to mediation without the parties' consent: *Federal Court of Australia Act 1976*, sec 53A(1), (1A).

Both the Supreme Court and the District Court have issued practice notes relating to their powers to order mediation: Supreme Court Practice Note 118 (8 February 2001); District Court Practice Note Number 33 (effective 1 January 2002). They are discussed in the last section of this article.

* Robert Angyal is Chair of the Bar Association's Mediation Committee. The views expressed in this article are those of the author and not necessarily those of the Mediation Committee or the Bar Association.

Is court-ordered mediation a contradiction in terms?

Many lawyers hold the belief that compulsory mediation is a contradiction in terms. They believe this because (by definition) a mediation can only produce a settlement by agreement of the parties and the parties cannot, of course, be forced to agree. Accordingly, they reason, it is pointless to order parties to engage in mediation if they are unwilling to mediate. See, e.g., Walker and Bell, 'Justice according to compulsory mediation: *Supreme Court Amendment (Referral of Proceedings) Act 2000* (NSW)', *Bar News* (Spring 2000), p. 7.

Further, many barristers believe that ordering parties to mediation against their will is futile because parties who are compelled to participate will attend grudgingly, merely go through the motions and do the bare minimum to comply with the court's order.

There are two reasons that compulsory mediation is not a contradiction in terms. The first reason was eloquently set out by Giles J (as his Honour then was) in the course of deciding whether an agreement to mediate was enforceable. In *Hooper Bailie Associated Ltd v Natcon Group Pty Limited* (1992) 28 NSWLR 194 at 206 A - D, his Honour said:

> Conciliation or mediation is essentially consensual and the opponents of enforceability [of agreements to conciliate or mediate] contend that it is futile to seek to enforce something which requires the co-operation and consent of a party when co-operation and consent can not be enforced; equally, they say that there can be no loss to the other party if for want of co-operation and consent the consensual process would have led to no result.
>
> The proponents of enforceability contend that this misconceives the objectives of alternative dispute resolution, saying that the most fundamental resistance to compromise can wane and turn to co-operation and consent if the dispute is removed from the adversarial procedures of the courts and exposed to procedures designed to promote compromise, particularly where a skilled conciliator or mediator is interposed between the parties. *What is enforced is not co-operation and consent but participation in a process from which co-operation and consent might come* (emphasis added).

The second reason that a court-ordered mediation is not a contradiction in terms is that most 'voluntary' mediations, in the author's observation, are voluntary only in a very attenuated sense. Most mediations seems to be motivated by factors such as:

> 1) The realisation by one and sometimes all of the parties that they cannot possibly afford the legal costs of a final hearing.
>
> 2) The realisation by one or all parties that they cannot possibly risk losing at the final hearing and incurring the obligation to pay the other parties' costs (plus, in the case of defendants, the judgment sum).
>
> 3) The realisation by one or all parties that the dispute must, if at all possible, be resolved without final determination by the court, tribunal or arbitrator involved:
>
> • lest the subject matter of the dispute evaporate (intellectual property cases); or

- lest the subject matter of the dispute be overtaken by its competitors (software disputes); or
- lest the publicity be damaging (e.g., professional negligence disputes); or
- because the cost in lost management time of a final hearing is manifestly excessive given what is at stake; or
- because the costs of taking the proceedings to the conclusion of a final hearing plus any likely appeals exceeds the value of what is in dispute.

You can probably add several more reasons to this list from your own experience!

Mediations undertaken in these circumstances are voluntary in the sense that no court has ordered them, but the parties concerned probably do not regard themselves as having had much choice about the matter.

In the author's experience, the behaviour of parties and their lawyers at court-ordered mediations is indistinguishable from behaviour at 'voluntary' mediations.

Further, mediation is usually stressful; it often is physically and emotionally exhausting for the parties; and it can be expensive. These factors also tend to indicate that it is not undertaken voluntarily.

Many of us have experienced judges who encourage the parties to attempt to resolve their disputes by mediation. Sometimes the encouragement is forceful. The author has had the experience, when seeking an extension of time for a client to file its evidentiary statements, of being told by the Bench that the extension would be granted, but only if the client agreed to mediation. Was the mediation that resulted a voluntary one?

Yet further, it is clear law that agreements to mediate are enforceable by the courts if they are properly drafted: *Hooper Bailie Associated Ltd v Nation Group Pty Limited* (1992) 28 NSWLR 194; *Elizabeth Bay Developments Pty Limited v Boral Building Group* (1995) 36 NSWLR 709. In other words, a party to such an agreement who is not willing to mediate a dispute caught by the agreement can be compelled to do so. Such a mediation could be described as 'voluntary' because the parties agreed, when entering into contractual relations with each other, to mediate their disputes. But the mediation could also be described as a court-ordered mediation because the party who now does not want to mediate has been compelled to do so by the court.

Finally, it should be remembered that the 'overriding purpose' of the *Supreme Court Rules 1970* is 'to facilitate the just, quick and cheap resolution of the real issues in…proceedings' (part 1, rule 3(1)); that parties have a duty to 'assist the court to further the overriding principle' (part 1, rule 3(3)); that 'a solicitor or barrister shall not, by his or her conduct, cause his or her client to be put in breach of [that] duty'; (part 1, rule 3(4)); and that the court may take into account any failure to comply with the two previous rules 'in exercising a discretion with respect to costs' (part 1, rule 3(5)).

In *Dunnett v Railtrack plc* [2002] EWCA Civ 303; [2002] 2 All ER 850; [2002] 1 WLR 2434, the UK Court of Appeal, in dismissing an appeal, applied broadly similar rules, the *Civil Procedure Rules 1998* and, as a result, did not order the unsuccessful appellant to pay the costs of the respondent. The respondent had refused to accept a proposal by the court, when granting leave to appeal, that alternative dispute resolution be explored. The appellant had agreed with the proposal.

Delivering the judgment of the Court of Appeal, Brooke LJ said (paragraph 15):

> It is to be hoped that any publicity given this part of the judgment of the court will draw the attention of lawyers to their duties to further the overriding objective in the way that is set out in CPR Pt 1 and to the possibility that, if they turn down out of hand the chance of alternative dispute resolution when suggested by the court, as happened on this occasion, they may have to face uncomfortable costs consequences.

NSW barristers and solicitors now have an express obligation to advise a client 'about the alternatives to fully contested adjudication of the case which are reasonably available to the client': *New South Wales Barristers' Rule* 17A and Rule 23 of the solicitors' *Revised Professional Conduct and Practice Rules 1995*. It is at least possible that a party might be found to have been in breach of the overriding purpose rule because it did not agree to mediation, and penalised in costs. The party may hold its barrister responsible for this result if the barrister did not comply with Barristers Rule 17A. Or the court may impose a costs penalty directly on the barrister under part 52A, rule 43A of the Supreme Court Rules. See 'The overriding objective of avoiding a costs order!', *Bar Brief* No. 99 (November 2002), page 6.

Are mediations agreed to under the influence of these rules voluntary?

What follows is that the distinction between 'voluntary' mediations and court-ordered mediations is evanescent. If the distinction exists, it is not a particularly useful one.

What are court-ordered mediations like?

Because the distinction is evanescent, it should not be surprising that court-ordered mediations look and feel much like 'voluntary' mediations. The author has mediated a number of proceedings ordered to mediation by the Supreme Court and the District Court. In one multi-party set of proceedings, all parties had opposed mediation. The author has also mediated many disputes under the Retail Leases Act and the Farm Debt Mediation Act, where mediation is compulsory before proceedings can be commenced.

In the author's experience, the behaviour of parties and their lawyers at court-ordered mediations is indistinguishable from behaviour at 'voluntary' mediations. This is not surprising, for a number of reasons. Firstly, once the parties are committed to paying their share of the mediator's fees and their own lawyers' fees for the mediation, and once they have committed their own time and emotional energy to participating in the mediation - and realised that the other party has done likewise - it would be strange if they did not try to take advantage of the occasion as an opportunity to settle their dispute. Thus, common sense and self-interest tend to drive the parties to participate constructively in the mediation.

Secondly, as mentioned earlier, the parties have a statutory

obligation in court-ordered mediations to participate in 'good faith'. Courts have had no difficulty in determining whether good faith was present at mediations: see, e.g., *Gain v Commonwealth Bank of Australia* (1997) 42 NSWLR 252 at 257 per Gleeson CJ (mediation under the Farm Debt Mediation Act); *Western Australia v Taylor* (1996) 134 FLR 211 at 224 - 225 (mediation under the *Native Title Act 1993* (Cth)).

In the latter case, Member Sumner of the National Native Title Tribunal listed no fewer than eighteen criteria for deciding whether a government had negotiated about native title in good faith. In *Aiton Australia Pty Limited v Transfield Pty Limited* (1999) 153 FLR 236; (2000) 16 BCL 70; [1999] NSWSC 996 at paragraph 156, Einstein J set out in dicta 'the essential or core content of an obligation to negotiate or mediate in good faith'.

Further, neither the confidentiality of a mediation, nor the fact that the 'without prejudice' privilege generally applies, excludes the Trade Practices Act 1994 or the fair trading Acts. Statements made in the course of a mediation can be false or misleading conduct: *Quad Consulting Pty Limited v David R Bleakley & Associates Pty Limited* (1990 - 1991) 98 ALR 659.

The fact that the court has ordered the proceedings to mediation does not excuse barristers from being adequately skilled for the mediation or from preparing adequately for it.

Practical consequences:

What are the practical consequences for barristers of court-ordered mediations being much like voluntary mediations?

The first consequence is that barristers need to use their skills to attempt to ensure that mediations are not ordered at inappropriate times. A court may be minded to order proceedings to mediation too early for the mediation process to be effective.

As noted already, the Supreme Court issued Practice Note 118, entitled 'Mediation', on 8 February 2001. It is not yet clear how the court will used the procedures outlined in the practice note. What sorts of proceedings will the court order to mediation over the parties' objections? What sorts of cases will be referred to a registrar for an 'information session' where the appropriateness of mediation will be discussed? If the parties do not agree on whether mediation is appropriate, what criteria will the registrar use to recommend to the court that mediation is appropriate - or inappropriate?

Supreme Court Practice Note 120, entitled 'Differential Case Management' (3 July 2001), provides by paragraphs 13(1) and (3) that, at any status conference, the court may consider whether the proceedings are appropriate for alternative dispute resolution. If the proceedings appear to the court to be appropriate for resolution by mediation, the court will refer them to mediation.

The District Court's revised Practice Note Number 33 took effect on 1 January 2002. The revised practice note has a heavy emphasis on alternative dispute resolution. Paragraph 5.8.1 provides for a status conference seven months after the filing of the statement of claim. At the status conference, the parties must be ready to take an arbitration date, or have their case referred to mediation, or take a hearing date.

Under paragraph 5.8.4, if a date is given at the status conference for mediation, a further date - for the hearing of the matter or for fixing a hearing date - will also be given. Paragraph 10 states:

'It is proposed to finalise as many matters as possible through alternative dispute resolution systems. Most matters will be referred to arbitration or court managed mediation. ... Cases may be sent to arbitration or mediation at any time.'

Again, it is not yet clear how these powers will be used. What is clear is that there is scope for barristers to attempt to influence whether and when matters are referred to mediation. For example, it may be too early for a matter to be mediated effectively - the issues in dispute may not be clear because the pleadings are not yet closed. Or it may be desirable to have discovery before mediation; see, e.g., Knoll, 'Discovery before or after mediation?' *Bar News* (Summer 2002/2003).

Thus, barristers can use their knowledge of the issues underlying the proceedings and their understanding of mediation to arrive at an educated view whether mediation is appropriate for the proceedings and, if so, when it is likely to be appropriate. It seems likely that a judge inclined to order proceedings to mediation would hold his or her hand if presented with a reasoned submission that mediation would be premature.

The second practical consequence of court-ordered mediation being much like voluntary mediation is that barristers need to have the same skills for preparation for and advocacy at the mediation as if the mediation were voluntary, and employ those skill with just as much vigour. The fact that the court has ordered the proceedings to mediation does not excuse barristers from being adequately skilled for the mediation or from preparing adequately for it.

Thus, barristers should help their clients understand the process. In particular, they need to prepare them for the pressure to settle that mediation will exert on them. With their clients' assistance, barristers should try to unearth the issues that lie behind the formal pleadings in the proceedings. They should canvas options for resolution of the dispute, and it is always useful to analyse the client's best alternative to a negotiated agreement. And they should determine what role they will play at the mediation. See Wade, 'Representing clients at mediation and negotiation' (Dispute Resolution Centre, School of Law, Bond University 2000); and Angyal, 'Practical tips on representing clients at mediation' (NSW Bar Association CPD seminar, 5 March 2003).

Mediation in the Family Court of Australia: A legal framework

By Richard Bell

The *Family Law Act 1975* (Cth) makes specific provision for primary dispute resolution (PDR) as an alternative to formal litigation.

Mediation is a useful tool in resolving family disputes where intense feelings lie between the parties and the costs, both financial and emotional, of litigation are not in the best interests of those involved.

Part III of the Act provides a framework for PDR. The object of this part is to

> encourage people to use primary dispute resolution mechanisms (such as counseling, mediation, arbitration or other means of conciliation or reconciliation) to resolve matters in which a court order might otherwise be made under this Act.

Section 19BA gives the Family Court a general power to advise the parties to 'seek the help of a family and child mediator'. Further, the court may adjourn proceedings to enable mediation: sec 19BA(2).

Clause 63(1)(a) of the *Family Law Regulations* describes the process of mediation:

> (a) The process of mediation is one by which the parties involves, together with the assistance of the mediator:
>
> i. isolate issues in the dispute; and
>
> ii. develop and consider options to resolve those issues; and
>
> iii. if appropriate – attempt to agree to one or more of those options; and
>
> iv. if a child is affected – attempt to agree to options that are in the best interests of the child….'

It is recognised that there are some cases in which mediation is not appropriate. Both parties must be willing and able to enter into meaningful negotiations; in some family law cases this is not always possible due to a variety of factors, including non disclosure of assets or income or a history of fraud, a history of family violence, child sexual abuse, or prior history of default on the part of one party.

The PDR services are court annexed and the Family Court places great emphasis on mediation and other associated processes such as conciliation as being appropriate diversions from litigation in family disputes.

Mediation generally

It is now no longer necessary to emphasise the significance of mediation in everyday practice.

It has gone far beyond occasional utlilisation of the procedure. It now affects all manner of practice beyond the mediations themselves from the greater use of round table conferences and a flexible approach generally.

Family and industrial law were the pacesetters but it is now universal.

The matrimonial practice over the long term however has made its approach culturally different. For a long time the approach has favoured gearing listings and evidence and procedure towards resolution, with hearings being those cases which could not be settled.

The significance of mediation was acknowledged by Austin J in *Albarran & Anor v Envirostar Energy Limited & Anor* (2002):

> Skilled mediators are now able to achieve results satisfactory to both parties in many cases which are quite beyond the power of courts and lawyers to achieve (quoting from *Dunnett v Railtrack plc* (2002) per Brooke LJ).

Mediation is a useful tool in resolving family disputes where intense feelings lie between the parties and the costs, both financial and emotional, of litigation are not in the best interests of those involved. Mediation allows 'people to remain in control of their lives through a decision making process that encourages mutually acceptable solutions' whilst providing a 'constructive model of dispute resolution that the parties can fall back on' if future problems arise.[1]

Mediation is helpful in family law as the aim is towards resolution of issues between parties, not simply an outcome. Seventy five per cent of court mediation clients reach full or partial agreement through a process which assists the parties understand each other's needs and options, to communicate effectively, and develop a framework which establishes a satisfactory ongoing relationship.[2]

In my own experience the skilled lawyer representing a client does not seek to trivialize the 'personal and emotional' but may separate it from other issues. Lead footed lawyers will simply say 'you have to be commercial'; others however will look at further solutions to add on such as grief counseling, alcohol counseling, anger management etc. This should not be seen as merely emotional. Many a captain of industry has messed up family money by not addressing the problems.

Process of mediation

Mediation is offered before, at the commencement and after proceedings have been filed. Mediation will also be considered at other times, particularly at pre-hearing conferences.

There are four discrete stages of mediation.

- Information session

- Individual interview
- Joint interview
- mediation session

At the information session the role of the mediator is explained to the parties, as are the features and objectives of the mediation process. The mediator must comply with cl 63 of the *Family Law Regulations* which requires *inter alia* the giving of a written statement to the parties that sets out the factors listed in sub-cl 1(a); this includes a directive that a party has a right to obtain legal advice at any stage in the mediation process, and that anything said during the mediation is not admissible in any court or proceedings. A mediation agreement is entered into and a timetable is set for pre-mediation undertakings. Preparation may include agreeing on the issues to be dealt with during the mediation.

Although there are excellent and committed private services I tend to find the agreements realised in the court's mediations are more practical.

The mediation session follows a general structure which involves the following steps:

- opening statements by mediators;
- opening statements by clients;
- setting the agenda for the mediation (generally with reference to the timetable entered into at the initial stage);
- prioritising issues;
- outline of history between the parties;
- exploring the needs, interests and concerns of the parties and children (if applicable);
- outlining available options based on the facts disclosed;
- determining the most workable solutions;
- reducing the agreement(s) to writing;
- referral for independent legal advice; and
- further sessions where necessary.

General practical

Mediators act as facilitators of a mutually acceptable decision making process between the parties. They are responsible for the processes and the context in which the discussions and negotiations take place but do not control the content of the mediation.

The mediator has a number of primary roles to fulfill including:

- neutrality; the use of the co-mediation model, with a male and female combination of social science and legal backgrounds, is employed to reinforce this;
- assist both parties to listen to one another and value and appreciate both parties' contributions;
- articulate the essential elements of the dispute, reframing them if necessary;
- guide parties to discussing their present and future needs as opposed to focusing on unresolved issues from the past;
- promote the raising and consideration of proposed solutions to the various aspects of the dispute; and
- maintain confidentiality.

Many of these are consistent with mediations generally however given the Court's overriding concerns for children there are differences. The *Family Law Amendment Bill 2003* flags the possibility of certain disclosures.

Personal suggestions

In my own experience clients regard these processes as helpful. Information sessions with other courts may be worth trialing.

I prefer the Family Court's mediation to some external alternatives, although outside providers can be quicker. Although there are excellent and committed private services I tend to find the agreements realised in the court's mediations are more practical. This is particularly so with children's matters. Some less-experienced external services seem to me to proceed too quickly to 'an agreement', rather than the most practical one. For example, one often sees alternate week about arrangements agreed to in such sessions which many clients (and their partners) soon find unworkable. That said, even an unsuccessful start can reduce the antagonism in a hearing.

Although I have seen many robust conciliations involving practitioners, I have never seen untoward use of that process in family law. For some reason the walkouts, in-your-face comments to other parties and histrionic performances concerning underlying emotional issues which should be dealt with discreetly are not used in matrimonial proceedings as I have seen in other places. I suspect but cannot be sure that it is because it may backfire on the solicitors who have to routinely go back and who can see it does not assist anyone.

1 Brown, Dr C Family Mediation and Conciliation Counselling in the Family Court, Paper presented to the International Conference on Mediation, Singapore August 1997

2 Nicholson, The Hon Justice A, 'Mediation in the Family Court' Law Institute Journal v65 n1-2 p61-62

Child care for barristers

By Rashda Rana

All of us with children, in any profession, at some time have had to deal with the nanny who can't come in today, the sick child who can't go to school or the child who throws up at the door of the day care centre. We are expected in court or an important conference in about an hour. What to do?

If you are lucky, and very few of us seem to fall into that category, you might be able to enlist the help of granny, grandpa or a friendly neighbour. But these indulgences are few and far between and if called upon too often can turn a good relationship into a sour one.

A key feature of the scheme is that the carer who is called in under this service will be someone who already knows the children of the barrister because of a regular periodic investment of some child care time by the barrister's family with that carer.

For many years the Bar Association's Equal Opportunity Committee has received complaints, information and expressions of concern from barristers indicating that they were having difficulty in reconciling their responsibilities for the care of one or more children with conduct of a successful practice at the Bar. In short, the problem appears to arise when rigid court hours meet inflexible children's day care arrangements, the risk of some failure in the overall arrangements of which leads to professional embarrassment. When it occurs it is extremely stressful for those involved.

The Equal Opportunity Committee investigated whether or not the Bar Association could do anything to assist. It concluded that there was a possible solution.

What the committee proposed was a scheme, the principal purpose of which is to provide a backup or emergency child care service to cover the situations that had been identified as problematic for barristers. The scheme can best be described as an 'in-home care scheme' or otherwise as occasional care based in the home.

The scheme and a pilot being conducted at the moment will operate in the same way. The pilot is necessary to test the feasibility of the scheme before it is offered more widely to the Bar. The pilot will take six months, commencing in May 2003 and will operate over the winter months when unexpected child sickness is highest.

The scheme is to be operated by a service provider with extensive experience in the child care industry. With the detailed help of a consultant, Jane Smythe, the committee is working with a well-established service provider, McArthur Management Services ('McArthur'). McArthur was discovered by Jane Smythe and assessed by her as one of the few service providers with the size, background and reputation sufficient to provide services to the barristers involved in the pilot scheme to a standard and with the level of reliability that would be expected by barristers.

McArthur is an Australian owned and operated consultancy which commenced providing services in South Australia in 1969. It specializes in providing recruitment and human resources services in a number of divisions, including health and child care services.

The scheme enables a barrister in an emergency or when normal child care arrangements fail to make one phone call to McArthur, which would then make all the necessary arrangements for the carer to arrive at the barrister's home or collect the child as is required. The centralised phone system operated by McArthur will be a 24-hour service. McArthur will have a comprehensive database supporting the facility containing the names, address, chambers address of the barrister parent, clerk, children's likes and dislikes, the child's routine and more, which assist in administering the scheme and which would also be available to the carer.

If, for example, a family member or usual carer calls in sick at 7am and the barrister is due in court at 10am, it is a requirement of McArthur's service under the scheme that the carer will be there to relieve the situation within an hour of the call. Similarly, the barrister may be caught unexpectedly at a hearing until 5pm and is unable to meet prior arrangements to collect a child from day care or to meet some other commitment in relation to the child that the barrister expected to be able to meet. In those circumstances, the barrister (or the barrister's clerk) can telephone McArthur to have the carer collect the child and do whatever is necessary to care for the child until the barrister becomes free from immediate professional obligations to meet domestic commitments.

Rash Rana

Lisa Friggieri of McArthur Management Services

A key feature of the scheme is that the carer who is called in under this service will be someone who already knows the children of the barrister because of a regular periodic investment of some child care time by the barrister's family with that carer. A regular engagement is necessary for the smooth running of the scheme. This is achieved by the barrister engaging the carer in a minimum of four hours per fortnight in some caring role with the children. This may be babysitting or some other child-centered activity. The continuity of contact will ensure that the transition from the parent leaving for work and the carer arriving at the home goes smoothly and without causing any stress or anxiety for the parent, child or carer.

Families will be given a choice of carers matched to suit the needs of the family and the location of the home.

McArthur has indicated to the committee that so far as they are aware no scheme like this for professionals exists anywhere else in Australia. The scheme will only work if the Bar can generate interest in it. However, it would be unwise to allow the scheme to be offered to the Bar as a whole until the pilot has proved successful. The Equal Opportunity Committee's informal research indicates that a number of barristers would readily use this facility if it existed. Indeed, the idea of the scheme and the realisation that there was a problem at the Bar arose from a number of complaints by barristers that they lacked that kind of support.

Further information on the pilot or the proposed scheme may be obtained by contacting Rashda Rana on 9930 7965 or Julia Lonergan on 9221 5140.

Owen Dixon

By Justin Gleeson SC

Philip Ayres has produced a fascinating exposition of the character, life and beliefs of Owen Dixon. His source material is largely the private papers of Dixon. Dixon kept diaries for 1911, part of 1929 and the 31 years of 1935 - 1965. He kept travel diaries covering trips to Europe and the United States for 1922 – 1923, 1923 – 1924, 1939, 1953, 1955 and 1958. Ayres concludes the diaries were composed for Dixon himself and not for posterity. They were made available to Ayres by Dixon's surviving daughter. In addition, Ayres has conducted interviews with a number of Dixon's surviving associates or personal assistants, and has analysed Dixon's judgments and speeches.

The biography is unfortunately, but perhaps inevitably, given a barrister's lack of time to keep a diary, abbreviated on Dixon's 12 years at the junior Bar. We learn that he earned 113 guineas in his first year at the Bar, with some months being very lean. The Melbourne University School of Law refused him a lectureship which might have supplemented his income. Selborne Chambers, at 462 Chancery Lane, provided a spartan but collegial environment. In his second year at the Bar, Dixon appeared before the High Court in Sydney in an estate matter. Dixon had time to watch the first Test between Australia and England at the Sydney Cricket Ground, and subsequently visited galleries and gardens and took boating excursions with his family in Sydney. In 1914 Dixon assisted Sir Leo Cussen in the consolidation of the statute law of Victoria. His practice was already extensive. He was accepting briefs in industrial matters, local government and traffic, insolvency, wills, defamation and intellectual property. Robert Menzies became Dixon's pupil in 1918. He remarked on Dixon's close knowledge of the forensic qualities and methods of his leading opponents, and of the judicial strengths and weaknesses of the judges before whom he appeared. Reminiscent perhaps of the current Australian cricket team, Dixon, according to Ayres, would regularly engage in a running commentary, in undertones, on the weaknesses of opposing counsel's argument, to great effect. His arguments were not always successful. In one case he added claims for equitable relief in order to avoid the matter being heard by a jury. The chief justice, Sir John Madden, threw out Dixon's application, stating that it was a 'palpably bad common law claim masquerading in a rugged gown of equity'. By some means not fully explained, Dixon rapidly came to have a detailed and complete mastery of case law. His later associate, Richard Searby, referred to a judgment which Dixon wrote straight through without authorities. Searby pointed to this deficiency. Dixon laughed and then 'decorated' the judgment, to use his word, by inserting in every relevant point the name of the case, year of the report, name of the judge and page at which the passage appeared.

the reasons given by the Privy Council were not satisfactorily expressed for application later by Australian courts.

Dixon took silk after 12 years in March 1922 by which time he was appearing in a majority of the High Court cases emanating from Victoria, especially constitutional, equity and common law cases. He travelled to London to appear before the Privy Council at the end of 1922 to seek leave to appeal in the *Engineer's* case and a year later made a similar trip on behalf the Central Wool Committee. His travel diaries are revealing for the life which a barrister could then have. His 1923 diary records in great detail the books he was reading, especially classical Greek and Latin literature, as well as the very late hours he would work mastering the detail of the case. He would prepare extraordinarily detailed chronological notes of the facts in the case. Arriving in London, there were plays to be seen, a visit to the Privy Council to observe the judges who would be hearing the case and ultimately a meeting with Sir John Simon who was to appear in a common interest with Dixon. There is a fascinating account of how Dixon and Simon prepared for the appeal, the start being less than promising. At the first conference Simon knew nothing of the case. The second conference was cancelled. Three days before the appeal they commenced preparation in earnest at Simon's house in Oxfordshire. Although Simon and Dixon were successful in the appeal, there were already notes in Dixon's diary of a view he was to come to hold of the Privy Council that the judges did not adequately prepare themselves in the full details of the Australian cases coming before them, and that the reasons given by the Privy Council were not satisfactorily expressed for application later by Australian courts.

Dixon was an acting justice of the Supreme Court of Victoria for six months in 1926. He produced a formidable number of judgments. He had already formed a view that reserved judgments were preferable in any cases of complexity. He regarded the practice in English courts of giving *ex-tempore* judgments in complex cases as a mark of laziness. At the end of the year he declined the offer of a permanent appointment to the same bench, having made up his mind he would never be a judge. He returned to the Bar but in early 1929 accepted an offer from attorney-general Latham of an appointment to the High Court.

Ayres describes Dixon as a reluctant justice on the High Court in the decade up to the Second World War, largely because the court was composed of conflicting personalities with everybody seeming to dislike everybody else. Sir Frank Gavan Duffy had been on the court since 1913. He succeeded Isaacs as chief justice in 1931 and remained on the Bench until 1935. According to Dixon, Duffy never liked sitting on the Bench and did as little as he thought was necessary. Sir George Rich had also been appointed in 1913. Rich 'had ability but lacked energy'. One of Dixon's first judgments for the court was written on request of Rich in a case in which Dixon had not even sat! Subsequently, Rich would on occasions have the judgment written for him by a judge not even on the court, or on other occasions Dixon would be forced to write in addition to his own judgment the (conflicting) judgment of Rich. Evatt and McTiernan were appointed in late 1930 to replace Knox and Powers. The Labor Caucus instructed cabinet to make the appointments, notwithstanding the opposition of Labor prime minister James Scullen and attorney-general Frank Brennan who were out of the country. When the appointments were announced, Dixon wished to resign but Starke persuaded him not to do so. As Ayres notes, the new men 'were begrudgingly accommodated within an already uncongenial club'. Starke in particular treated them with contempt, and would later cease all communication with them, leaving Dixon to act as a go-between. Dixon's own views were harsh. He would describe Evatt as being 'an essentially political judge and dishonest', although he forced himself to get along with him. McTiernan he thought of as 'lazy and unqualified', although the two would sometimes go out together to tea or for a walk.

Ayres describes some of Dixon's judgments from the early and middle 1930s as ranking among his most brilliant, influencing the common law world in profound ways. Yet he notes that by the end of 1934 and probably much earlier, Dixon was looking for an opportunity to resign. He was preoccupied with who would be the new chief

justice. Latham had resigned as attorney-general and returned to the Bar, apparently on a promise that it would be him. On the other hand, if the Labor Party took office federally, Evatt would probably be the choice. Although Dixon respected the quality of some of Evatt's judgments, he was frequently critical of him and, according to Ayres, over the decade lost faith in his probity. Dixon regarded Evatt as one who could be very partial on the bench. The diary records on one occasion Evatt being 'full of antagonism to the respondent'; 'most unjudicial'. However, when Evatt was not particularly interested in a case he generally concurred with Dixon's judgment.

In February 1935 Dixon was offered an escape route from the High Court, being the chairmanship of a royal commission on banking and finance. According to his diary he seriously considered resigning to do this work and then returning to the Bar. Dixon however refused the royal commission and continued on to hear what would become the major cases on sec 92 of the Constitution in the following years. His classic interpretation of sec 92 as a protection of individual liberty was established in four judgments written in late February and early March 1935. Often he worked until 4a.m. on the judgments. In March 1935 a further blow up ensued between Dixon and Starke and again Dixon thought of alternatives to the High Court appointment, including whether he would accept the Victorian chief justiceship. Ultimately he decided against it but his views were very negative. He thought nobody could get any pleasure out of judicial work and he advised colleagues against taking appointments. He learnt in October 1935 that Latham had been appointed chief justice. Dixon regarded Latham as 'a usurper' and felt Menzies had let him down in appointing Latham. In 1936 the Privy Council delivered judgment in the *James* case allowing the appeal from the High Court decision. Dixon wrote to Latham that the judgment was 'very poor; very unphilosophical and a crude production'. He added with irony that 'Lord Hailsham seemed to have made some attempt to inform his mind by reading our courts' decisions'.

Dixon later regretted using the phrase 'strict and complete legalism', because predictably it was misunderstood.

From the outbreak of war in 1939 Dixon assumed enormous executive and administrative responsibility within Australia. He gave legal advice and drafted Regulations for the Central Wool Committee. He went beyond this and proffered advice of a political and even military kind to Menzies and made it clear he was prepared to work for the government abroad. He subsequently drafted an ever-growing number of Regulations concerning wheat, transport, aircraft production and other aspects of the war economy. He became involved in decisions as to what aircraft and engines would be manufactured. He continued to write High Court judgments, including on constitutional cases, even though he had become chairman of the CWC and on most days spent several hours in its offices working on its problems. He became chairman of the Australian Coastal Shipping Control Board and drafted the Regulations for it. When urged by the new prime minister, Curtin, he agreed to go to Washington as minister to the United States. The biography then continues with a fascinating record of Dixon's involvement with Roosevelt, the US military and political administration and Evatt as minister for external affairs. Dixon remained a justice of the High Court throughout this appointment. He became a close friend of Felix Frankfurter. According to Ayres, he was able to conduct diplomacy through a personal style by his relationships with Frankfurter, Dean Acheson and Roosevelt. Dixon determined on regular meetings with the senior US military as the best means to ensure continuous supplies for Australia. His diary records General Marshall telling him secrets about the US strategy which Washington would never share with Evatt, whom they distrusted.

Dixon returned home to Australia in 1944 and resumed High Court duties. Over the next five years he would sit on cases in which key legislation relating to government control of health care, airlines and private banks would be contested in the High Court. Ayres detailed extracts from Dixon's diaries concerning the *Bank Nationalisation* case heard in February 1948, and in particular his disparaging observations of both Evatt and Barwick as vounsel.

In 1950 Dixon took on a most difficult mission as the United Nations mediator in Kashmir. Returning to the High Court he sat on the *Communist Party* case and again his diaries provide great insights into his thinking. He was appointed chief justice in 1952 and delivered his famous address in which he stated:

> Close adherence to legal reasoning is the only way to maintain the confidence of all parties in federal conflicts. It may be that the court is thought to be excessively legalistic. I should be sorry to think that with anything else. There is no other safe guide to judicial decisions in great conflicts than a strict and complete legalism.

Ayres notes that Dixon later regretted using the phrase 'strict and complete legalism', because predictably it was misunderstood. He was using it of specifically constitutional matters and when he made the speech he had in mind criticism of the court in the Sydney press over the *Communist Party* case. Dixon believed that many of the great judges of the common law were from the third quarter of the nineteenth century. He modeled himself on judges such as Sir James Parke, Sir William Milbourne James, Sir James Knight-Bruce and Sir George Turner. However, his role was never solely judicial. In October 1952 he gave private advice to the Victorian governor, Sir Dallas Brookes, on a constitutional crisis in Victoria.

In 1955 Dixon attended Yale to receive the Henry V Howland Memorial Prize. It was there he delivered his address 'Concerning judicial method' in which he stated that the common law was 'based on strict logic and high technique, rooted in the Inns of Court, rooted in the year books, rooted in the centuries'. He lamented the many signs that the strict logic and high technique of the common law had fallen into disfavour. He was critical of the judge who, discontented with a result held to flow from a long accepted principle, deliberately abandoned the principle in the name of justice or social necessity or social convenience. Dixon wrote to Frankfurter that to a certain extent he was aiming at Denning LJ. To his consternation, however, he received a letter from Denning saying he completely agreed with everything Dixon had written! Dixon wrote to Lord Simon that Denning baffled him. He always seemed to set principle at defiance.

The biography continues through to Dixon's retirement from the court in 1964 just short of his 78th birthday. In retirement he spent a great deal of time reading the classics.

This is a biography which, because it is so close and faithful to the diaries and letters of Dixon, reveals his thinking and world view in a most complete manner. If there is a fault, it is that the narrative is too close and true to the thinking of Dixon. We are told that Dixon thought particular judges lazy or dishonest or incompetent without much reflection or analysis on whether he was entitled to hold such a view. There are interviews with persons closest to Dixon who held him in loyal and high esteem, but little from those with a different perspective. However, these are the minor criticisms. The work brings a great Australian and a great lawyer closer to his audience. It whets the appetite for the biographies which may come to be written on other great High Court justices and chief justices.

High Court appointments up to its jubilee year

By David Ash

The High Court of Australia first sat in October 1903, one hundred years ago. Below appear clerihews of appointments to the jubilee year, 1953.

As the *Oxford English Dictionary* (2nd ed) explains, the clerihew is a short comic or nonsensical verse, professedly biographical, of two couplets differing in length. Its creator Edmund Clerihew Bentley has left us with a number, including 'Sir Christopher Wren/Was going to dine with some men./He said, 'If anybody calls,/Say 'I'm designing St Paul's.'' and 'The people of Spain think Cervantes/Equal to half-a-dozen Dantes;/An opinion resented most bitterly/By the people of Italy.'

Sir Samuel Griffith
States' powers early zenith
Piloting two decades with the vigour of Jessel
Though Isaacs may later have scuttled the vessel.

Sir Edmund Barton, ex-prime minister
Was most restrained for an ex-political creature
In each full court case of CLR 1 to 3
With Griffith, says one source, he didn't once disagree.

Ex-senator Richard O'Connor
Broke his health with hard labour
Concurrence with Griffith was not such a likelihood
And he (not Higgins) first knocked back a knighthood.

Sir Isaac Alfred Isaacs
Could cut contrariness with an axe
His judgments were certainly not on the run
Take the pages in *Coal Vend* at first instance, 271.

Higgins, Henry Bournes
Each unionist to this day mourns
Shaw's 'enry 'iggins heard working class Doolittles
But his namesake preferred to harvest their vittles.

Sir Frank Gavan Duffy
Came from a family that was Irish, robustly
He retired, some say, at eighty-three
But only some say, as he was born on 29 February.

The Honourable Sir Charles Powers KCMG
(Incidentally, the first appointee without a degree)
Divided with (or from?) Higgins the Arbitration Court
But historians show reserve on what else he wrought.

Albert Piddington (middle name Bathurst)
A wit with a penchant for the quixotic burst
Without ever handing down a decision, he was gone
Returning years later, to defend Kisch (Egon).

Sir George Edward Rich
Practised in the equitable niche
Of his crisp contributions we may say certainly
To the God of Short Judgments he never said 'peccavi'.

Sir Adrian Knox
Steered the court well clear of rocks
Like Erskine, perhaps, preferring advocacy
He resigned upon becoming a residual legatee.

Sir Hayden Erskine Starke
To put it bluntly, had bite and bark
After a while, he sat without wearing a wig
And so, it is said, without fearing a fig.

Sir Owen Dixon
Sine qua non
Nesting dissent, then wresting the ball
By jesting Pilate, so besting all.

Herbert Vere Evatt (also known as Doc)
An appointment giving Tories nervous shock
A busy mind, he divined a remedy
Giving dissent in *Chester v Waverley*.

Sir Edward Aloysius McTiernan
A record to beat, if one can
A Depression elevation to broaden the mix
He stood down upon injury in seventy-six.

Sir John Greig Latham
Politically pre-empted Dixon's diadem
Yet did not begrudge his colleague's celebrity
And did not give up his own logical austerity.

Sir Dudley Williams (MC and twice MID)
Like Sir George Rich joked and knew equity
A valued member of a solid crew
Who heard as much as any of section 92.

Sir Willam Flood Webb
Benched at a time of flow and of ebb
Elevated by Evatt after much public service
Yet in some ways his appointor's antithesis.

Sir Wilfred Kelsham Fullagar
Wielded a kindly scimitar
His analysis of stevedoring
Left many a poor tortfeasor gnawing.

Sir Frank Kitto
Sloth's foe
Opts for writing with an elegant view
Spelt out in 'Why write judgments?', 66 ALJ (1992).

Taylor, Sir Alan Russell
Quintessentially Sydney intellectual muscle
So though under Dixon he was held in esteem
Was possibly more at home in the Barwick regime.

These portraits stop in fifty-three
Twenty appointments, one jubilee
They're drawn from a number of sources
The faults, of course, remain the author's.

Interview with Phillipa Gormly

An interview by Rena Sofroniou

Phillipa Gormly came to the Bar in 1996, having worked prior to that time as a solicitor for about two-and-a-half to three years. I met her and her husband last year at a very enjoyable performance of *A tale of two cities* (staged at the Genesian Theatre and, incidentally, featuring Brian Donovan QC) and have wanted to interview her ever since. This interview addresses the perpetual question, but with an unusual twist - how does a busy barrister juggle a burgeoning commercial practice, the raising of four children, part-time judicial membership of the Administrative Decisions Tribunal *and* multiple sclerosis? Phillipa Gormly provided this little black duck with a lesson in self-discipline and the maintenance of a positive attitude.

Rena Sofroniou: Were you planning a career at the bar when you were studying law, or was that a later idea?

Phillipa Gormly: I always knew that I wanted to go to the Bar, but it was something I wouldn't have told anyone I knew.

Rena Sofroniou: Why the secrecy?

Phillipa Gormly: I imagined everybody would have said 'oh that's right, she's just doing what the father does.' So I kept it to myself.

Rena Sofroniou: Because you come from a legal family, don't you?

Phillipa Gormly: Yes I do. There is my father, Frank Gormly, who was a QC, my brother Jeremy Gormly SC, another brother, Julian Gormly, who is a solicitor and who has also worked at the Bar and my uncle Kevin Coleman, who was a judge at the Workers Compensation Court.

Rena Sofroniou: Who was your role model?

Phillipa Gormly: Both Mum and Dad were wonderful people who provided me with the upbringing and example I rely on so often. Dad had a particular quality that many people who knew him also recognised. It is difficult to put in words what that quality was but he genuinely appreciated each person for themselves.

Rena Sofroniou: Were you pressured to become a lawyer when you were growing up, or was it in the blood?

Phillipa Gormly: Oh, no, no, not at all. I think you grow up with it, so you tend to follow what you are familiar with, rather than it necessarily being 'in the blood'. Certainly no pressure was applied on me from anybody to work at any specific career. We were advised to find out just what each of us was good at and to focus our energies on doing that.

Rena Sofroniou: What attracted you to the Bar?

Phillipa Gormly: I'd have to say I am very commercially oriented and so originally I did economics and accounting with the intention of studying law but the call of commerce got me. So I worked in the commercial world when I left university.

Rena Sofroniou: Do you notice the paucity of female commercial barristers?

Phillipa Gormly: I think there are a number of women working in family law and there are a lot of women working in criminal law too, but neither of those areas appeals to me. Commerce and tax areas are the areas that interest me. For my own part I have only ever had a positive experience at the Bar. I have had a large number of silk over the years leading me in matters and I have only ever felt welcomed. They have been accommodating when they have needed to be because of the wheelchair and things like that. The members of the Bench have always been accommodating, too. I've never actually had a problem, so whilst I know that there is obviously a huge discrepancy between the number of men and number of women working in the area I prefer to work in, perhaps I am just lucky.

Rena Sofroniou: Do you have business interests other than your legal work?

Phillipa Gormly: No, only inside my legal work. I really only have time for the legal work. The only reason I would stop at this stage is for health reasons. Certainly the MS is no reason for me

to stop work. It is possibly, probably, now as bad as it is going to get. I'm not particularly bad for an MS sufferer - I'm just dramatic because I'm in wheelchair, so people notice me!

Rena Sofroniou: It is interesting that you say that. I have no preconception of what an MS sufferer is 'supposed' to look like. I guess I notice nothing other than your wheelchair. Do you find that people project onto you their expectations of what MS sufferers are meant to be like?

Phillipa Gormly: Certainly not here at the Bar. I feel at home here, I feel welcomed, I feel accepted and people are always willing to lend a hand if I need it, which I do often, such as help with opening doors. I can't carry a silk's bag but nobody minds that, so in the legal world here I feel that this is my stomping ground, my home ground.

Rena Sofroniou: Actually, I think you're lucky that some QC doesn't just fling their bag onto your lap. You might end up with a whole pile of them.

Certainly initially I found that solicitors hesitated to brief me when I first got into a wheelchair. Nowadays there is less hesitation.

Phillipa Gormly: Sometimes I invite them to throw their bag on my lap! Really my legs are quite numb so they wouldn't feel that bad with the bag lumped on top of them. Though that is not an invitation to do it!

Rena Sofroniou: Now you have got to answer this, *Bar News* wants names. Tell me honestly who has been dumping their red bag on top of you!

Phillipa Gormly: *(Laughs).* No names! There is no preconception here in the legal world. Out in the public world absolutely there are preconceptions. The preconception is that if you are in a wheelchair, or if your legs have gone, your brain is gone.

Rena Sofroniou: Is it as stark as that?

Phillipa Gormly: Oh, absolutely! In shops and in all sorts of other places.

Rena Sofroniou: I don't understand the correlation.

Phillipa Gormly: No. No. Well, I would love to say something but I won't say it in an interview!

Rena Sofroniou: Well you can tell me later! It occurs to me that it has been a long time since we have seen hundreds of war veterans around. I suppose there might have been a time when entire generations of people would have been habituated to seeing injured people, on crutches, in wheelchairs who have been away on service and have returned to the practice of their professions. I wonder whether that plays a part.

Phillipa Gormly: Lack of exposure. Definitely the more exposure people have, the more they know how to respond. I would say to an able-bodied person, check a wheelchair person out by looking at their eyes, because often the eyes can tell you whether they are disabled intellectually or whether they are an aggressive wheelchair person. For example, for me, I appreciate a push up-hill but some other people in wheelchairs growl at any offer of help from an able-bodied person. My sister tells me that she will not offer other people a push because she gets growled at, since they insist on being so independent. Well personally, I just appreciate the help, so I think that the growling is silly. Who wants to prove that they can push themselves up a hill? I certainly have other things to do with my time.

Rena Sofroniou: Do people step out of their comfort zones to make the offer of assistance?

Phillipa Gormly: They certainly do around here. Around Wentworth/Selborne I have always received help and I feel that I can always ask. People do offer to help me up that little ramp between Wentworth Chambers and the court, for example.

Rena Sofroniou: Well you belong, don't you?

Phillipa Gormly: I feel like I belong. People certainly make me feel like I belong. But in other public areas, say to get myself from chambers down to the ADT in the St James Centre. I would hesitate doing it these days because I am not so keen on just asking anybody in the street to give me a push, whereas if I see a familiar face I'd ask.

Rena Sofroniou: It's probably a safer than dealing with strangers anyway.

Phillipa Gormly: Well, you can imagine the scene if they pushed me into the road to stop the traffic! There are some weirdos around.

Rena Sofroniou: Pedestrians are pretty desperate in this part of town, have you tried crossing Phillip Street lately?

Phillipa Gormly: Exactly.

Rena Sofroniou: What about the attitude of your clients to your wheelchair?

Phillipa Gormly: Certainly initially I found that solicitors hesitated to brief me when I first got into a wheelchair. Nowadays there is less hesitation. In fact I am very busy, but my briefs come from institutions, or regular solicitors, so I have built up a core of solicitors who know me and know my work. It's probably the same as for any barrister I would say but mine has just been a bit slower.

Rena Sofroniou: But you weren't in a wheelchair when you first came to the Bar, were you?

Phillipa Gormly: No, no.

Rena Sofroniou: So you are saying that the wheelchair had an impact on your practice?

Phillipa Gormly: Oh absolutely, no doubt about that. I can see why, actually. Frankly, if an able- bodied man is standing beside a disabled woman, well not even just disabled, but a wheelchair

woman and you the solicitor are going to be charged their fee at the same rate, which one would you choose to brief if you were a young solicitor?

Rena Sofroniou: *(Sigh)* The smarter one, Phillipa?

Phillipa Gormly: Well yes, but if you are a young solicitor who's pushing his or her own career then you are not going to be so brave. Now that I have seven years seniority at the Bar, I find that it tends to be the more senior people who brief me, and the young ones don't have to decide. As a more junior barrister I had a real problem.

Rena Sofroniou: Well you are telling me this with a very understanding attitude. I would find it quite vexing! Because it is stupid, it is arbitrary.

Phillipa Gormly: Well it is, but that's what it is. There are so many vexing things about this. I could become really frustrated, particularly when you realise that I walked for 43 years. I just haven't walked for the past three, so I could become frustrated when I find that I can't do things that I used to be able to do. For example, in the beginning, when I expected to be able to stand up, I used to fall out of bed because I would swing my legs out and go to stand up before I properly woke up. I'd land on the floor, and think 'oh, that's right, I can't stand up!' I soon figured out that it is better not to fight what I can't change. I told myself just to keep going, that everyone would get used to me, that they would see that I haven't lost my mental capacity and so it would all be OK. And that is what has happened.

Rena Sofroniou: Has the experience strengthened you? You are describing a thought process that I would imagine would require a considerable degree of self-discipline and practice.

Phillipa Gormly: Don't you think that the law is self-discipline? This work that we do is self-discipline.

Rena Sofroniou: If it's OK I'd prefer not to have to answer that question, actually.

Phillipa Gormly: It's all about self-discipline. When I first started studying, first I did school normally, then went and did a degree in economics and accounting, so that was all straightforward. Soon after that I got married. I worked for Citibank for two or three years, got married and had four children in very quick succession. If you have a lot of little children around you, you have to be self-disciplined. You can't say 'I'm too tired!' because with children the buck stops with you. You have got no choice when one wakes up in the middle of the night. You have to get up, because nobody else is going to get up for them.

Rena Sofroniou: Sounds like Dante's *Inferno* to me.

Phillipa Gormly: No, they are really cute. It was a really nice time of my life. It was busy but so what? We are all tired now anyway! Everybody's tired. So really having babies is just like that.

Rena Sofroniou: A worthwhile tiredness?

Phillipa Gormly: Oh yes, really worthwhile. Oh yes.

Rena Sofroniou: So self-discipline was in any event a major part of your personality, in terms of motherhood and legal practice.

Phillipa Gormly: Yes, when my youngest child was 15 months old and I still had three pre-schoolers I undertook SAB studies so that I could stay with the kids, which was what I wanted to do. So they would have an afternoon sleep and I would study then. That was managed by self-discipline. Then they would go to bed at 6.30 or 7.00 o'clock and I would work some more from 7pm until late in the evening. So self-discipline has just been part of my life for years.

Rena Sofroniou: And extremely good organisational skills, by the sound of things. Don't you have the urge to let an amazingly self-indulgent side of you let rip, after all of the years it has been held at bay?

Phillipa Gormly: There are things I would love to do now that I can't do.

Rena Sofroniou: *Really* self-indulgent things?

Phillipa Gormly: Oh, yes! I used to love doing active things such as going to the beach and snorkelling, skindiving and sailing, and also horse riding. I can't do those things any more. There are lots of things I'd love to do. But I should tell you that whilst I am self disciplined with the things that I really want to do and really have to do, but I have absolutely no interest or application in unimportant things. If, for example, the children were sick, then the fact that the house might be falling down around my ears and the washing was piling up was totally irrelevant to me. What was important to me was the kids. So I am able to let go off things that other people might find important.

Rena Sofroniou: It's all about priorities?

Phillipa Gormly: Absolutely. I would just prioritise things and focus only on the most important things. These days, I don't

have to clean the house, cook, wash or iron because fortunately I really can't do any of those things.

Rena Sofroniou: I should record that there is a huge beaming smile on your face as you say that.

Phillipa Gormly: Well there is too, I'm lucky, aren't I?! I go home and my dinner is on the table and I am really quite looked after in that way. I couldn't do all this without my husband, that is the reality of it. He is a really nice fellow. He is an organised, conservative Englishman, really and so we have far better organised house than we ever had when I was looking after it. And we eat better, too, because he is a far better cook than I ever was. I just couldn't do it without him. We work as a team. I am really lucky. After I divorced from my first husband I was raising the children on my own for about eight years.

Rena Sofroniou: A long period.

Phillipa Gormly: Yes, but in the final analysis, I must say I am proud of each of my children.

Because of the wheelchair it is very easy to be slotted into disability or equal opportunity work and I am not really interested in being an advocate for disability issues.

Rena Sofroniou: What's the prognosis with regard to the MS?

Phillipa Gormly: There are three or four different types of MS. I have what is called relapsing remitting, which means it relapses for a period and then comes back, making it a very difficult condition to diagnose. The symptoms can repeatedly come and go. Sometimes people suffer from it for a number of years and nobody even knows.

Rena Sofroniou: Including themselves?

Phillipa Gormly: Including themselves, and once you are in a wheelchair, leaving aside the MS, it is easy for your muscles to atrophy. I should be exercising more – I love swimming but I am flat out with my practice.

Rena Sofroniou: Not just your practice as a barrister, I suppose. You are also a part-time judicial member of the ADT until October this year. Do you take on another term after then?

Phillipa Gormly: I hope I wouldn't because my practice really has taken over and I really don't have time to do it.

Rena Sofroniou: Have you enjoyed your time there?

Phillipa Gormly: I really enjoyed it. It was a very interesting experience, and it was interesting writing judgments.

Rena Sofroniou: You sat in the Community Service Division?

Phillipa Gormly: Yes and in the Equal Opportunity Division, although that is not my area of interest. Because of the wheelchair it is very easy to be slotted into disability or equal opportunity work and I am not really interested in being an advocate for disability issues.

Rena Sofroniou: To what degree is that role imposed on you?

Phillipa Gormly: Certainly there would be attempts, but I have a very strong personality. I make it clear upfront. I am a director of the MS Society and am happy for them to use me as they wish to, for example, if they need I give a speech, that's fine. But as for work, I am interested in the law and preferably commercial law. So I am just showing by example, and if people can use me as a good example then that is great.

Rena Sofroniou: You sound as though you can face the future with equanimity and confidence.

Phillipa Gormly: Oh absolutely - better to, don't you think? I don't waste any energy beating my head against a brick wall. It is not just a smart way to go, is it? Better to find out what you *can* do, which is what my Dad said and pursue that. Don't pursue what you are not good at.

Rena Sofroniou: What message did you give the schoolkids who heard your recent 'Law as a career' talk during Law Week?

Phillipa Gormly: There were a number of us speaking at that function. I told them that I loved it, that the Bar is a very accepting workplace and that people should just pursue what they want to pursue. I think it is a great profession. I love the camaraderie of it and I like the open door policy that has survived to date.

Rena Sofroniou: Well if you really feel the urge to do it, then I don't suppose that you can possibly be as satisfied doing anything else, can you?

Phillipa Gormly: I think it will depend on what life has to offer me.

Rena Sofroniou: Do you divide your life into separate compartments, each of which must be balanced and maintained? A checklist?

Phillipa Gormly: No I don't think you can split up your life like that. I do think that I am actually an example for young women who might be thinking 'can I manage all of this or can't I? Can I juggle or can't I?' Well it can be done and it can be done successfully, but perhaps slower than for a man's career because of the demands on your time that might not have occurred for him. I think it has always got to be a constant balance between the two. You just can't push one aside while you pursue your career. You have got to balance it. And you have got to be kind to yourself.

'The dancing man' – Frank McAlary QC

By Andrew Bell

'In Elizabeth Street I danced a dance like a semi-despondent fury.

For I thought that I should never hit on a chance of addressing a New South Wales jury'.

With apologies to WS Gilbert, *Trial by Jury*

In the last 10 years alone, he has been involved in a number of notable cases including, Astley v Austrust; Brodie v Singleton Shire Council and Burnie Port Authority v General Jones Pty Limited.

Impromptu farewell sittings are rare enough for judges. For counsel, they are, to this writer's knowledge, unprecedented. McAlary QC, however, has made a habit of 'breaking the mould'. Accordingly, in December 2002, on the final day of his last appeal in the New South Wales Court of Appeal, the President's court was packed with friends and colleagues. McAlary, who was quite unaware of the looming honour, was somewhat bemused by the fact that they had, apparently, taken a sudden interest in the second day of his argument and were in the well of the court. He also wondered what a television camera was doing there but, to a man famously not shy of the camera, thought nothing of it! The Bench, augmented by his two former floor colleagues, justices Sheller and Giles, convened and the President of the Court of Appeal offered the following tribute:

> This is the last occasion when Mr McAlary QC will appear in this court. I have it on the authority of his clerk that he has sold his chambers and is leaving practice at the Bar at the end of the year. Experience with judges who retire 'never to return' cautions one to be sceptical about such foreswearings, but that is no reason why the formal end of a notable career should be overlooked.
>
> It is not the practice of this court to farewell every departing barrister, but it is fitting that we should do so on this occasion.
>
> It is appropriate that judges should acknowledge, from time to time, their indebtedness to the profession. The course of justice would simply not flow without the assistance of counsel and solicitors.
>
> In your case Mr McAlary there are particular reasons why it is fitting that we should break with tradition.
>
> You are the longest serving member of the Bar in this state, perhaps the country. You were called to the Bar on 7 May 1948 and have been in continuous active practice ever since. That is a very long time – I was one year old in 1948.
>
> Yours has been a most varied practice. Common law was your staple diet, but you moved freely in equity, family law, commercial cases, local government law and many other fields. The law reports attest to the range of leading cases in which you appeared, and the long list of your doughty clients.
>
> On this occasion special mention should be made of your role as an appellate advocate. The court wishes to thank you for the assistance given to it (and to its predecessor, the full court of the Supreme Court) over many years. Your advocacy has been marked with clarity of definition of issues and agility of expression. You have a mine of persuasive anecdotes. Your reminiscences about points of long-forgotten procedure and evidence have generally been accurate and helpful. (For obvious reasons I exclude from these comments my views about your submissions in the present case. I shall reserve them until judgment.)
>
> Another aspect of your advocacy style has been its forcefulness. If prodded, you do not take a backward step. Your nickname 'Roan Bull' probably attests to the number of opponents who have been gored. Judges have also felt your wrath. It is said that there was an occasion in the Court of Appeal, presided over by Mr Justice Moffitt, when you had a blazing row with Mr Justice Hutley. Even you thought you might have gone a little too far and this was confirmed when you received a note from Mr Justice Moffitt commanding you to attend his chambers at the conclusion of the hearing. You were relieved when, upon entering the judge's chambers you were greeted with a glass of whisky. He said 'Here Frank, take this and settle down, I haven't seen such a good show in years'.
>
> The marks of a true appellate advocate are the ability to inform, to persuade and not to bore the Bench; and to do so with charm and utter frankness. These have been your hallmarks.
>
> The court wishes you well in your retirement.

McAlary QC, who took silk in 1969, has had a long and distinguished career at the New South Wales Bar. In the last 10 years alone, he has been involved in a number of notable cases including, *Astley v Austrust* (1999) 197 CLR 1; *Brodie v Singleton Shire Council* (2001) 206 CLR 512 and *Burnie Port Authority v General Jones Pty Limited* (1994) 179 CLR 520 (a case which he won at each level of the judicial hierarchy on a different ground at each level). But as Justice Mason alluded to, the depth and breadth of his practice has been vast. This should not have come as a surprise to those of his colleagues at the Sydney University Law School. In 1947, one of the student editors of *Blackacre*, an E G Whitlam BA LLB, had written of Frank:

> The red-haired boy of the Stone Age, Frank very early came to the fore. Year Rep. in his first year, he was on the SRC in his third and fourth years. He took a courageous stand last year in the often thankless job of director of student publications. A brilliant student, he left no page of Stone unturned. The child Jesus disputing with doctors in the temple would have been no match for Frank disputing in lectures with the doctor of scientific jurisprudence. He [Frank] was articled to Messrs Freehill, Hollingdale and Co. and is now the brains trust of messrs. Minter, Simpson and Co.'

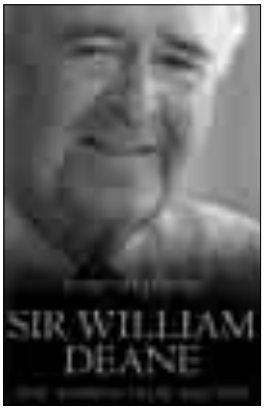
Justice Michael Kirby, who originally briefed and then appeared with Frank in his time at the Bar before seeing him regularly on the Bench, has paid the following glowing tribute:

> I have known Frank McAlary since my earliest days in the law.
>
> As an articled clerk I briefed him many times for the workers in compo cases. He was a great fighter and the Labor Council of NSW loved him. Being Irish and Catholic did not hurt him in that department. His charm and ability soon wore down my Ulster doubts.
>
> My first case out of Sydney involved instructing him in a claim of an abattoir worker. I think it concerned an alleged 'holiday meatie' - a claimed self amputation of a finger in order to get the compo to pay for a modest holiday. Things were pretty basic back in 1958. The worker denied the dastardly charge.
>
> We flew to Bourke in central NSW. Against all odds Frank won the case. Then he jumped on a truck to another town leaving me marooned in a heat wave, twenty-four hours to the next plane, most of them spent thinking alternatively, about Frank's brilliance and his cruel abandonment of me to my fate.
>
> But to really understand his technique of advocacy one had to see him from the other side of the Bar table. Opponents never knew his secret weapon. It was those eyes. It was *unbearably* painful for a judge to reject the slightest argument, however trivial, of a barrister always so utterly convinced of the rectitude of his client's cause. I hope those eyes are captured on video in the High Court's filmed archives. They should be played and replayed in centuries to come to teach new judges of the need to be on the lookout for advocates of passion like Frank McAlary. A big mind. A big heart. Impossible to believe that he will retire.

The occasion in 1999 of the dinner celebrating 50 years in practice of McAlary QC, Porter QC and Hughes QC will long be remembered as one of the great nights of the New South Wales Bar. The sense of *esprit de corps* was palpable as each of those towering figures took their respective bows. Frank McAlary now retires as the senior member of the New South Wales Bar and as the last of the original occupants of the Wentworth/Selborne building, having joined the 11 Selborne, as it then was, in 1957.

Earlier this year, Frank's current and past colleagues on the 11th floor held a memorable dinner in his honour. Frank will pursue his modest business and pastoral interests in retirement. He has been a legend of the New South Wales Bar and we wish both he and Paddy a long and healthy retirement.

Frank McAlary, 'The Dancing Man', in Elizabeth Street, Sydney, during victory celebrations on VJ Day, 15 August 1945. *Photo: News Image Archive*



Sir William Deane: The things that matter

By Tony Stephens
Hodder Headline, 2002

When taking his oath of office to the High Court of Australia in 1982, Justice William Deane declared that 'The source of law and judicial power in a true political democracy… is the people themselves, the governed, the strong and the weak, the rich and the poor, the good and the bad, all manner of people.'

The Hon Sir William Deane's view of the Constitution of Australia, expressed in 1997 during his term as governor-general, is that it must be construed 'as a living force' and 'not as containing a declaration of the will and intention of men long since dead.'

Tony Stephens' book, *Sir William Deane: The things that matter* is necessarily full of quotable material, but these pivotal statements will be of especial interest to the lawyers for whom this review has been written.

The book, however, has been written for a general readership of 'the people themselves', the men and women of Australia whom Sir William Deane served as governor-general in 1996-2001.

In his preface, Stephens states that his book is 'not a biography, although it contains a considerable amount of biographical detail.' Neither is it 'a book of speeches, although it draws heavily on his [Sir William's] addresses and quotes.' Rather the book is 'an attempt to understand what made William Deane the governor-general he was and to draw together the strands of the Australian identity that he feels matter most.'

Tony Stephens is well known to readers of the *Sydney Morning Herald* as a respected senior writer. The expectation that his book would be well written, is amply fulfilled. The chapters numbered (1-9), and aptly titled, are individual essays, although the sense of continuity is well maintained.

In the first chapter, 'The very model of a modern governor-general', Sir William's statement of intention, made shortly before he assumed the vice-regal post, is unequivocal: 'The focus of what I want to do lies with the disadvantaged.'

Sir William's legal career, from the Sydney Bar to the High Court is covered efficiently and comprehensively, but without much depth (in chapter 2: 'From altar boy to High Court'). There is, however, a generous reproduction of the Peace Prize address entitled 'Peace and justice: The search for Aboriginal reconciliation' which was delivered in 2001 after Sir William had retired from office. This is 'meatier' fare for lawyers with its exposition of the Mabo issues and the Constitutional aspects of Aboriginal reconciliation.

'Anzac: Something too deep for words' is, for me, the most moving essay. This may be because, as a young woman, I met Cornelius (Con) Deane, Bill's father, who had fought in the First World War (1914-18).

Con's photograph, in the book, portrays a handsome young officer destined for the horrors of the Somme, in northern France, where so many lives were lost. Winston Churchill, in *Great contemporaries*, described the death of his close friend, Raymond Asquith, in 1915: 'The War, which found the measure of so many men, never got to the bottom of him, and when the Grenadiers strode into the crash and thunder of the Somme, he went to his fate, cool, poised, resolute, matter-of-fact, debonair'.

At the time of our meeting, Con would have been in his 60s, a widower who never ceased to mourn the death of Lillian, Bill's mother, at the age of 43. I was conscious of his sadness, but the overriding impression was of his charm and dignified bearing.

William Deane's father. *Cornelius Deane collection.*

William deane with children on the Tiwi Islands.
Rick Stevens/Sydney Morning Herald

Newly sworn-in as a High Court judge.
Deane collection

Con, like my husband's uncle and former partner, Leonard Chippindall, had been decorated for courage under fire in France. In the manner of their generation, neither of these veterans spoke of their wartime experiences. I do remember that while Bill Deane, John Chippindall and their friends as young men were profuse in their scorn of 'old fools' generally, a special respect was reserved for the surviving Anzacs from both world wars. In the 1950s, the cynicism and disillusionment which were to be engendered by the Vietnam War and later skirmishes had not yet touched them. They were haunted by the poignancy of men dying young.

The most lengthy essay, 'The longing in our hearts', describes the movement towards Aboriginal reconciliation. In this context, Sir William's Lingiari Lecture entitled 'Some signposts from Daguragu', has been reproduced in its entirety. Delivered in Darwin in 1996, the address was prepared after much research. It was written with the clarity and precision of language which characterised his High Court judgments. For many readers, however, the photograph of Bill with children on the Tiwi Islands may be more affecting than any words. His love for children, and obvious acceptance by them, shines out from the page.

The courage of Lady Deane, speaking out herself on behalf of Aboriginal women, was most inspiring to her friends, although not surprising. We were always aware of the intelligence and strength of character beneath Helen's self-effacing manner. After her speech at the Australian Reconciliation Convention in Melbourne, Lady Deane received a standing ovation. Her voice had quavered slightly at first, from emotion, but to her audience it bespoke a deep sincerity and commitment to the cause.

Other chapters deal with multi-culturalism: 'The greatest achievement'; and Sir William's concern for the underprivileged: 'The work of a bleeding heart' and 'In the land of the fair go.' 'Don Bradman and slow racehorses' delivers 'the Don's' funeral oration and provides some light relief. The Deanes' horse, Man About Town was slow to start and seldom finished. There are some good jokes here about Bill's own sporting experiments which should not be spoilt by repetition.

The final chapter, 'Celebration and mourning', contains excerpts from some of the governor-general's finest speeches: eulogies delivered upon the deaths of notable Australians including Dame Roma Mitchell, Sir Mark Oliphant, Dr HC Coombs and Shirley Smith, better known as 'Mum Shirl', and on occasions of national disaster such as Thredbo, Port Arthur, the Black Hawk helicopter collision, the Swiss Canyon tragedy and Childers.

People have often asked Bill's old law school mates what he was like as a youthful student. The caring instinct was already there, especially where Anthony Gallagher was concerned. When Bill embarked for Europe en route to Trinity College, Dublin, after his graduation in 1954, his last words to John Chippindall were 'Look after Gallagher!'

Thus, John became chauffeur/custodian to the intellectual behemoth of our generation at Sydney University, the former dux of St Joseph's College, university medallist in Latin and Greek, Shakespeare and opera buff, and mesmerising orator, who was blessed with the *embonpoint* and gravitas of one of the more self-indulgent popes. Keeping Gallagher 'on track' proved to be a formidable responsibility. The acclaimed scholar tended to quote Horace, *'Nunc est bibendum'*, rather frequently. Nothing could induce him to study the boring practical subjects of the law school curriculum.

As Stephens notes in the biographical chapter 'From altar boy to High Court', 'Gallagher could not pass conveyancing, so dropped out of law, became a teacher and ran a bookshop. He suffered from obesity and was dead at 50.'

Recently we saw an epitaph which might have been written for Tony Gallagher: 'Give me, O Lord, Thy early grace, nor let my soul complain that the young morning of my days has all been spent in vain.'

Tony's lasting achievement may have been that he brought together his school friends Gus Nossal (whom he met at St Aloysius College) and Bill Deane (whom he met later at St Joseph's College). The two men, the scientist and the lawyer, having reached the pinnacles of their respective professions, were to be re-united in 1997 in a common cause: their concern about the standards of health in Aboriginal communities.

In practical terms Stephens's book passes every test: it is a superior paper back (262pp.), reasonably priced, with fine typesetting and photographic reproduction.

The book, written with Sir William Deane's co-operation, handsomely meets its brief as a re-examination of the personal and public concerns of a remarkable governor-general. The cover photograph of Sir William captures the quality, which, above all others, transcended his term of office: a loving-kindness seldom encountered in public life, and already greatly missed. O rare Bill Deane.

Reviewed by Pamela Chippindall

Forum shopping and venue in transnational litigation

By Andrew Bell
Oxford University Press, 2003

When Andrew Bell arrived back from Oxford some 10 years ago clutching his D Phil thesis under his arm, a poorer and leaner figure than he currently cuts, few (but Andrew) could have predicted how productive his thesis would become. It was entitled *Venue in transnational litigation*. Over the last decade it has become a source for an extensive practice which Bell has

developed in private international law cases as a specialty within a general commercial practice. Oxford University Press has now published, in its prestigious Oxford Private International Law Series, an updated version of Bell's thesis under the title *Forum shopping and venue in transnational litigation.*

Prior to the 1990s, in Australia at least, private international law was a rather esoteric subject taught at law school. Most practitioners would encounter it but rarely. Occasionally there would be a choice of law question requiring the pleading and proof of foreign law. Slightly more often there would be an application in a superior court for leave to serve proceedings outside the jurisdiction, which would be a matter of applying the terms of the court rules. Venue disputes between courts of different states of Australia or the Federal Court, though once prevalent, largely disappeared with the 1987 cross-vesting scheme. What has mushroomed in Australia in the last 10 – 15 years has been litigation over where to litigate. This sometimes takes the form of the so-called anti-suit injunction, whereby the local court restrains a party subject to its jurisdiction from instituting or maintaining proceedings in a foreign court. On other occasions the remedy is a stay order — whereby the local court, although seized with jurisdiction declines to exercise it — so as to permit proceedings to continue in a foreign court. Other available remedies are the anti-anti-suit injunction — whereby the Australian court issues an order restraining a person within its jurisdiction from seeking an anti-suit injunction from the foreign court which might prevent the continuance of Australian proceedings. A further remedy is the use of the negative declaration — whereby the Australian court is asked to issue a declaration which effectively negatives a claim or right which might otherwise be brought in a foreign court.

Bell's book traces the reasons for the growth in litigation over where to litigate and analyses in detail remedies such as those referred to above. The perspective is not limited to Australia. Common law authorities are discussed from the UK, Canada, New Zealand, Singapore, Malaysia, Hong Kong, the US and Europe. There is also substantial discussion of UK and European decisions based on the Brussels and Lugarno Conventions or now upon European Council Regulation 44/2001. While these conventions are not as yet directly relevant to Australian courts, the book provides a valuable discussion of how problems which Australian courts are grappling with in venue disputes might at some point be solved by means of a convention whereby both the Australian and nominated foreign courts strive to apply a common set of rules.

The book explores the tensions involved in venue disputes. For the individual litigant, to win the venue battle may be to win the war. The chosen venue may have procedural devices, such as discovery, depositions or a jury trial, not available in the alternative forum. Similarly the chosen venue may offer substantive law principles or remedies not available in the alternative forum. Often the battle over the appropriate forum is a prelude to settlement. However, from the viewpoint of the courts, additional considerations arise. There is a concept of comity with courts of other jurisdictions, which is easy to state but difficult to apply. Local courts should not be too chauvinistic in assuming or holding on to jurisdiction where a foreign court may be better suited to determine the matter. On the other hand, the local court should not be too deferential in allowing a foreign court to assume jurisdiction. In commercial and insurance disputes a conflict will often arise between the Australian and the US courts. The US courts administer a long arm jurisdiction whereby conduct occurring outside the United States but with effects on commerce within the United States may be justiciable there. Further, by means of a jury trial and the availability in some cases of statutory or triple damages, the ultimate award in the United States could far exceed that which is available in Australia. One of the tensions explored in the book is the extent to which Australian courts should deprive litigants, in particular Australian citizens, of access to their local court to resolve the dispute where the consequence will be to subject those litigants to justice in the American courts.

The book also contains a useful analysis of the role of agreements between parties to resolve disputes either in the courts of a particular country or via arbitration. This extends to the steps which litigants can take either to seek to enforce such agreements or alternatively to circumvent them by the commencement of traditional court action.

The style of Bell's work is not that of a conventional textbook. Rather, it reads as an extended analysis, discussion and reflection on the themes and principles at work in the area, and with detailed reference to the authorities. It is best read as a whole and in detail so as to come to terms with the fundamental principles and concepts at work and then used thereafter as a useful reference work.

The authorities canvassed are, as mentioned, from a variety of jurisdictions and also stem from a variety of subject matters. The problems of venue are thrown up in disputes ranging from personal injury, insurance, commercial, industrial, family law and product liability. There would be great benefit for many barristers in obtaining familiarity with the principles at work in venue disputes and this work provides an authoritative and masterly statement of these principles. Like constitutional law issues, issues of venue potentially arise in many litigious situations and a barrister who may be specializing in one of the areas of law referred to above needs an understanding of the principles of venue to recognise the problem when it arises. This book will be the standard reference in the area.

This work is highly recommended to all barristers and practitioners. It contains both a scholarly survey and a practical exposition of the authorities and principles of work in this burgeoning area of law.

Reviewed by Justin Gleeson SC

The law of letters of credit and bank guarantees

By Agasha Mugasha
Federation Press, 2003

The stated aim of this book is to present the Australian law of letters of credit and bank guarantees. The primary focus is on the position in Australia, however there is frequent reference to overseas literature and authorities having regard to the international nature of its subject matter.

Like many such topics-specific books, it originated from a postgraduate thesis; in this case, a master of laws dissertation by the author on the topic of standby letters of credit in International transactions, which was submitted to Osgoode Hall Law School of York University, Canada in 1988.

The book contains a detailed analysis of both commercial (documentary) letters of credit, and the newer instruments of standby letters of credit and bank guarantees. The table of contents is detailed and provides a useful guide to the book. The index however is somewhat basic.

The opening chapters provide a good introduction to the history and nature of letters of credit and bank guarantees, and the fundamental principles, including the autonomy principle (also known as the independence principle) namely, that the undertaking of the issuer to the beneficiary is separate from the underlying transaction and from other related contracts.

The legal issues arising from the various relationships of applicant and beneficiary, issuer and applicant, and issuer and beneficiary are each considered in turn. There is passing reference to the impact of the insolvency of the applicant, the issuing bank or the beneficiary.

Of particular interest to practitioners is the in-depth analysis of the availability of injunctive relief against beneficiaries from demanding payment from the issuers of letters of credit and bank guarantees. The commonest reason for seeking to restrain the beneficiary is alleged fraud on its part. There are however other arguable bases to restrain payment which are well considered by the author, including whether on proper construction of the document, the issuer's obligation is subject to the underlying contract.

The authorities in this area focus upon the question of whether the document creates an absolute obligation so that payment under the relevant document is conditional simply upon the presentation of a demand or other document asserting that an event of default or other activating event has occurred, or whether proof is required that the event of default or activating event has actually happened.

Australian courts recognise that a performance bond may give rise to an unconditional obligation not predicated upon proof of breach (see, for example: *Hortico (Australia) Pty Ltd v Energy Equipment Co (Australia) Pty Ltd* (1985) 1 NSWLR 545; *Wood Hall Ltd v Pipeline Authority* (1979) 141 CLR 443).

To the authorities considered in the book may be added the recent decision in *Roehampton Developments Pty Ltd (in liq) v FAI General Insurance Company Limited* [2000] WASC 235 (Unreported, Hasluck J, 26 September 2000) where Hasluck J took into account the commercial purpose of the agreement (as he was entitled to do), when construing a performance bond involving an unconditional undertaking to pay on demand, and applied the presumption in favour of a construction which holds a performance bond to be conditional only upon the making of a properly formulated demand, rather than upon facts. His Honour held that the provisions of the performance bond itself did not rebut such presumption.

The conclusion in *Roehampton Developments* accorded with the reasoning of *Ackner LJ in Esal (Commodities) Ltd v Oriental Ltd* [1985] Lloyd's Rep 546, that if a performance bond of this kind was conditional not upon a properly formulated demand but upon proof of facts, then payment could never safely be made by the bank or institution except on a judgment by a court of competent jurisdiction. Such a result would be wholly inconsistent with the entire object of the transaction, namely, to enable the beneficiary to obtain prompt and certain payment.

Ultimately, each document has to be construed in accordance with its terms, and there can be no blind categorisation of its character or blind assumption of the obligations which it creates (see Hirst J in *Siporex Trade SA v Banque Indosuez* [1986] 2 Lloyd's Rep 146).

Although the book is a specialised work directed primarily at banking and commercial lawyers, it provides a good starting point for all practitioners who encounter a problem involving letters of credit or bank guarantees. The book is a useful contribution to the legal issues frequently raised by these instruments.

Reviewed by Fabian Gleeson

Robyn Ashes (1952 – 2003)

By David Maddox and Robyn Druitt: Based on a eulogy given by John Ashes

On 22 January 2003 the Family Court at Parramatta closed so that its staff and practitioners could attend the funeral of Robyn Ashes and to reflect on her life. There is no more fitting tribute that the legal profession could have made. She was an energetic, resourceful, friendly and loved member of Arthur Phillip Chambers from her admission in 1990 until her death from cancer in January 2003. She was also an expert family lawyer, as anyone who had contact with her in that field would attest.

Three groups of people gave Robyn strength during her career and in particular during her battle with cancer: Her family, her large circle of diverse friends (from school to her profession) and the legal fraternity. The comraderie and esteem she gained from all levels of the profession was of utmost importance to her. She loved the law and those who practised it.

Robyn was born on 25 November 1952. Her mother's family were of Hungarian extraction and moved to Australia, where they set up a distillery in the St Marys area before the start of World War II. Her father escaped from Poland only to be interned by the Japanese in the Philippines during the war, and came to Australia more or less by chance afterwards. Robyn's paternal grandmother survived the horrors of the Warsaw ghetto largely alone, migrating to Australia to join her son in the late 1940s and lived well into her 90s. She always showed the courage, spirit and love of life that was a trait of Robyn's.

Robyn attended her local primary school in Chatswood where she grew up, but in year five she gained a place in Artarmon Opportunity School. A very capable student in high school, she attended North Sydney Girls High, the premier selective high school for girls in NSW in those days. She always did well academically. Although never at the top, she was not too far away. Robyn had a gift and love of the arts and languages. She spoke fluent German, could get away with French and right up until late last year was studying Italian in her spare time. This is not all that surprising, given that she initially planned to study arts with a major in Asian languages at The Australian National University and intended to work towards a career in foreign affairs.

Unfortunately for Robyn, a tumultuous event intervened. Her father suddenly and tragically passed away on the October long weekend in 1970, just before the HSC. This catastrophic event changed the direction of her life. She felt she could no longer attend the ANU in Canberra and study arts, and decided to stay at home to support and be with her beloved family.

What was she to do? Being an arts lover, teaching crossed her mind, but her mother immediately vetoed that, saying 'Your HSC pass is much too good for that. What about law?' And that was it: a change in direction to the new arts/law course at the University of New South Wales. Robyn was part of the first intake in 1971. It didn't take her long to settle into the new course and she never looked back. She established many firm friendships at university and in subsequent years that endued until the end. It was there that she also met her husband, at the UNSW ski club.

Skiing was one of Robyn's great passions, aside from her passion for world travel. She regularly searched the globe for skiing venues and from the early 1980s until recently she planned and looked forward to her annual 2-3 week overseas skiing holiday. It was a passion she shared with her husband and one which they were able to introduce to their children. They spent many a happy holiday skiing with family and friends. She was not a great sportsperson, but to be fair was a good swimmer and played a reasonable game of tennis; however, she was the most beautiful skier, racing for her ski club and UNSW in her youth. She had a very upright classic Austrian style that people used to stop in the middle of the slopes and admire.

On graduating from UNSW, in 1976 she attended the new 'college of knowledge' in St Leonard's, being one of the very first intakes as the old article clerk system was being abolished. She easily completed the six-month course and then the real challenge began - to find a job. Due to her change of plans after school, a career had not really been fully thought through, nor did her family have 'connections' in the law. It was a difficult and frustrating time for her, but one that she showed the determination to succeed that we came to expect of Robyn. Her break came later in 1976 when Geoffrey Walker, a local Castle Hill solicitor, offered her contract work. He would drop over instructions to Robyn at her home in Baulkham Hills, where she would beaver away and prepare his documentation on her little manual portable typewriter. It wasn't much of a job, but it was a start. The applications went out and the rejections came in, including a one memorable one: 'This firm has never employed a female solicitor and will never'.

Finally a break came in later in 1976 when Keith Brown and John Vaughan, of Edgely Brown and Sanderson, an old established Fairfield firm of solicitors, employed her on to build their family law practice. Being relatively new to family law was not such a problem as the fairly radical Family Law Act had just been introduced by Lionel Murphy.

A year later Robyn left and set up in private practice in Castle Hill. When an approach came to amalgamate with Wilmot and Klimt in the early 1980s she jumped at the chance. The practice thrived for many years, with Robyn handling the family law and Peter Klimt and Peter Zipkis the property and commercial work – they always remained close friends.

In the late 1980s Robyn had strong feelings to change her career. She loved the court work, and her family was growing up and were less dependent on her time, so she made the decision to come to the Bar in 1990.

This was a reasonably traumatic decision for her, but with the support of her family and encouragement from many colleagues she undertook the Bar exams and Bar Practice Course. She was fortunate in that she read with David Collier, who always encouraged and

supported her greatly throughout her career. On being admitted, she joined Arthur Phillip Chambers where she stayed to the end.

Robyn gained strength from her move to the Bar and was a strong, enthusiastic member of her chambers. If jobs needed to be done, such as installing a new telephone system, Robyn could be relied on to organise it. She always had time for others, willingly helping and counselling colleagues and taking a special interest in those newer to the profession. Her trademark initiation of a conversation was: 'Tell me something interesting'.

While all of those at Arthur Phillip Chambers and in the profession generally greatly miss her cheery countenance and her winning ways, we are grateful to have known Robyn, to have learnt from her, and to have the gift of the many memories she has left.

We are grateful that Robyn was part of our lives.

Robyn died on 18 January 2003 after a long and courageous fight with breast cancer and requested that we consider the NSW Cancer Council rather than send floral tributes.

George Hillary Smith QC (1923–2003)

The following is an edited version of the eulogy delivered by his Honour Judge Stephen Norrish QC on 26 March 2003

Dorothy, Vicki, Greg and Rob, family and friends of George.

When I was asked by Greg on behalf of Dorothy to speak today I was deeply honoured but also immediately daunted by the task. Although I propose to only speak about the legal career of George, it was a significant part of his life and it overlapped in many ways with his personal life. My immediate concern was how could I do justice to a man who always did justice to those with whom he dealt particularly when required during his judicial career. As a judge he was intelligent, he was insightful, he was wise, he was compassionate. These qualities were a reflection not only of his capacities as a judge, but his qualities as a man. It should be pointed out compassion is not encouraged nowadays in some quarters as a judicial quality.

He achieved so much but was a modest self-effacing man, slow to anger or frustration, always prepared to see the best in others, slow to judge unkindly. He disdained pomposity and had tremendous reserves of irreverent humour. Much of what I feel about George, and what I know about him by way of reputation was confirmed by my research for this eulogy.

The bare details of career do not tell the full story of his life.

The achievements as a lawyer and a judge were impressive enough but he had many other interests. Some overlapped with his love of the law. He held family life dearest to his heart. He had his charitable works to occupy whatever spare time he had. He loved theatre and music. Even 'conversation' according to the latest edition of *'Who's who'*.

George was educated at Sydney High School. He had service with the 2nd AIF between 1942 and 1945. He studied law at Sydney University, graduating on Australia Day 1949, with my dear friend and mentor Ken Glass (who passed away 18 months ago at the same age as George).

He completed his articles of clerkship at Dawson Waldron Edward Nicholls but was clearly made for a career at the Bar.

The overlap between law and his personal life is exemplified by his love for Dorothy, her love of him and the close support they gave one another throughout their married life.

George was called to the Bar on 10 February 1950, two months and 23 days before I was born. He was an original member of 3 Wentworth Chambers in 1957. Barrie Thorley and Phillip Twigg, two judges of my court (and present today) were colleagues on that floor, as was John (later Justice) Slattery QC, amongst many other legal luminaries.

He had a distinguished career at the Bar. His contemporaries uniformly speak of his brilliant legal mind and his persuasive skills as an advocate. In fact most speak of their surprise that it was not until 25 November 1971 that he took silk. For many years before taking silk he was regarded as one of the best, if not the best, junior at the Bar. He had skills in equity and common law. He served on the Bar Council in 1960 to 1961 and 1968 to 1971.

George was appointed to the District Court on 16 October 1972. The chief judge was James Staunton QC.

The Sun newspaper (a reliable source of information, no doubt; I suppose that is why it is no longer published) detailed the speeches at his swearing-in. It reported George's swearing–in with the breathless headline 'Almost a 'High Court Bench", a reference to the presence of Sydney High School alumni present such as Harold Glass QC, representing the Bar Association.

Apart from wit, whilst on the Bench George regularly displayed qualities of legal learning, erudition, incisiveness, courtesy and mercy for which he was widely renowned and universally respected. During his career on the Bench he served as deputy chairman of the Medical Disciplinary Tribunal. He also found time apart from family commitments to serve as president of the NSW Asthma Foundation (of which he had been previously a director) and was appointed its life governor in 1985. His interest in these matters arose from concern for the welfare of his own children and others as well as the encouragement of Dorothy who recently was awarded an Order of Australia for her tireless work for charitable and community causes.

On the Bench his work was greatly supported by Dorothy. She travelled with him when family commitments allowed. Her company was a source of strength and enjoyment in an environment when loneliness and isolation can dominate one's thinking. He made friends with the profession on both sides of the ledger (so to speak) in crime and in the civil jurisdiction. I note the presence of his good friend Bob Lord QC who I know admired George greatly for his wit, his sense of justice and his *bon homie*. They

travelled extensively together in the days of real circuits in the southern part of the state.

I made mention earlier of his greater modesty. One story reflects this. When on the Bar Council he stood aside in 1971 in expectation of his appointment as silk. He did not regard it as fair or proper that he should keep another member of the outer Bar from serving on the council upon his own elevation to the inner Bar.

He served on the Guardianship Board with distinction between 1992 and 1996. He took that appointment after his work as a consultant with Blake Dawson Waldron on retirement from the Bench. He maintained a regular stream of witty correspondence to the letters editor of the *Sydney Morning Herald* until recently.

The community, litigants and legal friends were privileged to have a man such as George Hillary Smith serve the legal profession and the judiciary in this state. He would be an asset in any legal system in any part of the world but as the fates proclaimed it, it was our privilege to have him with us here in Sydney, not only to enrich our lives, but to enrich the lives of all with whom he dealt. We should all be grateful. We will all miss him greatly. Those of us left behind will do our best, albeit no doubt unsuccessfully, to match his contribution.

On behalf of all of his legal friends I wish to convey our deepest sympathies and condolences to Dorothy, Vicki, Greg and Rob, their families and George's wider family.

Bob St John QC (1925 – 2003)

By The Hon Justice R N Madgwick*

For all the bad press barristers have lately had, the Bar has enough decent people to justify its pride in its traditions of independence, courage, generosity in defending the poor and oppressed, and public service generally.

Few, however, exemplify these traditions as well as Robert James Baldwin St John.

Bob was the second of three sons of a North Coast small farmer, who had more principles than money. As a boy, Bob did the milking before school. Barefoot, on frosty winter mornings he would hop between fresh cowpats to keep his feet warm as he brought the cows in.

He left Coffs Harbour High School in war-time, a sportsman and scholar. Bob followed his elder brother Bill into the Services, enlisting in the RAN as a rating in 1943, barely 18. Declining officer training, he served as a gunner on HMAS *Warramunga* for the balance of WWII, taking part in the Battle of Leyte Gulf and the invasion of Lingayen. He was never keen on war thereafter. His reminiscences centred on such larrikin activities as being caught selling liquor to American sailors. Later, he served with the occupation forces in Japan (including driving trams in Tokyo).

Demobbed, St John studied at Sydney University Law School in the surge of bright and ambitious scholarship ex-servicemen. A boxing blue, he was 1950 inter-varsity middleweight champion, though he also fought in light-heavy and heavyweight divisions. Early on, he outpointed his lifelong friend, Harry (later Judge) Bell. They agreed to fight thereafter in different divisions. St John said there was 'no point in cobbers knocking each other about'.

He worked his passage to England and, along with such as Kep Enderby and Des O'Connor, took a Master of Laws degree there. He worked as a solicitor in London and married his first wife Ann (also from Coffs Harbour) before returning to Sydney in 1955 to go to the Bar, intending to practise company law.

Fortunately for many, he soon moved to other work. He had a big common law and especially criminal law practice. In the latter field he stood out for his dignity, erudition and practical shrewdness. Judge Aaron Levine, who presided in the famous *Heather Brae Clinic* trial of qualified doctors for performing abortions, credited St John (who appeared for one of them) with the advocacy that saw the jury set the doctors free. The case eventually led to a more rational approach in New South Wales to the whole abortion issue.

Influenced by George Orwell and the Andersonians of the old Newcastle Hotel crowd, St John helped to found the NSW

Bob StJohn QC

Council of Civil Liberties (CCL) in 1963. The early lights included Bob Hope QC, Ken and Berry Buckley and Dick Klugman. The CCL was formed to assert what are now commonly called human rights. The then NSW police force was often thuggish, and benighted censorship policies were the order of the day. The CCL arranged for sympathetic lawyers to appear free of charge in police brutality and censorship cases. St John personally fought many of these. Some of the interesting people he defended became family friends and enriched his children's lives. He succeeded Hope as the council's president. In character, Bob's contribution to CCL fundraising was to host huge bush barbecues. He roasted pigs and Ann cooked camp-oven damper.

Both before and after the formation in 1970 of an Aboriginal Legal Service, St John was in his day the most senior barrister consistently to appear free for Aborigines. A District Court judge recently wrote of him as a 'hero' for that effort. Fred Hollows's autobiography candidly describes Bob's offhand treatment of clients, as well as his generosity. He did not care for official honours and resisted taking silk until 1974. He was a great cross-examiner, much influenced by JW Smythe QC. His submissions were put firmly and economically.

St John steadily did what he could in the interests of his vision of a rational and civil society. He was, for example, an early feminist and encouraged the then few women at the Bar, including Jane (later Justice) Mathews, Priscilla Flemming QC and Caroline (now Justice) Simpson. Recalling the backyard 'knitting needle nells' of earlier times, he was proud to be a director of a non-profit ethical abortion clinic.

In 1975 Bob was appointed to the then Australian Industrial Court at the suggestion of justices Jim Staples and the great industrial lawyer Jack Sweeney, despite the latter's initial antipathy to him – arising out of old differences in the CCL of which Sweeney was another founder. Sweeney, appointed to head a Royal Commission into aspects of the maritime industry, when told that St John was to be counsel assisting, affected not to know him: 'Hmm', he said, 'a pugilist of note, I believe'. However Sweeney soon recognised that St John had real ability and persuaded him that it should be used on the Bench.

When the Federal Court was set up in 1977 St John was appointed as one of its original judges. He wrote some significant judgments, including on copyright, and also on constitutional matters during his three years as chief justice of Western Samoa. He quietly urged the introduction of universal suffrage there. During his secondment to Samoa and his appointments to the Norfolk Island and Northern Territory supreme courts, he traveled to remote areas to meet local communities and, when he could, to fish – a lifelong passion.

However, a born barrister, he ultimately preferred combat to umpiring and left the court in 1985, intending to go back to the Bar. A term as chairman of the Australian Electoral Commission continued into 1986.

Outside the law and agitation for people's civil rights, Bob was a man of many and unexpected parts, among other things, a fair bush carpenter. A country boy at heart, Bob had various rural properties. Away from legal life, he applied unflagging energy to their improvement. For his Bilpin retreat, he found an Italian mason who, along with Bob's son Richard, built a superb stone house. Bob dabbled there with an orchard and filled sheds with early Australian tools and cedar furniture. His friend, the artist Salvatore Zofrea, painted his portrait which was hung in the Archibald.

A constant for nearly 40 years was Quail Island, an offshore Queensland cattle lease. In partnership with solicitor Bill McNally and various others, he fished, enjoyed hosting family and friends and squabbled with his partners. His remote shack saw legendary mudcrab and oyster feasts.

For a few years he did some work back at the Bar and continued his interest in collecting and dealing in furniture, fine art pieces and old tools. His second marriage to Jenny ended.

A period of more serious endeavour at the Bar followed. He practised in Coffs Harbour as well as in Sydney, and appeared in some important criminal cases.

Finally, with worsening emphysema, the legacy of heavy smoking until mid-life, he returned to his North Coast farming roots. Here he embarked on what was to be his last project, the transformation of an old banana farm north of Woolgoolga into a coffee plantation.

Despite his physical condition, he lived alone, disdained home help, and cared for himself. Recently, while picking beans in his vegetable garden, a fall caused him severe head injury. That and his lung disease carried him away a fortnight later.

Bob had a sharp, often biting wit. He loathed small talk. He could be difficult. His nickname, 'The Bear', bestowed by CLD Meares QC, described his temperament as well as his physique. Bob had an anti-authoritarian streak and a contempt for bullies of every kind but especially when they were police, judicial officers or others in a privileged position. He pricked the pompous.

Among his intimates, warmth, kindness and loyalty balanced a somewhat severe devotion to his principles and straightness. All his life he quietly looked out for a Navy shipmate whose peace had not equalled his war. He was a deeply loving father and the best of friends.

He made a difference.

He is survived by his children Rosemary, Richard, Bhakti (Robyn), and Jill; their ten children; his step-children David and Hannah; and his younger brother David.

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* The following is the unedited text of the obituary printed in edited form in the *Sydney Morning Herald* on 14 May 2003.

Bar Practice Course 01/03

Photo: Murray Harris Photography

Top row left to right:
Daniel Meltz, Gerard Fisher, Ed Muston, Andrew Gee, Hamish Stitt, Lachlan Menzies, Frank Hicks, Tim Gartelmann, David Shoebridge, Steven Berveling, Hugh White

Second row left to right:
Greg Sarginson, David Liebhold, Angela Seward, Steven Torpey, Jacob Horowitz, Peter Doyle, Geoff McCarthy, Ben Clark, Jason Potts, Avni Djemal

Third row left to right:
Tania Evers, Peter Cullen, Sandy Dawson, Lincoln Crowley, Chris Catt, James Crisp, Tony Slevin, Paul Moorhouse, Emily Pender, Ben Katekar, Dymphna Hawkins

Front row left to right:
Kate Barrett, Richard Steele, Julian O'Sullivan, Rachel Francois, David Thiering, Angus Macinnis, John Levy, Tina Jowett, Justin Hogan-Doran, Karena Viglianti

The Hon Justice John Dyson Heydon

On 11 February 2003 the Hon Justice Dyson Heydon was sworn in as a judge of the High Court of Australia, the 44th such appointment since the court's establishment in 1903.

His Honour was welcomed to the Bench by the Commonwealth Attorney-General, the Hon Daryl Williams AM QC MP, the President of the Law Council of Australia, Ron Heinrich, the President of the Australian Bar Association, A J Glynn SC and the President of the New South Wales Bar Association, Bret Walker SC.

The Attorney recounted for the assembled guests Justice Heydon's considerable scholastic achievements. Born in Ottawa as the son of a diplomat, his Honour was educated in a number of cities around the world, including London, Wellington, Rio de Janeiro, and Sydney, where he attended Shore and St Paul's College at the University of Sydney. He graduated in 1964 with a Bachelor of Arts degree with First Class Honours and the University Medal in history.

In 1964, his Honour was awarded a Rhodes scholarship to study law at Oxford University. It was there that he was awarded the Martin Wronker prize for the top first-class honours degree in law in 1966. He completed the degree of Bachelor of Civil Law and was awarded the Vinerian Scholarship for the best results in that course.

Between 1967 and 1973 his Honour was a fellow of Keble College, Oxford, and lectured in evidence and trusts at the Inns of Court School in London from 1969 to 1972. In 1973, he returned to Australia as Professor of Law at Sydney University Law School, where he lectured in equity, evidence, commercial and company law, and restrictive trade practices. He became the youngest person to head a law school in Australia when he was appointed Dean of the Sydney University Law School in 1978.

Walker SC paid tribute to Justice Heydon's academic career with a personal recollection from his days as one of his Honour's law students:

> An undergraduate population does not rise early in a good or eager mood. I share with many others, therefore, some wonderment at the way at which at 8.00am a crowded lecture hall, well underground, would attend your Honour's equity lectures; not because it was compulsory and not because they were the only lectures, but because of your Honour's strong expository style was of a kind which even we…understood was not likely to be replicated to the same quality anywhere else.
>
> Your Honour's teaching style could not be described as having succumbed to any new-fangled techniques of pedagogy. Conversation was not encouraged, of any kind, and there was no pretence on your Honour's part that there was any intellectual, cognitive, academic, scholarly or legal equality of interchange between lecturer and lectured. That approach had two great advantages: first, it was entirely accurate; and, second, it permitted those of us on the unfavourable side of the comparison to try and do something about bridging the unbridgeable gap. Those qualities of strong, clear, unsentimental exposition stood your Honour in great stead as an advocate at the Bar.

His Honour commenced practice at the NSW Bar in 1980, when he joined the eighth floor of Selborne Chambers. There he read with Peter Hely (as he then was) and worked with other senior barristers, including AM Gleeson and RP Meagher and WM Gummow, and the Hon TEF Hughes QC.

Walker SC commented on the transition from academia to practice, saying that 'it was then a remarkable thing for the Dean of the Law School to come to the junior bar. Your Honour carried off that remarkable feat remarkably well and your Honour soon came, figuratively, to tower at the Bar.'

His Honour developed a very successful practice based upon his longstanding specialties of trade practices, company law, equity and trusts. His Honour was appointed Queen's Counsel in 1987 after only seven years in full-time practice. He served as a member of the New South Wales Bar Council from 1982 to 1987

The Court of Appeal

In February 2000 Justice Heydon was elevated to the Supreme Court of New South Wales and the Court of Appeal, an appointment which Walker SC described as 'popular and well-regarded in legal circles' and noted that 'everything that happened in the nigh on three years since then from your Honour's activities as a judge on the Court of Appeal vindicated the applause for that appointment'.

The Attorney-General had earlier commented that during his three years on the Bench, Justice Heydon:

Justice Dyson Heydon after his High Court swearing-in ceremony. *Photo: News Archive*

> adorned volumes of the *New South Wales Law Reports* with written judgments that have had a profound impact on the law. Of particular note is your contribution to the law of expert evidence given in the *Makita v Sprowles* decision, in which you provided seminal guidance on determining the validity of expert evidence. I have no doubt that your background as an appellate judge, an advocate and an educator, your fine personal attributes and your extensive experience in careful analysis and exposition of the law will serve you well in the discharge of the important duties of your new office.

Publishing and editing

In addition to being a respected legal academic and practitioner, his Honour has been a prolific writer and editor of works which have long been essential reading for students and practitioners alike. *The restraint of trade doctrine*, published in 1971, was quickly followed by numerous others, including *Economic torts* (1973), *Casebook on evidence* (1975), *Heydon and Donald on trade practices law* (subsequently *Trade practices law*) (1978). For many years he was editor of Cross on evidence (Australian edition) the *Australian Law Reports, the New South Wales Law Reports, Australian Bar Review* and *Halsbury's Laws of Australia.* His Honour has also published a large number of journal articles on equity, expert evidence, torts, trade practices and trusts.

Walker SC capped off the welcoming speeches on a congratulatory note, saying that:

> if a Bar may be permitted, however illegitimately, to feel pride in the preferment of one of its own, the New

> South Wales Bar is unashamedly proud of what is happening today. We wish you well in all of your discharge of your onerous office, and we simply note that when your Honour wrote last year in a collection of essays, that…we live surrounded by a legal world drifting towards chaos. Your Honour is now at the apex of the system. It is an apex from which more than one broad field is supervised by this court. Your Honour's activities, we are confident, will do something to contribute to this court's arrest of that drift towards chaos.

In reply, Justice Heydon began by paying tribute to Justice Mary Gaudron. The resignation of Justice Gaudron, he said:

> has left an immense hole in the ranks of those who administer the judicial branch of our federation. She stood high among those best equipped for the task by capacity, by training, particularly at the hands of the late Mr Justice Hutley, by experience and by achievement…Personal experience of her abilities in oral argument cannot survive oblivion in the minds of those who had it, but there is another benefit which will remain available for much longer. Any lawyer attempting to analyse a novel or difficult problem can do no better than examine any relevant judgments of hers. If they are read slowly, line by line, repeatedly, carefully and sympathetically, they create a much fresher and clearer vision of the issue. One might not agree with either her reasoning or her conclusion, though very often one would, but the question of agreement is not to the point. The value of her judgments lies not so much in compelling acceptance of a conclusion as in aiding readers to their own conclusions. For that reason they will be read as long as any parts of the *Commonwealth Law Reports* continue to be read.

Justice Heydon also paid tribute to the Honourable TEF Hughes QC and Justice Meagher, praising their high intellectual and professional abilities and their loyalty, and to the members of 8 Selborne Chambers, past and present.

> The floor is not just to be compared to a group of Irish or Northumbrian monks vainly trying to preserve civilisation through the strife of a new Dark Age. Its leaders were masters at conducting the classical common law trial.

The Honourable Justice Annabelle Bennett

On 5 May 2003 Annabelle Bennett SC was sworn in as a judge of the Federal Court of Australia. The Commonwealth Solicitor-General, David Bennett AO QC, began his speech to welcome Justice Bennett to the court by noting that the Attorney-General, who would otherwise have delivered the address, was not there to speak in person because 'sometimes the first law officer accepts and acts on recommendations from the second law officer'. The following is an edited version of his entertaining and informative welcoming remarks.

When your Honour was in the third class of Wenona school for girls primary school a defining event occurred in your Honour's life. Your Honour came second in the class. This was a defining event because it was the only occasion in your Honour's primary and secondary school career in which your Honour did not top the year both overall and in every subject.

Ironically, your Honour never finished school. This is because you were in the first year of the Wyndham Scheme under which secondary education was increased from five to six years. At the end of fifth year your Honour decided to spend a long vacation studying and to sit for the matriculation examination in January. This enabled your Honour to proceed to enrol in science at the University of New South Wales, without completing the final year of school in a year when your Honour's only fellow students are people who are repeating the year and people who have taken the year off. Your Honour thus had the luxury of uncrowded lecture theatres and virtually individual tuition.

Your Honour had always intended to enrol in law but your Honour's father who had graduated in law in Poland before the Second World War advised you that law was unsuitable for women for two reasons; first, you would need to be better than the best just to succeed and, secondly, it was a career that did not travel. This was before women silks and judges and before travelling practising certificates. Hopefully, 36 years later we've moved a long way in the legal profession to remedy both these deficiencies. Your Honour, however, would have satisfied his criteria in being better than the best.

Your Honour's father, incidentally, came from the small Polish town of Sosnowiec. There must have been something in the water, because four descendants of residents of that town have joined the Australian judiciary; Chief Justice Spigelman of the Supreme Court of New South Wales, Justice Hampel of the Supreme Court of Victoria, now Professor Hampel, Chief Justice Rosenes of the Victorian County Court and your Honour. Naturally, at the end of three years of science your Honour proceeded to do an honour's year. Your Honour wrote a thesis on *Mitachondrial populations in chick embryo livers*, a tome which no doubt changed the world. Your Honour proceeded to do a doctorate in biochemistry and delivered a thesis entitled *Some aspects of the nature and role of phospholiopids in spermatozoa of ram, bull, boar, dog, fowl, rabbit and human* - that no doubt being their scientific order of importance. Nineteen scientific publications have flowed from your Honour's thesis.

Then as now your Honour was uninhibited in discussing such matters. In 1973 your Honour attended a dinner at Admiralty House where you were seated next to the then governor-general Sir Paul Hasluck. His Excellency inquired what your Honour did and your Honour told him in some detail the nature of the work you were doing for your thesis including the fact that the Department of Veterinary Physiology was prepared to pay students $2 per ejaculate to be used for experimental purposes. Your Honour inquired whether he was interested in contributing, an invitation which His Excellency politely declined.

That was not the only occasion when your Honour made a *faux pas* when confronted by a senior dignitary. Some years ago your Honour was at a black tie function at a legal conference in Queensland. Your Honour was introduced to the chief justice of Queensland, Sir Dormer Andrews. Immediately after the introduction there was a silence. If there is anything your Honour dislikes it's silence. So in a desperate attempt to make conversation your Honour admired his bow tie and asked him 'Do you tie it yourself'. As you

said the word 'yourself' your Honour glanced down and noticed that his Honour had only one arm. His reply was a credit to him; 'I can tie them myself, my dear' he said 'but I cannot tighten them'. Your Honour's dislike of silences is unlikely to be a problem on the Bench of this court.

In the second half of the 1970s your Honour completed your post doctoral research on spermatozoa and then made the move you'd contemplated eight years earlier by enrolling in a graduate program of law at the University of New South Wales.….

Your Honour came to the Bar in 1980 and rapidly developed a practice in commercial law and professional discipline. In the professional discipline field your Honour has acted on all sides; as counsel for the accused professional, as prosecuting counsel and as a decision maker in relation to a variety of professions. The only role your Honour has not fulfilled before disciplinary tribunals is the role of accused professional and your Honour will now never get a chance to do so.

The Bar enabled your Honour to combine your qualifications. Your Honour developed a very extensive intellectual property practice with an emphasis on biotech patents. Your Honour has acted for Dolly the sheep and in a case involving the patent for Viagra…

In 1994 your Honour was appointed senior counsel in New South Wales in the second batch of appointments under the new regime….

It's usual on occasions like this to identify some first which your Honour's appointment represents. The most conspicuous, so to speak, is that your Honour is almost certainly the first Australian judge to be less than five feet tall. The High Court, to its credit, has recognised your Honour's inability to see over the podium and provides a special item of furniture for your Honour to stand on when your Honour appears there. No doubt it will now be stored for some future date when another practitioner with your Honour's commanding height emerges. Whether structural changes need to be made to the furniture of this court remains to be seen.

Your Honour has taught advocacy both in Australia and in Bangladesh. Most importantly of all your Honour was a member of the Council of the Australian National University and for the last four years its Pro-Chancellor. Only this and the Sydney Children's Hospital will survive your appointment to this Bench but your Honour's elevation has not deterred you from accepting new appointments. Only last week your Honour was appointed to the board of the Centennial Park & Moore Park Trust.

Your Honour is a brilliant cook and your dinner parties are legendary. Your dress style has created a new standard for the female Bar. I understand that plans are now afoot for water jugs in this court to be filled with Evian water and for the standard uninspiring furnishings of your Honour's new chambers to be replaced by tasteful pastels simultaneously with the installation of a dressing table containing your Honour's signature chocolate drawer thermostatically controlled to an ideal temperature. Your Honour has complained that the court robes are too long and is having them adjusted but they are to be re-designed by a committee which will include nominees of Yves St Laurent.

There is one final matter; some years ago a judge was sworn into the Supreme Court of Manitoba. His wife was the president of the Manitoba Bar Association so it fell to her to speak at his swearing in. She concluded with these words; 'I want you to listen very carefully to what I am about to say because, as I will never be able to appear in front of you, this is the first and last time you will ever hear me address you this way, My Lord.'

That witticism is not available to me since we don't address judges as My Lord or My Lady but for the same reason this is the first and last time on which I'll be able to address you as your Honour. Notwithstanding that I will never cease to honour you and your incredible achievements.

The Honourable Jeffrey William Shaw

Former Attorney General Jeff Shaw QC was sworn in as a judge of the Supreme Court on 4 February 2003.

His Honour was welcomed to the court by the current Attorney General, the Hon Bob Debus MP. The Attorney recounted that his Honour grew up in Beronia Park, a small Sydney suburb between Gladesville and Hunters Hill. The area was described by the actress and writer Pamela Stephenson as 'a sparsely landscaped desert, dotted with mounded dwellings and indigenous giant red biting ants' and inhabited by 'fierce magpies, striped goannas and funnel web spiders'. Children walking to the bus stop 'became accustomed to leaping over venomous black/brown snakes that lay sunning themselves on the path'.

Surviving such travails, his Honour went on to attend Beronia Park Public School, Chatswood Public School and then Hunters Hill High School before studying arts and law at Sydney University. He was admitted as a solicitor of the Supreme Court of NSW in 1975 and a barrister the following year. After ten years of practice he was appointed Queens Counsel in 1986.

In May 1980 his Honour was appointed to the NSW Legislative Council to fill a casual vacancy and was the shadow minister for industrial relations and local government from 1991 to 1995. In government he served as attorney general and minister for industrial relations from 1995 to 2000 and also as minister for fair trading from 1998 to 1999. After more than five years as a minister, he announced his intention to retire from politics and return to the Bar. On his last sitting day in the Legislative Council the accolades were strong and sincere from both sides of the chamber.

His Honour has been a prolific academic writer, having written for a wide variety of publications and on a wide variety of topics including, in particular, the area of industrial law. The Attorney noted that he had written on subjects as diverse as the enduring influence of Trotsky on Sri Lankan politics and the sartorial pitfalls of wearing sandals with or without socks. On a more academic level his Honour

has received appointments as a member of the Council of the Sydney College of Advanced Education, visiting professor of law at the University of New South Wales, adjunct professor at the Sydney University Faculty of Economics and adjunct professor of law at the University of Technology. He has also been deputy chairman of the NSW Law Reform Commission.

In reply, his Honour referred to his experience in the executive government, stating that his five years as attorney general was gratifying both in terms of the administration of the criminal and civil justice system and the opportunity for legislative reform. His Honour said as follows:

> Although the doctrine of the separation of powers might not apply *stricto sensu* to a sovereign state parliament, nonetheless the central doctrine of our liberal democracy is the independence of the courts. This requires the fearless adjudication of matters whatever might be the criticisms that come from individuals, the media or even the executive government in relation to such decisions.
>
> It's important I think there should be an understanding knowledge and respect in the relationship between the executive government, the legislature and the courts…although some of my former colleagues in the legislature might disagree. I accept the view of the American writer Alexander Hamilton whose 1787 commentary on *The constitution of the states* referred to the judicial sphere of government as the least dangerous branch. It is a check against possible excesses of the executive and the legislature.
>
> Justice Heydon recently quoted George Orwell in his Honour's well-publicised *Quadrant* speech on 'Defence of traditional legal institutions'. I would only enter those controversies with great trepidation but I do venture to refer to the English historian EP Thompson who when referring to some of our old legal terms said that the rule of law is an unqualified human good and supported institutions which have proved to be flexible, capable of modification through centuries of conflict and after protracted studies of reform.

The Honourable William Henric Nicholas QC

On 5 February 2003 Henric Nicholas QC was sworn in as a judge of the Supreme Court.

His Honour was welcomed to the court by Murray Tobias QC, speaking on behalf of the Bar. Tobias QC, in an address which has been noted for its comprehensiveness, recounted that his Honour was educated at the Kings School and Sydney University. He was articled to Major General John Broadbent at what was then Stephen Jaques and Stephen. His admission as a solicitor was moved by Mr R P Meagher as his Honour then was. After taking a working passage on a cargo ship to Europe, his job being to paint the hull, his Honour worked as research assistant for the International Commission of Jurists in Geneva. Upon return to Australia, his Honour was an employed solicitor before being admitted to the Bar in October 1966. His Honour evidently spent much of his reading year improving his knowledge of classic novels and foreign cinema. His Honour joined 6 Selborne Chambers in 1971 and rapidly developed a leading practice in defamation.

His Honour had two terms as an assistant commissioner of the Independent Commission Against Corruption and served as a member of the Legal Profession Disciplinary Tribunal and later the Legal Services Division of the Administrative Decisions Tribunal. He was a member of the Bar Association's Arbitrator' Panel and a member of the Bar Council. His Honour also served as a director of Counsels Chambers Limited and participated in the Bar Association's Olympic Pro Bono Scheme.

Outside the law his Honour was chairman of the NSW Publications Classifications Board and a trustee of the Centennial Park Trust. In the area of the arts he served as a director of the Sydney Theatre Company, chairman of the Eleanor Darke Foundation/Veruna Writers Centre and a director of the Blake Society for Religious Art. He is currently chairman of the Kimberley Foundation of Australia which promotes research into ancient Aboriginal rock art in the Kimberley region. His Honour has been for many years a councillor of the Royal Agricultural Society of NSW and a commercial breeder of cattle.

His Honour follows his paternal grandfather Harold Sprent Nicholas to the Bench. H S Nicholas was chief judge in equity.

On behalf of the Bar, Murray Tobias QC warmly welcomed his appointment, saying:

> Your Honour has already made a significant contribution to the law and to a large number of other fields of endeavour and to numerous community causes. Your great experience as a jury trial and appellate advocate and your undoubted energy, work ethic and legal skills coupled with your wide experience of the world and life in general can only result in your Honour being a judge of great distinction exhibiting all the wisdom, humility, judgment and common sense and not unimportantly courtesy and humour which your family, friends and colleagues have come to expect from you…
>
> My wife asked me whether she could read this speech in one of its earlier drafts. Having done so, her only criticism which was somewhat devastating was that she thought it read like an obituary. I prefer to think of it as the profession's version of 'This is your life', albeit without the feigned surprised and sudden cameo appearances of long lost and usually forgotten relatives and acquaintances. And indeed, what a full and productive life it has been…
>
> Your Honour now seeks to further that life and continue your effort in public service by commencing a new and exciting phase of your career. You do so with the warmest best wishes of your friends and floor colleagues in particular and the Bar in general.

The Hon Justice Murray Tobias takes the Oath of Allegiance'.

The Honourable Murray Herbert Tobias

Murray Tobias QC was sworn in as a judge of the Supreme Court and a judge of appeal on 28 April 2003.

His Honour was welcomed to the court by Walker SC, speaking on behalf of the Bar. Walker SC recounted that his Honour had a long and distinguished career at the Sydney Bar, including as a member of the Bar Council from 1976 and as its president in 1993 and 1994. His leadership of the Bar came at a very testing time, particularly by reason of the introduction of what after many amendments would become the *Legal Profession Act 1987*. His Honour was also a member of the NSW Casino Control Authority and chaired a major inquiry by it in 1994 and 1995. He was also a captain in the Naval Reserves and presided over a number of inquiries as a Defence Force magistrate. On Australia Day in 1998 he received membership of the Order of Australia for services to the profession, particularly through the Australian Bar Association and New South Wales Bar Association, and for service to military law.

His Honour also maintained a busy practice in a broad range of work, including in administrative law, local government planning and development as well as equity and commercial law.

Walker SC, in welcoming his Honour's appointment, noted that in consulting authorised reports one comes up with case after case that not only settled the outcome of fortunes or government policy but also informed and added to the development of principal in those areas. He went on to say that:

> Two in particular stick out as having been decided some time ago, your Honour being victorious, that, no doubt being more than a mere coincidence, and of application to the position you are about to take. In *Heron v McGregor*, decided as long ago as 1986, your Honour successfully contended that even the pressing public interest of disciplinary action against professionals, like all other operations of the rule of law, would finally give way to the paramount dictates of fairness and justice in the administration and disciplinary system. The authority is a good one, the principal was age-old, the application was timely. A reminder of it is also timely.
>
> And finally, joining a bench next after Justice Ipp in seniority, it is of course important to point out that *San Sebastian v The Minister* in which you appeared successfully for the council of the City of Sydney, was decided as long ago as volume 162 of the CLR. I'm not sure whether your erstwhile floor brother Justice McHugh would regard 162 CLR as still on the compulsory reading list or not, but it suffices to say that in *San Sebastian* matters were held, accepting your Honour's argument, in relation to the possibility of a duty of care with respect to governmental and quasi governmental actions of a kind which remain extremely current in the kind of doctrine which your Honour will be administrating very shortly.

In reply his Honour was commendably brief, perhaps due to comments following his welcome address at the swearing-in of Justice Nicholas. Justice Tobias noted with pleasure that his fear of an empty courtroom at his swearing-in had not materialised.

The Honourable Ruth Stephanie McColl SC

The immediate past-president of the New South Wales Bar Association was sworn in as a judge of the Supreme Court and as a judge of appeal on 29 April 2003.

Her Honour was welcomed to the court by Bret Walker SC, speaking on behalf of the the Bar. Walker SC recounted that her Honour came to the Bar in February 1980 after receiving her education at Willoughby Girls High School and the University of Sydney and practice as a solicitor. Her Honour was on the Bar Council continuously from 1981 to 2001. Her Honour was secretary from 1987 to 1994, treasurer from 1995 to 1997, senior vice-president in 1988 and 1999 and was its first woman president in 2000-2001. Her Honour spent some 16 years on professional conduct committees and was also editor of Bar News from 1985 to 1997. She also acted as chair of the ADA and Arbitration Committee and the Equal Opportunity and Gender Issues Committee. Her Honour has become the first senior counsel to sit on the Court of Appeal.

The Hon Justice Ruth McColl takes the Oath of Allegiance.

Her Honour also found time to act as a board member of the Public Interest Law Clearing House, as a part time commissioner of the NSW Law Reform Commission, the advisory board of the Faculty of Law of the University of Melbourne and the president of the Australian Bar Association, chairman of the Law Council of Australia's Advisory Committee on Indigenous Legal Issues and president of the NSW Women

Lawyers Association.

Her Honour of course, whilst serving the public and the profession, managed to find time to conduct a busy practice at the Bar as well as relaxing by running appallingly long distances. Some of the cases in which her Honour appeared include *Shevill v Builders Licensing Board, Attorney-General of NSW v Quinn, Kartinyeri v The Commonwealth*, and *ASIC v DB Management*. Her Honour also appeared as counsel and acted as an assistant commissioner in several ICAC inquiries and inquiries concerning the Thredbo Land Slip and the Glebe Morgue.

Her Honour's presidency of the New South Wales Bar Association coincided with what the current president described as a 'much less happy episode in the history of the Bar, over the rehabilitation of which your Honour ably presided'. That is, the publicity surrounding taxation and other offences of barristers. Walker SC went on to say:

> I can speak for the Attorney General … when I say that it was your Honour's role in rapidly denouncing that which should be denounced, with respect to the failure to honour their civic obligations in relation to taxation of certain members of the Bar, that led both to the rapid governmental, and later parliamentary and continuously professional response of a highly principled and, I know, painful kind over which your Honour so capably presided. The Bar will owe you a particular debt of gratitude into many years to come for the way in which you dealt with that extremely unhappy episode.

Walker SC ended his address by expressing the not uncommon view that her Honour's appointment to the Court of Appeal is 'not a culmination, but a beginning'.

In reply, Justice McColl began by acknowledging the Eora people, the traditional owners of the land on which the Supreme Court is located. Her Honour noted the opportunities afforded her by a 'vigorous, egalitarian democracy operating under the rule of law' which provided public education and scholarships at both secondary and tertiary levels.

As one would expect, Justice McColl had much to reflect upon after twenty years of service on Bar Council. Particular mention was made of the positive work done by the Bar Association's Equal Opportunity Committee to promote real opportunity for women barristers, as well as the establishment of the Indigenous Barristers' Trust, the Mum Shirl Fund. However, her Honour used the occasion to call for more efforts to redress the unequal participation of women and Indigenous Australians in the legal profession.

In respect of the impact which her decision to accept appointment to the Bench would have on the gender imbalance at the Bar, Justice McColl concluded her speech by noting that:

> after 23 years at the Bar, the time had come to give something back to the community which has given me so much. The appropriate way to do that was to move to the engine room of the administration of justice. I was acutely conscious that there was a tension on the one hand between the belief held by many…that the Bar needs women leaders and, on the other, the belief that the profession was well served by women accepting judicial office. These tensions were not easily resolved. They and other matters were the subject of much soul searching on my part. I will leave it to others to decide whether I made the correct decision.

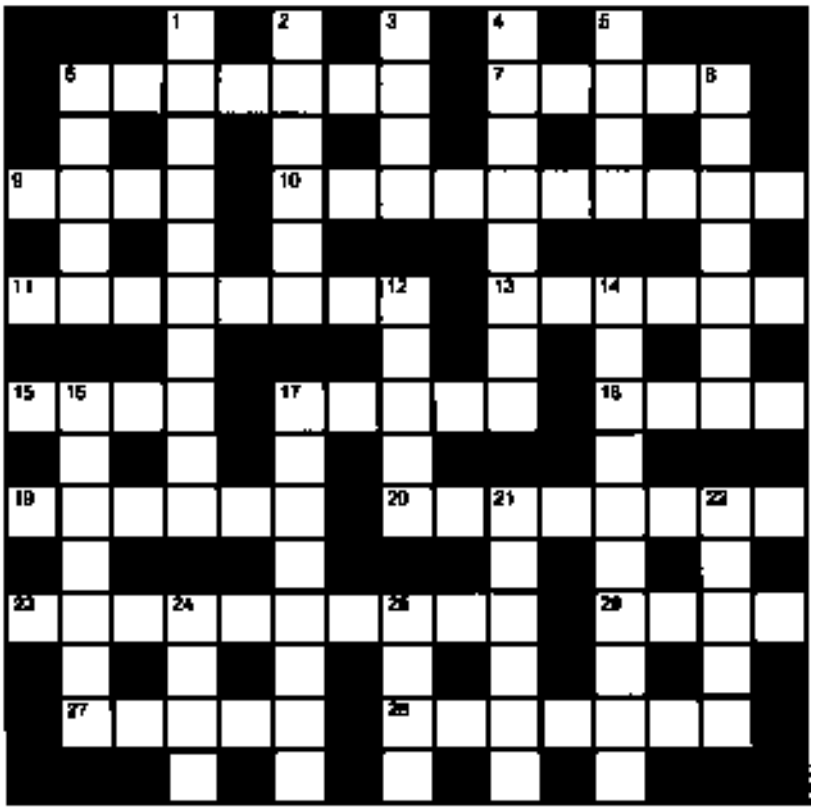
The Honourable Justice Paul Stein

A farewell ceremony for Justice Stein was held in the Supreme Court on 11 April 2003 on the occasion of his retirement as a judge of the court. His Honour had a lengthy, varied and successful practice prior to his appointment to the Land and Environment Court and then the Court of Appeal. This included roles with the NSW Anti-Discrimination Board and as deputy ombudsman. His Honour took silk in August 1981. His Honour appeared in the trial conducted in 1972 of those accused of the murder of Mr Emmanuel, the district commissioner at Rabaul, a trial which was a very significant event having regard to the political and constitutional issues concerning the relationship between Australia and New Guinea at that time. There is an account of these matters in the Bar's history *No mere mouthpiece*.

His Honour was instrumental in the setting up of Forbes Chambers and the later transfer to Macquarie Street of Frederick Jordan Chambers.

Walker SC in speaking for the Bar on this occasion concluded his remarks with the following:

> Finally, in relation to your demeanour on the Bench, a submission that cannot ever be made except on an occasion like this. Your Honour is most noticeable for a combination of penetration, humour and gentleness. It is not to be thought that the first and third referred to were in any way in conflict with each other, or contrary to each other because, like Mahoney J of the Court of Appeal, the quietest comment could be the most devastating. It was highly significant for counsel always to recall that, in what I would call the nicest possible way, the somewhat ironic comment your Honour would insist on inserting from time to time into … discussions, the mildest inquiry as to how this might assist in the adjudicating …of what some might recall are the merits of disputes.
>
> It is your Honour's great capacity with courtesy, skill and ability to mediate which the Bar will long remember and which it appreciates as an example to your present and future colleagues and successors.



Across

6 Middle Eastern reason may result in betrayal. (7)

7 Harnesses sounds within eggs? (5)

9 US law officer's redoubt, or Russian chamber. (4)

10 Seems in solution but is without? (10)

11 Winter sport within, in beer becomes JFK's favourite European. (8)

13 Graduate to Dr Magoo's Chinese wall? (6)

15 See 14 down. (4)

17 A disease of six winter sporting codes. (5)

18 Help love mean average. (2-2)

19 'Bearing place sounds unsure? Spittle and muck!' (6)

20 One who traffics in preferments otherwise omits sin. (8)

23 Sickly, uneasy soul, after a fashion. (10)

26 8 across, courted. (4)

27 One loses it on becoming bankrupt. One becomes bankrupt on keeping it. (5)

28 A rock loses a way to become 'Rocky'? (7)

Down

1 Defective emerald nit resulted in this (as Ireland met disorder). (10)

2 Transfer signs a transfer? (6)

3 Bonus loses (bad start) and becomes burden. (4)

4 Bulls say 'properly presented, this is an epitome.' (8)

5 Decomposed leaf to fly (insect, that is, by the sound of it). (4)

6 The extreme... or certainly the last, of *The Fortunes of Richard Mahoney*... Maul it? Drop that. It's left. (5)

8 Pubs' thunderbox within without (Fr). (7)

12 Diced carrots lose about petty corruption. (5)

14 Orthodox US geographical history. Or heterodox Australian jurisprudence? (with 15 across) (5,5)

16 Little devil overrode each to accuse of high crime before competent tribunal. (7)

17 Virginian elk bearing vanishes. (8)

21 Might edge to chaos? (6)

22 Sounds bad and strange for the assembly. (5)

24 King who softens as David harps on. (4)

25 Moveable framework (worn over shoulder or around waist). (4)

Solution appears on page 72.

Cafe Eataliano

Personal legal affairs took me recently to my old stamping ground, Tamworth. As the old song says, 'By chance, but not really by chance' my visit coincided with a District Court circuit attended by many of my old comrades-in-arms.

Accordingly I attended the judge's dinner which was held at Cafe Eataliano in the middle of the main drag (Peel Street).

The chef/proprietor, Vince Tusa, is an Italian-Australian whose father was a policeman in Florence. Vince began in the restaurant business in a very small way with a take-away pasta outlet in West Tamworth, initially opening only on Sundays.

The business grew quickly and he returned to Italy and scoured the country for an old-fashioned wood-fired oven, which he imported to Australia and installed in the present restaurant.

He is serving fabulous peasant-style Italian food. I had grilled mussels with very fine breadcrumbs, herbs and parmesan and shared with my solicitor, Terry Broomfield, and her Honour Judge English the 'Of the Day' pizza with artichokes, prosciutto, black olives, garlicky tomato sauce and just a light sprinkle of parmesan.

The restaurant is a BYO and Chris Hickey, as usual, did us all proud.

As we thought we were winding down, Vince Tusa approached the table and asked us how we had found our meals. We delivered a suitable rave, which was greeted with 'Do you like baby octopus?' Answered by us with a chorus of 'Yes!' He asked 'Are you going to be here tomorrow? Because that's tomorrow's special'. We replied 'Sadly, no. We're back to Sydney'. He said, 'Just wait a few minutes,' and he returned with two metal dishes containing the *piece de resistance* (or the Italian equivalent!): very fast-fried baby octopus in a tomato, garlic and olive sauce with just a splash of white wine. It was tender and absolutely delicious.

Her Honour insisted on picking up the tab. We let her, because the whole meal, for five, cost less than $90.00!

Cafe Eataliano
251 Peel St, Tamworth.
Ph/Fax: (02) 6761 2993
Open for dinner seven nights a week
Credit cards: All major cards

When the shorthand writer turns mean

Most barristers probably regard their presentation in court as pretty smooth. It sometimes occurs that a transcript of the presentation in court (which, before the transcript became available, was regarded as pretty smooth) reflects a presentation which was not pretty smooth. That is one of the awful things about transcripts.

But the fact is that most transcripts contain a fair amount of editing, the effect of which is to make the barrister's presentation in court read more smoothly than it really was.

What happens when the editing does not occur? What happens when the shorthand writer turns mean?

The following is a transcript of the commencement of proceedings in a workers compensation case. The proceedings were heard on a day when the shorthand writer appears to have been in a poor frame of mind. Names have been changed out of respect for the privacy of those involved, except for one: the name which remains unchanged is that of the interpreter who was identified in the transcript as 'Ms ...?'.

The transcript discloses that the proceedings settled soon after.

WORKERS' COMPENSATION COMMISSIONERS

BEFORE COMMISSIONER BLUE

DATE: 31 MARCH 1989

IN THE MATTER OF DETERMINATION BETWEEN:

BLACK v WHITE PTY LTD

MR GREEN APPEARED FOR THE APPLICANT

MR RED APPEARED FOR THE RESPONDENT

COMMISSIONER BLUE: Yes, ah, the matter of Black and White Pty Ltd. I note the appearances of Mr Green for the Applicant, Mr Red for the Respondent. Any applic, any amendments to the Application?

MR GREEN: Yes, ah, ah, ah, ah, firstly ah, I, I, ah, ah, ask ah, Mr Commissioner's leave to substitute ah, an application ah, which is ah, ...? ... of ah, a proposed application for compensation and ah, which ah, appears to me to ah, bear date the ah, (do you know where my glasses are?), the ah, 3rd of May of 1988 and any rate that's the ah, that's, that's, that's, the ah, the imprint of the ah, that's the date of the imprint, imprint of the ah, Workers' Compensation ..

COMMISSIONER BLUE: Yes, I have ..

MR GREEN: ... Commission.

COMMISSIONER BLUE: I have a copy.

MR GREEN: Ah, then, ah, having ah, achieved that leave and having ah, ah, presented that application I would ask of you sir your leave, pursuant to Notice, further to amend the application by including in paragraph 5A …

COMMISSIONER BLUE: Yes?

MR GREEN:... Nature & Condition of the Applicant's Employment ..

COMMISSIONER BLUE: ...?...

MR GREEN: … ah, ah, between ah, ah, 2nd August '87 to 2nd of November '87 and from 15th of December '87 to 19th August '88 and also to amend the claim, um paragraph 11 by substituting for the figure representing 30th of April 1988 in paragraph A thereof the figures represent 2.8.87.

COMMISSIONER BLUE: So the claim is from ah, $50.00 per week from the 2nd of August '87 to date?

MR GREEN: Yes sir it is, yes.

COMMISSIONER BLUE: Under section 40.

MR GREEN: Yes.

COMMISSIONER BLUE: Yes, any objections to those amendments Mr Red?

MR RED: No, Mr Commissioner.

COMMISSIONER BLUE: Thank you. So amended. Call the applicant.

MR GREEN: Yes Commissioner. Ah, have I ah, Mr Commissioner's leave to take ah, his evidence through an interpreter?

COMMISSIONER BLUE: Yes.

MR GREEN: Thank you.

COMMISSIONER BLUE: Ah, what, what ah, language?

MR GREEN: Ah, the language is...

MS..?...: French

MR GREEN: ...Serbo Croate.

MS ...?... Croatian.

MR GREEN: Croatian, Sir.

COMMISSIONER BLUE: Thank you, Croatian. Thank you.

MR GREEN: Thank you. If you'd like to go, ah, Sir, this is ..

MS ...?....: ...?..., oh, sorry.

MR GREEN: .. a member of the official panel.

COMMISSIONER BLUE: Thank you.

INTERPRETER SWORN, EXAMINED, DEPOSED

MR GREEN: I understand that Mr Red will ah, will need to make a telephone call within ah, 10 minutes from now or thereabouts ah, ah, eh, ah, eh, eh, the effect of that telephone call could lead considerably to shorten this matter.

COMMISSIONER BLUE: Alright.

Verbatim

Bar News recently scoured the High Court web site for evidence that counsel are framing their submissions in terms of the strict logic and high technique of the common law espoused by Sir Owen Dixon and recently defended by Heydon J in his *Quadrant* article. We found Jackson QC (the former Queenslander and not the other Jackson) seeking to persuade the High Court that the heads of damage recoverable where a doctor's negligence has caused an unwanted birth do not include the costs of maintaining a healthy child. Judge for yourself whether the submissions of Jackson QC display that 'strict logic and high technique, rooted in the Inns of Court, rooted in the year books, rooted in the centuries' demanded by Sir Owen:

> **Mr Jackson:** Returning to what your Honour the Chief Justice was putting to me, in our submission, expenditures of that kind do not fall within the legal categorisation of a loss and the reason why, ultimately, in our submission, your Honours, is that one is speaking about maintaining a child. A child is not like a cat or a dog or an animal and, without seeking in any way to minimise the tragedy of what was involved, the notion that there is something special about human life can be seen by the different reactions one would have, on the one hand, to the death of seven astronauts, to, on the other hand, the death of seven monkeys dressed in space suits. One is speaking about something which is a central part of humanity...
>
> ...Now, your Honours, could I just say in relation to that, one of the arguments that is advanced on behalf of our learned friends is that no principled reason is put forward against allowing this head of damages. Your Honours, we would say that the reason why the set of damages is not available is that one is speaking about a human being and, your Honours, if I can put it, I do not mean to do it unduly brutally, but one cannot readily treat the claim or treat this head of damages as being similar to one for the cost of extra dog food, because a vet did not spay the dog properly; there is a different thing involved - a human being.
>
> **Gleeson CJ:** Thank you, Mr Jackson. We will reserve our decision in this matter.

From a case before Bergin J …

First the audit manager gave evidence…

> **Carnovale:** Leave aside what the ultimate form of the audit report was. You, yourself, were not prepared in your own mind to take his word for the bona fides of the transaction, were you?
> **Witness:** We raised the matter on numerous occasions up until audit committee and at the end of that process Mr [X, the audit partner] was satisfied with the transaction.
> **Carnovale:** You know in the last question I asked you about your mind, don't you?
> **Witness:** I didn't have a mind. I just work for my audit partner.
> **Carnovale:** And how can an auditor do any work at all if he doesn't have a mind?
> **Witness:** Because he raises the issues for the deliberations of his more senior legal - or his more senior accounting partner.

Then the following evidence was given by one of the defendants, who is an accountant…

> **Carnovale:** At the top of the second page you seem to be charging him for the false statements you say you made in the letter that you wrote to his solicitors. Is that what you're doing there?
> **Witness:** Yes.
> **Carnovale:** Why would you want to charge the man for false statements that you wrote to his solicitors?
> **Witness:** I charged everybody for everything.

The following exchange occurred in the District Court in Parramatta in a personal injuries case in which the plaintiff was claiming damages as a result of the alleged negligence of a horse riding school. They had not tightened the girth of the horse upon which the plaintiff was riding. The plaintiff alleged that the girth had slipped and he had fallen. During the course of cross-examination counsel for the defendant was attempting to suggest that the slipping of girths was a frequent occurrence when pressure was applied to one stirrup as opposed to equally between them. This caused the trial judge to interject. The conversation went as follows:

> **Delaney DCJ:** Have you been to a rodeo recently Mr Minehan?
> **Mr Minehan:** No
> **Mr Adam Johnson (counsel for the plaintiff):** I have been to the Court of Appeal, your Honour.
> **His Honour:** That remark will be sure to get you there Mr Johnson.

Bill Walsh of William Owen Chambers at Orange reports the following extract from transcript of evidence given recently in the Bathurst District Court. The matter was an all grounds appeal being heard by a well-known, all-knowledgeable judge with a passion for trout fishing. The evidence was being given by the mother of the appellant and the appellant's christian names were 'Shannon Leah'.

> **His Honour:** Why did you pick Leah as a second given name?
> **Witness:** Hebrew.
> **His Honour:** Yes, I know. You know what it means?
> **Witness:** Yes I do.
> **His Honour:** Given of God - yes go on do you know what Shannon means?
> **Witness:** It's the River Shannon in Ireland.
> **His Honour:** There was one in Tasmania called the Shannon from which there was a beetle called the Shannon Moth that rose every year - trout fishermen loved it - it's now under water. The Shannon rises no more.

NSW Bar XI v HIH Royal Commission

By Lachlan Gyles

On 9 February 2003 the NSW Bar cricket team took on the might of the HIH Royal Commission at Reg Bartley Oval, Rushcutters Bay, hoping to return some of the fire handed out by counsel assisting over the previous few months.

We were sent in to bat, although as things transpired the conditions for batting seemed significantly more favourable than were experienced by some of the witnesses at the commission. Counsel assisting also seemed somewhat confused when appeals were refused, and more so when the commissioner himself called back Habib after having been given out in controversial circumstances by Sexton SC who, according to Habib, must have been watching another game.

A brief but typically flamboyant cameo from Bell at the top of the order was consolidated by Habib, Sexton SC and Brender in the middle stages and built to a crescendo in the dying overs by Gray, Mclnerney, Vincent and Reynolds SC.

We finished with 179.

The commission struggled with the loss of early wickets including the tragic run out by Carroll of White SC. A steady partnership between Nicholl and O'Bryan then gave the commission a glimmer of hope until Foord was introduced into the attack and took a wicket with his first ball, a feat also achieved earlier in the innings by King SC with a well disguised slower ball. We then held them at bay for the last few overs and victory was ours, the commission finishing about 40 odd short.

A most enjoyable day for all concerned and a good tune up for the match against the Qld Bar.

NSW Bar XI v QLD Bar XI

By Lachlan Gyles

On 5 April 2003 the might of the NSW Bar travelled to Brisbane to take on the Queenslanders. We won the toss, which some regarded as the high point of the day, and sent them into bat on a slightly moist track, which was thought to contain something for the firebrand NSW opening bowlers.

The expected carnage did not materialise as the Queensland openers survived the onslaught from King SC and Naughtin, albeit in relatively restrained fashion.

The first wicket fell shortly before drinks which were taken after 20 overs, caught Scruby in the covers off Gyles. Durack and Carroll then combined to take another three wickets over the next few overs, including another Scruby catch and an unexpected LBW from a Queensland umpire (thought to have been the first for 15 years).

Taylor, the Queensland opener, then put the accelerator down and in combination with some good hitting at the other end saw the enemy reach 184 off their allotted overs, Taylor finishing with an unbeaten 91.

It was always going to be a big ask to get the runs, and one of the NSW big guns (if you could call them that) was going to have to fire for us to even get close. After the early dismissal of Dalgleish, uncharacteristically playing the hook shot, Harris joined Carroll and kept up with the required run rate for the first ten or so overs. Things however stagnated somewhat when they got out and when Durack was tragically run out attempting a quick single, the target probably moved beyond our reach.

Notwithstanding that, a brave rearguard action was fought by Neil, Ireland QC, Benson and Naughtin, and we were able to achieve at least some respectability in getting to about 120, all out.

The match was followed by the now traditional session at the Regatta Hotel, followed by an excellent dinner hosted by the locals and their wives.

This fixture has now been going for thirty years and has been greatly enjoyed by all who have been involved in it. Its continuity depends upon younger members of the Bar coming forward to continue the tradition set by the original players such as the late Jack Hartigan, and all cricketers are encouraged to make themselves available.

The combined talents of the NSW Bar and the HIH Royal Commission.