THE JOURNAL OF THE NSW BAR ASSOCIATION | WINTER 2012

barnews

Problems faced by the modern jury

The Constitution v the states:
federalism a century after federation

The presumption of innocence

The 2012 Sir Maurice Byers Address

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barnews

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Views expressed by contributors to *Bar News* are not necessarily those of the New South Wales Bar Association. Contributions are welcome and should be addressed to the editor, Jeremy Stoljar SC.

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Cover: Henry Fonda in *Twelve Angry Men*.
Source: Moviepix / Getty Images

Editor's note

The centrepiece of this issue is the 2012 Sir Maurice Byers Address. Lord Phillips discusses the extent to which British courts should take account of, or follow, decisions of the European Court of Human Rights at Strasbourg, at least in respect of questions of human rights.

The topic has provoked some consternation in Britain – Lord Phillips remarks that a body of opinion believes that Strasbourg has been extending its empire into realms better left to individual member states. He adds:

> More recently the Strasbourg Court has provoked ministerial dismay and public anger by ruling that it would offend the human rights of a gentleman called Abu Qatada if we deport him to his own country, which is Jordan. He is an Islamic radical cleric whom the Jordanians wish to try on charges of terrorism. We do not want him in our country.

However the lecture concludes on a positive note. Lord Phillips suggests that it may be possible for the British and Strasbourg Courts to engage in a dialogue – a dialogue to some extent already occurring – through which the former can ensure that its domestic process is sufficiently appreciated and accommodated by the latter.

The influence of Strasbourg is also touched upon in one of the cases covered in Recent Developments, *Assange v Swedish Prosecution Authority*.

Other articles in this issue include a piece by Professor Bruce Kercher, reporting on important new research identifying a previously overlooked case from 1820, in which a white man was executed for killing an Indigenous person.

Peter Lowe addresses the challenges confronting juries in an age of social media. How does one protect the integrity of the jury when one of its members may, through the medium of Facebook or Twitter, communicate with the outside world – including even the accused in one of the more remarkable cases discussed here. The common law has marched far from the simpler times described in W J V Windeyer's *Lectures on Legal History*, when juries were locked in a room without food or water until they arrived at a unanimous verdict.

The solicitor-general discusses federalism a century after federation. John Bryson QC provides a personal memoir of life in the law during the post-war years.

In the opinion section Alan Shearer and Jennifer Chambers discuss the implications for contract law of the High Court's remarks when dismissing special leave in *Western Exports v Jireh*.

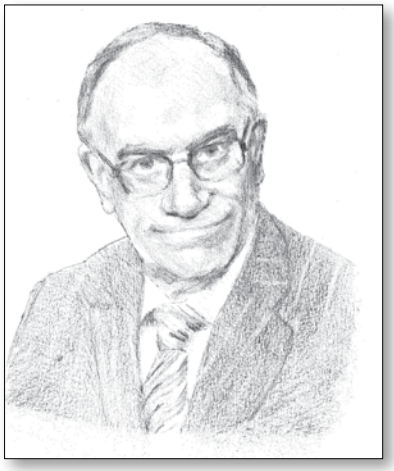
John Nader QC considers the presumption of innocence in the light of the Slipper case. Jason Donnelly presents five lessons for readers who have just come to the bar.

And Bullfry is contemplating new chambers, not to mention – with the assistance of his favourite junior, Ms Blatly – his entry in his floor's website. It seems that even Bullfry may be succumbing to technology.

Jeremy Stoljar SC
Editor

A first-rate member benefits programme

By Bernard Coles QC



Ten years ago the Bar Council initiated a new era of professional development with the introduction of CPD. Over the past decade, the Bar Association has run over 650 seminars and conferences. On behalf of the Bar Council, I now invite members to experience CPD online – on your computer, iPad or even your iPhone or Android smart phone. Seminars being presented in the Bar Common Room are now recorded in high-definition and are available for viewing online within a few days of the event. In addition, all papers or PowerPoint accompanying the sessions are also available online.

The website which streams the CPD seminars, http://cpd-streaming.nswbar.asn.au can be accessed by all members with a simple login and password.

This service represents a major step in the member services provided by the Bar Association, and of course means that CPD points may be obtained through viewing our seminars on the website as well as through physical attendance.

The Bar Association's official website is also in the process of a major review and upgrade, which will ensure a more up-to-date and easily accessible web resource for all members. Once completed, members' information will be able to be accessed through a single, universal member log-in on the new website.

I am also pleased to report that members of the association now have access to a first-rate benefits programme. Launched by the ABA, but designed to meet the requirements of local barristers, the new member benefits programme includes special offers on luxury motor vehicles, car rental, travel, Qantas Club membership, health and life insurance policies, premium wines and petrol discounts. I encourage members to take advantage of these offers, which can be easily accessed through the Member Benefits section on the association's homepage.

One of the major focuses for the Bar Council at the Planning Day held in February was on improved services for members, and I am delighted that such progress has been made in a few short months. Thanks are due to the Bar Association's staff who have been involved in the development of these initiatives, most particularly June Anderson, Chris D'Aeth and Matthew Vickers.

Another issue which occupied the attention of Bar Council at the Planning Day was the question of what can be done to encourage diversity at the bar. This issue was recently considered by Bar Council, which has decided to adopt a series of initiatives aimed at fostering equal opportunity for all people wishing to come to the bar or at the bar. Among the initiatives agreed upon were:

- the development of a Diversity and Equity Policy;
- the reinvigoration of existing Sexual Harassment and Discrimination Policies;
- the review of the implementation and monitoring of the Law Council's Equitable Briefing Policy, which has been adopted by the association for some years; and
- the preparation of a Return to Work Programme and Resource Pack for barristers.

The Equal Opportunity Committee will have primary responsibility for these and other relevant programmes, in consultation with other bar committees as required.

The Bar Association looks forward to the government's response to the report, and has indicated that it is ready, willing and able to assist in the drafting of simpler and principled bail legislation.

In early June the NSW Law Reform Commission released its bail report, which contains far reaching recommendations for improvement to the system, including the introduction of a uniform presumption in favour of bail. Under the current system, many people charged with offences

and held in custody pending trial are then acquitted or do not receive a custodial sentence. That currently happens in over a third of cases. The Bar Association looks forward to the government's response to the report, and has indicated that it is ready, willing and able to assist in the drafting of simpler and principled bail legislation.

As I write, the government's workers compensation reforms have passed both houses of the New South Wales Parliament. The Bar Association, and in particular the Common Law Committee, worked extensively to bring our perspective on workers compensation reform to the attention of government, both directly in meetings with the responsible minister, and through its submission to, and appearance before, the Joint Select Committee established to report on this issue.

The Bar Association's position was that any changes must:

- be financially supportable and avoid the risk of the present tail;
- properly support those injured in the workplace; and
- produce incentives to exit the workers compensation scheme and return to work.

The report of the Joint Select Committee took up a number of the association's recommendations for principled reform which would not adversely affect injured workers, including the liberalisation of commutations. Although some of these proposals have been adopted in the legislation as introduced into parliament, other changes have been made which markedly worsen the position of injured people. A number of aspects of the legislation as introduced, including its retrospective application to existing benefits, were not the subject of any consultation and were not included in the committee's recommendations. The Bar Association expended a great deal of time and effort in working to bring about suitable amendments to the legislation, however these amendments did not receive the support of the government.

A number of aspects of the legislation as introduced, including its retrospective application to existing benefits, were not the subject of any consultation and were not included in the committee's recommendations.

The Bar Council has spent considerable time and effort this year on the need for suitable changes to the Senior Counsel Protocol. The silk selection system is kept under constant review and changes have again been made this year which are aimed at improving the process. Further aspects of this process remain under consideration.

Finally, the Bar Association recently hosted the unveiling of Mathew Lynn's portrait of the Hon James Spigelman AC QC in the Common Room. Chief Justice Tom Bathurst was present to receive the painting on behalf of the Supreme Court. The portrait will hang for the time being in the Common Room until its new home in the Supreme Court is ready. The portrait was funded by members of the Bar Association and the Law Society of New South Wales, and the function recognised the former chief justice's enormous contribution to the administration of justice in this state.

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Letters to the editor

Dear Sir,

I would like to draw your attention to two matters mentioned by John P Bryson QC in his article 'Before Wentworth Chambers' in the Autumn 2012 *Bar News*.

In the first paragraph of his article he says Wentworth Chambers was completed and opened in 1958. I have good reason to remember that it was during 1957 that the opening of Wentworth Chambers began, and proceeded floor by floor. When the seventh floor of Wentworth opened, (and I am fairly sure it was in May) I moved into one of the two beginners' rooms on that floor. I stayed on the floor until 1983.

The second matter is in my memory closely connected with the first. On the second page of his article John mentions that Peter Clyne established Club Chambers of which he was the only occupant. Although Club Chambers was not, as I remember, strictly speaking in Phillip Street, its address was 96 Phillip Street. When I started in practice at the bar in November 1956 I moved into Club Chambers. There were at least five occupants already established there: Peter Clyne, who was later the subject of some significant legal history; Bill Fisher, who became a Supreme Court judge and president of the Industrial Commission; Quentin Tubman, a lively junior barrister in good practice; Michael Lazar, who at that time was still occasionally called by his university name, 'Marcus Bullus'; and Malcolm Hilbery, master of a forensic style reminiscent of FE Smith, although it did not gain him quite the same rewards.

The reason I remember clearly my time in Club Chambers is that I became a sub tenant of Hilbery's in a tiny triangular room (at a rent of 12/6 a week) from which there was a very long walk to any of the courts in the Phillip Street precinct. I used to feel some uneasiness in walking in wig and gown through distinctly un-legal like areas. Although I became friendly with Tubman and Hilbery (I did not see much of the other three) I did not want to stay in Club Chambers any longer than I had to, so was looking forward anxiously to to moving into the beginners' room on seventh floor Wentworth.

LJ Priestley

Dear Sir,

Congratulations to you and to The Hon Bryson QC on the Legal History recounted in the Autumn edition of *Bar News*. May I be permitted to suggest some addenda and (perhaps) corrigenda? With, of course, the greatest respect; I have not forgotten the flagon of Dymple Haig that he gave me as recompense for some trifling favour – it stood on my desk for years, with countless (unacknowledged) refills of inferior Scotch, to impress visitors.

Now, to the point: The pharmacy in King Street was one of the Hallams chain, managed for some years by Pat Smyth and later by Pat Grennan. The shop where 'stationery was sold' was run by Miss Walker, who also sold lottery tickets. I think it was in her shop that Horace ('The Pieman') Millar was controversially alleged to have been spied, eating a meat-pie while wigged and robed. Horrie always disputed it.

The Teachers' Federation building was known as 'The New Stamp Office', that 'great office of State' having moved there from 'The Old Stamp Office', 150 Phillip Street. On the first floor was the Requisitions Counter where Mr Mclnerney used to terrorise articled clerks and registration clerks. I remember seeing Ambrose (Mick) Love, ex-paratrooper and later solicitor, picking Mac up by the scruff of his neck and making him apologise to some little girl whom he had reduced to tears. The Journalists' Club was located there, too, and one would see well-known actors such as Chips Rafferty in the vicinity.

The chambers in the Old Stamp Office were, as a matter of council policy, let only to ex-servicemen so was universally known as 'Diggers' Inn' – a nice salute to the Inns of Court. And then I must take issue with the learned judge: the 'few shops' between Diggers Inn and Chalfont Chambers included (between a milk bar and a fish shop) 148 Phillip Street, Lanark House, which housed, among others, R. Cecil Cook (later Cook J), Charles Leycester ('Shagger') Devenish-Meares (later Meares J), Philip Morgan Woodward (later Woodward J), JB (John) Kearney (later Kearney

J), Robert James Anning (Bob) Franki (later Franki J), David Hunter (later Hunter CJ of Tonga), Aaron Levine, Ken Torrington, Peter Leslie and your scribe, (all later DCJJ). It would be remiss of me to omit TP (Tom) Flattery, who lectured in Roman law and Henry Wilkinson (Harry) May, father of Lord May and a legend himself. Let me remind you, too, of the Lanark Song, sung to the tune of 'Men of Harlech' which (relevantly) recited:

Those who live in Selborne might as well be still-born;
Chalfont gents
Pay fancy rents
And Denman by both wind and rain is well-worn.
Forbes is full of weary diggers,
'Varsity of student figures;
Lanark men all work like (Very hard);
Here's to Lanark Men.

Also intervening before Chalfont was the Volkswagen dealership of Charley & Lord. Between Chalfont and Smith's Weekly was Radio 2GB with a coffee shop below. In the late forties and early fifties, Smith's also housed one barrister: Tom (later The Hon TS) McKay, whose father, Claude, edited the Weekly. And the corner pub, The Assembly, during the fifties and part of the sixties was the watering-hole of the Country Party members of the Legislative Assembly. I don't dispute John's account of 'The Push' frequenting it, though I never encountered them; I always thought of The Hero of Waterloo as their regular venue.

The Quay end of Phillip Street, in a terrace house near the present site of The Sydney Institute, for some years during the fifties, housed RJB (Bob) St John (later St John J and Chief Justice of Western Samoa), John Foord (later Foord DCJ) and Peter Clyne.

The back-to-back pubs on the Phillip and Elizabeth St corners of King Street were, respectively, The Phillip and The Balfour. The latter house was the scene of a famous wager between Sammy Ross (later Ross DCJ) and Tony Ormsby, of Teakle, Ormsby & Francis, Solicitors. Sammy was very obese – about 23 stone. Tony, sometimes called 'The Snake Man' was a fitness fanatic, reputed to keep in condition by wrestling with a python. Sam wagered five pounds that he could perform more press-ups than Tony. The stakes were handed to the barman. A large crowd had gathered and Sam, magnanimously, said 'You can go first, Tony'. When Tony, sweating and gasping, rose after a stupendous effort, Sam said (as he had always intended): 'You win, Tony.'

The barber's shop was where Gordon ('Bunter') Johnson, a great fan of PG Wodehouse, when asked how he wanted it cut, incautiously replied: 'In absolute silence, broken only by the busy click of shears'. He eventually had to have his head virtually shaved to undo what he had brought on himself.

Next, the 'Old Law School', 167 Phillip Street, was officially known as University Chambers (the 'Varsity' of the Lanark song.) Michael Manifold Helsham had chambers there, in a sort of penthouse, beyond the top of the lift. I delivered his first brief there, on the morning of his admission, 9 February 1951. And it was there that Laurie Daniel, one of the Law School class of 1947-50 used to embarrass his brother-in-law by saying, in a lift crowded with students: 'G'day, Dave' as the Hon Ernest David Roper J was making his way to his Equity class.

John then takes us north of Martin Place on the western side of Phillip Street. In the TAA building were housed the Special Federal Court and – after its removal from the Commonwealth Bank Building in Martin Place – the Bankruptcy Court, presided over by Sir Thomas ('Sammy') Clyne – no relation of Peter.

Insurance? Of course not. Barristers were immune from suit, weren't we? Yes, that's what we thought!

Finally, The Tudor was indeed conveniently located – but it stocked only Britten's (Britton's?) Beer – or was it Millers? Neither a popular drop.

Old men forget. My comments are therefore open to contradiction – except for Lanark House! I'll nail my flag to the mast on that one!

Harry Bell

Letters to the editor

The editor responds

Thanks to the Hon H H Bell for his kind words. And thanks in particular for the story about the late Horace Miller, said to have been spotted eating a meat pie while wigged and robed.

Regular readers may recollect that this story was the subject of a letter from Poulos QC to the editor in the Autumn 2011 edition of *Bar News.*

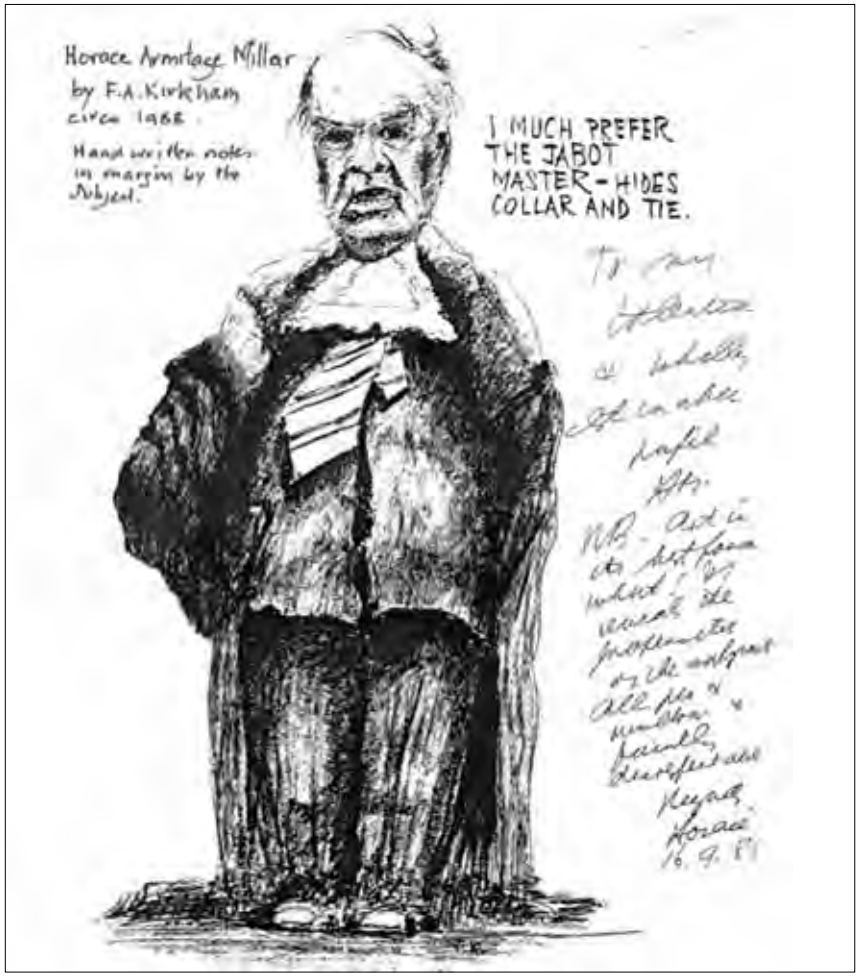
But the story is a lot older than that – it goes back at least 30 years. On 3 May 1983 the *Sydney Morning Herald* referred to a 'nameless but well-known barrister some time ago' who, according to the report, was said to have been subjected to disciplinary action by the Bar Association, as follows:

> He was severely reprimanded for walking down King Street, wigged and robed, eating a meat pie. Or so the story goes.

Do any readers have further information on this curious piece of bar lore?

The incident may or may not have occurred – both Poulos and Bell say that Miller disputed it.

In order to jog readers' memories, a sketch of Miller by the late FA Kirkham is reproduced. (Thanks to MRM Lawyers in Newcastle, who drew the 1983 *Sydney Morning Herald* article to my attention and provided *Bar News* with a copy of Kirkham's sketch).



Dear Sir,

In his article in the current edition of *Bar News* Mr Cunneen gives an account of the many barristers who served with distinction in the Second World War (some even giving their lives). Their contribution to the survival of Australia and our way of life should never be forgotten.

The difficulty facing a writer in seeking to include all barristers who saw service during this conflict is obvious. I should like however to draw attention to some men who are not included in the article and whose names come to mind.

The first is John Harrington, who served in Bomber Command in the RAAF Halifax 462 Squadron, the same Squadron in which Ted Perrignon served and whose experiences are referred to in the article. Ted also was a great personal friend of John's and I knew him well as a member of the bar.

John, who like George Buckworth (whose incredible adventures are referred to by Mr Cunneen), came late to the bar, having practised for many years as a solicitor. John was in the Crown Solicitors Office and later in the GIO and was well known to all those who were involved in the common law litigation. He was admitted to the bar in November 1973. He is still with us but is unfortunately now very ill. He will be 88 on 12 July next.

In early 1942 he commenced Arts at Sydney University, but on his eighteenth birthday he enlisted in the RAAF by filling in an appropriate form at the local Post Office. He was accepted into the Air Force and after training in Canada he joined the above squadron. The unique and dangerous nature of this unit's operations were described by Ted as involving acting as a decoy attracting German fighters and other fire. John, in an interview with the BBC, given long after the war, described the squadron's task as flying and conducting 'radar counter-measures most of the time and doing bombing raids to support that'. The metallic substance referred to by Ted was designed to give the Germans the impression that a very large force of allied planes was in the area. An attack on this apparent force would, it was hoped, relieve what was in fact was the actual bomber force, a very dangerous situation for 462!

In March 1945 while flying back from Frankfurt and while over Koblenz (the now very pleasant town at the junction of the Moselle and the Rhine much visited by tourist river boats) the Halifax, of which John was the navigator 'was hit by enemy fire – we still do not know whether it was anti aircraft fire or by the 262s, the new German jets that had come in'. The outer port engine was 'lost'. During the attack the flight engineer, a Scot, was killed and the wireless operator 'took a terrible blow to his foot'. Rather than bailing out 'everyone decided it would be better to take a chance on landing and we did just that.' They landed in Rheims which only two weeks before had been occupied by the Americans. The wireless operator was able to receive proper medical attention and after two weeks a plane from the Squadron took the survivors back to the UK. They 'were out of action for about a month while we re-crewed. That happened on our second operation and we did another ten operations after that with no incidents at all'. This certainly was an understatement. All this illustrates the tremendous team work involved in the operation of these heavy bombers.

John completed his Arts Law degrees in 1949 and 1952.

It is interesting to note that in June in London a most impressive memorial will be dedicated to the men of Bomber Command. The support for this in Australia and New Zealand has been intense and so far as Australia is concerned this has resulted in substantial assistance being given to enable veterans to attend. It seems that the New Zealand Government was always fully supportive of the matter.

Keith (Barney) Walsh also interrupted his university studies to go into the Army. Barney passed away in May 2011 aged 91. As

Letters to the editor

appears from his obituary in the Sydney University Rugby Club's News of May 2011 he served as a lieutenant (anti aircraft) in New Guinea, but it seems that it was in 1939 that he actually left the university, the same year in which he was half back in the victorious university team. I cannot obtain information as to his career between 1939 and the Japanese entering the war by the attack on Pearl Harbor in December 1941. Barney, however, continued his association with the army after the war until he retired having become a colonel. In 1996 he was made a member of the Military Division of the Order of Australia. In addition to various medals for his service in World War II he received the Vietnam Service Medal and RFD decoration. The obituary refers to him as having been a solicitor, but he was admitted to the bar in August 1949. He was a prominent player for the club. Incidentally he remained a member of the club until his death and was, in the '50s, a very prominent coach. He became a District Court judge in 1983.

Ray Loveday, with whom I read, served with RAAF in New Guinea in connection with the installation of radar equipment at airfields – a dangerous task. Frank Hutley seems to have been connected with John Kerr in the Directorate of Research in Melbourne. He began his service, it would appear, in a tank regiment, but he served in New Guinea primarily in a legal capacity. He travelled to the USA and was involved in preparations for the military occupation of Japan. He was eventually a member of the occupation force there with the rank of major. He became a judge of the Supreme Court and a member of the Court of Appeal. He had had a most distinguished university record. Ray Loveday also became a judge of the Supreme Court after a distinguished career in the District Court and also of course at the bar.

Another name that comes to mind is Edmund (Peter) Raine. He later became a judge of the Supreme Court of Papua and New Guinea. He served in the Army from 1940 to 1945 when he joined the Navy. In the 1977 edition of *Who's Who* in Australia, he nominates his active service as being between 1943 and 1945. He served (obviously in the occupation force) in Japan from 1945 to 1946 and by some means renewed his association with the Army eventually becoming a colonel in 1970.

I cannot leave this note without mentioning Gordon (Bumper) Johnson. I found this somewhat eccentric barrister an hospitable and engaging person. Harry Bell wrote an informative obituary of him in the SMH of 3 April 1999. How time passes! He was an Englishman but although he may not have been old enough to join the forces at the outbreak of the war he joined the Royal Navy and served in HMS *Crocus,* a Flower class corvette in the North Atlantic, and after the European war came to the Pacific with the Pacific Fleet, as Harry told us.

Brian Herron

Bar Practice Course 01/2012

Back row, L to R: Nicholas Gangemi, Aj Karim, Simon Lipp, Stefan Schonell, Glenn Theakston, Timothy Holmes, Pouyan Afshar, Philip Wallis, Sharna Clemmett, Jarryd Malouf, Rhett Walton.

Third row, L to R: Steven Boland, Callan O'Neill, Brett Eurell, James Baxter, James Macken, Jennifer Layani Ellis, Nicholas Kelly, Tracey Stevens, Dean Stretton, Amy Munro, Anthony Howell, Adam Hochroth

Second row, L to R: Natalie Zerial, Talitha Fishburn, Felicity Maher, John Tarrant, Shauna Ross, Craig Tanner, Gregory Antipas, Catherine Spain, John Gaitanis, Barry Dean, Petros Macarounas

Front row: Hernan Pintos-Lopez, Stephanie Patterson, Ravi Vivekananda, Carmel Lee, Juliet Lucy, Louise Mathias, Thomas Prince, Lee-Ann Walsh, Raphael Perla, Andrew Oag, Anne-Marie Murphy, Adria Poljak.

Absent: Michael Langenheim

The presumption of innocence

By John Nader QC

Throughout the web of the English Criminal Law one golden thread is always to be seen – that it is the duty of the prosecution to prove the prisoner's guilt …

Per Lord Sankey in *Woolmington v DPP* [1935] AC 462

The political fiasco that recently caused turmoil in national politics has compelled me to give serious thought to the legal doctrine expressed in the maxim *presumed innocent until proven guilty.*

The issues raised by the allegations made against the speaker of the House of Representatives and another member have focussed our minds sharply on that maxim. An interpretation of the maxim was shouted in the parliament by some very eminent members who may have known better what they were talking about. Perhaps they did.

The maxim can be mischievous if not properly understood, or if deliberately misused. It has seeming clarity. Its language is clear but its meaning is obscure. That clarity of language conceals a technical ambiguity that leaves it open to abuse in the mouths of clever advocates or mischievous persons.

What is commonly overlooked it that the maxim is a forensic rule ensuring that judges and juries do not ask themselves what might seem to be a very natural question, namely, why didn't the accused person give answers to the investigator's questions, and why not now in court if he is innocent? What was he hiding if he is not guilty, and what is he hiding now? Those questions should not be asked. The accused has nothing to prove because he must be presumed by the court to be innocent. He had, when questioned by investigators and continues during his trial to have, no duty to explain anything. He may remain silent not putting up any defence without any inference adverse to him being drawn. Of course, if he freely elects to speak to the investigator or the court, what he says may be considered as part of the evidence in the case.

Some supporters of the speaker and of the other member have urged that due process be allowed to operate in order that the presumption of innocence to which the speaker and the member are entitled is not infringed.

The principle that a person is innocent until proved guilty can easily be misunderstood.

I believe that some of those urgers honestly but ignorantly believed what they say publicly, and that others who do not believe it think that it might appeal to persons not familiar with the proper application of the maxim. Therefore it is desirable to comment on its application.

The maxim has only peripheral application in the circumstances of the speaker's and other member's cases. It may have direct application if either of them is ever tried before a court or quasi court.

The principle that a person is innocent until proved guilty can easily be misunderstood. It is unfortunately worded but the wording is entrenched and hallowed by ancient usage and none would want it changed. Its application is well understood in proceedings where it does apply, but its wording has lent it to misunderstanding in the recent debates.

One thing the presumption of innocence does not do is, as if by magic, make a person innocent of a wrongdoing that he has in fact done. The mere want of a formal finding of guilt cannot alter the fact that a person has committed a crime. A person found guilty by a court was as guilty before conviction as he is after it.

The origins of the maxim are interesting. The Digest of the Roman Emperor Justinian contains an early statement of the maxim concerning the presumption of innocence. It states that *ei incumbit probatio qui dicit* (proof falls on the person who alleges, not (on him) who denies). The maxim has sometimes carried the rider: *cum per rerum naturam factum negantis probatio nulla sit* (since by the nature of things negating a fact may not be possible). The rider is not part of the maxim but, rather, a reason for it. Since that time rules to similar effect have become part

of almost all civilised legal systems, although the right to silence is not part of the Civil law. The maxim was paraphrased in the terms *innocent until proven guilty* by Sir William Garrow (1760-1840).

The improper extension of the application of the maxim can be illustrated by many situations that arise in everyday life, a couple of which I will give later.

A magistrate is expected to give reasons for a verdict of acquittal or of conviction; a jury generally does not give reasons because a jury may arrive at a valid unanimous verdict for diverse reasons. A magistrate may express an opinion that the prosecution allegations are very persuasive and are likely to be true but that nevertheless he still entertains reasonable doubts concerning them. In such a case he would rightly enter a verdict of *not guilty*, notwithstanding that it may be against a strong balance of probabilities.

It is important to note that a criminal court *cannot* formally declare a person's innocence: it is not structured to do so. The court is confined to answering this one question: has the accused person's guilt has been proved beyond a reasonable doubt? No *innocent* verdict is available in our courts no matter how clearly it may emerge from the evidence that the accused is in fact innocent.

A magistrate may, in order to comfort a defendant whom he has acquitted, express an opinion that the evidence positively supports the defendant's contentions and that he regards the defendant as telling the truth and that he is innocent. However, such a finding in a criminal case would be informal and although great weight might be given to it, it would still not amount to formal proof of innocence. The question for a court is not, 'is the defendant guilty or innocent?' – it is, 'is he guilty or not guilty?' where the words 'not guilty' have the special meaning I have tried to explain: namely, that guilt has not been proved beyond reasonable doubt.

It is important to note that a criminal court cannot formally declare a person's innocence: it is not structured to do so.

Innocent persons may, in a practical sense, be seriously disadvantaged by suspicion of guilt that sometimes exists even after acquittal. How often has one heard people say, 'He was arrested for fraud but he got out of it'. Such a comment is generally intended to be damning and may be very damaging.

The alleged wrongdoing may not amount to a criminal offence in any event: a great deal of seriously improper conduct is not unlawful. The impropriety of conduct may depend on the circumstances of the perpetrator. The term *impropriety*, even *serious impropriety* has a much broader comprehension than *criminal offence*. As I understand it some of the allegations against the speaker are not criminal.

As a simple example of conduct that can lead to adverse consequences consider a person employed in a position of trust in a business where circumstances come to the employer's notice creating a reasonable suspicion that the employee has improperly disclosed information to someone not entitled to it. If the employer is unable by diligent inquiry to remove the suspicion it could not be suggested that the employer might not remove the suspected person from access to the sensitive files, or even terminate his employment. It may well be actionable negligence for him not to do so. That is a judgment that the employer must conscientiously make. In these times an appropriate industrial tribunal might later have to consider whether the suspected conduct was sufficiently serious and whether the decision was reasonable in the circumstances. Notwithstanding the serious consequence to the suspected employee, the absence of a conviction for an offence would not prevent the employer from taking the action mentioned. The maxim did not apply to him.

More specifically, focussing on the parliamentary fiasco, I believe that a permanent commission, not hamstrung by any false application of notions of due process, could be established by the parliament itself to protect its good reputation. It would I envisage be a permanent body with power to summon witnesses, whose questions if not answered could give rise to adverse inferences. It should, I think, be constituted by a judge or retired judge who is not a member of parliament and who is and has been manifestly free of party political connections.

The implications of *Western Export*

The High Court's recent observations when dismissing an application for special leave in *Western Export Services Inc v Jireh International Pty Ltd* [2011] HCA 45;(2011) 282 ALR 604 have been the subject of much interest and debate. *Bar News* presents two opinion pieces which consider the implications of *Western Export*. In the article below, Alan Shearer argues that it may undermine the doctrine of precedent. In the following article, Jennifer Chambers takes a different view.

The ambiguous law concerning admission of surrounding circumstances in the interpretation of contracts

By Alan Shearer

In the course of dismissing an application for special leave to appeal, the High Court (Gummow, Heydon and Bell JJ) took the opportunity to make observations as to the circumstances in which evidence of surrounding circumstances may be admitted in aid of contractual interpretation. Whether any greater clarity was added by the adoption of that course is contestable. Furthermore, the making of those observations in the context of a special leave application may result in some confusion as to the system of precedent.

Special leave disposition

The issue which the case concerned perhaps makes the subsequent attention it has received surprising. A contract provided 'For sales by JIREH INTERNATIONAL PTY LTD to GJGC STORES in Australia and to other countries, WES shall receive a commission of 5% of the ex-factory price of the coffees, teas and other products'. The issue was whether reference to 'JIREH INTERNATIONAL PTY LTD' was ambiguous such that the words 'or an associated entity' should be read into that clause. The trial judge considered they were not ambiguous and the additional words should not be read in, but nevertheless adopted a construction which included sales by suppliers other than 'JIREH INTERNATIONAL PTY LTD' as it was thought to make more sense from a commercial point of view. The Court of Appeal overturned that holding on the basis that 'JIREH INTERNATIONAL PTY LTD' (as the trial judge had found) was not ambiguous and 'there was therefore no warrant for departing from the unambiguous terms of [the clause]'.[1]

Against that background, it is not surprising that special leave was refused. In the course of so doing, substantive reasons were given and the opportunity was taken to reject certain authorities of intermediate appellate courts that had held that, when interpreting contracts, it was not necessary to identify ambiguity in the language of a contract before regard may be had to the surrounding circumstances and object of the transaction.[2] Those statements were seen as consistent with certain English authority.[3]

The court considered that acceptance of that proposition would require reconsideration of what was said by Mason J in *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337 (Codelfa) at 352 to be the 'true rule' as to the admission of such evidence. As such, it was said in the course of disposing of the leave application that until the High Court embarks upon that exercise, intermediate appellate courts and primary judges are bound to follow *Codelfa*, a point which their honours said should have been unnecessary to reiterate having regard to the confirmation of the authority of *Codelfa* in the face of subsequent English authorities in *Royal Botanic Gardens*.[4]

This echoed comments in a footnote to the reasons of Heydon and Crennan JJ in *Byrnes v Kendle* (2011) 279 ALR 212 where it was said that the extent to which surrounding circumstances are admissible 'is controversial' (fn. 135). In so doing, the issue was seen as a competition for acceptance between *Codelfa* and *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 (ICS).

The High Court's observations in *Jireh* were in contrast to a number of decisions of intermediate appellate courts which have considered various decisions of the High Court

subsequent to *Codelfa* and held, based on that trend of authority, that a finding of ambiguity is not first needed for regard to be had to surrounding circumstances.[5] Those decisions have been applied many times subsequently.

Authority post-*Codelfa*

While their honours addressed the issue in the language of stare decisis and the role of intermediate appellate courts and courts beneath them, this does not reflect the grey area that has been created post-*Codelfa*. Much of the difficulty is that the High Court has not spoken clearly and with one voice since *Codelfa*. Comments made in cases post-*Codelfa* have seemed to indicate that ambiguity is no longer essential.[6] Reference to *Royal Botanic Gardens* does not assist in resolving that uncertainty as it was decided prior to those further decisions.

The issue as it has developed is not one concerning the resolution of whether *Codelfa* or *ICS* should be preferred. The issue developed in *Metcash* was whether subsequent authority of the High Court had qualified what had been said in *Codelfa* such that the position in Australia had in certain respects merged with that in England.

In *Jireh*, their honours said that they did not read anything in those subsequent authorities as operating inconsistently with what was said by Mason J in *Codelfa*. That is highly debateable. For example, in *Pacific Carriers* it was said that the construction of certain letters of indemnity required 'consideration, not only of the text of the documents, but also the surrounding circumstances known to [the parties], and the purpose and object of the transaction' (at [22]). The authority cited by the court for that proposition was the decision of the House of Lords in *ICS*. In *Toll* it was said that the meaning of the terms of a contract are to be determined by what a reasonable person would have understood them to mean and that 'normally, requires consideration not only of the text, but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction' (at [40]).

Moreover, the author of the relevant judgment in *Codelfa* apparently disagrees. Sir Anthony Mason has since said:[7]

> I generally support Lord Hoffman's restatement of principles or guidelines [in ICS].... And I think that the High Court of Australia has endorsed them [citing *Pacific Carriers* and *Toll*]. I am not persuaded by the criticisms thus far made of them....

Indeed, Sir Anthony seemed to suggest that his reasons in *Codelfa* were not intended to lay down a strict rule of the kind which their honours in *Jireh* have apparently taken it to represent, stating:[8]

> [T]he [approach] now favoured, is to say that ambiguity is unnecessary, that the extrinsic materials are receivable as an aid to construction, even if, as may well be the case, the extrinsic materials are not enough to displace the clear and strong words of the contract.
>
> It was that idea that I was endeavouring to express in *Codelfa*, albeit imperfectly, because I recognised that ambiguity may not be a sufficient gateway; the gateway should be wide enough to admit extrinsic material which is capable of influencing the meaning of the words of the contract. The modern

point of criticism is that one should not have been thinking in terms of gateway. At the time, however, it was natural to do so because it stressed the importance of the natural and ordinary meaning of the words used by the parties in their written instrument and it respected the difference between interpretation and rectification.

The status of the remarks and uncertainty to the system of precedent

The irony is that in seeking to uphold the doctrine of precedent, it may have been undermined. Unusually, a judgment number has been assigned to the special leave disposition and it has been reported several times. However, that is apt to breed confusion as to the status of the disposition. The disposal of a special leave application does not involve any proceedings inter partes before the court and merely involves the seeking of permission to commence a proceeding.[9] It is accepted that such a disposition is of no precedential importance; McHugh J stating in one case that '[r]efusal of special leave creates no precedent and is binding on no one'.[10]

What may be seen as an attempt to settle disputed and substantive questions of law on an application for special leave is unfortunate. It may create embarrassment within the system of precedent. Given the debate as to the substantive issue it is apparent that it needs to be properly argued and resolved in an actual proceeding before the High Court. Until then a primary judge is now faced with the dilemma between following decisions of the Court of Appeal (as to the effect of what the High Court has said in actual decisions) which have precedential significance and remarks made in a special leave disposition by the High Court (as to the effect of those same decisions) which have no precedential significance. Strictly the observations in *Jireh* (which were, in any event, obiter to the result of the special leave disposition[11]) should be placed to one side in determining what the law is. Of course, that may be a brave path to adopt.

Where to from here?

How intermediate appellate courts and judges at first instance deal with the issue presented by *Jireh* is yet to be seen. A full court of the Federal Court has already avoided considering the effect of the 'guidance' offered in *Jireh* and the correctness of its earlier decision to the contrary.[12] The issue is obviously of significance in the multitude of proceedings concerning the interpretation of contracts. A practical answer may be to readily find an ambiguity so that surrounding circumstances will be admissible; as McHugh JA (as he then was) said 'few, if any, English words are unambiguous or not susceptible of more than one meaning', an approach apparent in various authorities.[13] After all, in *Royal Botanic Gardens* ambiguity was readily found in respect of the word 'may' (at [9], [147]).

Moreover, in all but the clearest case, a court is unlikely to determine ambiguity up front on a relevance objection when evidence of surrounding circumstances is tendered. Notwithstanding recent frowning upon the approach,[14] such material is likely to be admitted subject to relevance under s 57 of the Evidence Act with admissibility determined as part of the final judgment on interpretation. To the extent that a concern for promoting efficiency in litigation lies behind adherence to a rule requiring a prior finding of ambiguity,[15] it is unlikely to be achieved by the adoption of the rule. Nor are concerns as to the position of assignees of contractual rights likely to provide justification, given the other exceptions recognised in *Codelfa* (for example, rejected clauses in draft contracts), and that surrounding circumstances will be admissible where there is an ambiguity.

In the meantime, the profession must await the resolution of the issue by the High Court in a proper case and in a proper way. As Sir Anthony Mason has observed it is surprising 'to discover that the authorities are in such a state of disarray' and 'the doctrine of precedent ... is partly responsible'.[16] While the outcome may be predictable, *Jireh* should not be afforded a status it does not possess.

Endnotes

1. *Jireh International Pty Ltd t/as Gloria Jean's Coffee v Western Exports Services Inc* [2011] NSWCA 137 at [64].
2. Especially, *Franklins Pty Ltd v Metcash Trading Ltd* (2009) 76 NSWLR 603 (Metcash).
3. *Westminster City Council v National Asylum Support Service* [2002] 1 WLR 2956 was referred to.
4. *Royal Botanic Gardens and Domain Trust v South Sydney City Council* (2002) 240 CLR 45 at [39] (Royal Botanic Gardens).
5. See *Masterton Homes Pty Ltd v Palm Assets Pty Ltd* (2009) 261 ALR 382 at [2]-[4], [113]; *The Movie Network Channels Pty Ltd v Optus Vision Pty Ltd* [2010] NSWCA 111 at [68]; *WorldBest Holdings Ltd v Sarker* [2010] NSWCA 24 at [17]; *Phoenix Commercial Enterprises Pty Ltd v City of Canada Bay Council* [2010] NSWCA 64 at [178]; *Franklins Pty Ltd v Metcash Trading Ltd* (2009) 76 NSWLR 603 at [14]-[16], [49],

[90], [239]-[305]; *Lion Nathan Australia Pty Ltd v Coopers Brewery Ltd* (2005) 223 ALR 560 at [78] –[79], approved on appeal (2006) 156 FCR 1 at [45]-[46], [122], [238], [250]-[257]; *Ralph v Diakyne Pty Ltd* [2010] FCAFC 18 at [46]-[47]; *Ryledar Pty Ltd v Euphoric Pty Ltd* (2007) 69 NSWLR 603 at [107]-[109]; *Synergy Protection Agency Pty Ltd v North Sydney Leagues Club* [2009] NSWCA 140 at [22]; *LMI Australasia Pty Ltd v Baulderstone Hornibrooke Pty Ltd* [2003] NSWCA 74 at [40]-[53]. See also the observations of McLure JA (Wheeler JA agreeing) in *Home Building Society Ltd v Pourzand* [2005] WASCA 242 at [25]-[33].

6. *International Air Transport Association v Ansett Australia Holdings Ltd* (2008) 234 CLR 151 at [8] and [53]; *Wilkie v Gordian Runoff Ltd* (2005) 221 CLR 522 at [15]; *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 (*Toll*) at [40]; *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451 (*Pacific Carriers*) at [22].
7. Sir Anthony Mason, 'Opening Address' (2009) 25 JCL 1 at 3.
8. (2009) 25 JCL 1 at 3.
9. *Collins v R* (1975) 133 CLR 120.
10. *North Ganalanja Aboriginal Corporation v Queensland* (1996) 185 CLR 595 at 643. See also *Attorney General (Cth) v Finch (No 2)* (1984) 155 CLR 107 at 114–115; *New South Wales Medical Defence Union Ltd v Crawford (No 2)* (1994) 8 ANZ Ins Cas 61 – 226; and D O'Brien, *Special Leave to Appeal*, 2nd Edition (2007), at 48–49.
11. Their honours held that even with regard to surrounding circumstances the result would have been no different (at [6]).
12. *Balani Pty Ltd v Gunns Ltd* [2011] FCAFC 153 at [28].
13. *Manufacturers Mutual Insurance Ltd v Withers* (1988) 5 ANZ Ins Cases 60-853 at 75,343 per McHugh JA. See further *Colby Corp Pty Ltd v Commissioner of Taxation* (2008) 165 FCR 133 at [43]-[44] per Branson and Stone JJ; *Trawl Industries of Australia Pty Ltd v FM Foods Pty Ltd* (1992) 27 NSWLR 326 at 358, 359; *B&B Constructions (Aust) Pty Ltd v Brian A Cheesman & Associates Pty Ltd* (1994) 35 NSWLR 227 at 245; *Brambles Holdings Ltd v Bathurst City Council* (2001) 53 NSWLR 153 at [139]-[144]; *LMI Australasia Pty Ltd v Baulderstone Hornibrook Pty Ltd* [2003] NSWCA 74 at [40]-[53].
14. *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588 at [83] per Heydon J.
15. See J D Heydon, 'Implications of *Chartbrook Ltd v Persimmon Homes Ltd* for the Law of Trusts' a paper delivered at a symposium organised by the Law Society of South Australia and the Society of Trusts and Estate Practitioners on 18 February 2011 (accessible at http://www.anthonygrant.com/trusts.html).
16. (2009) 25 JCL 1 at 2.

Jireh: is the only controversy the controversy itself?

By Jennifer Chambers

In *Western Export Services Inc v Jireh International Pty Ltd* [2011] HCA 45 (Jireh), the High Court (Gummow, Heydon and Bell JJ) refused an application for special leave and said that, in construing a contract, it is first necessary to identify ambiguity in the language of the contract before regard can be had to the factual matrix in which the contract was made.

In so doing, their honours reiterated (not without some consternation) long-standing High Court authority, namely, the judgment of Mason J (with whom Stephen and Wilson JJ agreed) in *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337:[1]

> The true rule is that evidence of surrounding circumstances is admissible to assist in the interpretation of the contract if the language is ambiguous or susceptible of more than one meaning. But it is not admissible to contradict the language of the contract when it has a plain meaning. Generally speaking facts existing when the contract was made will not be receivable as part of the surrounding circumstances as an aid to construction, unless they were known to both parties, although, as we have seen, if the facts are notorious knowledge of them will be presumed.

This position was explicitly embraced in *Royal Botanic Gardens and Domain Trust v South Sydney City Council* (2002) 240 CLR 45, where the court was required to construe a provision in a deed of lease between two public bodies. In applying settled principles of construction, including a consideration of the legislative framework in which the parties operated and the provision in the context of the whole deed, the plurality held that no question of uncertainty arose as to the meaning of the language employed.[2] As such, evidence of the surrounding circumstances of the deed was not admissible, consistent with *Codelfa*. The court noted that in the course of argument, it had been taken to decisions of the House of Lords[3] which had been decided after *Codelfa* and observed:[4]

> It is unnecessary to determine whether their Lordships there took a broader view of the admissible 'background' than was taken in *Codelfa* or, if so, whether those views should be preferred to those of this Court. Until that determination is made by this Court, other Australian courts, if they discern any inconsistency with *Codelfa*, should continue to follow *Codelfa*.

*Post-*Jireh*, some authors have suggested that the High Court has vacillated in respect of the question as to when regard may be had to surrounding circumstances such that a decision of the court in exercise of its appellate jurisdiction[7] is required to clarify the position.*

The court's expression of that particular canon of the doctrine of precedent reflected its earlier decision in *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395 where the court said *'it is for this court alone to determine whether one of its previous decisions is to be departed from or overruled'*.[5] The principles of the doctrine were affirmed more recently in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89.[6]

Post-*Jireh*, some authors have suggested that the High Court has vacillated in respect of the question as to when regard may be had to surrounding circumstances such that a decision of the court in exercise of its appellate jurisdiction[7] is required to clarify the position.[8] In light of the established principles of precedent referred to above, it is difficult to accept that *Jireh* has placed trial judges and intermediate appellate courts in the 'unenviable position'[9] of having to decide which authority to follow, as the High Court has ruled on the subject, not in *Jireh*, but in earlier, binding decisions such as *Codelfa* and *Royal Botanic Gardens*.

The high point of the court's supposed equivocation was reached in *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451. In determining a question of construction in relation to certain letters of indemnity, the court held:[10]

> The construction of the letters of indemnity is to be determined by what a reasonable person in the position of Pacific would have understood them to mean. That requires consideration, not only of the text of the documents, but also the surrounding circumstances known to Pacific and BNP, and the purpose and object of the transaction.

Though the court did not make express reference to ambiguity before it took into account evidence of the surrounding circumstances, it is plain from the decision that the letters under consideration were susceptible of more than one meaning, thus satisfying the pre-

condition articulated by Mason J in *Codelfa*.

Notably, the court in *Pacific Carriers* included Gummow and Heydon JJ who, together with Bell J, comprised the bench in *Jireh*, in which their honours said:[11]

> We do not read anything said in this Court in *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 45 [and other High Court authorities] as operating inconsistently with what was said by Mason J in the passage from *Codelfa* to which we have referred.

Indeed, the court's decision in *Pacific Carriers* aptly demonstrates that the conflict between *Codelfa* and some intermediate appellate court decisions[12] gives rise to 'difficulties' which may be more illusory than real. As McHugh JA said in *Manufacturers Mutual Insurance Ltd v Withers*:[13]

> …few, if any, English words are unambiguous or not susceptible of more than one meaning or have a plain meaning. Until a word, phrase or sentence is understood in the light of the surrounding circumstances, it is rarely possible to know what it means.

In the ordinary course, it is likely that a trial judge faced with competing interpretations of a contract at an early stage of trial and without the benefit of all the evidence or the parties' submissions will readily admit ambiguity so as to permit reference to the surrounding circumstances.[14]

Endnotes

1. *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337 at 352.
2. *Royal Botanic Gardens and Domain Trust v South Sydney City Council* (2002) 240 CLR 45 per Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ at 62 [38].
3. *Investors Compensation Scheme Ltd v West Bromwich Building Society [No 1]* 1998] 1 WLR 896 per Lord Hoffmann at 912 – 913; *Bank of Credit and Commerce International SA v Ali* [2002] 1 AC 251 per Lord Bingham and Lord Hoffmann at 259, 269.
4. *Royal Botanic Gardens and Domain Trust v South Sydney City Council* (2002) 240 CLR 45 at 62 – 63 [39], citing *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395 at 403 [17].
5. *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395 at 403 [17].
6. *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at 150–151 [134].
7. Special leave applications do not constitute proceedings inter partes before the court: *Collins v The Queen* (1975) 133 CLR 120 at 22.
8. See K Mason AC QC, 'The distinctiveness and independence of intermediate courts of appeal' (2012) 86 ALJ 308 at 331; D Wong and B Michael, '*Western Export Services v Jireh International: Ambiguity as the gateway to surrounding circumstances?*' (2012) 86 ALJ 57; D McLauchlan and M Lees, 'Construction Controversy'(2011) 28 JCL 101.
9. See D Wong and B Michael, '*Western Export Services v Jireh International: Ambiguity as the gateway to surrounding circumstances?*' (2012) 86 ALJ 57 at 66 – 67.
10. *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451 at 462 [22].
11. *Western Export Services Inc v Jireh International Pty Ltd* [2011] HCA 45 at [5].
12. For example, *Franklins Pty Ltd v Metcash Trading Ltd* (2009) 76 NSWLR 603; *Ryledar Pty Ltd t/as Volume Plus v Euphoric Pty Ltd* (2007) 69 NSWLR 603; *Lion Nathan Australia Pty Ltd v Coopers Brewery Ltd* (2006) 156 FCR 1.
13. *Manufacturers Mutual Insurance Ltd v Withers* (1988) 5 ANZ Ins Cas 60-853 at 75,343, followed in *Trawl Industries of Australia Pty Ltd v Effem Foods Pty Ltd* (1992) NSWLR 326 at 358 where Samuels JA said 'in many, if not most, cases in which the court is seeking to construe a particular term or terms of a contract there will be sufficient uncertainty as to the meaning of the relevant term as to enable the admission of evidence of surrounding circumstances'.
14. See the discussion by Campbell JA in *Franklins Pty Ltd v Metcash Trading Ltd* (2009) 76 NSWLR 603 at 667 – 668 [260] – [261]. Elsewhere in these pages, Alan Shearer ably canvasses other approaches available to a trial judge.

From the High Court (carpark)

Practice Note SC Eq 11

Justin Hogan-Doran examines changes to the Practice as to Disclosure in the Equity Division of the Supreme Court of New South Wales – Practice Note SC Eq 11

From early 2012, the Equity Division of the Supreme Court began trialling a new regime as to the making of 'disclosure' orders at the interlocutory stage of matters. From 26 March, Supreme Court Practice Note SC Eq 11 has formalised the position.

The practice note applies to new and existing proceedings, but existing discovery and disclosure regimes are not affected, except perhaps in the limited case where the parties have so conducted themselves so as, in effect, to 'abandon the regime established by the court's orders.'[1].

Early discovery reflects historical practice from a time when matters moved from pleadings to hearing, without affidavits. Wide ranging discovery, including 'general discovery' was necessary for parties to ready themselves for trial without being taken by surprise. In these modern times, where the practice is to require parties to serve their evidence by way of affidavit, at least three results obtain.

First, the real issues in dispute between the parties – on which parties are required to focus (s 56(1) *Civil Procedure Act 2005*) and for which discovery only should be sought – may only be apparent after the evidence has been served. At that time, there is far less scope for surprise as to any issue.

Second, in these days of word processors, emails, photocopiers and the like, with the sheer volume of documentary material possibly available for discovery being so large, the late identification of the real issues has meant that much of the time and cost of discovery is wasted.

Third, the evidence served is often tailored – subconsciously or deliberately – to suit the documents rather than a witness' reasonable recollection of events. Evidence is longer, more voluminous, and less penetrable by cross-examination on documents.

It is important to understand what the Practice Note does do and what it does not do in terms of changing existing practice.

First, and foremost, the Practice Note merely changes the timing at which discovery and discovery-like orders are made, not their legal basis. As a general rule, orders for disclosure will not be made before the parties serve their evidence (paragraph 4). The Practice Note restates the principle that 'disclosure' will not be ordered 'unless it is necessary for the resolution of the real issues in dispute in the proceedings' (paragraph 5).[2]

As noted by list judges in a recent seminar, the Practice Note is intended to be facilitative, not obstructive; the intention is to use both pleadings and evidence to identify the real issues in dispute before discovery and other disclosure is ordered.[3]

Second, the Practice Notes does not technically affect notices to produce or subpoenas. These are not the subject of an 'order' but are instead issued under the Rules and derive their authority from the Rules. However, since they are liable to be set aside if issued in an abuse of process, they may be liable to be set aside if the apparent object of their issue is to circumvent the requirement that disclosure come after evidence. The Practice Note thus informs the content of the test of abuse of process as applied to subpoenas and notices to produce. In the author's opinion, notices to produce under r 21.10(1)(a) will not be affected. However, a notice issued under r 21.10(1)(b) seeking 'any other specific document or thing that is clearly identified in the notice and is relevant to a fact in issue' is open to being set aside if it infringes the intendment of the new regime.

Third, preliminary discovery under UCPR Pt 5 is not affected.

Discovery may be ordered before evidence if the applicant can establish 'exceptional circumstances' (paragraph 4). This requires a motion, filed with an affidavit in support setting out (paragraph 6):

(a) the reason why disclosure is necessary for the resolution of the real issues in dispute in the proceedings;

(b) the classes of documents in respect of which disclosure is sought; and

(c) the likely cost of such disclosure.

The application is made to the list judge, or to the chief judge in Equity for general list matters. It must be made even if orders for discovery are sought by consent. Of course, parties can informally (i.e. without seeking an order) agree to conduct discovery at any stage they choose.

What are exceptional circumstances remains to be tested on a case by case basis. In *Leighton International*,

McDougall J said it meant 'out of the ordinary, or unusual'.[4] In the second matter considered in that case, the plaintiffs' expert had reverse engineered the likely cause of failures in tunnel construction; however he had not had access to the detailed design documentation, including the calculations, load assumptions and the like, to directly check the design process. Further, the various defendants involved in the construction had raised proportionate liability defences, raising the question whether and to what extent each is liable. McDougall J having found that the plaintiffs needed the documents to make out their case, disclosure was ordered.

In any case, the question will be asked whether, on an application for disclosure, it is reasonably necessary 'now' to make such an order, as opposed to after the parties have put on all of the evidence that they can. Evidence in support of the application may have to show why it is necessary for the party even to take that step.[5]

Endnotes

1. *Prowse v Rocklands Richfield* [2012] NSWSC 448, McDougall J at [14].
2. 'Necessary' means 'reasonably necessary': *Leighton International v Hodges; Thiess v Reinforced Earth* [2012] NSWSC 458, MacDougall J at [22].
3. See *Armstrong Strategic Management and Marketing Pty Limited & Ors v Expense Reduction Analysts Group Pty Limited* [2012] NSWSC 393, Bergin CJ in Eq, esp at [65]-[66]. While it will be possible to put on supplementary affidavits after discovery, as was also observed at the seminar, there should be no 'half-baked' affidavits served before discovery, in which a party holds back evidence on crucial matters until after discovery is finally obtained.
4. (at [20]).
5. *Leighton* at [38], [43].

Expectations of directors and senior executives

Talitha Fishburn reports on two High Court decisions on corporate governance: *ASIC v Meredith Hellicar & Ors* [2012] HCA 17 and *Peter James Shafron v ASIC* [2012] HCA 18.

On 3 May 2012, the High Court of Australia handed down two related decisions, *ASIC v Meredith Hellicar & Ors* [2012] HCA 17 (*Hellicar*) and *Peter James Shafron v ASIC* [2012] HCA 18 (*Shafron*). The decisions represent a further judicial tightening of corporate governance expectations of directors and senior executives. They also see the heavy curtains starting to draw on the lengthy James Hardie civil prosecution, though both matters will now be remitted to the Court of Appeal in relation to the issue of penalty.

Both decisions were unanimous (the plurality judgments delivered by French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ, with Heydon J giving separate reasons but arriving at the same outcome).

In *Hellicar*, the High Court confirmed the first instance decision (of Gzell J in the NSW Supreme Court) that found seven non-executive directors (directors) of James Hardie Industries Limited (JHIL) had breached their duties by approving a misleading ASX announcement. In *Shafron*, the High Court upheld the finding of liability of Mr Shafron (JHIL's general counsel and company secretary) for failing to provide adequate advice to JHIL's board (board) and its CEO.

Factual background

JHIL was the ultimate holding company of the James Hardie group of companies. In 2001, JHIL proposed a group restructure. At this time, two of JHIL's subsidiaries were subject to substantial present and anticipated claims for asbestos related damages.

On 15 February 2001, the board met to consider a group restructure proposal (meeting). Minutes of the meeting (confirmed by the board in April 2001 and signed as a correct record by its chairman) recorded that an ASX announcement had been tabled and approved by the board (minutes). The following day, JHIL sent a media release to the ASX based on the ASX announcement. It stated that adequate funds were available to meet present and future asbestos related compensation claims. This statement was false. In fact, the relevant compensation fund was grossly underfunded (the entity controlling it, the Medical Research and Compensation Foundation, soon after facing bankruptcy).

Previous proceedings

In 2007, ASIC brought civil penalty proceedings

against the directors and other officers of JHIL (former chairman, Meredith Hellicar and ex-directors Michael Brown, Michael Gillfillan, Martin Koffel, Dan O'Brien, Greg Terry and Peter Wilcox and former company secretary and general counsel, Peter Shafron) for breaches of s 180(1) of the *Corporations Act 2001* (Act) relating to the obligation to exercise due care and diligence.

The ultimate issue was whether or not a draft of the ASX announcement had been tabled at the meeting and if so, whether or not the directors had approved it. In the Supreme Court of NSW, Gzell J found in the affirmative to both these questions and held that the directors had contravened s 180(1) of the Act. He also found Mr Shafron in breach of his statutory duties by failing to properly advise the board that the announcement was 'expressed in too emphatic terms' in respect of the adequacy of funding, or that there were potential shortcomings in the financial advice received by the board from advisors.

The NSW Court of Appeal upheld an appeal by the directors to the effect that ASIC had failed to prove that the board had approved the ASX announcement. It also held that a body in the position of ASIC, having regard to the scope of its powers and the public exercise of its functions had an obligation of fairness analogous to that owed by a crown prosecutor in the conduct of its prosecution. The Court of Appeal found that ASIC had breached this duty by not calling JHIL's lawyer who had attended the meeting and prepared the minutes and that this diminished the overall cogency of ASIC's evidence. However, in relation to Mr Shafron, the Court of Appeal held that he had acted in his capacity as an officer and had breached his duties.

ASIC appealed to the High Court against the ruling in favour of the directors. Mr Shafron appealed to the High Court on the basis that the allegations against him concerned his actions made in his capacity as general counsel and not in his capacity as an officer of JHIL.

High Court decisions

Hellicar proceeding

The High Court overturned the decision of the Court of Appeal. Although the directors sought to impugn the accuracy of the minutes, the High Court held that identification of other inaccuracies in the minutes did not necessarily imply that the relevant parts of the minutes were inaccurate. Nor did the fact that the minutes were prepared in draft before the meeting mean that they were not a true record of what occurred during the meeting. Instead, the High Court found that it would be 'too great a coincidence' for not one of the individuals present at the April board meeting (which adopted the minutes) to notice that the minutes contained a resolution that to their knowledge had not been passed. On the directors' case, this would have been 'a glaring blunder, or worse than a blunder – recording a vitally important resolution which never took place'.

The High Court also noted that when the ASX announcement was later circulated, none of directors demurred or protested as to its terms. This was held to be consistent with the finding that the board had approved the ASX announcement. Heydon J noted that it was a particularly heavy burden to establish that the minutes of an ASX-listed company that were subsequently adopted as a correct record were incorrect. Accordingly, in the absence of any contrary evidence, the minutes were proof of the board's approval of the ASX announcement.

The High Court also held that the Court of Appeal erred in finding that ASIC had breached a duty of prosecutorial 'fairness' by not calling JHIL's solicitor and concluding that a failure to call a witness, in breach of such a duty of 'fairness', diminished the cogency of the evidence called by ASIC. The High Court noted that the Court of Appeal had not identified the source of any duty to call particular evidence, or the source of the rule that was said to apply if that duty was breached. Further, even if such a duty existed, it would be expected that the remedy would lie either in the primary judge directing ASIC to call a witness or staying proceedings until ASIC did so, or if the trial went to verdict in the appellate court considering whether a miscarriage of justice necessitated a retrial.

In relation to the duty of fairness, Heydon J found that beyond ASIC's duty as a Commonwealth instrumentality to act as a model litigant, no such special duty existed. His Honour noted the adverse consequences if such a duty existed, including immensely time-consuming debate at trials and appeals about whether the duty has been satisfied.

His Honour also considered an argument as to whether

Blatch v Archer (1774) 1 Cowp 63 supported a wider principle than *Jones v Dunkel* (1959) 101 CLR 298. It was held in *Blatch v Archer* that all evidence is to be weighed according to the proof which it was in the power of one side to have produced and in the other to have contradicted, however, his Honour held that the present case did not afford an opportunity to determine that issue, because the conditions upon which the respondents relied for the application of the principle in *Blatch v Archer* were in fact no different from those necessary to invoke *Jones v Dunkel*. In any case, his Honour held that *Jones v Dunkel* does not allow the court to infer that the evidence of an absent witness would have been positively adverse to the party who failed to call that witness.

ASIC and its opponents in civil penalty litigation should now approach the conduct of cases on the basis that the civil rules of evidence and procedure apply. Further, while ASIC must behave as a model litigant, significantly, any failure on its part to do so will not reduce the cogency of its evidence.

Shafron proceeding

The High Court rejected the submission that Mr Shafron could divide his responsibilities and capacities between those belonging to his role as company secretary and those in his role as general counsel. There was no evidence led in support of this submission. Further, to find otherwise, would have wrongly assumed that some distinction could be drawn between Mr Shafron's tasks as company secretary and general counsel and that no overlap existed in these tasks. Rather, Mr Shafron's responsibilities were viewed as a composite whole. This required examination of all the tasks performed by Mr Shafron as an officer of JHIL. The High Court found that in Mr Shafron's case, all of the tasks he performed were undertaken in fulfillment of his responsibilities as general counsel and company secretary. Given Mr Shafron's dual role, the High Court was able to find that his responsibilities extended to giving advice about, and taking steps to ensure compliance with, all relevant legal requirements, including those that applied to JHIL as a listed public company, such as how duties of disclosure should be met. The primary judge and the Court of Appeal described this as a duty to protect the company from 'legal risk', which extended beyond purely administrative tasks.

Key corporate governance implications

ASIC's recent response to the High Court's decisions in Hellicar and Shafron has been to note that they 'reinforce the behaviour expected of gatekeepers in our markets such as directors' and that they are 'already shaping corporate behaviour and ... having a positive deterrent effect'.[1] The decisions are highly fact-driven, and as such, they do not significantly expand the nature and scope of directors' duties. However, they helpfully clarify aspects of corporate governance, including the following:

- Company directors need to demonstrate adequate engagement with board minutes, and not merely 'rubber stamp' them. There is an implied obligation for directors to carefully examine board minutes to ensure that they accord with what transpired at the board meeting and, if they do not, the director(s) should raise an objection at the next board meeting.
- Directors and officers of a company may not be able to delegate the task of important public announcements to management – careful consideration should be given to drafting ASX announcements including the use of specific language and verified information.
- Senior executives and officers of a company must ensure that they properly inform and advise the board of material matters.
- A person merely participating in a decision that affects the whole or a substantial part of a business (including general counsel) may be liable as an 'officer' for the ultimate decision.
- The fact that an in-house counsel is not an expert in a particular subject field will not absolve them of liability where they have enough knowledge to understand the importance of information they have, and they will be required to bring it to the attention of the relevant decision makers.

Endnotes

1. ASIC Press Release '12-85MR Decision in ASIC's appeals in James Hardie matter' dated 3 May 2012.

Breaches of copyright

Tim Holmes reports on *Roadshow Films Pty Limited v iiNet Limited* [2012] HCA 16

Roadshow Films Pty Limited, in conjunction with 34 other appellants, brought proceedings against iiNet Limited ('iiNet') alleging that it had infringed the appellants' copyright. The appellants are companies that either own or exclusively license the copyright in a significant number of commercially released films and television programmes. The respondent is an internet service provider ('ISP') that provides its customers with access to the internet.

The appellants alleged that iiNet had authorised its customers to breach their copyright though the use of a BitTorrent system. A BitTorrent system is a peer-to-peer file distribution system which allows its users to download files, usually films and music files, from multiple sources across the internet. It was noted that a user of a BitTorrent system who downloaded copyrighted material would infringe section 86(a) of the *Copyright Act 1968* (Cth) by downloading the film but also section 86(c) of the Act, as after the material is downloaded the system then makes the film available for others to download.

On 2 July 2008, the executive director of the Australian Federation Against Copyright Theft ('AFACT') wrote to iiNet identifying alleged infringements of copyright by customers of iiNet though the use of BitTorrent systems. This notice requested iiNet prevent their customers from continuing their alleged infringements of copyright. AFACT continued to send these notices to iiNet on a weekly basis until August 2009. These notices did not contain information about how AFACT had gathered the information. iiNet responded to these notices requesting AFACT refer its allegations to the appropriate authorities and that the information was insufficient for iiNet to take any further action. iiNet did not suspend or terminate any customer accounts due to allegations of breach of copyright. The appellants argued that iiNet's inactivity following the receipt of the AFACT notices at least amounted to a countenancing of the primary acts of infringement. However, iiNet did take some actions to indicate that it did not support the infringement of copyright rights, including press releases and information on its website.

Copyright in cinematographic films may be infringed if a party authorises another party's performance of an act that infringes upon the copyright holder's rights.[1] This would include the making of copies of the film and communicating the film to the public.[2] A primary infringement could occur, for example, when a person makes the film available online without the consent of the copyright owner. A secondary infringement could occur when a person authorises the making available of the film online without the consent of the copyright owner.

The court noted that section 22 of the Copyright Act provides that a communication, other than a broadcast, is taken to have been made by the person responsible for determining the content of the communication.[3] However, a person does not determine that content 'merely because' that person takes steps to gain access to what another person has made available online or by receiving the electronic transmission of the communication.[4] Gummow and Hayne JJ (with whom French CJ, Crennan and Kiefel JJ agreed) considered that the effect of section 22 was that iiNet could not be responsible for determining the availability of the appellants' films. This meant iiNet could not be a primary infringer. Therefore, the question was whether iiNet was a secondary infringer due to its authorisation of its customers' infringement.

Gummow and Hayne JJ provided a detailed consideration of the common law principles that related to the concept of authorisation. Their honours noted the general legal principle that in the absence of a special relationship, one person has no duty to control another person to prevent damage to a third party.[5]

French CJ, Crennan and Kiefel JJ noted that the agreement between iiNet and their customers made it clear that iiNet was not purporting to grant the customers any right to use the internet to infringe another person's rights or an illegal purpose. Their honours noted that for a party to be guilty of authorising the infringement, that party must have power to prevent the preliminary infringement.[6] Therefore, even if their honours were satisfied that iiNet's inactivity following receipt of the AFACT notices amounted to support for their customers' actions (and their honours were not so satisfied), iiNet's limited power to take action led their honours to conclude iiNet was not a secondary infringer.

Their honours then went on to consider whether iiNet took reasonable steps to prevent or avoid the preliminary infringement of the appellants' rights given their indirect power to do so. It was noted that the

inactivity was not indifference but an unwillingness to act because of the potential risks of acting based only on the limited information contained in the AFACT notices.

Their honours concluded that the Copyright Act did not impose the obligation to suspend or terminate customer accounts due to the alleged breach of copyright identified by the AFACT notices. Their honours found that the AFACT notices did not provide a reasonable basis for sending warnings to individual customers threatening to suspend or terminate their accounts. Therefore, the conclusion could not be reached that iiNet's inactivity gave rise to an inference that iiNet had authorised their customers' infringement.

Gummow and Hayne JJ also dismissed the appeal. Their honours concluded that an ISP could not be taken to have authorised a primary infringement of copyright merely because it provided facilities making the infringement possible. Their honours also concluded that it was reasonable for iiNet not to act on the incomplete information contained within the AFACT notices.

Endnotes

1. *Copyright Act 1968* (Cth) s 101.
2. *Copyright Act 1968* (Cth) s 86.
3. *Copyright Act 1968* (Cth) s 22(6).
4. *Copyright Act 1968* (Cth) s 22(6A).
5. *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254, 264, 270, 292, 299-300; *Brodie v Singleton Shire Council* (2001) 206 CLR 512, 551.
6. *WEA International Inc v Hanimex Corporation Ltd* (1987) 17 FCR 274, 286-288.

Factual causation under the Civil Liability Act

Adam Hochroth reports on *Strong v Woolworths Limited t/as Big W* (2012) 285 ALR 420; (2012) 86 ALJR 267; [2012] HCA 5

The High Court held that a plaintiff in a slip and fall case could establish factual causation in the absence of direct evidence as to when the slippery substance was deposited. The court discussed the requirements of factual causation under s 5D of the *Civil Liability Act 2002* (NSW).

Facts

The plaintiff/appellant, Kathryn Strong, suffered a serious spinal injury when she slipped and fell in a shopping centre. The centre consisted of a Woolworths store and a Big W store separated by a common area, part of which was operating as a food court. The area where the plaintiff fell was the sidewalk sales area outside a Big W store, and was under the care of the respondent, Woolworths. At the time of the incident, the appellant was on crutches due to a disability. The fall was caused by the tip of her right crutch coming into contact with a greasy chip that was lying on the floor of the sidewalk sales area. The accident occurred at about 12.30pm. It was not in question that on the day of the fall, Woolworths did not have any system in place for the periodic inspection and cleaning of the sidewalk sales area.

Proceedings in the lower courts

The proceedings at first instance were heard in the District Court of New South Wales. The primary judge found Woolworths liable in negligence, but did not separately address causation.

Woolworths did not challenge the finding of negligence on appeal. The only issue was causation. The NSW Court of Appeal found that Ms Strong could not establish that Woolworths' negligence was the cause of her injuries.[1]

First, the court addressed what reasonable care required of Woolworths. There was evidence as to the cleaning system employed by the owner of the mall and the common areas. Its cleaning contract required periodic inspection and cleaning every 15 minutes. The cleaner on duty gave evidence that the area was in fact cleaned every 20 minutes.

The Court of Appeal approached the issue of causation on the basis that reasonable care on Woolworths' part required periodic inspection and cleaning of the sidewalk sales area at 15 minute intervals. On that basis, it held that Ms Strong could not establish that the chip had been deposited on the ground long enough that it would have been detected and removed had such a

system been in place.

There was no direct evidence of when the chip was deposited. Nor was there evidence that the chip had been on the floor for some time (for example, that it was dirty or cold to the touch). The accident occurred at lunchtime and close to the food court. Thus, it could not be concluded on balance of probabilities that the chip had been dropped more than 15 minutes prior to Ms Strong's fall.

The High Court's decision

The majority (French CJ, Gummow, Crennan and Bell JJ) allowed Ms Strong's appeal. Justice Heydon dissented.

The majority found that the appellant could establish that Woolworths' failure to maintain a proper system of cleaning was a necessary condition of her harm, on the basis of probabilistic reasoning akin to that employed in *Shoeys Pty Limited v Allan*[2] and *Kocis v S E Dickens Pty Limited*[3].

The mall had been open since 8.00am. The evidence did not permit a finding of when, in the interval between 8.00am and 12.30pm, the chip was deposited. Reasonable care required inspection and removal of slipping hazards at intervals not greater than 20 minutes. The court reasoned that the probabilities favoured the conclusion that the chip was deposited in the longer period between 8.00am and 12.10pm, not the shorter period between 12.10pm and the time of the fall.

The Court of Appeal had reasoned to the contrary on the basis that the deposit of the chip was not a hazard with equal likelihood of occurrence throughout the day, because, *inter alia*, chips are more likely eaten at lunchtime. The majority rejected this reasoning, finding it speculative.

Causation under the Civil Liability Act

Although not necessary for the outcome of the appeal, the court discussed the requirements of causation under s 5D. Section 5D(1)(a) provides that an element of causation is whether 'the negligence was a necessary condition of the occurrence of the harm'. Ms Strong had submitted that the Court of Appeal incorrectly proceeded on the basis that this provision excludes consideration of factors making a 'material contribution' to the harm suffered by the plaintiff.[4] The court noted that 'material contribution' has come to be used in different ways in the context of causation in tort, including cases where there is a cumulative operation of factors causing harm[5] and where conduct materially increases the risk of harm and scientific knowledge is lacking to prove the cause of harm.[6] The court noted that in accordance with established principles,[7] such cases may be treated as establishing causation under s 5D(2), subject to the normative considerations therein. The court also noted cases of 'causal over-determination' at common law[8] but found it unnecessary to comment on how such cases may be accommodated under s 5D.

The dissent of Heydon J

Justice Heydon, in dissent, considered Ms Strong's submission that the 'evidential burden' on the issue of causation fell on the defendant in the case. His Honour commented that the expression 'evidential burden' has been used in three different senses in the authorities. In the present case, his Honour found, the appellant's argument required her to show that her evidence was strong enough to entitle the trier of fact to find in her favour, in the absence of evidence from the defendant. However, applying considerations flowing from 'the common experience of ordinary life' (a matter on which, his Honour opined, 'appellate courts are not necessarily well equipped to speak'), his Honour found that the appellant had not proved the chip was probably dropped prior to 12.15pm.

Conclusion

The case may be seen as an indication that the High Court is receptive to 'burden shifting' in classes of tort cases where proof of causation is inherently difficult. Left undecided is how s 5D will be applied to causation questions such as material contribution, material increase of risk, and causal over-determination.

Endnotes

1. *Woolworths Limited v Strong* [2010] NSWCA 282.
2. (1991) Aust Tort Reports ¶81-104 (NSW Court of Appeal).
3. [1998] 3 VR 408.
4. See *Zanner v Zanner* [2010] NSWCA 343 at [11] per Allsop P.
5. *Bonnington Castings Limited v Wardlaw* [1956] AC 613.
6. *Fairchild v Glenhaven Funeral Services Limited* [2003] 1 AC 32.
7. *March v E & M H Stramare Pty Limited* (1991) 171 CLR 506 at 514 per Mason CJ.
8. *Amaca Pty Limited v Booth* (2011) 283 ALR 461; (2011) 86 ALJR 172; [2011] HCA 53.

Never to be released

Stephanie Patterson reports on *Crump v State of New South Wales [2012] HCA 20*

Introduction

In *Crump v State of New South Wales* [2012] HCA 20, the plaintiff (Mr Crump) commenced proceedings in the original jurisdiction of the High Court challenging the constitutional validity of s 154A of the *Crimes (Administration of Sentences) Act 1999* (NSW) in its application to Mr Crump. Section 154A was introduced in 2001. Section 154A operated to effectively prevent Mr Crump (as an offender who had been the subject of a non-release recommendation) from obtaining parole unless he was in imminent danger of dying or permanently incapacitated. Section 154A had this operation notwithstanding that in 1997, Justice McInerney of the Supreme Court of NSW had made an order setting a minimum term of imprisonment of 30 years, which term expired in November 2003, after which Mr Crump would be eligible for release on parole.

Factual and legislative background

In 1973, Mr Crump was sentenced to life imprisonment for the murder of Mr Ian Lamb, and also to life imprisonment for conspiracy to murder Ms Virginia Morse. The sentencing judge, Justice Taylor of the Supreme Court of New South Wales, declined to fix a non-parole period, and expressed the view that Mr Crump should never be released.

In 1989, amendments were made to sentencing legislation in NSW, and as part of those amendments, s 13A was introduced into the *Sentencing Act 1989* (NSW). That provision provided that a person who was serving an existing life sentence, and who had served at least eight years of that sentence, could apply to the Supreme Court for the determination of a minimum term of imprisonment that the person must serve and an additional term during which the person might be released on parole.

In 1997, upon an application made by Mr Crump pursuant to s 13A of the Sentencing Act, McInerney J made an order replacing Mr Crump's life sentence with a minimum term of 30 years and an additional term of the remainder of Mr Crump's natural life in respect of the murder conviction (his Honour made a similar order, but with a minimum term of 25 years, in respect of the conspiracy to murder conviction). The effect of McInerney J's order was that, if the system of parole continued to operate unchanged[1], Mr Crump would become eligible for release on parole in November 2003.

However, in 2001, s 154A was introduced in to the Administration of Sentences Act. Section 154A provided that, in relation to an offender who was the subject of a non-release recommendation, the parole authority may make an order directing release of the offender on parole if, and only if:

(a) the offender was in imminent danger of dying or was incapacitated to the extent that he or she no longer had the physical capacity to do harm to any person; and

(b) the offender had demonstrated that he or she did not pose a risk to the community.

Mr Crump was the subject of a 'non-release recommendation' (and s 154A therefore applied to him) because of the views expressed by Taylor J when the life sentences were imposed in 1974.

The plaintiff's argument

The basis of Mr Crump's challenge was that s 154A varied or detracted from an entitlement created by McInerney J's order. The plaintiff claimed that because Ch III of the *Constitution* establishes an 'integrated national court system'[2] and because the power to vary or alter judgments or orders is a part of the judicial power for which Ch III provides, the Parliament of New South Wales did not have the power to enact a provision such as s 154A, which had the effect of varying or detracting from an entitlement created by an order made by a judge of the Supreme Court.

The judgments of the High Court

The High Court held that s 154A did not have the effect of altering an entitlement created by McInerney J's order, or of varying his Honour's order.

The majority (Gummow, Hayne, Crennan, Kiefel and Bell JJ) held that in considering the effect of s 154A, it was necessary to have regard to the substance and practical effect of McInerney J's sentencing determination. Their honours concluded that it did not create any right or entitlement on the part of Mr Crump to release on parole. Instead, that determination did not itself have any operative effect, but rather was a fact upon which the parole system (as subsequently

amended by s 154A) operated.[3] Therefore, s 154A did not alter or vary the order made by McInerney J, and so the constitutional question did not arise.

Chief Justice French agreed with the reasons in the joint judgment.[4] His Honour also emphasised that there is a 'clear distinction' between the judicial function exercised by judge in imposing a sentence, and the administrative function exercised by a parole authority in determining whether a person eligible for release on parole should be released.[5] His Honour observed that s 154A imposed strict conditions upon the exercise of *executive* power to release Mr Crump, and it thereby altered what had been the statutory consequences of the sentence imposed by McInerney J. However, his Honour concluded, contrary to Mr Crump's case, that s 154A did not alter the legal effect of the sentence.[6]

Justice Heydon held that the only consequence of McInerney J's determination of a minimum term was that it created an opportunity for a parole application in November 2003 under the legislative scheme governing parole applications, and s 154A only operated on such a parole application, by altering the conditions which must be met before Mr Crump could be released on parole. Section 154A did not deal with the sentence determined by McInerney J, and it therefore did not alter any rights or entitlements created by his Honour's order.[7]

Having concluded that s 154A did not have the effect contended for by the plaintiff, it was unnecessary for the High Court to embark upon any analysis to identify what limits Ch III of the *Constitution* might impose upon a state parliament's power to legislate in a manner which alters or varies orders made by a court.

Endnotes

1. *Crump v State of New South Wales* [2012] HCA 20 at [48] per Gummow, Hayne, Crennan, Kiefel and Bell JJ.
2. *Kable v Director of Public Prosecutions* (NSW) (1996) 189 CLR 51 at 102, 112, 138.
3. *Crump v State of New South Wales* [2012] HCA 20 at [60] per Gummow, Hayne, Crennan, Kiefel and Bell JJ.
4. *Crump v State of New South Wales* [2012] HCA 20 at [5] per French CJ.
5. *Crump v State of New South Wales* [2012] HCA 20 at [28] per French CJ.
6. *Crump v State of New South Wales* [2012] HCA 20 at [35] per French CJ.
7. *Crump v State of New South Wales* [2012] HCA 20 at [70]-[72] per Heydon J.

Motor accident compensation

Daniel Hanna reports on the decision in *Nominal Defendant v Wallace Meakes* [2012] NSWCA 66 (4 April 2012)

On 4 April 2012 the NSW Court of Appeal delivered a leading decision on section 34 of the *Motor Accidents Compensation Act 1999* (NSW). It is also the first major decision on the 'due inquiry and search' test in Nominal Defendant cases since 1975.

Background

Wallace Meakes, a solicitor, was injured on 1 August 2008. He was a pedestrian who was attempting to cross Park Street, near the corner of Elizabeth Street in the Sydney CBD. It was 4.00pm and the traffic was congested. Being in a hurry to get to an appointment, he did not check the pedestrian signals before crossing.

Just before Mr Meakes completed his crossing, he was hit by a car. The driver stopped, got out of the car and spoke with him. Mr Meakes then left the accident scene. He did not take down the details of the car or driver before leaving. A few days later he reported the accident to the police and returned to the scene to find witnesses. A couple of employees at the nearby Starbucks had seen the accident, but nobody had taken down the registration details of the car.

Section 34(1) of the *Motor Accidents Compensation Act 1999* (NSW) provides that an action for the recovery of damages in respect of death of or injury to a person caused by the fault of the owner or driver of a motor vehicle may, if the identity of the vehicle cannot be established, be brought against the Nominal Defendant. However, subsection (1AA) provides that a claim cannot be made against the Nominal Defendant under s 34 unless due inquiry and search has been made to establish the identity of the motor vehicle concerned.

In the District Court trial the Nominal Defendant, represented by Allianz, contested due inquiry and

search on the basis that the plaintiff should have taken the driver's or vehicle's details down before leaving the scene.

Judge Levy SC found that due inquiry and search had been established. He excused the failure to take down the car's details on the basis that Mr Meakes did not think he was severely injured until some time later. He also found Mr Meakes to be justifiably unaware of the legal requirements of making a claim, despite both being a solicitor and having a prior motor accident claim in which he had obtained the other driver's details.

Appeal

The appeal judgment of Sackville AJA (with whom McColl and Basten JJA agreed) explored the history of the 'due inquiry and search' test, dating back to *Blandford v Fox* (1944) SR (NSW) 241 and *Harrison v Nominal Defendant* (1975) 7 ALR 680. It affirmed the following principles:

- It is a plaintiff's duty to prove that due inquiry and search has been performed;
- The level of search and inquiry required is what is 'reasonable' in the circumstances of the accident, and in the situation of the plaintiff after the accident;
- To be 'reasonable' the effort must be 'as prompt and thorough as the circumstances will permit... The inquiries must be set on foot before the scent is cold...';
- The concept of 'due' search cannot be applied stringently – it does not mean that every single path must be followed;
- The test can be satisfied if, in the circumstances, no search or inquiry is performed but no such efforts could be expected to reveal the information in any case;
- A finding by a trial judge that the vehicle's identity cannot be established as required by the section should not easily be set aside on appeal.

Appellate interference was justified in this case because Levy DCJ had applied the wrong reasoning process. Instead of asking whether the positive duty had been met, he found that it was 'understandable and excusable' for the plaintiff not to have made the inquiry.

The court went a little further. Paragraph 71 of Sackville AJA's judgment is critical:

> In assessing 'due inquiry and search' that should have been undertaken in this case it is appropriate to treat the respondent as a *reasonably informed member of the community*. Such a person could be expected to know that a victim injured in a motor vehicle accident, where another person is at fault, may be able to claim compensation from the person at fault. Where the victim is a pedestrian, a reasonably informed member of the community could be expected to appreciate that it is important to obtain the registration number of the vehicle and, if possible, the details of the driver in order to pursue any claim for compensation. [emphasis added]

Applying those principles to Mr Meakes, the Court of Appeal found that a reasonable person in his position would have taken down the offending vehicle's details. The factors they found telling were:

- The ease with which the plaintiff could have recorded the details. The driver approached him. He had a pen and paper in his briefcase. He agreed in evidence that it would have been a simple thing to record the number plate;
- The plaintiff must have been aware that he was injured, despite his value judgments about the extent of his injury;
- The plaintiff was not so injured as to prevent him writing down registration details, which would have taken no more than a few seconds; and
- To find that the plaintiff had satisfied section 34 in this situation would come close to undermining it and depriving it of any real utility.

The District Court verdict, originally totalling $433,565 plus costs, was overturned and replaced with a verdict for the defendant, with the plaintiff/respondent to pay the costs in both the lower court and appeal proceedings.

Commentary

This case should become a benchmark for the 'due inquiry and search' provisions of the *Motor Accidents Compensation Act 1999* (NSW), and similar provisions in other statutory schemes. The court's findings about what an objective 'reasonably informed member of the community' should know about a right to claim also break new ground. How that concept will be applied to other claim situations remains to be seen.

Media responsibility under the Racial Discrimination Act

Nicolas Kirby discusses *Eatock v Bolt* [2011] FCA 1103

Andrew Bolt is no stranger to controversy. He calls it like he sees it. In 2009, he saw a 'trend' of fair-skinned Indigenous people opportunistically choosing to falsely identify themselves as Aboriginal to further their careers and gain access to opportunities reserved for Aboriginal and Torres Strait Island peoples. Bolt wrote two articles called 'It's so hip to be black' and 'White Fellas in the Black'. The articles were published in the *Herald Sun* and on its website. Bolt argued that a person with fair skin is not sufficiently Aboriginal to genuinely identify as an Aboriginal person.

Bolt made his argument by providing alleged real-life examples of this 'trend' – 18 of them. He told of how they were 'eager to proclaim their Aboriginality'; how they 'chose, incidentally, the one identity open… that has political and career clout'; he said that the 'choice' of Aboriginality 'can seem almost arbitrary'. He described one of them as 'a professional Aborigine'; others that 'out of their multi-stranded but largely European genealogy, [they] decide to identify with the thinnest of all those strands'.

Bolt made extensive reference to the physical appearances of his subjects. He described them variously as 'pink in face as they are in politics'; 'blue-eyed and ginger-haired'; and 'pale as a blank canvas'.

He juxtaposed their physical characteristics against what he regarded as 'real' Aboriginals: 'Hear that scuffling at the trough? That's the sound of black people being elbowed out by white people shouting 'but I'm Aboriginal, too!'; 'privileged white Aborigine… underprivileged black Aborigine'; and 'White university lecturer… real draw-in-the-dirt Aboriginal artists.'

Bolt's articles were appended to the judgment. They are well-written: powerful and emotive. Their tone ranges from wry bemusement to mocking, sarcastic derision. Their style is cynical and inflammatory. The way Bolt wrote the articles was an important factor in the outcome of the case.

The RDA proceedings

Pat Eatock brought proceedings against Bolt and the Herald and Weekly Times (HWT) (publisher of the *Herald Sun*) in the Federal Court under the *Racial Discrimination Act 1975* (Cth) (the RDA) seeking declarations, injunctions and an apology.

In resisting Eatock's claim, Bolt and his employer denied that the articles were offensive, denied that race had anything to do with their publication and, if those defences failed, said that the articles were excused by provisions in the RDA which make exceptions for freedom of expression.

When the matter came before Bromberg J, the main issues for determination were:

- whether it was reasonably likely that fair-skinned Aboriginals would be offended, insulted, humiliated or intimidated by the articles[1];
- whether the articles were written including because of the race, colour or ethnic origin of fair-skinned Aboriginals[2]; and
- whether the articles were protected by the exception for fair comment on a matter of public interest and were an expression of Bolt's genuine belief[3].

Defamation principles apply

Part IIA of the RDA is designed to prohibit offensive behaviour based on racial hatred. The questions to be determined under that part require the importation of principles from defamation law. Ms Eatock relied on the ordinary and natural meaning of the articles' words[4]. Imputations were pleaded and his Honour decided those imputations by reference to what 'an ordinary and reasonable reader' would have understood upon reading the articles. Bolt's defence was analysed by reference to the defamation defences of fair comment and qualified privilege.

Reasonably likely to offend

The way Ms Eatock pleaded her case, the issue was not whether or not she was reasonably likely to be offended, but, instead, whether the identified class of persons (i.e. fair-skinned Aboriginals) were reasonably likely to be offended[5].

Bromberg J found that such a reasonable likelihood existed. His Honour found that such persons would be reasonably likely to fear that many people would read the articles and agree with the imputations and attribute the negative characteristics that Bolt associated with so-called 'white Aborigines'[6]. Such persons would be particularly sensitive to the fact that their appearance does not fit the stereotypical image of an Aboriginal

person and would be the more offended by the articles' challenging the legitimacy of their identity.

Two fundamental rights collide

A publication is not unlawful if it is made reasonably and in good faith and a fair comment on a matter of public interest and is an expression of the author's genuine belief[7].

In determining whether Mr Bolt and his employer were entitled to avail themselves of this exception, Bromberg J had to consider the impact of two fundamental rights: on the one hand, the common law right of freedom of expression[8]; on the other, the right to be free from racial prejudice and intolerance[9].

In support of freedom of expression[10], sources as diverse as Benjamin Franklin, John Locke and Thomas Jefferson were called upon alongside statements of the High Court in *Lange v ABC*[11] and *Lenah Game Meats*[12].

In support of the freedom from prejudice[13], his Honour said: 'At the heart of any attempt to secure freedom from racial prejudice and intolerance is the protection of equality and the inherent dignity of all human beings. These are the values that infuse international human rights.'

Bolt's defence fails

Bromberg J held that Mr Bolt's treatment of the subject in the articles was not reasonable or done in good faith. His Honour's reasons rested on both the substance and the style of the articles.

In terms of the substance, there were two problems. First, Bolt only told half the story. The half he omitted comprised the inconvenient facts that tended to spoil his argument. The second problem was that the half of the story he chose to tell, he got substantially wrong.

The factual errors were significant. Criticism of a woman who won 'plum jobs reserved for Aborigines' turned out to be a reference to what was, in fact, an unpaid voluntary position. A statement that a man's Aboriginality rested solely on a part-Aboriginal great-grandmother ignored the fact that both his parents, all his grandparents and all but one of his great-grandparents were Aboriginal. Mr Bolt charged Ms Eatock with choosing to identify as Aboriginal 'when she was 19 after attending a political rally'. Mr Bolt failed to say that Ms Eatock began publicly identifying as Aboriginal at that age, but had thought of herself as Aboriginal since she was much younger.

These factual errors proved to be a stumbling block to Mr Bolt's fair comment defence. That defence requires the comment to be based on true facts. The incursions made into free speech by defamation require a publisher to be diligent in verifying the accuracy of statements and, where practicable and necessary, seek responses from those whose reputations are at stake.

In terms of the articles' style, Bolt's mocking tone and inflammatory language was neither necessary for his argument nor reasonable. Bromberg J held that the strong language and disrespectful manner in which the articles dealt with their subjects heightened the intimidatory impact of the articles and regarded that as the most pernicious aspect of the contravening conduct. His Honour said 'That young Aboriginal persons or others with vulnerability in relation to their identity, may be apprehensive to … publicly identify as Aboriginal as a result of witnessing the ferocity of Mr Bolt's attack… is significant to my conclusions that… Mr Bolt failed to honour the values asserted by the RDA.'[14]

His Honour found Mr Bolt's conduct involved a lack of good faith: '…insufficient care and diligence was applied to guard against the offensive conduct reinforcing, encouraging or emboldening racial prejudice.[15]'

Subjects not taboo

The court did not find that the articles' subject constituted the contravention. Bolt claimed that he wanted to draw attention to what, in his view, was an undesirable trend in people relying upon racial differences – undetectable to the naked eye – when they ought to be drawing attention to our common humanity. But that is not what he wrote. Instead he attacked people's identity and attributed cynical and opportunistic motivations for their self-identification[16].

Clarke v Nationwide News [2012] FCA 307

Recently, Bolt was applied extensively in *Clarke v Nationwide News* ('Clarke'). In that case Barker J applied the RDA to the modern phenomenon of online readers' comments.

Four young Aboriginal boys were killed when they

crashed the stolen car they were driving. Readers were encouraged to provide their opinions and many did.

Many readers suggested that the boys' criminal behaviour was their parents' fault. Some readers suggested that they had no sympathy for them and that the boys got what was coming to them. Others commented that the Aboriginal community would never gain the respect of others until they respect the law. Certain comments were truly unedifying: 'Let em all fight and kill each other I say!'

Nationwide News 'moderated' (i.e. vetted) the posting of the comments. There were hundreds of comments in all. Complaint was made in respect of 16 of them. Barker J analysed each comment in turn and found that 4 of the 16 contravened the RDA. The other 12 comments, while often hurtful, ignorant or intemperate, were held not to be unreasonable.

Of the four comments that were held to contravene s 18C of the Act (which prohibits offensive behaviour because of race, colour or national or ethnic origin), one implied that the family would have a criminal record and his Honour inferred that that assumption was based on their being Aboriginal; one called the boys 'scum' and suggested he would use them as landfill; one of them implored hopeless mothers to realise their limitations and stop breeding and one lamented the increase to insurance premiums due to 'criminal trash like these young boys.'

When compared to Bolt the decision in *Clarke* shows:

- Website publishers do have a duty to moderate readers' comments and online forums.
- A reader expressing a crude and ill-informed opinion is afforded more leniency than a professional writer such as Andrew Bolt.

Examples of the leniency include many comments which, on one view, fell into stereotyping by associating the Aboriginal community with crime and anti-social behaviour. Another comment, which was found not to contravene, was the comment calling on the funeral attendees to 'fight and kill each other'. After reading both Bolt and Clarke, one cannot escape the impression that had Bolt written some of those comments, they would have been found to contravene the Act.

This disparity can be reconciled. All the circumstances of the publication must be considered. Readers would be entitled to assume Bolt had his facts right. His opinion carries weight. An anonymous commenter on a news website ought not be expected to apply the same diligence as a professional writer in order to avail himself of the statutory defence. Nor will such a person be in a position to so influence public opinion.

One more comment

Although Barker J provides detailed reasons for why some comments contravened and other comments did not, a publisher faces an unenviable task. When one reads the comments – and before reading his Honour's reasons – it is very difficult to predict which comments will be held to contravene. Even after reading his Honour's reasons, it will be difficult for publishers (and even lawyers) to read a comment and intuit whether it will or won't run afoul of the Act. Different processes of reasoning yield different results. Some comments that seemed to be quite benign were held to contravene and others which some might find unequivocally racist and offensive were held not to.

News consumers now expect to interact with the publisher and with other readers. When inviting readers' comments on controversial matters touching race, publishers must conscientiously consider whether the comment is reasonable or whether it is likely to offend a particular group of people. Clearly, the law does not require from readers the same level of proportionality, fairness, accuracy or temperance that it requires of professional writers. But publishers are still required to negotiate a minefield – and without much of a map. The only certainty is someone's bound to get hurt.

Endnotes

1. s 18C(1)(a) of the RDA
2. s 18C(1)(b) of the RDA
3. s 18D(c)(ii) of the RDA
4. Judgment at [16]
5. Judgment at [270]
6. Judgment at [288]
7. s 18D of the RDA
8. Judgment at [192]
9. Judgment at [212] – [226]
10. Judgment at [227] – [240]
11. *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520
12. *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199
13. Judgment [212] – [226]
14. Judgment at [415] and [417]
15. Judgment at [425]
16. see also Judgment at [445] and [446]

NSW racing & wagering protecting its own? Don't bet on it

Susan Cirillo reports on *Betfair Pty Limited v Racing New South Wales* [2012] HCA 12 *Sportsbet Pty Limited v State of New South Wales* [2012] HCA

A wagering operator requires information about a race field so that punters can place bets. In *Betfair* and *Sportsbet* (heard together on appeal[1]), the High Court upheld the validity of the New South Wales racing industry's regime, implemented in 2008, of securing payment for the use of race field information from all wagering operators. Prior to this regime, only New South Wales operators contributed to the viability of the NSW racing industry, while interstate competitors freely used the information.[2]

Section 92 dictates that trade, commerce and intercourse among the states 'shall be absolutely free'. In contrast to the present cases, it will be remembered that in *Betfair Pty Ltd v Western Australia,*[3] the impugned WA legislation in that case attracted the ire of section 92 of the Constitution because it prohibited, without approval, the use of Western Australian race field information to an out of state operator such as Betfair that facilitates the making of bets by people in different states using the internet.

Background

Racing New South Wales (RNSW) and Harness Racing New South Wales (HRNSW) are the authorities responsible for the regulation of racing in New South Wales, each being a 'relevant racing control body' under the *Racing Administration Act 1998* (NSW) (the Act).

Section 33(1)(a) of the Act makes it an offence for a wagering operator to use New South Wales's race field information unless given an approval under section 33A. Section 33A(2)(a) of the Act provides that the relevant racing control body may impose a condition that the approval holder pay a fee. The regulations made under the Act provide that the fee payable must not exceed 1.5 per cent of the approval holder's 'wagering turnover' in respect of the races covered by the approval.

The approvals granted by each of RNSW and HRNSW (being in the nature of administrative decisions) imposed the 1.5 per cent fee with a $5 million fee-free threshold in respect of RNSW and a $2.5 million fee-free threshold in respect of HRNSW.

Betfair

Betfair is the only 'betting exchange' operator in Australia. It runs a call centre in Hobart and is licensed by Tasmania's gaming authority. Betfair sought declarations that the approvals granted to it were invalid, or invalid to the extent that they imposed a discriminatory fee contrary to section 92, and to recover the monies paid.

The plurality, French CJ, Gummow, Hayne, Crennan and Bell JJ,[4] observed that the standard fee was 'facially neutral' in that it applied to all types of operators (whether bookmakers, totalizators or betting exchanges), whether their activities and customers were located in NSW or not, and, whether the use of NSW race field information was for wagering activities spanning interstate trade or intrastate trade.[5]

A betting exchange allows punters to bet with each other on whether a particular event will occur on a fixed price basis – it will accept a wager if it is able to match it with an opposing wager. A totalizator pools the wagers in respect of a certain event and divides the pool once the outcome of the event is known and takes a commission.

Betfair established that on its current pricing structures, given its low margin, the conditional fee absorbed a higher proportion of its turnover on interstate transactions than that of the turnover of TAB Limited (TAB) (a totalizator), the principal intrastate wagering operator.[6] But in order to engage section 92, it was not enough for Betfair to show that the conditional fee was discriminatory because it had a greater impact upon its business than its non-betting exchange competitors.[7] Such a submission founded on Betfair's individual circumstances appeared to rely on the 'individual rights' theory of section 92 that was abandoned in *Cole v Whitfield*.[8]

Betfair had to show that the conditional fee was unauthorised because its practical effect was to discriminate against interstate trade and thereby protect intrastate trade of some kind.[9] Betfair failed to show, first, that operation of the fee showed 'an objective intention to treat interstate and intrastate trade in wagering transactions alike, notwithstanding a relevant difference between them' and secondly, that the fee 'burdens interstate trade to its competitive disadvantage'.[10] Therefore, it was unnecessary to consider whether such burden was necessary for NSW to achieve a legitimate non-protectionist purpose.[11]

Protectionism, and now competition?

The plurality agreed with Kiefel J that the question whether any effect of lessening competition in a market that operates without reference to state boundaries is contrary to section 92 was one for another day[12] (even though the court invited submissions on the point). Her Honour observed that if such a principle applied – in light of the developments in the Australian legal and economic milieu in which section 92 operates, such as a National Competition Policy – the requirement that a legislative measure be seen as protectionist in effect may not be essential.[13]

Heydon J asserted that the meaning of section 92 cannot be affected by legislative innovations three quarters of a century after 1900 (i.e., trade practices legislation) directed towards testing substantial lessening of competition in a market.[14] The question of whether there is a burden on interstate trade, being one simply of 'fact and degree', is not to be encumbered by analysis of such a test.[15]

Sportsbet

Sportsbet is a corporate bookmaker operating out of the Northern Territory and holds a bookmaking licence pursuant to NT legislation. Unlike Betfair, it is not a 'low cost operator'.

Section 49 of the *Northern Territory (Self-Government) Act* 1978 (Cth) ('the NT Act'), provides that trade, commerce and intercourse between the territory and the states 'shall be absolutely free'. This 'positive rule' attracts the operation of section 109 of the Constitution (dictating that a Commonwealth law prevails in the event of an inconsistency with a state law); so that any exercise of judicial discretion in respect of a state law that is inconsistent with section 49 will be liable to appellate correction – the state law remains valid.[16]

Therefore, by seeking declarations that sections 33 and 33A of the Act and the corresponding regulations were invalid, Sportsbet sought relief that was too widely framed. The question was simply whether the power of conditional approval granted by those provisions is confined by the positive rule created by section 49 of the NT Act.[17] A similar analysis to that employed when a law is challenged under section 92 of the Constitution applied.[18]

The plurality[19] observed again that the provisions were facially neutral[20] and that a minute analysis that focussed on the business models of particular traders, rather than trade was to be avoided.[21] Furthermore, section 49 was held to depend on the effect of the measure concerned, not the intention of those responsible for the implementation of the measure.[22]

The court concluded that the practical operation of the fee-free thresholds of $5 million (RNSW) and $2.5 million (HRNSW) was not to provide a protectionist measure to insulate the New South Wales on-course bookmakers from the burden of the fee. Both intrastate and out of state competitors could benefit from threshold.[23] The evidence even showed that 16 on-course bookmakers in NSW did have to pay the fee.[24]

Finally, at the time of the introduction of the impugned fee arrangements, the TAB was a party to an agreement with RNSW and HRNSW entitling it to a 'royalty-free licence' to use 'NSW Racing Information' on condition that it pay substantial fees. The introduction of the 1.5 per cent approval fee meant that this information was no longer free to TAB and that RNSW was arguably in breach of the agreement. The dispute which ensued was settled by way of a deed of release permitting repayment to the TAB for the fees charged to it for a certain period (in an amount less than that payable by TAB pursuant to its approval fee). The court found that this compromise did not demonstrate any prior agreement that the TAB would be insulated from the fee, and in any case, did not give TAB a discriminatory or protectionist advantage over Sportsbet or interstate trade.[25]

Endnotes

1. In *Betfair Pty Ltd v Racing New South Wales* (2010) 189 FCR 356 Keane CJ, Lander and Buchanan JJ dismissed Betfair's appeal against Perram J's orders: *Betfair Pty Ltd v Racing New South Wales* (2010) 268 ALR 723. In *Racing New South Wales v Sportsbet Pty Ltd* (2010) 189 FCR 448, Keane CJ, Lander and Buchanan JJ upheld Racing New South Wales's appeal against Perram J's orders, and dismissed Sportsbet's appeal against Perram J's orders: *Sportsbet Pty Ltd v New South Wales* (2010) 186 FCR 226.
2. See Heydon J in *Sportsbet* [2012] HCA 13 at [38] and [40].
3. (2008) 234 CLR 418.
4. Heydon and Kiefel JJ agreeing, each writing separately and providing similar reasoning.
5. *Betfair* [2012] HCA 12 at [29].
6. *Betfair* [2012] HCA 12 at [55]. See also Kiefel J at [97] – [98].
7. *Betfair* [2012] HCA 12 at [34] – [35].
8. (1988) 165 CLR 360. See *Betfair* [2012] HCA 12 at [42] – [50].
9. *Betfair* [2012] HCA 12 at [36]. See also Heydon J at [62] and Kiefel J at [110].
10. *Betfair* [2012] HCA 12 at [52].
11. Ibid.

12. *Betfair* [2012] HCA 12 at [127].
13. *Betfair* [2012] HCA 12 at [123].
14. *Betfair* [2012] HCA 12 at [64].
15. *Betfair* [2012] HCA 12 at [65].
16. *Sportsbet* [2012] HCA 13 at [10] – [12].
17. *Sportsbet* [2012] HCA 13 at [14]. Compare Heydon J at [41].
18. *Sportsbet* [2012] HCA 13 at [41].
19. This time including Kiefel J; Heydon J agreeing and providing similar reasoning.
20. *Sportsbet* [2012] HCA 13 at [17].
21. *Sportsbet* [2012] HCA 13 at [20].
22. *Sportsbet* [2012] HCA 13 at [23] to [24]. The plurality commented that Perram J at first instance appeared to base his decision in favour of Sportsbet on inferences that there was an intention that the TAB and NSW on-course bookmakers would be insulated from the economic effects of the conditional fee: (2010) 186 FCR 226 at [101].
23. *Sportsbet* [2012] HCA 13 at [27].
24. *Sportsbet* [2012] HCA 13 per the plurality at [27] and per Heydon J at [44].
25. *Sportsbet* [2012] HCA 13 per the plurality at [32] and per Heydon J at [50].

Correction

In the Recent Developments section of the Autumn 2012 edition of *Bar News*, bylines for articles by Benjamin Jacobs ('Expert evidence', pp.18–19) and Catherine Gleeson ('Restitution, illegality and assignment', pp.31–33) were omitted.

This error occurred during the production process and *Bar News* apologises to Ben and Catherine.

DNA evidence

Laura Thomas reports on *Aytugrul v The Queen* (2012) 286 ALR 441; [2012] HCA 15

The appellant was convicted of murder. The prosecution case at trial was circumstantial. It included DNA evidence from analysis of a hair found on the deceased's thumbnail. The hair was subjected to mitochondrial DNA testing. An expert called by the prosecution gave evidence that the appellant could have been the donor of the hair and that one in 1,600 people in the general population would be expected to share that DNA profile (the frequency ratio). She then gave evidence that this equated to an exclusion probability of 99.9 percent (the exclusion percentage). That is, 99.9 percent of the population would not be expected to have that DNA profile.

The appellant argued on appeal that the evidence expressed as an exclusion percentage should not have been admitted. It was submitted that s 137 of the *Evidence Act 1995* (NSW) requires courts to refuse to admit DNA evidence expressed as an exclusion percentage because its probative value is outweighed by danger of unfair prejudice to the accused. In the alternative, it was submitted that the only proper exercise of the discretion under s 135 of the Evidence Act was to refuse to admit the evidence.[1]

By majority (Simpson and Fullerton JJ), the New South Wales Court of Criminal Appeal denied Aytugrul's appeal. McClellan CJ at CL dissented. His Honour surveyed academic literature on the presentation of DNA evidence and held that the trial judge should not have admitted evidence of the exclusion percentage because it 'invited a subconscious 'rounding-up' to 100'[2] and 'the Crown should not have the advantage of the 'subliminal impact' of statistics to enhance the probative value of the evidence.'[3] His Honour found that the trial judge's warnings were not sufficient because the 'exclusion percentage figures were too compelling.'[4] Due to their 'potential to overwhelm the jury' his Honour would have ordered a new trial.[5]

The High Court unanimously dismissed Aytugrul's appeal. The plurality (French CJ, Hayne, Crennan and Bell JJ) held that a New South Wales court could not take judicial notice of research on the persuasive power of different forms of expressing DNA statistics. The evidence did not fall within s 144 of the Evidence

Act, which provides that proof is not required about knowledge that is not reasonably open to question and is common knowledge or capable of verification by reference to a document the authority of which cannot reasonably be questioned. The plurality noted that:

> No proof was attempted…of the facts and opinions which were put forward (by reference to the published articles)… Yet that was the basis on which it was asserted that a general rule should be established to the effect that evidence of exclusion percentages is *always* inadmissible.[6]

The plurality concluded that 'a court cannot adopt such a general rule based only on the court's own researches suggesting the existence of a body of skilled opinion that would support it.'[7]

The plurality considered the appellant's submission that evidence of the exclusion percentage could not add anything of substance to the frequency ratio and thus was of minimal incremental probative value, such that a court should refuse to admit it if there was any risk of the jury giving it more weight than it deserved. The plurality reasoned that:

> Given the mathematical equivalence of the two statements, there may be some doubt about the validity of approaching the application of [ss 135 and 137 of the Evidence Act] on the basis that there were two distinct pieces of evidence… and given that the exclusion percentage and the frequency ratio were no more than different ways of expressing the one statistical statement, the probative value of the exclusion percentage was necessarily *the same* as that of the frequency ratio.[8]

The plurality emphasised that the risk of unfair prejudice must be assessed having regard to the whole of the evidence, particularly the evidence of the witness to which objection is taken. In this case, the relationship between the frequency ratio and the exclusion percentage was explained, and warnings were given. The majority concluded that, while there may be cases where evidence of exclusion percentages may warrant close consideration of the application of ss 135 and 137, in this case the impugned evidence was 'in no sense *unfairly* prejudicial, or misleading or confusing.'[9]

Like the plurality, Heydon J held that McClellan CJ at CL should not have relied upon the academic articles unless that material was received through an expert witness. Heydon J said that 'the appellant appeared to be urging the creation of a legal rule, in the sense of a hitherto unsuspected construction of s 137.'[10] Thus the material could be considered evidence of 'legislative facts…which help the court to determine what a common law rule should be or how a statute should be constructed.'[11]

Like the plurality, Heydon J held that McClellan CJ at CL should not have relied upon the academic articles unless that material was received through an expert witness.

Heydon J accepted that 'legislative facts can legitimately be derived by analysing factual material not tendered in evidence either at trial or on appeal' but said that the 'appellant did not make clear how this Court could take the expert material into account.'[12] His Honour considered the possibility that s 144 of the Evidence Act does not apply to legislative facts, but concluded that '[i]f it does not, and the common law position continues, it is unlikely that the material was sufficiently uncontroversial for judicial notice to be taken of it.'[13] This was because:

> …the level of technical sophistication involved in the material on which the appellant relied is so great that it would not be satisfactory for this Court to take it into account without the assistance of expert witnesses who had been cross-examined.[14]

Heydon J also gave detailed reasons for distinguishing two cases relied upon by the appellant, including *Old Chief v United States*,[15] in which the Supreme Court of the United States accepted that 'probative value' in Rule 403 of the Federal Rules of Evidence means 'marginal probative value relative to the other evidence in the case.' The appellant submitted that this approach to ss 135 and 137 warranted rejection of prejudicial evidence when other less prejudicial evidence of the same or greater probative value was available (in the present case, the result would be to admit the evidence of the frequency ratio but reject evidence of the exclusion percentage).

Among other reasons, Heydon J stated that a problem with the appellant's argument regarding *Old Chief* was the 'highly questionable' contention that 'even though two statements may be understood to contain the same content, they are still two discrete items of evidence.'[16] That exercise was characterised by his Honour as 'slicing up evidence.'

Endnotes

1. Section 135 of the Evidence Act allows a court to refuse to admit evidence if its probative value is substantially outweighed by danger that the evidence might be unfairly prejudicial, misleading or confusing, or result in undue waste of time.
2. (2010) 205 A Crim R 157; [2010] NSWCCA 272 at [99].
3. Ibid at [98].
4. Ibid at [99].
5. Ibid at [121].
6. (2012) 286 ALR 441; [2012] HCA 15 at [22]. Emphasis in original.
7. Ibid.
8. Ibid at [27]-[28]. Emphasis in original.
9. Ibid at [24]. Emphasis in original.
10. Ibid at [71].
11. Ibid.
12. Ibid at [71]-[72].
13. Ibid at [73].
14. Ibid at [74].
15. (1997) 519 US 172.
16. Ibid at [64].

Rape in marriage

Caroline Dobraszczyk reports on *PGA v The Queen* [2012] HCA 21

This case deals with the highly interesting and controversial issue as to whether the 'rape in marriage' defence was ever part of the common law of Australia.

On 5 July 2010 the appellant was charged for trial in the District Court of South Australia with numerous offences including two counts of rape contrary to s 48 of the *Criminal Law Consolidation Act 1935* (SA) ('CLC Act'). Both offences were alleged to have occurred in 1963. The issue for the High Court was whether the appellant was correct in his argument that he cannot be guilty of the rape of his wife, given that they were married at the time of the alleged offences, and that his wife had given her consent to sexual intercourse as a result of the marriage contract. This concept of 'marital exemption' was argued to be part of the common law at the time.

The majority, French CJ, Gummow, Hayne, Crennan and Kiefel JJ, held that if the 'marital exemption' was ever part of the common law of Australia it had ceased to be so by the time of the enactment in 1935 of s 48 of the CLC Act.[1]

The majority considered what is meant by the term 'common law' and 'the common law of Australia.' In relation to 'the common law', they referred to the *Native Title Act Case*.[2] They noted that the term 'common law' is not only 'a body of law created and defined by the courts of the past, but also as a body of law the content of which, having been declared by the courts at a particular time, might be developed thereafter and be declared to be different.'[3] In relation to 'the common law of Australia', the majority noted that the 'common law' which was received in South Australia in 1836 did not include the jurisdiction with respect to matrimonial causes which in England was exercised by the ecclesiastical courts.[4] At [28] they referred to *Skelton v Collins*[5] where Windeyer J discussed the reception of the doctrines and principles of the common law in Australia as follows:

> To suppose that this was a body of rules waiting always to be declared and applied may be for some people satisfying as an abstract theory. But it is simply not true in fact. It overlooks the creative element in the work of courts. ... In a system based, as ours is, on case law and precedent there is both an inductive and a deductive element in judicial reasoning, especially in a court of final appeal for a particular realm or territory.

It is interesting to note that the main source of the appellant's argument was based on a particular passage in *The History of the Pleas of the Crown*, being the extra judicial writings of Sir Matthew Hale, chief justice of the Court of King's Bench (1671–1676), first published in

1736. The short version of this law was that a husband cannot be guilty of a rape he commits on his wife. This was repeated in numerous texts thereafter, however the majority noted that what was missing was any statement and analysis of reasoning to support the principle.[6] The majority however noted that whatever its character in law, Hale's proposition was not framed in absolute terms, and that the reason given by Hale was based on an understanding of the law of matrimonial status at the time he wrote the Pleas.[7]

It was noted that the law affecting matrimony and the status of women continued to change after Hale's time, for example trust law recognising separate property for a wife after her marriage; the married womens' property legislation; and the passage of divorce legislation, in the United Kingdom in 1857 and then in all the states of Australia.[8]

Heydon J noted, in dissent, that there are numerous cases, including Australian cases, in which courts have assumed Hale's proposition to be correct at common law.

The majority referred to *State v Smith*, a decision of the Supreme Court of New Jersey in discussing the relevance of nineteenth century legislative changes to the law concerning spousal rape:

> We believe that Hale's statements concerning the common law of spousal rape derived from the nature of marriage at a particular time in history. Hale stated the rule in terms of an implied matrimonial consent to intercourse which the wife could not retract. This reasoning may have been persuasive during Hale's time, when marriages were effectively permanent, ending only by death or an act of Parliament. Since the matrimonial vow itself was not retractable, Hale may have believed that neither was the implied consent to conjugal rights. Consequently, he stated the rule in absolute terms, as if it were applicable without exception to all marriage relationships. In the years since Hale's formulation of the rule, attitudes towards permanency of marriage have changed and divorce has become far easier to obtain. The rule, formulated under vastly different conditions, need not prevail when those conditions have changed.

In particular, the majority questioned 'If a wife can exercise a legal right to separate from her husband and eventually terminate the marriage 'contract', may she not also revoke a 'term' of that contract, namely, consent to intercourse?'[9]

The majority also noted the following matters:

- the ecclesiastical courts never embraced the notion of a general consent to sexual intercourse;
- Australian colonies only received jurisdiction with respect to matrimonial causes via local statute; and
- the attitudes of the equity jurisdiction to the property rights of women could not substantiate an argument that a wife had no legal personality distinct from her husband.[10]

Accordingly the majority held at [64] that by the time the CLC Act was enacted in 1935, local statute law had removed any basis for continued acceptance of Hale's proposition. Therefore, at the relevant time in this case, a husband could be guilty of a rape upon his wife.

Heydon J noted, in dissent, that there are numerous cases, including Australian cases, in which courts have assumed Hale's proposition to be correct at common law.[11] Also, that the High Court was not taken to any authority stating that Hale's proposition was not the law and that the leading English and Australian academic lawyers specialising in criminal law agreed that the immunity existed.[12] Bell J, also in dissent, referred to various cases where the immunity was relied upon as well as the authority of the *Pleas of the Crown*.

Endnotes

1. *PGA v The Queen* [2012] HCA 21 at [18].
2. *Western Australia v The Commonwealth* (1995) 183 CLR 373 at 484-486.
3. *PGA v The Queen* [2012] HCA 21 at [23].
4. at [25]-[27].
5. (1996) 115 CLR 94 at 134.
6. at [4].
7. at [43], giving the example of the *Matrimonial Causes Act 1858* (SA).
8. at [44]-[57].
9. at [59].
10. at [60]-[61].
11. at [100].
12. at [156].

Extradition in Europe

Felicity Maher reports on *Assange v Swedish Prosecution Authority* [2012] UKSC 22

There has been intense international interest in the efforts of Julian Assange to resist extradition from the United Kingdom to Sweden to face questioning in relation to offences including rape. In February this year, his fight reached the UK's Supreme Court. On 30 May, the court handed down its judgment. Despite a clear majority dismissing Assange's appeal, his future remains uncertain.

Facts, issue and decision

In December 2010, the Swedish Prosecution Authority (SPA) issued a European Arrest Warrant (EAW) against Assange, who was then in the UK. Assange unsuccessfully challenged the validity of the EAW, on a number of grounds, in the Magistrates Court and the High Court.

Section 2(2) of the UK *Extradition Act 2003* (EA) requires that an EAW be issued by a 'judicial authority'. The EA implemented the Council of the European Union framework decision on the European arrest warrant and surrender procedures between Member States of the European Union (framework decision).[1] The sole ground of Assange's appeal to the Supreme Court was that the SPA was not a judicial authority.

By a majority of 5:2, the Supreme Court held that the SPA is a judicial authority within the meaning of section 2(2) EA.

Majority judgments

Lord Phillips gave the leading judgment of the majority. Given the presumption that parliament intended that 'judicial authority' should bear the same meaning in the EA as in the framework decision, he considered the first question was the meaning of this phrase in the framework decision.[2] Lord Phillips considered the natural meaning of the words, the purpose of the framework decision and relevant preparatory materials. He noted that in an earlier draft of the framework decision (the September draft), 'judicial authority' was defined as a judge or a public prosecutor. That draft was amended by a later draft (the December draft), which abandoned the definition of judicial authority. The later draft formed the basis of the framework decision finally adopted.[3]

Lord Phillips identified two possible reasons for abandoning the definition: to restrict the meaning, so as to exclude public prosecutors; or to broaden the meaning, so as not to restrict it to judges and public prosecutors. He then set out five reasons why the second of these possibilities was more probable.[4]

First, if the intention was to restrict the power to issue EAWs to judges, one would expect this to be expressly stated. Such a restriction would effect a radical change, preventing public prosecutors from performing functions they had performed for decades.

Second, a significant safeguard against the improper issue of EAWs lay in the antecedent process that formed the basis of an EAW. If there was concern to ensure the involvement of a judge, the obvious focus should have been on this process.

Third, member states had existing procedures for extradition and the authorities involved in those procedures were not restricted to judges and public prosecutors.

Fourth, various articles in the December draft suggested that there was a range of possible judicial authorities, not restricted to judges.

Fifth, article 31.3(b) of the 1969 Vienna Convention on the Law of Treaties (VC) permitted recourse, as an aid to interpretation, to 'any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation'. After the framework decision took effect, various member states had designated public prosecutors as judicial authorities, and commission and council reports reviewing the implementation of the framework decision did not criticise this.

Lord Phillips concluded that, in the framework decision, 'judicial authority' embraced public prosecutors, including the SPA.[5] Further, the phrase should be given the same meaning in the EA.[6]

Lord Walker agreed, regarding Lord Phillips' fifth reason, based on article 31.3(b) VC, as determinative.[7] Lord Brown also agreed, principally on the basis of Lord Phillips's fifth reason.[8]

Lord Kerr agreed that, since the framework decision had come into force, various member states had designated public prosecutors as judicial authorities. Accordingly, there was a sufficiently widespread and uncontroversial practice in Member States to enable article 31.3(b) VC to come into play.[9] Like Lord Phillips, Lord Kerr relied

on the presumption that parliament did not intend to legislate contrary to the UK's international obligations, and concluded that 'judicial authority' had the same meaning in the EA as in the framework decision.[10]

Lord Dyson also agreed, again for the fifth reason given by Lord Phillips. He held that 'judicial authority' in the framework decision included public prosecutors as, within article 31.3(b) VC, there was an agreement established by subsequent practice to this effect.[11] Lord Dyson rejected Lord Phillips' four other reasons.[12] He concluded that 'judicial authority' should be given the same meaning in the EA as in the framework decision, again relying on the presumption in favour of interpreting domestic statutes consistently with the UK's international obligations. Lord Dyson considered that this presumption was even stronger where (as here) the language in the domestic statute, and the international law to which it gave effect, were identical.[13]

Dissenting judgments

Lord Mance gave the leading dissenting judgment. He did not accept Lord Phillips' first four reasons.[14] As to the fifth, he accepted that the subsequent use, by various member states, of public prosecutors as judicial authorities was a relevant factor in the interpretation of 'judicial authority' in the framework decision.[15] Indeed, he concluded that the European Court of Justice was likely to hold that public prosecutors may be judicial authorities under the framework decision.[16]

However, Lord Mance differed from the majority in relation to the question whether 'judicial authority' in the EA should have the same meaning. He held that the presumption relied on by the majority was merely a canon of construction which must yield to contrary parliamentary intent.[17] To ascertain the intention of parliament when the EA was passed, Lord Mance conducted a detailed analysis of parliamentary materials which he regarded as admissible under the rule in *Pepper v Hart*.[18] He concluded that those materials demonstrated an intention that, under the EA, a judicial authority must be a court, judge or magistrate.[19]

Lady Hale agreed with the reasons of Lord Mance.

Watch this space

On 30 May, counsel for Assange indicated that an application would be made to re-open the Supreme Court's decision, on the ground that the majority had based their decision on article 31.3(b) VC, which she had not been given a fair opportunity to address. The unusual application was made and unanimously dismissed by the court on 14 June. The court considered that counsel had made relevant submissions, placed before the court relevant documentary material, and importantly had been asked by Lord Brown about the applicability of the VC and been given an opportunity to challenge its applicability and the relevance of customary international law rules arising under it, which she did not do.

At the same time, it is understood that Assange may appeal to the European Court of Human Rights. Media commentary has been circumspect on the availability of such an appeal. Future developments will be reported in subsequent editions of *Bar News*.

Endnotes

1. 2002/584/JHA.
2. *Assange v Swedish Prosecution Authority* [2012] UKSC 22 at [10].
3. At [42],[54],[55].
4. At [61]-[71].
5. At [76].
6. At [80].
7. At [92],[94].
8. At [95].
9. At [106],[108]-[109].
10. At [112].
11. At [131]-[132].
12. At [155]-[159].
13. At [122],[160].
14. At [239].
15. At [242],[244].
16. At [244].
17. At [201],[206]-[207].
18. [1993] AC 593.
19. *Assange v Swedish Prosecution Authority* [2012] UKSC 22 at [261],[263]-[265].

The Constitution v the states: federalism a century after federation

By MG Sexton SC, NSW solicitor general. This article is based on an address originally given to the Australian Chapter of the Anglo-Australasian Lawyers Society in May 2012

In 1957 Gough Whitlam published a lengthy essay – originally given as a lecture at Melbourne University – entitled *The Constitution Versus Labor*. This title was a reference to the problems of constitutional validity that might be faced by a future Labor government – still 15 years away as it happened – particularly in light of the High Court's striking down of the bank nationalisation and airline nationalisation legislation by the Chifley government in the late 1940s.[1] A little over half a century later the subject might be reformulated as the Constitution – perhaps more accurately the Constitution as interpreted by the High Court – versus the states.

The centralisation of financial power

To some extent, of course, the expansion of Commonwealth power at the expense of the states is not a recent phenomenon. The effect of the court's decision in the *Uniform Tax Case*[2] of 1942 was to leave the Commonwealth as the major recipient of revenue in the form of income tax and to make the states largely dependent on grants – under s 96 of the Constitution – from those federal funds. This scheme was endorsed by the court's decision on the grants power – *Victoria v Commonwealth* – in 1957. These decisions do not preclude a state from imposing income tax but political realities have meant that no state government has been prepared to take this course.

... the Commonwealth finds it practical to use the administrative resources of the states in the day to day implementation of much of its legislative programme.

Up until the late 1990s the states had, however, raised considerable sums by what were in effect sales taxes on liquor and tobacco at the wholesale and retail levels. These sources of revenue were held by the court to be in contravention of s 90 of the Constitution in *Ha v State of New South Wales*[4] in 1997. In the wake of this decision the Commonwealth agreed to collect these taxes and largely refund them to the states, but this became another potential source of funds over which the states had lost control and this situation continued when the GST was introduced in 2000.

The corporations and external affairs powers

This centralising of financial power in the Commonwealth has been accompanied by a generally broad approach by the court to the construction of specific federal legislative powers in s 51 of the Constitution. The two most significant powers in s 51 in relation to this expansion of the scope of federal legislation have been the external affairs power and the corporations power. The court's construction of the external affairs power has allowed the Commonwealth to legislate in relation to a range of matters that are not referred to in s 51 by way of implementing the provisions of international treaties ratified by Australia[5] (of which there have been a great number over recent decades).

The full extent of the corporations power had long been hinted at by the court in the aftermath of *Strickland v Rocla Concrete Pipes Ltd*[6] but never really spelt out until the decision in the *Work Choices Case*[7] where it became clear that this power allowed the Commonwealth to regulate a wide range of economic and social activities, given that those activities were largely carried out by corporations. As a result, large areas of these activities that would have long been considered as amenable only to state regulation are now the subject of detailed federal legislation, including food labelling, tobacco advertising and environmental requirements for infrastructure projects. The corporations power would also be the basis for any federal regulation of gambling on poker machines in hotels and licensed clubs.

All that said, the states continue to exist as large-scale political and administrative entities and, at least for the present and the immediate future, the Commonwealth finds it practical to use the administrative resources of the states in the day to day implementation of much of its legislative programme. This process has given rise to its own problems, chiefly in the form of increasingly complex agreements in relation to these co-operative exercises. There are also areas, such as transport and health, that are still largely the subject of state legislation and administration, although, as in most fields, the states are heavily dependent on federal funding in carrying out these functions.

Inconsistency between federal and state laws

Section 109 of the Constitution provides that a state

law is invalid to the extent that it is inconsistent with a federal law. The inconsistency can be direct where, for example, both laws cannot be obeyed, or indirect where the Commonwealth legislation is intended to be exclusive in relation to the subject of the two laws, though there may be no categorical distinction between those two classes.[8] In many areas, however, federal legislation expressly states that it is *not* intended to exclude the operation of state laws on the same subject (in the absence, of course, of any direct inconsistency). These savings provisions had long been considered to be effective but some doubt has been cast on this view by the court's decision in *Momcilovic v The Queen*[9] in 2011. Ms Momcilovic was convicted of trafficking in methylamphetamine under the relevant section of the Victorian *Drugs Poisons and Controlled Substances Act 1981*. It was argued that the Victorian provision was inconsistent with the offence of trafficking under the federal Criminal Code despite the presence of a savings clause in the code in relation to the operation of state legislation concerning drug offences.

All members of the court considered, however, that the Victorian provision did not criminalise conduct that was not prohibited by the equivalent provision of the code. This leaves open, however, the question of whether a savings provision would be effective in circumstances where the standard of liability in the state legislation was more stringent than that provided for in the equivalent federal provision. If the savings provision were held to be ineffective in this situation, there would be serious consequences for a number of areas of state regulation, including, of course, drug offences but also such subjects as consumer protection and tobacco advertising. It should be noted that the Commonwealth argued in *Momcilovic* for the general effectiveness of the savings provision but this is no guarantee that the court would come to that conclusion if the issue is raised in a case where liability attaches under a state provision but not under its federal equivalent.

Judicial power under Chapter III

Another limitation on state legislative power over recent years arises out of the court's decisions on Chapter III of the Constitution. The court has pursued a number of themes in its public law judgments and perhaps the most consistent – although not followed with equal vigour by all members of the court – has been the preservation and, on occasions, expansion of judicial power at the expense of the functions of the legislative and executive branches of government. These decisions are applicable at both the federal and state level, although they have had a much greater impact on state legislation than on federal statutes. As George Winterton observed, speaking of the 'tradition of judicial self-preservation', 'courts have always shown exceptional sensitivity to infringement on their domain'.[10]

The primary means of achieving this goal has been by finding implications in Chapter III of the Constitution, including the implication – first unveiled in *Kable v Director of Prosecutions (NSW)*[11] in 1996 and refined in later decisions – that no function could be conferred on a federal court or a state court capable of exercising federal jurisdiction which undermines the institutional integrity of that court.

In the thirteen years following *Kable*, however, it was relied on only once – by the Queensland Court of Appeal[12] – and challenges to legislation based on the decisions were rejected on numerous occasions in the High Court and in intermediate appellate courts. Then, over the period 2009–2011, the *Kable* doctrine had an apparent resurrection in the form of three decisions of the High Court. In *International Finance Trust Company Limited v NSW Crime Commission*[13] in 2009, a majority of the court held a provision of the *Criminal Assets Recovery Act 1990* (NSW) invalid on the ground that it directed the NSW Supreme Court to hear and determine an application by the NSW Crime Commission for a restraining order preventing dealings with alleged proceeds of crime without the holder of the property in question having an opportunity to be heard. In *Wainohu v New South Wales*[14] in 2011, a majority of the court struck down the *Crimes (Criminal Organisations Control) Act 2009* (NSW) on the basis that it imposed no obligation upon a judge of the Supreme Court – albeit acting not as a judge but as *persona designata* – to provide reasons when deciding an application to make a declaration under the legislation in relation to a particular organisation.

It will be observed, however, that both the provision invalidated in the *International Finance Trust Company* case and the provision on which the court's decision to invalidate the Act turned in *Wainohu* were quite minor aspects of comprehensive schemes, in the one case relating to confiscation of the proceeds of crime and

in the other to making declarations concerning certain organisations and the subsequent imposition of control orders in respect of the members of those organisations. Both defects could obviously be remedied by small amendments to the relevant legislation.

The impact of the court's other decision in 2010 in this trilogy on the legislation there in question – *South Australia v Totani*[15] – was more substantial in that, according to a majority of the court, control orders under the *Serious and Organised Crime (Control) Act 2008* (SA) could not be validly made by a Magistrate's Court on the basis of a declaration of the attorney-general because this process enlisted the court in the implementation of a decision of the executive government. Even this problem with the South Australian legislation could, however, be readily remedied by the adoption of the NSW model concerning criminal organisations, with, of course, the addition of an obligation to give reasons for the making of a declaration by a judicial officer in accordance with the decision in *Wainohu*.

It must be conceded, of course, that the full effect of the *Kable* doctrine is not reflected only in these decisions. It is always present in the minds of those responsible for legislation that confers functions on courts and judicial officers, usually at the state level but at the federal level as well. The doctrine has no doubt influenced the kinds of functions that have been conferred – or not – in legislation and the way in which they have been conferred.

The interlocking decision in 2010 that underlines the influence of the federal Constitution on the role of the Supreme Court at the state level was *Kirk v Industrial Court of New South Wales.*[16] On its face, that decision held that the decisions of courts or tribunals at the state level could not be protected by way of legislation from judicial review in the Supreme Court of the state in cases of jurisdictional error. What that means, however, is that functions that could not be conferred on a court because of the *Kable* doctrine cannot be conferred instead on an administrative body whose decisions were immunised against judicial review. It might be noted, however that privative clauses ousting judicial review have been relatively uncommon in state legal history and largely confined to the decisions of industrial tribunals. The relevant privative clause in *Kirk* – s 179 of the *Industrial Relations Act 1996* (NSW) – had already been amended prior to the High Court's decision to allow judicial review in the case of jurisdictional error.

Free speech and public order under the Lange principle

One potential area of limitation on state legislative power – but one that has not so far operated significantly in this way – arises out of the court's decision in *Lange v Australian Broadcasting Corporation*[17] in 1997. Again this was a decision applicable to the Commonwealth as well as the states but its potential impact is likely to be much greater at the state level. A majority of the court found there to be an implied freedom of communication concerning political or government matters in the Constitution and posed a two-stage test for the validity of legislation in the light of the implied freedom. At the first stage it was asked whether the law in question effectively burdened the freedom of communication about government or political matters in its terms, operation or effect. If the answer to that question be yes, it was then asked – as a question slightly refined in *Coleman v Power*[18] in 2004 – whether the law is reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the system of government prescribed by the Constitution.

Lange was itself a case about defamation law but the most likely area of collision between the implied freedom and state law is in the area of public order. Thus in *Coleman v Power* the relevant provision of the Queensland *Vagrants, Gaming and Other Offences Act 1931* provided that it was an offence to use threatening, abusive or insulting words in or about a public place. Mr Coleman was convicted of using insulting words to a police officer and it was conceded by the state that the words used concerned matters within the freedom of communication protected by the Constitution. That left only the second question posed in *Lange* to be answered by the court. Three members of the court – Gummow, Kirby and Hayne JJ – construed the statutory provision as limited to language that might provoke in effect a breach of the peace and on this basis concluded that the provision did not contravene the implied freedom – because the second question posed in *Lange* could be answered 'yes'. The other four members of the court did not place this limitation on the provision but then disagreed as to its validity, with Gleeson CJ, Callinan and Heydon JJ holding it to be valid and McHugh J finding that it did contravene the

implied freedom.

Similarly, provisions of the Queensland Corrective Services Act allowing the imposition of conditions on parole restricting public comments and limiting media interviews with persons on parole were upheld in *Wotton v State of Queensland*[19] in 2012.

Freedom of trade between the states

Section 92 of the Constitution provides that trade between the states shall be 'absolutely free' and Commonwealth legislation extends this freedom to trade between the states and the territories. It must be said that the High Court has always had difficulties with the intersection of law and economics that seems to be embodied in s 92. From the 1930s through to the 1950s, however, s 92 was held to invalidate various state statutes, particularly marketing schemes for primary products and the regulation of road transport to the benefit of rail networks.[20] It might be noted, of course, that Commonwealth legislation was also struck down over this period, most particularly the bank nationalisation and airline nationalisation statutes. To some extent these decisions were based on a notion of the rights of individual traders but in *Cole v Whitfield*[21] in 1988 the court concluded that what was prohibited by s 92 was legislation that discriminated against interstate trade with the purpose or effect of protecting the intrastate trade in question.

In *Betfair Pty Limited v State of Western Australia*[22] in 2008 the court used this test to hold invalid two provisions of Western Australian legislation that restricted the operations of Betfair – which operated a betting exchange from premises in Tasmania – in Western Australia. In *Betfair Pty Ltd v Racing New South Wales*[23] and the associated case of *Sportsbet Pty Ltd v New South Wales*[24] in 2012, however, the court upheld the validity of NSW legislation that provided for fees to be paid by gaming operators – whether based inside or outside the state – for the use of race fields information in carrying on their businesses.

Federal funding to bodies other than the states

As already noted, the Commonwealth can provide grants to the states under s 96 of the Constitution, and can attach conditions to those grants. The question was raised, however, in *Williams v Commonwealth*[25] – which was argued in the High Court in early August 2011 – as to the scope of Commonwealth power to make grants to other bodies or individuals. It had generally been accepted that this could be done when the funds related to an area of federal legislative power under s 51 of the Constitution; or arose out of an exercise of the prerogative power; or concerned an exercise of so-called nationhood power. But what if none of those three situations were relevant? The Commonwealth argued that such payments could still be made under s 61 of the Constitution – the executive power. Consider, however, an example that we put to the court – in those circumstances it would be possible for the Commonwealth to provide the funds for an individual or a corporation to establish a university in one or more of the states, although this had always been seen to be a sphere of activity for state governments and, in more recent times, for some private organisations. This was a big question because the Commonwealth's contention, if accepted, obviously had the potential to significantly undermine the role of the states in the federation.

When the decision of the court was delivered in June 2012, it was explicit or implicit in all of the judgments, except for Heydon J who dissented, that expenditure was not authorised under the executive power in s 61 if it could not be authorised by legislation under a head of power in s 51 or under one of the following heads of power:[26]

- the administration of departments of state under s 64 of the Constitution;
- the execution and maintenance of laws of the Commonwealth;
- the exercise of the prerogative powers of the Crown;
- the exercise of inherent authority derived from the character and status of the Commonwealth as the national government.

Furthermore, it was not sufficient for four members of the court that legislation supported by s 51 could have authorised the expenditure in question. It had been argued in the alternative in *Williams* by the Commonwealth that, although the expenditure (the funding of a chaplaincy programme in schools) had not been made under a statute on a s 51 subject, this could have been done (under the corporations power in s 51(xx) or the power in s 51(xxiiiA) concerning benefits to students) and this was sufficient to bring the

payments under s 61. Despite the general assumption already referred to that this would have authorised the expenditure, a majority considered that, in the absence of specific legislation under a head of power in s 51, the payments in question could not be validly made under s 61, given that they did not relate to any of the additional bases of power set out above.[27]

Two members of the court – Hayne and Kiefel JJ – considered that the s 51 heads of legislative power relied on by the Commonwealth could not have authorised the payments in question in any event but the other members of the court did not need to decide this question.[28]

This was a significant victory for the states in the sense that many direct Commonwealth payments to local governments and community bodies over recent years would appear to be beyond power and could only be made in the future indirectly via s 96 grants to one of the states. In rejecting the Commonwealth's submissions, French CJ and Kiefel J emphasised the effect on the states of the expansion of Commonwealth executive power.[29]

... the court's decisions over the last two years have resulted in a number of successes, at least in appearance, for the states.

A new model of federalism?

The net result of all these decisions is that the High Court has dramatically changed the distribution of powers between the Commonwealth and the states that appeared to be adopted by the Constitution in 1901, although the court's decisions over the last two years have resulted in a number of successes, at least in appearance, for the states. There are no doubt differing views as to whether the overall trend since federation is a good thing or not. It is also a different model from the existing versions of federalism that exist in Canada and the United States which have always been considered Australia's closest counterparts in this respect.

Oddly enough, the United Kingdom, once a unitary state that gave birth to these and other federations, has had significant changes to its original political structure over recent decades. These have been the result of both internal and external pressures. At the external level, membership of the European Union has meant that British laws are subject to the overriding provisions of the European Convention and British courts are required to construe those laws accordingly. At the internal level, Wales and Northern Ireland have a greater degree of autonomy and in Scotland, where devolution has proceeded much more quickly, there is a strong movement for independence, at least in a political if not a financial sense. In the absence of similar pressures to those at play in the United Kingdom, however, the centralising trend in decisions by the High Court over the century since federation does not appear likely to be reversed in the immediate future.

Endnotes

1. *Australian National Airways Pty Ltd v Commonwealth* (1945) 71 CLR 29; *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1; *Commonwealth v Bank of New South Wales* (1949) 79 CLR 497.
2. *South Australia v The Commonwealth* (1942) 65 CLR 373.
3. *Victoria v Commonwealth* (1957) 99 CLR 575.
4. *Ha v State of New South Wales* (1997) 189 CLR 465.
5. See e.g. *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168; *Commonwealth v Tasmania* (1983) 158 CLR 1.
6. *Strickland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468.
7. *NSW v Commonwealth* (2006) 229 CLR 1.
8. *Momcilovic v The Queen* (2011) 85 ALJR 957; 280 ALR 221 at [245].
9. *Momcilovic v The Queen* (2011) 280 ALR 221.
10. G Winterton, 'The Communist Party Case' in HP Lee and G Winterton (eds.) *Australian Constitutional Landmarks* (Cambridge University Press, 2003) at 153.
11. *Kable v Director of Prosecutions (NSW)* (1996) 189 CLR 51.
12. *Re Criminal Proceeds Confiscation Act 2002* [2004] 1 QDR 40.
13. *International Finance Trust Company Limited v NSW Crime Commission* (2009) 240 CLR 319.
14. *Wainohu v New South Wales* (2011) 278 ALR 1.
15. *South Australia v Totani* (2010) 242 CLR 1.
16. *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531.
17. *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.
18. *Coleman v Power* (2004) 220 CLR 1 at [93] and [196].
19. *Wotton v State of Queensland* [2012] HCA 2.
20. See e.g. *James v Cowan* (1932) 47 CLR 386; *Hughes & Vale Pty Ltd v New South Wales (No. 1)* (1953) 87 CLR 49.
21. *Cole v Whitfield* (1988) 165 CLR 360.
22. *Betfair Pty Limited v State of Western Australia* (2008) 234 CLR 418.
23. *Betfair Pty Ltd v Racing New South Wales* [2012] HCA 12.
24. *Sportsbet Pty Ltd v New South Wales* [2012] HCA 13.
25. *Williams v Commonwealth* [2012] HCA 23.
26. *Williams v Commonwealth* [2012] HCA 23 at [4] per French CJ; [150] and [159] per Gummow and Bell JJ; [199] and [252] per Hayne J; [534] per Crennan J; [594]-[595] per Kiefel J.
27. *Williams v Commonwealth* [2012] HCA 23 at [83] per French CJ; [134]-[137] per Gummow and Bell JJ; [544] per Crennan J; cf [288] per Hayne J; [569] per Kiefel J.
28. *Williams v Commonwealth* [2012] HCA 23 at [286] per Hayne J; [574]-[575] per Kiefel J.
29. *Williams v Commonwealth* [2012] HCA 23 at [61], [83] per French CJ; [581] per Kiefel J.

Problems faced by modern juries

By Peter Lowe

This article argues that the institutional integrity of the jury system in common law jurisdictions is under severe threat. While the focus of this article is the criminal jury, similar if not identical concerns exist with regard to the civil jury. In the past, the nature of the challenge was primarily external: jury packing, jury vetting, qualifications for jury duty, compilation of jury lists – the list goes on. Sadly today the challenges are more commonly, but not exclusively, of an internal nature: technology, the complexity of the task and comprehension, the quest for the reasoned verdict. The question must be asked, do these challenges – both external and internal – presage the end of the jury system as we know it?

The essential feature of the modern common law jury is the institutional integrity and independence of its decision-making processes. Crucially, jurors are not told about issues such as the character of an accused which, if discovered or disclosed, could well affect the outcome of their deliberations. Protection of the jury from receipt of any information regarding the accused has now become a rod for their own back. Information about trial matters is freely available and impossible to control, even with the delivery of extensive warnings by the trial judge. The problems that jurors face today are thus very different from the past: juror misconduct; access to information; and complexity of criminal laws illustrate that the challenge to the jury process is chiefly of an internal nature. The problems emanate from within the jury – constituted by a failure of comprehension or to follow warnings. So significant have these problems become that it is necessary to consider a variety of proposals for reform in order to preserve the jury for future generations: taping of jury deliberations; the introduction of jury facilitators; reduction and simplification of judicial directions; reconsideration of the utility of sequestration; these among other reforms, need to be considered.

A. Juror misconduct

Juror misconduct has been around for as long as there have been common law juries. Indeed, a review of the Year Books and Abridgments for the fourteenth and fifteenth centuries reveals about one hundred cases which deal with juror misconduct, involving allegations of bribery, embracery, runaway jurors, and drinking and eating during deliberations. Nowadays,

Juror number eight stands alone. Photo: Getty Images

juror misconduct typically involves one or more of the following:

- an unauthorised visit to the scene;
- consultation of outside substantive information;
- communication with non-jurors;
- physical intimidation or coercion by other jurors; and
- bribery and improper suasion of jurors.

Part of the problem of juror misconduct must be suspected to be the enduring pull of popular culture, particularly such films as *12 Angry Men*. In Australian jury research, jurors consistently tend to compare their own experiences with that film.[1] Many other films and television programmes may well form part of the constitutive experience of the juror, but *12 Angry Men* provides a foil as to how a juror might approach his or her task as a prospective juror.

... it is necessary to consider a variety of proposals for reform in order to preserve the jury for future generations...

The movie is notable for how a lone juror (juror number eight, played by Henry Fonda) stands alone when he enters the jury room, saying that he has a reasonable doubt, and eventually sways the rest of the jury, by reasoned argument, to the same conclusion.

For example, juror number eight's doubts are reinforced by the fact that the murder weapon is not as unique as the prosecution would contend. He buys an identical knife from a pawn shop near the scene of the crime. He

brings it into the jury room and jams it into the table. His driving the knife into the table is a turning point in the jury's deliberations, unleashing other jurors' hitherto undisclosed doubts.

Juror number eight does what the defence lawyer failed to do: he tests the prosecution case to see whether there is any room for reasonable doubt.[2] It is in this that the allure of the movie resides.

Conversely, the movie has legitimately attracted criticism for its depiction of serious juror misconduct.[3] Charles Weisselberg has identified the following juror irregularities:

- conducting an unauthorised visit to the accused's neighbourhood;
- the giving of unsworn, hence untested, evidence in the jury room regarding an identical knife that was purchased near the home of the accused;
- juror number five (played by Jack Klugman) giving expert evidence as to the use of a switchblade knife;
- speculative calculations regarding train speed and noise; and
- conducting an experiment, not based on any evidence adduced at trial, as to whether a witness could reach a door within 15 seconds.

In fact the nature of the speculative activity of the jury in the movie drove United States Supreme Court Associate Justice Sotomayor, when sitting as a lower-court judge, to refer to the movie in instructing jurors how *not* to carry out their duties.

1. Unauthorised visits to scene

In Australia, an extra-curial investigation by the jury in the trial of Bilal and Mohammed Skaf for aggravated sexual intercourse without consent proved pivotal in forcing judicial change regarding directions given to juries on carrying out such investigations. The foreman of the jury went with another juror to ascertain the prevailing conditions under which the complainant was able to identify the accused. The misconduct led the New South Wales Court of Criminal Appeal to quash the conviction on the basis that the jury's verdict was tainted by misconduct.[4] The foreman of the jury told the court, 'I only went to the park to clarify something for my own mind. I felt I had a duty to the court to be right'. Whilst the judicial direction now given is admirable for its clarity on the issue, jurors still seek to circumvent the direction. This was exemplified in the recent discharge of a New South Wales jury in a high-profile murder case where the Crown contended that the victim was forcibly thrown head first off a cliff. A jury member called a radio station to complain that a fellow juror was a bully and had already made her mind up, and that the jurors were planning to visit the cliff site. The jurors were questioned by the trial judge the next day, and his Honour concluded that the caller was a member of the jury and that one or more jurors had misconducted themselves. He discharged the jury.

... to tell anyone from the millennial generation not to retrieve information available at their fingertips is a red rag to a bull.

2. Juror research – the challenge of technology

The last three decades have proved to be a watershed in the development of technology and the challenges it poses to the institutional integrity of the jury. Since the 1980s they have witnessed the first commercially available mobile phone (1983), SMS text messaging (1989), Google (1996), the first mobile phone with wireless email and internet (1996), and the launch of Wikipedia (2001), Facebook (2004), YouTube (2005) and Twitter (2006). There are yet more microblogging and social network sites providing an unknown and unknowable opportunity to affect the functionality of the jury.

It is a truism that social networking, the World Wide Web, and smart phones have altered our daily lives, and they now have the potential to alter the way jurors decide cases. As one insightful writer on this issue has said the new technology is transforming the 'jury box into Pandora's box'.[5] There are now some in society who do not really know how to survive without information technology – and to tell anyone from the millennial generation not to retrieve information available at their fingertips is a red rag to a bull.

Professor Cheryl Thomas was recently commissioned by the United Kingdom Ministry of Justice to undertake an empirical study of the fairness of juries *vis à vis*

jurors' internet usage.[6] This was probably the largest study done so far on jurors' use of the internet. The study showed that in standard cases five per cent of all jurors looked for information about the case they were presiding over while the case was going on. Over twice as many jurors serving on high profile cases (12 per cent) admitted to doing so. The figures are proportionally higher in relation to seeking media reports regarding the trial, with 13 per cent doing so in standard cases and 26 per cent in high profile cases. Surprisingly, the great majority of jurors looking for information about their case (68 per cent) were aged 30 years or older.

Australia is not immune from such impropriety. In June 2011, following the announcement that the jury in a high profile Victorian murder trial were deadlocked, court officials discovered that a jury member had gone online to 'Google' a legal term and download information from an online encyclopedia. The juror was released without a conviction being recorded, but on a 12-month good behaviour bond and with a $1,200 fine. There have been more reported instances of the same type of conduct elsewhere in Australia.[7]

Social networking sites have been accessed by jurors to seek background information about offenders and victims. In one sexual abuse trial in the United States, jurors looked up the MySpace profile of two victims who gave evidence. So much for the careful safeguards on introducing character evidence against victims in sexual offences trials.

It should also be said that there is no guarantee that the information retrieved by an aberrant juror has not been put online by the accused him- or herself, or through an agent. Such information has as much potential to affect the deliberations of the jury as information retrieved from Wikipedia or any other apparently objective source, precisely because of free access to the internet, and the lack of peer review of such information. Providing the website is ranked sufficiently high on Google's search engine, it will be found fairly easily – usually within the first page or so of the search results. A similar point was made in November, 2010, by Lord Judge, the Lord Chief Justice of England and Wales, that Twitter could be used by campaigners in a bid to influence the outcome of a trial. His warning, given before the misconduct of a juror named Joanne Fraill (as to which, see *post*), that it may be necessary to deal with an aberrant juror for contempt and treat the misconduct with the 'seriousness that it requires' was remarkably prescient, and Lord Judge was later responsible for imposing an eight-month sentence of imprisonment on Ms Fraill.

For his Lordship:

> the misuse of the internet represents a threat to the jury system, which depends, and rightly depends, on evidence provided in court which the defendant can hear and if necessary challenge. He is not to be convicted on the basis of material which from his point of view is secret material – not only secret material, which is bad enough, but material which may be inaccurate and could also be false.

The issue of digital injustice has the potential to derail the very basis upon which justice is administered and must, on that score alone, be addressed if the notion of a fair trial according to law is to be preserved.

... there is no guarantee that the information retrieved by an aberrant juror has not been put online by the accused ... or through an agent.

3. Improper contact and the challenge of social media: When all that twitters is not told

Technology not only provides unprecedented opportunities for juror research; it appears that, precisely because of its anonymity and immediacy, the siren song of the web encourages transgressions through the phenomenon of 'disinhibition', leading to impulsive behaviour.[8]

In November, 2008, a female juror serving on a Lancashire child abduction and sexual assault trial posted that 'I don't know which way to go, so I'm holding a poll'. As she didn't use any privacy settings on her profile, the Facebook post could be seen and read by anyone. After some users responded that the defendant should be found guilty, the court authorities were tipped off anonymously and she was dismissed from the jury.

In March, 2011, a 20-year-old female juror from Detroit was caught posting on her Facebook page 'actually excited for duty tomorrow. It's gonna be fun to tell the defendant they're GUILTY'. This was during a trial for resisting police arrest. The comment was apparently posted on a lay day in the proceedings, when the

prosecution were still in their case and the defendant was yet to give evidence. The juror was found guilty of contempt of court and fined $250.

In another case, a juror in a criminal trial in Victoria posted 'everyone's guilty' on his Facebook page. Luckily, that posting was discovered before the trial had proceeded far, and after he had failed to show up for jury duty. The jury were discharged and the trial judge referred the matter for prosecution.

The internet has also been used by jurors to criticise other jurors. In January, 2011, a Scottish juror used her Facebook page to post claims that the accused was innocent and that her fellow jurors were 'scum bags' for convicting him.

Special mention should be made of the potential for sites such as Twitter to challenge the functional viability of a jury. Twitter is a free social networking and micro-blogging service that has changed the way many people communicate. Twitter allows users to send 'tweets', or text-based posts, up to 140 characters long via phone or internet. Thus, a juror in a murder trial in Washington, DC, was dismissed after tweeting 'Guilty Guilty… I will not be swayed. Practicing [sic] for jury duty'.

A recent Reuters analysis undertaken in late 2010 revealed that blogging, tweeting and other online diversions were causing a headache with jurors in the United States. Researchers typed 'jury duty' into Twitter's search engine and found that 'tweets from people describing themselves as prospective or sitting jurors popped up at the astounding rate of one nearly every three minutes'.[9] It may be inevitable that in the near future jurors will be subjected to questioning regarding their internet and social networking habits.

The examples above all represent improper contact by jurors broadcasting their opinions to the public, or at least a considerable sector of the public. But social media also makes direct interpersonal contact considerably easier than before. In what is colloquially known as the 'Facebook five' case, Facebook was used by a number of jurors all of whom were Facebook friends to discuss the case. Needless to say, discussions of trial matters in the absence of other jurors is not permitted.

But Facebook contact can take a much more sinister turn.

At first glance, Joanne Fraill would have appeared as a typical Facebook user. She was 40-years-old, a mother who had three children and three step-children. She was adept in using Facebook to communicate with the world. Her downfall came when serving as a juror in a trial for conspiracy to supply heroin and amphetamines. In August 2010 the trial collapsed in a spectacular fashion after it was discovered that Ms Fraill had communicated on Facebook with one of the accused being tried by the jury regarding deliberations taking place in the jury room. The pair exchanged 50 messages in a 36-minute chat about the trial including the latest position of the jury. Her misconduct was discovered when the female accused confided in her solicitor the following day. Both Fraill and the female accused were convicted of contempt of court and Fraill was sentenced to eight months' imprisonment.[10]

Researchers typed 'jury duty' into Twitter's search engine and found that 'tweets from people describing themselves as prospective or sitting jurors popped up at the astounding rate of one nearly every three minutes'.

Fraill's case may be a taste of things to come. In January 2012, again in the UK, Theodora Dallas was found guilty of contempt of court for conducting research on the internet while serving as a juror. She had carried out a search into the accused's prior acquittal of sexual assault and communicating that fact to the other jurors. One of the jurors then told a court officer about what she had said in the jury room. Dallas told the court that she didn't fully understand the trial judge's warning not to carry out research but that excuse was rejected and the university academic was sent to gaol for six months.

New technologies make improper contact easier, but such contact existed long before their advent. Thus, a remarkable case of attraction between a juror and an accused – involving far greater contact than Joanne Fraill's Facebook chat – occurred in an eight-month murder trial held in 1995 in Vancouver, Canada. In this

trial for two gang-related slayings, Gillian Guess was a juror, and became romantically attracted to one of the accused. Later on, in the jury room, she was instrumental in securing his acquittal. Immediately after the trial, she commenced a sexual relationship with him. She was eventually prosecuted for obstruction of justice, and her case was a *cause célèbre* in Canada. It represented the only case where a juror faced criminal sanctions for what happened in the jury room, and evidence was admitted, at her trial, of those very same jury room discussions. Guess was found guilty and sentenced to 18 months' imprisonment, plus 12 months' probation. An appeal against that sentence was dismissed.

Infatuation of a juror with an accused is by no means an isolated problem. In July, 1998, a juror had to be discharged, when she asked the trial judge for the accused's date of birth, as she wished to draw up his star-chart.

Occasionally, a juror's infatuation is with someone else in court. Impropriety arguably may exist where a juror becomes sexually attracted to counsel in the case (usually counsel for the prosecution) and decides a case against an accused. Some years ago, in a trial where a female juror propositioned counsel in the days following the trial, the conviction appeal alleging impropriety was dismissed on the basis that the presumption of impartiality had not been rebutted.

It is, however, beyond doubt that tweeting, emailing, or contacting the accused or a witness over Facebook, is far easier than getting hold of them by more traditional means, and most forms of social media will, subject to the public viewing settings on your social media page, broadcast what would formerly have been a private opinion – or one expressed to a few confidants – for all to see.

4. The problem of intimidation, bullies and racists

It is trite to observe that one essential aspect of a jury is that they should be impartial. Impartiality requires that jurors be, and be seen to be, independent, disinterested and unbiased. Because of the impenetrability of the jury's verdict, the potential problem of what actually happens in the jury room rarely gets aired. But is this a problem that is restricted to isolated cases?

There is a dearth of research on the impact of intimidation on the jury deliberation process. In the wake of a public outcry in Western Australia about acquittals due, allegedly, to the intimidation of juries, the attorney-general there commissioned research into jurors' experience. The report revealed that, although the incidence of intimidation, whether actual or perceived, was relatively rare, there was a problem of intimidation taking place inside the jury room.[11]

Impropriety arguably may exist where a juror becomes sexually attracted to counsel in the case (usually counsel for the prosecution)...

How jurors suffer such intimidation was revealed by New Zealand research. In relation to four juries whose deliberations were the subject of disclosure, it appeared that deliberately intimidatory jurors were given free rein, refusing to discuss things rationally, making adverse or mocking comments about other jurors' opinions, hurling insults at them, and monopolising the process.[12] It is difficult to extrapolate much from the research as only four juries were involved, save that intimidation is not an isolated event.

On a more positive note, recent empirical research in relation to the jury system in England and Wales has revealed that racial considerations may be less of a problem there than previously thought. The research revealed that jury conviction rates showed only small differences based on defendant ethnicity.[13]

Some practical suggestions have been advanced to minimise the potential for juror harassment. The jury's deliberations could be broken by 'time out' at the direction of the trial judge – say for five or ten minutes per hour. Alternatively, the judge could proactively ask the jury whether they were having difficulties in their deliberations.[14]

5. Coercion of the jury: bribery, tampering and jury nobbling

Bribery and other forms of improper suasion of the jury have existed from the time of the early development of the common law jury and remain as prevalent a practice today as in the past. They also remain as difficult to detect.

In England and Wales, concern about jury nobbling was instrumental in causing legislative change by introducing majority verdicts to prevent intimidation or bribing of jurors. Legislation was also passed making it an offence to intimidate a juror or potential juror, intending to obstruct, pervert or interfere with the course of justice. Where an acquittal is tainted by such intimidation, the High Court may quash the acquittal and order a retrial.

Such was the nature of the concern in England and Wales regarding the problem of jury tampering that the step of sanctioning judge-alone trials in relation to indictable offences was taken to remedy the problem.

Australia is not immune from allegations of jury tampering.[15] In almost all Australian jurisdictions, legislation providing for majority verdicts has been introduced.[16] Where federal offences are involved, however, the jury are required to return a unanimous verdict.[17]

Legislation has been passed in Queensland and Western Australia permitting the court to take into account conduct constituting intimidation, corruption or threatening of a juror in determining whether to proceed by judge alone.[18]

B. Solutions to juror misconduct

1. Legislation

There is no uniform legislation in Australia which covers jury impropriety and confidentiality of jury deliberations. That said, a number of Australian jurisdictions have enacted legislation which addresses these issues. In Queensland, there is a statutory prohibition on jurors making an inquiry into the accused, including any use of the internet to obtain that type of information.[19]

Taping, if permitted, could constitute direct evidence of the jury's deliberations and the integrity of the reasoning process.

Further, jury room confidentiality can be pierced during the currency of a trial where there are grounds to suspect bias, fraud, or an offence relating to a person's membership of the jury or to the performance of functions of a member of the jury.[20]

In New South Wales, jury deliberations may be disclosed to the court during the course of a trial where there are reasonable grounds to suspect any irregularity in relation to membership of the jury, or in relation to the performance of another juror's functions, where such would include, among other things, any misconduct, the refusal to take part in or lack of capacity to participate in the jury's deliberations, partiality, or reasonable apprehension of bias or conflict of interest.[21] A former jury member who has reasonable grounds to suspect any irregularity can complain to the sheriff.[22]

In Victoria, jurors are precluded from making an enquiry for the purpose of obtaining information about a party to the trial or any matter relevant to the trial. This is defined to include research by any means, with specific reference being made to the internet and viewing or inspecting an object that is relevant to the trial.[23] A person who is or was a juror is specifically permitted to disclose to the judge or a court any information about the deliberations of the jury.[24] In addition to the above the Uniform Evidence Act, as it applies in various Australian jurisdictions, would permit the admissibility of evidence of jurors in relation to matters affecting the conduct of a trial or of their deliberations.[25]

By virtue of the application of these provisions to the disclosure of an irregularity following completion of the trial, both New South Wales and Victoria permit appellate court review of the evidence of deliberations in the jury room and of whether a miscarriage of justice has been occasioned as a result of those deliberations.[26] In all three states, the trial judge is empowered to conduct an inquiry into jury room deliberations on the basis of suspected juror misconduct. The failure of a trial judge properly to address the misconduct could itself become the basis for holding that there had been a miscarriage of justice.

2. Taping of jury deliberations

It may be an unpalatable suggestion, but serious consideration should be given to reviewing the absolute prohibition on taping jury room deliberations. Currently no jurisdiction in Australia permits the taping of jury deliberations. No jury deliberations have ever been recorded in Australia.[27]

As discussed above, certain jurisdictions in Australia have remedial legislation relating to disclosure of jury

deliberations. Taping, if permitted, could constitute direct evidence of the jury's deliberations and the integrity of the reasoning process. Such direct evidence would demonstrate whether the presumption ordinarily underpinning juror deliberations, that they comply with their oath and assiduously follow the trial judge's instructions, was well-founded and, even if not the case, whether a miscarriage of justice has been occasioned.

A study in Milwaukee of the impact of videoing juries has revealed that it did not seem to have any effect on jury deliberations. Jurors in one case openly decided to ignore the evidence and acquit the defendant. This raises the spectre that access to the taped evidence may be used by the prosecution to overturn an acquittal, subject to legislation permitting such an appeal.

C. The challenge posed by complexity of criminal laws

Complexity, either in terms of facts or the law, makes reaching a verdict more difficult to achieve. This is because complex criminal laws require detailed directions to the jury regarding elements of the offence, available defences, as well as relevant warnings required to be given at common law and, more usually nowadays, by statute. The complexity, prolixity and ubiquity of directions given to the jury are under review in a number of jurisdictions in Australia at the current time.[28]

The review of directions to the jury is driven by various studies and research reports revealing that jurors, on the whole, have a great deal of difficulty understanding the law or the judge's instructions. New Zealand research revealed that of the 48 trials examined, there were only 13 trials (27 per cent) where 'fairly fundamental misunderstandings of the law at the deliberation stage did not emerge'.[29] Empirical research into the same subject undertaken in England and Wales showed that when jurors were directed to answer two questions relating to whether the defendant acted in self-defence – those questions being whether the defendant believed it was necessary to defend himself and whether he used reasonable force – 31 per cent of jurors accurately identified both questions. A further 48 per cent correctly identified one of the two questions and 20 per cent did not correctly identify either question. The study did not attempt to examine how juror understanding affected deliberations, but no relationship was found between jury verdicts and the number of jurors who correctly identified the two legal questions.[30]

In Australia, the Queensland Law Reform Commission commissioned a research project into juror understanding of directions as to the *burden of proof* given by a trial judge. That research related to 14 trials that proceeded either before the Supreme or District courts and 33 jurors (out of a total 168 jurors) agreed to participate. Only 61 per cent of jurors correctly understood the direction. Where the juror's sense of understanding of *burden of proof* was flawed, the more they relied on their common sense and the prosecution evidence, and the less they relied on defence evidence in arriving at a verdict.[31]

The complexity, prolixity and ubiquity of directions given to the jury are under review in a number of jurisdictions in Australia at the current time.

The advice that Kirby J gave for trial instructions – that they should be comprehensible, not imposing unrealistic or over-subtle distinctions on the jury, distinctions which are counter-productive of the end sought – should apply in equal measure to criminal laws.[32]

Complexity of the law is in large measure driven by the need to cover the wide-ranging activity the subject of prohibition. By their nature, simple rules tend to be over or under inclusive in fulfilling their purpose, increasing the potential for undesirable consequences – and this is even more true of complex cases. In the absence of research into juror understanding of such complexity, there must be a sneaking suspicion that a flawed understanding of the law may well favour the prosecution, in much the same way as revealed by the Queensland research, above.

The *Criminal Code Act 1995* (Cth) is a case on point. It arose out of the work of the Gibbs Committee which published a major report in 1990 regarding the general principles of criminal responsibility, together with a draft Codifying Bill, and from work undertaken by the Model Criminal Code Officers Committee (MCCOC), later known as the Criminal Lawyers Officers Committee (CLOC).

The codification was undertaken in a staged process commencing with the introduction, by the *Criminal Code Act 1995* (Cth), of Chapter 2 of the Criminal Code (Cth) which provided general principles of criminal responsibility. The code is meant to replace the common law regarding criminal responsibility. It came into effect on January 1, 1997.

Offences consist of physical elements and fault elements, and the law that creates an offence may provide different fault elements for different physical elements.[33] There is now an elaborate degree of parsing required in respect of any Commonwealth offence in order to determine how many physical elements there are in any particular offence and, once that is established, what the corresponding fault elements are.[34]

So far so good. The task is made more difficult and complex by the tripartite nature of the inquiry that needs to be undertaken as the physical elements of an offence may consist of conduct, the result of conduct ('result') and a circumstance in which conduct, or a result of conduct, occurs ('circumstance').[35] The fault element for a physical element can either be intention, knowledge, recklessness or negligence.[36] In addition, there are offences which have no fault element.[37] There are many offences found in the Criminal Code which do not specify a fault element for a physical element. Current exegetical analysis of offences found in the code finds overlapping aspects of conduct, result and circumstance. Where a physical element *only* involves conduct, the default is that intention is the fault element.[38] Where the physical element consists of a circumstance or result, the default fault element is recklessness. Hence, it is conceivable and entirely possible that any direction to a jury in a Commonwealth trial today will have both intention and recklessness intermingled. If the legal profession is muddled and confused about all of this (I say nothing here of judicial officers), pity the poor jury who has to apply the directions of law regarding that offence.

This is not a call for the code to be abandoned, just an observation that any analysis of the problem should include an understanding of what drives the complexity of the current trial process. The inherent difficulty in composing comprehensible jury instructions originates in the complexity of the law itself.

In practice, the substantive offence charged may aggravate this complexity. For instance, in *R v Ansari*,[39] a number of brothers who ran a *bureau de change* were charged, in effect, with money laundering. The trial lasted some six months and the offence before the jury was a conspiracy to deal with money where there was a risk that the money would become an instrument of crime, with recklessness as to the fact that the money would become an instrument of crime. The trial judge's directions were reduced to writing and occupied 18 pages, single spaced. The directions were fulsome and traversed the issue of substantial risk, instrument of crime, recklessness, unjustifiable risk, and conspiracy. It was a formidable task for the judge. Ultimately, the complexity of the case was mirrored in the High Court decision regarding the concept of recklessness as it applied to the physical elements of the offence.

There is no way of telling whether the complexity of criminal laws is altering the way juries deliberate. The point has been recently made that it is not difficult to predict that the task of juries will become more difficult in the future, precisely because of the increase in the prosecution of complex corporate and financial crimes.[40] Short of testing jurors on their ability to understand instructions before hearing the actual case, it is just not possible to make that assessment.[41] It may be that the complexity of certain criminal laws provides a compelling case for empanelling jurors with specialist skills and knowledge. What is known is that simplicity is always to be preferred to complexity. Surely, the aim of the criminal law – in terms of its enforcement and understanding by all participants in the criminal justice system, particularly jurors charged with applying those same laws to the facts as they find them – ought to be simplicity.

D. Making the trial process more understandable to jurors

In recent years, Australia has seen considerable research – and substantial proposals for reform – aimed at making the jury trial process more understandable to jurors. That work has already brought tangible results in the form of changes to trial procedure intended to render the trial process less daunting for the lay juror. These steps include:

- pre-trial education of jurors;
- judicial instructions at the commencement of the trial;
- the encouragement of juror participation in the

trial process (note-taking, access to transcripts and asking questions);
- improved use of visual aids;
- length and timing of the summing-up;
- the reduction of trial directions to written form for dissemination to the jury;
- a re-evaluation of the necessity to give particular directions or warnings to the jury during the course of the summing-up.

This research and these proposals for reform have been complemented by significant research into juror comprehension and understanding undertaken in New Zealand.[42] In addition, there are the enlightening results of the research into the fairness of juries undertaken in England and Wales which revealed that jurors, regardless of ethnic background, do not racially stereotype black, Asian or white defendants as more or less likely to commit certain crimes.

Each of these steps could improve the criminal trial process, and builds on the rich history that underpins the notion of a jury of one's peers. Further, it is fitting that the process of interaction between judge and jury is continually changing to reflect socio-cultural change and the continuing impact of technological development.

Beyond this, various options for reform have been advanced to address jurors' understanding of directions of law *within the jury room*. Many of these suggestions have the added benefit of guarding against certain forms of juror misconduct. One is that when the jury retire to consider their verdict, the judge should retire with them to assist and guide them in their deliberations.[43] This is a variation of the French criminal trial model where the judicial officer is present in the jury room. Another is that a jury facilitator should be provided – a person trained and experienced in helping groups come to decisions. Such a person would not be entitled to vote or express an opinion regarding the evidence, but would try to ensure that the jury's deliberations focussed on consideration of the evidence, and to minimise the discussion of irrelevant matters and the airing of biased opinions.

E. Implications for the civil jury

The jury in civil proceedings in Australia is very much a threatened species. Almost all states and territories have passed legislation severely eroding the right to a civil jury. Indeed, it has been abolished altogether in South Australia and in the Australian Capital Territory.[44] In New South Wales civil proceedings are to be tried without a jury unless the court orders that it is in the interests of justice to require a trial by jury.[45] A coronial jury is still available in that state but not elsewhere.[46] In Western Australia the right to a jury trial is restricted to claims of defamation, libel, slander, fraud, malicious prosecution, false imprisonment, seduction or breach of promise of marriage.[47] In Queensland, there is a prima facie right to a civil jury in common law cases unless the right is denied by statute.[48] In Tasmania, a trial by jury in civil matters is permitted by order of the court.[49]

Where proceedings are brought before the Federal Court trial by jury exists in exceptional cases – because, by virtue of statute, the ordinary mode of trial is by judge alone.[50]

One [option for reform] is that when the jury retire to consider their verdict, the judge should retire with them to assist and guide them in their deliberations.

Most jury trials in civil proceedings are now conducted in Victoria. The reason for this is that where proceedings are commenced by writ and are founded on contract or tort, the mode of disposition is prescribed to be by jury unless the court orders otherwise.[51]

Since the introduction of substantially uniform Defamation Acts in 2005 and 2006 the jurisdictions of New South Wales, Victoria, Queensland, Western Australia and Tasmania permit that a party may elect for trial by jury, unless the court otherwise orders.[52] The court may, however, order that such proceedings are not to be tried by jury if they involve prolonged examination of records, or any technical, scientific or other issue that cannot conveniently be considered and resolved by the jury.[53]

Many of the concerns canvassed earlier in this article in discussing the criminal jury apply with equal force to the civil jury. There is a similar pressing need to curtail extra-curial investigation by jurors, as both civil and criminal

The jury in civil proceedings in Australia is very much a threatened species.

matters have the same potential to generate prejudicial pre-trial publicity. The problem may not properly be appreciated where the civil jury is concerned. This is exemplified by the significant difference in the Criminal and Civil Trials Bench Book directions to be given upon the empanelment of juries – the criminal jury is given detailed instructions regarding that issue, whereas the civil jury direction is limited to just a few lines.[54]

Complexity of the task, either in terms of complicated technical issues as well as the jury's ability to comprehend highly nuanced legal arguments, is one criticism invariably raised to reduce the right to have a jury determine civil cases. Legal minds may and do differ as to the sagacity of retaining the civil jury.[55] At least one such mind is a strong admirer of the jury – Rares J – has written, in the context of discussing defamation proceedings and the retention of the civil justice system, that the 'solution is not the abolition of civil juries, but rather lucidity, succinctness of advocates and judges and appropriate case management by the trial judge'.[56] In the context of the ongoing erosion of the civil jury to the limited extent it exists in Australia today such a useful insight may well be considered a rage against the dying of the light. Sadly, the erosion of the right can and should be seen as having contributed to the erosion of another fundamental aspect in the pursuit of justice, the decline of the art of public advocacy where suasion of the jury was the order of the day.

Endnotes

This is an edited and updated version of a longer article which appeared in [2011] *Journal of Commonwealth Criminal Law* 175 published by the recently established Association of Commonwealth Criminal Lawyers (see http://www.acclawyers.org). The association has been established to promote lawyers' understanding of criminal law in each other's jurisdictions as well as current developments in common law criminal justice.

1. See New South Wales Law Reform Commission (NSWLRC), *Majority Verdicts*, (NSWLRC R111, 2005), para.4.29.
2. Juror number eight memorably says, at one point, 'It is also possible for a lawyer to be plain stupid, isn't it?'.
3. Charles D. Weisselberg, 'Good Film, Bad Jury' (2007) 82 *Chicago-Kent Law Review* 721, 726.
4. *R v Skaf* [2004] NSWCCA 37, (2004) 60 NSWLR86.
5. John G. Browning, 'The Online Juror' (May-June 2010), 93 *Judicature* 231, 234.
6. Cheryl Thomas, 'Are juries fair?' (Ministry of Justice Research Series 1/10, February 2010).
7. *R v Folbigg* [2007] NSWCCA 371 (information from the internet regarding the retention of body heat in a deceased baby), *R v K* [2003] NSWCCA 406, (2003) 59 NSWLR 431 (material acquired from an unreliable internet source).
8. Caren Myers Morrison, 'Jury 2.0' (2011) 62 *Hastings Law Journal* 1579, 1613.
9. Brian Grow, 'As jurors go online, US trials go off track', Reuters US (Atlanta, December 8, 2010).
10. *R v Fraill and Sewart* [2011] EWHC 1629 (Admin.), [2011] 2 Cr App R 271.
11. Judith Fordham, *Juror Intimidation: an investigation into the prevalence and nature of juror intimidation in Western Australia* (Report to the attorney general of Western Australia, approved for publication April 1, 2010).
12. Warren Young, Neil Cameron, Yvette Tinsley, New Zealand Law Commission, *Juries in Criminal Trials, Part Two: A Summary of Research Findings* (NZLC PP37, vol. 2, 1999), paras 6.35-6.39.
13. Thomas (n 6), 24, fn 7.
14. Phillip Boulten, 'Trial by jury or trial by ordeal?', *Bar News* (Winter 2011) 62, 63.
15. *R v Richards & Bijkerk* [1999] NSWCCA 114, (1999) 107 A Crim R 318; *R v Elfar & Tier*, unreported, October 9, 1995, NSWCCA).
16. Available from 1927 in South Australia, *Juries Act 1927* (s 57); in 1936 in Tasmania, *Juries Act 2003* (ss 3 and 43); in 1960 in Western Australia, *Criminal Procedure Act 2004* (s 114); in 1963 in the Northern Territory, *Criminal Code Act 1983* (s 368); in 1994 in Victoria, *Juries Act 2000* (s 46); and finally in New South Wales in 2006, *Jury Act 1977* (s 55F). A unanimous verdict is still required in relation to trials held in the Australian Capital Territory.
17. Commonwealth Constitution, (s 80). See *Cheatle v The Queen* [1993] HCA 44, (1993) 177 CLR 541.
18. *Criminal Procedure Act 2004* (WA), s 118, and *Criminal Code Act 1899* (Qld), s 615.
19. *Jury Act 1995* (Qld), s 69A.
20. *Jury Act 1995* (Qld), s 70.
21. *Jury Act 1977* (NSW), s 75C(1) and (4).
22. *Jury Act 1977* (NSW), s 75C(2).
23. *Juries Act 2000* (Vic), s 78A.
24. *Juries Act 2000* (Vic), s 78(3)(a)(i).
25. *Evidence Act 1995* (Cth), (NSW) and (ACT), *Evidence Act 2001* (Tas), and *Evidence Act 2008* (Vic), ss 16, 129.
26. Thus overcoming the difficulty of investigating jury impropriety after delivery of verdict because of the principle of secrecy of jury deliberations, which grounded a common law rule that, whilst jury impropriety could be investigated, any evidence obtained was strictly inadmissible, see *R v Skaf* (n 4); *R v Rinaldi* (1993) 30 NSWLR

605; *R v K* [2003] NSWCCA 406, (2003) 59 NSWLR 431, and *R v Potier* [2005] NSWCCA 336 (in that case, a journalist wrote a book regarding his experiences as a juror on Mr Potier's trial and an attempt to call the journalist to give fresh evidence on the hearing of the appeal was refused).

27. See Jacqueline Horan, 'Communicating with jurors in the twenty-first century' (2007) 29 *Australian Bar Review* 75, 93, fn 92.
28. Queensland Law Reform Commission, *A Review of Jury Directions: Report, vol. 2* (QLRC R 66, 2009); Victorian Law Reform Commission, *Jury Directions* (Final Report 17, 2009); and New South Wales Law Reform Commission, *Jury Directions* (NSWLRC CP 4, 2008).
29. See Young et al., NZLC, *Juries in Criminal Trials, Part Two* (n 12), para 7.12.
30. See Thomas (n 6), 36-37.
31. Blake McKimmie, Emma Antrobus and Ian Davis, *Jurors' Trial Experiences: The Influence of Directions and Other Aspects of Trials* (November 2009) found as Appendix E to QLRC, *A Review of Jury Directions: Report, vol. 2* (QLRC R 66, 2009).
32. *Zoneff v The Queen* [2000] HCA 28, (2000) 200 CLR 234, [65].
33. *Criminal Code 1995* (Cth), s 3.1.
34. ibid., s 3.2
35. ibid., s 4.1.
36. ibid., s 5.1.
37. ibid., s 3.1(2).
38. ibid., s.5.6(1).
39. Unreported, November 10, 2006 (District Court); see also *Ansari v The Queen* [2007] NSWCCA 204, (2007) 70 NSWLR 89; and *Ansari v The Queen* [2010] HCA 18, (2010) 241 CLR 299.
40. Justice Peter McClellan, 'Looking inside the jury room' *Bar News* (Winter 2011) 64, 68.
41. The testing of jurors has in fact been suggested: see Bob Hycran, 'The myth of trial by jury' (2005–2006) 51 *Criminal Law Quarterly* 157, 167.
42. New Zealand Law Commission, *Juries in Criminal Trials* (NZLC Rep. No.69, 2001).
43. Justice Roslyn Atkinson, 'Juries in the 21st Century; Making the Bulwark Better' http://greekconference.com.au/papers/2009/atkinson.pdf. Justice Atkinson raises two fundamental problems with such a course. First, any advice or assistance to juries would be given in private rather than in open court. Second, it increases the role of the judge at the expense of ordinary members of the community.
44. *Juries Act 1927* (SA), s 5; *Supreme Court Act 1933* (ACT), s.22.
45. *Supreme Court Act 1970* (NSW), s 85; *District Court Act 1973* (NSW), s 76A. Those provisions and their subsequent interpretation have all but stopped the use of civil juries in those courts, except in relation to defamation proceedings which fall outside the ambit of those provisions (s 85(6) and s 76A(4) respectively). Their desuetude is confirmed by the *Civil Trials Bench Book* published by the NSW Judicial Commission which referred to the role of the civil jury having been gradually diminished 'almost to the point of extinction save in defamation cases' http://www.judcom.nsw.gov.au/publications/benchbks/civil/civil_juries.html
46. *Coroners Act 2009* (NSW), s 48. Elsewhere in Australia the coroner sits without a jury.
47. *Supreme Court Act 1935* (WA); SCR, O 32; *District Court of Western Australia Act 1969*, s 52. Such civil jury trials are rare as, apparently, no such trial has occurred since 1994 and only a dozen or so trials have occurred in the past four decades, Law Reform Commission of Western Australia, *Selection, Eligibility and Exemption of Jurors, Discussion Paper* (2009) 11. In any event, the reference to claim for breach of promise of marriage is anomalous, as such claims were abolished under s 111A of the *Marriage Act 1961* (Cth).
48. *Supreme Court Act 1995* (Qld); *District Court of Queensland Act 1967*, s 75; UCPR rr 472, 474 and 475. Statutory exceptions arise under the *Civil Liability Act 2003* (Qld), s 73 and matters listed as a commercial cause.
49. *Supreme Court Civil Procedure Act 1932* (Tas), s 27. The general rule is that there be a trial without a jury- *Supreme Court Rules 2000*, rr 556 and 557.
50. *Federal Court of Australia Act 1976* (Cth), ss 39 and 40.
51. *Supreme Court (General Civil Procedure) Rules*, rr 47.02 and 47.04.
52. *Defamation Act 2005* (NSW), s 21(1) and analogous provisions. There is no such provision in the legislation in South Australia, the Australian Capital Territory or the Northern Territory. For a useful discussion of the availability of juries in defamation proceedings, see Justice Steven Rares, 'The jury in defamation trials' (2010) 33 *Australian Bar Review* 93.
53. *Defamation Act 2005* (NSW), s 21(3)(a) and (b).
54. Both bench books are published on the NSW Judicial Commission website http://www.judcom.nsw.gov.au
55. Justice Peter McClellan, 'The Australian Justice System in 2020' (2009) 9 *Judicial Review* 179; Rares (n 52); Jacqueline Horan, 'The Law and Lore of the Australian Civil Jury and Civil Justice System' (2006) 9 Flinders J L Reform 29, and by the same author, 'Perceptions of the Civil Jury System' (2005) 31 Monash U L Rev 120.
56. Ibid., 105.

Five lessons of a reader at the NSW Bar

By Jason Donnelly[1]

Photo: Fairfaxphotos

Introduction

Practising as a reader[2] at the New South Wales Bar can be extremely difficult. In this article, I will explore five key lessons, which I have learnt as a reader. It is hoped that they will provide assistance and insight to other readers or to lawyers admitted recently to the Supreme Court of New South Wales, who wish to embark upon a professional calling[3] at the bar. Further, this article will seek to provide more general insights into the professional life of a reader in Sydney.

Chambers

First, a reader should secure good chambers. This will correlate to some degree with financial success as a junior barrister, but more importantly, your chambers will provide the opportunity to meet more senior barristers and expand the network of contacts with other professionals.

In this respect, the reader should undertake extensive research in relation to the proposed chambers in which they seek to secure accommodation. Many of the chambers in Sydney can be understood in a general way by examining their websites. The reader should speak with as many people as possible who may be able to share their knowledge about the chambers in question.

In the end, the decision to secure accommodation at a particular chambers is a difficult one. For those readers who have the opportunity to choose between various chambers, the decision should ultimately be made by you. Readers should follow their heart and intuition in making the final decision about which chambers to make their home.

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Experience has taught me that the advice of others is not necessarily in the best interests of a reader. It may be well-intended, but may not always be sound. For example, the author of that advice may be out of touch with the life of a reader, that despite their seniority, the advice has much limitation.

It seems to me that a reader who does not have 'professional connections' should avoid securing accommodation at those chambers where the barristers on the floor and the clerk will not assist the

newly admitted reader to obtain work. Put differently, the reader should avoid taking chambers where all they get out of their new professional home is massive tax invoices for payment of 'chamber fees' that have to be paid on a monthly basis.

Significantly, a reader should seek to secure accommodation at chambers whereby payment of chamber fees for the first year is minimal or free. This enables a reader to build their practice and accumulate capital. Unfortunately, the author learnt this simple lesson after the fact.

As the foregoing discussion highlights, good chambers means various things: minimal or free accommodation for the first year of practice; the ability to network with barristers of high standing; the opportunity to save capital so that the reader can survive financially; and, of course, the development of a reputation as a member of a reputable floor.

Tutors & pupil masters

Secondly, it is important that the reader secures suitable tutors. A reader must undertake 'reading' in their first year of practice as a barrister. The concept of 'reading' entails a number of important considerations. Reading generally refers to a compulsory programme of post-admission practical legal training for newly admitted legal practitioners intending to practise solely as barristers.[4]

A reading programme usually comprises a 12 month period during which an experienced barrister (called the tutor or pupil master) provides instruction to the pupil or reader in the work and ethical standards required of a barrister and arranges for the pupil to observe and assist the tutor in work.[5]

At the commencement of the reading programme, the pupil is usually required to attend a course of instruction provided by the Bar Association over a period of several weeks, comprising lectures and workshops on theoretical and practical aspects of barristers' work.[6] In New South Wales, this programme is known as the Bar Practice Course, which effectively commences the professional obligations of a reader.[7]

Unfortunately, there is no simple answer to the question of how to secure suitable tutors. Obviously, readers should ensure they meet a proposed tutor to discuss in a frank manner what they expect from the tutor–reader relationship.

At the commencement of reading with a tutor, a number of professional obligations for the reader are invoked. The reader must attend on his or her tutors, appear as an observer with his or her tutors and comply with any reasonable directions of the tutors.[8] Furthermore, the reader must study diligently the art of advocacy, the general work and practice as a barrister (including drafting documents, advising clients and dealing with solicitors' clients, witnesses and the public) and the proper conduct and ethics of a barrister.[9] A reader is also obliged to study under his or her tutors, including reading and discussing briefs with the tutors.[10]

Unfortunately, there is no simple answer to the question of how to secure suitable tutors. Obviously, readers should ensure they meet a proposed tutor to discuss in a frank manner what they expect from the tutor–reader relationship. In turn, the proposed tutor can outline to the reader how he or she can assist the reader progress with their professional career as a barrister.

The reader can make a judgment whether there may be any possible character conflicts between the respective parties. The reader can also make a determination of whether the proposed tutor will discharge their professional and ethical obligations which accompany their important role.

The reader can make a judgment whether there may be any possible character conflicts between the respective parties.

The reader should speak to colleagues, enquiring as to any 'senior-juniors' who may be available to take on readers. If possible, it may be useful to speak with former readers of the proposed tutor to learn of their experiences.

It is also important that the reader enquires with the proposed tutor as to whether they intend to take on another reader at the same time. In such circumstances, it is possible that the reader might not get the same level of assistance.

Undoubtedly, the tutor–reader relationship will mean different things to different people and will be affected by many factors. For example, the level of education and benefit a reader gains from his or her tutor may be measured as much by their own expectations as by others'. In any event, the ability of a reader to secure a reliable tutor is a significant step in the proper professional development of an aspiring and newly admitted barrister.

The 'accept all' rule

Thirdly, a reader should not accept all work that is offered to them. Before I was called to the bar, I was advised that a reader should accept *all* work that comes their way. In my first few months at the bar, I followed this advice. Experience has taught me that it is fraught with danger. It is not necessarily compatible with financial benefit, proper advocacy experience or a development in reputation. For example, a reader may often find him or herself in a situation of being briefed at the last moment to attend upon a directions hearing or mention. These last-minute 'flick passes' are characterised by lack of clear instructions about the case. The result? The reader appears in court and is unable to properly assist the court with having the matter dealt with in a meaningful way. The reader is rebuked by the bench for appearing without proper instructions. The reader has his or her reputation affected by other professional colleagues in the courtroom who may draw an adverse inference that the reader does not know what they are doing. To make matters worse, there is a very real possibility that the reader will never receive payment of his or her professional fees for appearing.

Undoubtedly, the tutor–reader relationship will mean different things to different people…

Despite a lack of experience, readers need to make their own judgment (within the confines of the *New South Wales Barristers' Rules*) as to whether they will accept work that comes their way. A reader should not be pressured or intimidated to accept work from another barrister merely because of their seniority.

Significantly, there are solicitors and indeed some barristers who may take advantage of readers. In that respect, such solicitors and barristers may provide work to readers with the promise of payment for services rendered, yet when the work has been completed, the reader never receives payment. In this respect, readers should be cautious when accepting work from solicitors and barristers with whom they are unfamiliar.

If possible, the reader should discuss in a general way with their colleagues the reputation of the relevant solicitor or barrister. If time permits and the reader has

major reservations with regard to accepting work from the relevant solicitor or barrister, it may be useful to check whether they have been dealt with by the Office of the Legal Services Commissioner's legal practitioners' disciplinary registrar.[11]

The reader should also keep handy a 'black book'. That is, a record of those solicitors or barristers who failed to pay, or was very slow at paying, the fees of the reader. This is particularly useful in circumstances where the impugned solicitor or barrister attempts a repeat performance by not paying fees.

These last-minute 'flick passes' are characterised by lack of clear instructions about the case.

Pro bono & speculative briefs

Fourthly, there is plenty of *pro bono* work at the Sydney bar and to some extent a reader should accept it, as well as other speculative work, in order to gain experience. *Pro bono* work of course is defined as the provision of legal services for free or at a reduced rate.

Speculative briefs involve the provision of legal services with payment being made for those services upon the condition of a particular event or circumstance occurring. For example, a barrister may agree to take on a brief on the basis that they will be paid in the event that either they are ultimately successful in court or the matter settles.

In my view, a reader should seek to have a practice which includes *pro bono* and speculative brief work. The more difficult task, of course, is seeking to balance paid work with *pro bono* and speculative briefs. In this respect, a reader should not fall into the trap of *pro bono* work equating to 60–70 per cent of their practice. The adverse implications of adopting a heavy *pro bono* practice are obvious – the reader will not receive any payment for his or her services and may expend their own capital in undertaking the work.

Before reaching a decision about a *pro bono* brief, take the time to read what the matter is about. In this respect, the writer speaks from particular experience. After only a few months at the bar, I had a phone call from an old university colleague who offered a *pro bono* brief, involving an enormous amount of work. It involved advising and appearing for a convicted murderer who had already spent many years in prison.I assumed that accepting the brief would be a waste of time, but before rejecting it, reluctantly agreed to see the brief. Upon reading the brief, it was apparent that some of the legal issues involved in the case were of such significance that on balance I had to accept it without question. This simple story illustrates a number of important points about *pro bono* work. First, the nature of the work may involve important questions of law. Secondly, involvement in the case may assist the professional development and reputation of the reader, particularly if the case deals with significant legal issues. Thirdly, the story demonstrates the point by implication that rejecting *pro bono* work without at least examining the case may very well mean that the reader loses the opportunity to be involved in a case of great significance.

Development of professional customs and practices

Finally, there is the development of professional customs and practices. That is to say, a reader should foster particular professional traits which will assist with the development of their practice. For example:

- ensuring that reporting letters are both drafted and sent to the solicitor who briefed the reader for the directions hearing, mention or motion in a timely fashion;
- returning phone calls and emails quickly;
- sending Christmas cards and good wishes to respective professional colleagues on important dates; and
- showing appreciation and gratitude to those persons who have made a difference in your professional life as a junior barrister.

There are many professional customs and practices that can be adopted by readers. They are best described as doing the small things – yet, the paradox in that

statement is that it is the small things that often make the biggest difference in the development of professional relationships.

Concluding observations

The New South Wales Bar provides an opportunity to work among some of the most gifted and hard-working members of society. Regardless of what background a reader may have had before his or her professional calling to the bar, the reader commences anew; as if to undertake rites of passage in their professional careers.

Undoubtedly, many mistakes will be made by the reader. They will not be limited to legal mistakes, but may include, for example, misconceived financial decisions. The ultimate importance of mistakes is that the reader learns from the error of his or her ways, making them the better barrister.

Endnotes

1. Jason Donnelly, BA (Macq), LLB (Hons 1) (UWS), GDLP (COL), reader (May 2011-May 2012).
2. 'Reader' means a barrister undertaking a reading programme. See Rule 116, *New South Wales Barristers' Rules*, 8 August 2011, The New South Wales Bar Association.
3. A calling to the bar is the process by which a person becomes a member of the bar of England and Wales being an act of an Inn of Court completed when the candidate is admitted by the governing body of the Inn: *Re Perara* (1887) 3 TLR 677. To be eligible to be called, a person must have been admitted as a student member of an Inn and have satisfactorily completed prescribed vocational training and examinations. Having been called, the barrister is required to complete a period of pupillage before being entitled to practise. The expression has no exact application in Australia but is equivalent to admission by the Supreme Court of a state or territory as barrister: see *Encyclopaedic Australian Legal Dictionary*, LexisNexis, 'Call to the bar'.
4. *Encyclopaedic Australian Legal Dictionary*, LexisNexis, 'Reading'.
5. Ibid.
6. ibid.
7. http://www.nswbar.asn.au/docs/professional/prof_dev/BPC/bpc_index.php (Accessed 22/03/2012).
8. Conditions to be attached to initial (reader's) practising certificates, Provision 2, Bar Council, 15 June 2006, New South Wales Bar Association: http://www.nswbar.asn.au/docs/professional/prof_dev/readers_conditions.php (Accessed 22/03/2012).
9. Ibid.
10. Ibid.
11. Section 577 of the *Legal Profession Act 2004* (NSW) requires the commissioner to keep a register of disciplinary action taken against barristers and solicitors. The Legal Practitioners' Disciplinary Registrar can be accessed at http://www.lawlink.nsw.gov.au/olsc/nswdr.nsf/pages/index (Accessed 22/03/2012).

2012 Bench and Bar Dinner

Above: The Ballroom at the Westin Sydney

L to R: The Hon John Hatzistergos and Michael Tidball, CEO of the Law Society of New South Wales

L to R: Mr Junior, Chief Justice Tom Bathurst and Ms Senior

Above: President Bernard Coles QC and Mr Junior

Left: Chief Justice Tom Bathurst

Left: 'Blue Groove'

Below: Robert McClelland and Fiona McLeod SC

Below: Back row, L to R: Vanessa Bosnjak, James Hmelnitsky, John Marshall SC, Penny Wass, James King. Front row, L to R: Naomi Sharp, David Scully, Robert Hollo SC and Peter Whitford SC

Back row, L to R: Teni Berberian, Mark Dempsey SC. Front row L to R: Stephen Robb QC, Jodi Steele, Jason Lazarus

L to R: Sir Laurence Street, Liz Picker, Thos Hodgson

Back row L to R: Felicity Rogers, Craig Carter, Joanne Little, Simon Lipp. Front row L to R: Michael Wigney SC, Melanie Williams, Ben Katekar, Sophie York, Phillip English

Back row, L to R: Patrick Holmes, Scott Nixon. Front row, L to R: Zali Steggall, Brenda Tronson and Nuala Shaw

L to R: Ivan Leong, James Gibson, Dale Bampton, David Bennett AC QC

Back row L to R: Terry Ower and Brian Dooley SC

Front row L to R: Philippa Clingan, Misha Hammond, Kavita Balendra

Barristers in Schools

The Bar Association's Barristers in Schools Programme held a mock trial in Central Local Court on 15 May 2012 as part of Law Week.

Karen Conte-Mills assists at the bar table.

'Magistrate' Margaret Cunneen SC presiding.

Spigelman portrait

On 28 May 2012, Mathew Lynn's portrait of the Hon James Spigelman AC QC was unveiled at a small ceremony in the Bar Association's Common Room.

Maurice Byers Address 2012

By the Right Honourable the Lord Phillips of Worth Matravers KG PC

I have the great honour to be the first lawyer from the United Kingdom who has been invited to give the Maurice Byers lecture. That is perhaps because Sir Maurice was a great constitutional lawyer and we have only recently acquired the vestiges of a written constitution. So far as constitutional principles go, Australia does things in an orderly fashion. Thus it was in 1985 that the federal government announced the formation of the Australian Constitutional Commission and asked Sir Maurice , the obvious candidate, to chair it. He had made his name, as solicitor general and in private practice, as a master, or perhaps it would be more accurate to say the master, of constitutional law and practice.

The United Kingdom had no written constitution of its own, but its parliament was very good at enacting written constitutions for others. Queen Victoria gave the royal assent to your constitution in 1900. In 1986 the Australia Act removed the power of the United Kingdom Parliament to change the Australian constitution. That Act also brought to an end the right of appeal from the Australian courts to the Judicial Committee of the Privy Council.

I do not know whether these important constitutional developments owed anything to the influence of Sir Maurice.

At the time I must confess that I regretted the latter one, for joint expeditions to the Privy Council in company of distinguished and convivial lawyers from this country had been a particularly happy feature of my practice at the English Bar.

If Australian constitutional changes were carefully considered, the same cannot be said for those that included the creation of our Supreme Court. They were announced by the prime minister, Tony Blair, in 2003, unheralded and without consultation. They resulted in my ending my judicial career in a position that I had never anticipated. And they have meant that I found myself in the front line in dealing with the implications of one of our most significant constitutional developments in my lifetime, which was the enactment of the Human Rights Act in 1998. That constitutional change was brought about with due propriety. It had been part of the Labour Party manifesto and was attended by due consultation. But before we get to the Human Rights Act I want to go back in history to the end of the Second World War.

In direct reaction to that war the United Nations Charter was signed on 26 June 1945.

Some three years later, the Universal Declaration of Human Rights, drafted by Eleanor Roosevelt, was adopted by 48 members of the General Assembly. The Universal Declaration was the basis of the European Convention for the Protection of Human Rights and Fundamental Freedoms, in the drafting of which the United Kingdom took the lead. The convention was open for signature in 1950 and the United Kingdom was an initial party to it.

Under the first article of the convention the parties agreed to 'secure to everyone within their jurisdiction the rights and freedoms defined in the convention'. Remember those words 'within their jurisdiction'. Those rights included the right to life (article 2), freedom from torture and degrading treatment or punishment (article 3), right to liberty (article 5), right to a fair trial (article 6), right to respect for private and family life (article 8) and freedom of expression (article 10).

In 1958 eight signatories to the convention, but not the United Kingdom, accepted the compulsory jurisdiction of the European Court of Human Rights at Strasbourg under terms that gave individual citizens the right to petition the Strasbourg Court to seek compensation for infringement of their convention rights by their own country.

We did not think that we had much to learn about human rights. ... Well, we received something of a shock, because over the years there were quite a number of successful applications against the United Kingdom.

The United Kingdom did not accept this compulsory jurisdiction until 1966. When we did so I doubt whether we thought that the Strasbourg Court would cause us too much trouble. We did not think that we had much to learn about human rights. In drafting the convention we had been concerned to see that our common law rights were reflected in its provisions. In particular, the article 6 provisions in relation to the right to a fair trial were modelled on our own procedures.

Well, we received something of a shock, because over the years there were quite a number of successful

applications against the United Kingdom.

Up to 2008 there were no less than 373 applications to the court that were held to be admissible, of which the United Kingdom was held to have violated the convention in no less than 279.

This stream of cases led the Labour government to introduce the Human Rights Act with the intention of 'bringing rights home'. Public authorities were placed under a duty to comply with the convention. If they did not, they were liable to pay compensation. They had a defence, however, if an Act of parliament required, or authorised them, to act in a way that infringed the convention. This reflected the fact that the Human Rights Act preserved the supremacy of parliament.

Under a written constitution a country's Supreme Court, or Constitutional Court, will usually be given the power to strike down legislation that infringes fundamental rights. This is not the position under the Human Rights Act. That Act effects a typically British compromise. Section 3 of the Act provides that courts must, *so far as it is possible to do so,* read and give effect to legislation in a way which is compatible with convention rights. If it is not possible, however, the court must give effect to the legislation, even though this infringes human rights. In those circumstances section 4 gives the court the power to make a declaration that the Act is incompatible with the convention. Where a declaration of incompatibility is made, parliament has a fast track procedure under which it can rectify the legislation, and it almost invariably does so.

Of particular significance so far as this lecture is concerned is section 2 of the Act. This requires the court, when determining a question in connection with a convention right, to 'take into account' any decision of the Strasbourg Court. The nature of that obligation has proved to be controversial.

I am now going to take you to some of the Strasbourg jurisprudence that the House of Lords, and latterly the Supreme Court, has had to take into account. In considering that jurisprudence it is important to keep in mind an important principle that the Strasbourg court applies. This is the principle that the convention is a 'living instrument' – *Tyrer v United Kingdom*[1] para 16. This is the same as the doctrine of the 'progressive interpretation' of constitutional instruments under which the instrument is seen as 'a living tree capable of growth and expansion within its natural limits' in the famous words of Lord Sankey in *Edwards v A-G of Canada*[2] at 136. The convention specifies human rights in general terms, but the rights embraced by those terms can change over time to accommodate changes in the social attitudes in the member states, such as, for instance, the acceptance of homosexual relations. The principle is diametrically opposed to the approach of some members of the American Supreme Court, such as Justice Scalia, which involves interpreting the US Constitution through the eyes of those who signed it.

The first case I want to talk about involved a gentleman called Mr Soering (*Soering v UK*[3]). There was cogent evidence in the form of his own admissions that he had committed two capital murders in Virginia, in the United States.

The United Kingdom proposed to extradite him to the United States to stand trial for them. He applied to Strasbourg. He contended that if he were returned he would be put on death row, and thus subjected to inhuman treatment. He further contended that if the United Kingdom extradited him to such a fate it would itself violate article 3 of the convention. His application raised an important issue of principle. The convention required the contracting parties to secure the convention rights and freedoms within their jurisdictions. How could extraditing someone from one's jurisdiction infringe the convention if it did not impact on any right enjoyed within the jurisdiction? The Strasbourg Court dealt with this question by holding that 'It would hardly be compatible with the underlying values of the convention…knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture' or inhuman treatment. The court held on the facts that extraditing Soering would violate his rights under article 3.

I do not view this decision as involving the 'living instrument' principle. It was concerned essentially, not with changing values, but with jurisdiction.

Strasbourg's approach could be applied to extraditing or expelling someone to a country where any other of his fundamental rights would not be observed. *Soering* was potentially the thin end of a very large wedge.

The next case in this sequence was *Chahal v United Kingdom*[4]. Mr Chahal was a Sikh separatist leader

who had unsuccessfully sought asylum in the United Kingdom. The secretary of state had concluded that his presence in the United Kingdom posed a threat to national security. He wanted to deport him to India. Mr Chahal applied to Strasbourg against the decision to deport him. He argued, relying on *Soering,* that deportation would infringe his rights under article 3, because he would be exposed to the risk of torture or inhuman treatment if he was sent home.

The United Kingdom Government argued that there was an exception to the *Soering* approach where the individual to be deported posed a threat to national security. It relied upon article 33 of the 1951 Convention relating to the Status of Refugees.

This prohibits returning a refugee to a country where his life or freedom would be threatened, but expressly exempts from that prohibition a refugee whom there are reasonable grounds for regarding as a danger to the security of the country wishing to deport him. The Refugee Convention was concluded very soon after the Human Rights Convention by essentially the same member states.

This and similar decisions of the Strasbourg Court have been anathema to successive UK governments and, I suspect, to the majority of the general public. Their attitude is – we did not ask this man to come to this country. He has no right of abode here. He is a threat to our security. If he insists on staying, then he must stay on our terms – namely in detention.

They could not possibly have believed or intended that the Human Rights Convention would override the Refugee Convention in respect of the removal of aliens. But the Strasbourg Court nonetheless held that article 3 provided wider protection than the Refugee Convention and that it precluded the deportation of Mr Chahal. It also precluded holding him in detention without trial on the ground of national security. This and similar decisions of the Strasbourg Court have been anathema to successive UK governments and, I suspect, to the majority of the general public. Their attitude is – we did not ask this man to come to this country. He has no right of abode here. He is a threat to our security. If he insists on staying, then he must stay on our terms – namely in detention.

These two cases form the background to one with which I was personally concerned, that of *Ullah* (*R Ullah v Special Adjudicator*[5]). There were in fact two cases heard together. They came before me when I was presiding over the Civil Division of the Court of Appeal as master of the rolls. The appellants were failed asylum seekers who were resisting being returned to their own countries on the ground that this would infringe their right of freedom of religion because they would not be permitted to practise their religions on return. We rejected their appeals. In giving the judgment of the court I expressed the view (para 22) that the convention was not designed to impact on the rights of states to refuse entry to aliens or to remove them. The convention was designed to govern the treatment of those living within the territorial jurisdiction of the member states. I went on to accept that Strasbourg had created an exception where the risk of torture or inhuman treatment was involved.

I noted that the Strasbourg Court had recognised that a similar approach might be adopted in relation to other human rights, but observed that Strasbourg had never in fact adopted such an approach. I then said (para 64):

> Where the Convention is invoked on the sole ground of the treatment to which an alien, refused the right to enter or remain, is likely to be subjected by the receiving state, and that treatment is not sufficiently severe to engage article 3, the English court is not required to recognise that any article of the Convention is, or may be, engaged.

The House of Lords gave the appellants permission to appeal. It did so not because of doubts about the result that we had achieved, but in order to make it clear that our approach had been wrong. Lord Bingham held that our judgment did not reflect the current effect of the Strasbourg jurisprudence (para 22). He laid down the following principle (para 20):

> The House is required by section 2(1) of the Human Rights Act 1998 to take into account any relevant Strasbourg case law. While such case law is not strictly binding, it has been held that courts should, in the absence of some special circumstances, follow any clear and constant jurisprudence of the Strasbourg Court…This reflects the fact that the Convention is an international instrument, the correct

> interpretation of which can be authoritatively expounded only by the Strasbourg court.

From this it follows that a national court subject to a duty such as that imposed by section 2 should not without strong reason dilute or weaken the effect of Strasbourg case law…It is of course open to member states to provide for rights more generous than those guaranteed by the convention, but such provision should not be the product of interpretation of the convention by national courts, since the meaning of the convention should be uniform throughout the states party to it. The duty of national courts is to keep pace with the Strasbourg jurisprudence as it evolves over time: no more, but certainly no less'.

In the subsequent case of *Al-Skeini v Secretary of State for Defence*[6] at para 106 Lord Brown suggested that this last sentence should read 'no less, but certainly no more'. This was because if a case is decided by the Supreme Court against a claimant he can always go off to Strasbourg, but if a case is decided against the state, it has no such remedy.

Do these statements mean that we have no alternative but to follow any decision of the Strasbourg Court that deals definitively with a particular issue? Certainly not where the Strasbourg Court gives a one-off decision that cannot be described as 'clear and constant jurisprudence'.

Let me give you a relatively early example of a case where we managed to get the Strasbourg Court to have second thoughts. On 7 March 1988 a deranged man shot and killed a man called Ali Osman and injured his son. The son and his mother brought proceedings against the police in negligence, alleging that they should have prevented the shooting. The police succeeded in getting the action struck out on the ground that the police had, at common law, immunity as a matter of public policy from liability in negligence in relation to the investigation or suppression of crime. An appeal to the court of appeal was dismissed. The Osmans then went to Strasbourg. They alleged that their rights under article 6 of access to a court and of a fair trial had been denied. The Grand Chamber of 20 judges held unanimously that article 6 had been infringed. With respect to them, the court confused an immunity from negligence that the police enjoyed as a matter of substantive law with a procedural bar preventing the Osmans from bringing their claim.

Shortly after that decision the House of Lords gave judgment in *Barrett v Enfield London Borough Council*[7]. The claim was in negligence for breach of a duty of care alleged to have been owed by a local authority to a child in its care. Once again the issue was whether the claim should be struck out on the ground that, as a matter of public policy, the local authority owed no duty of care. Lord Browne-Wilkinson referred to the Strasbourg Court's decision in *Osman* and said that he found it extremely difficult to understand. He then subjected the decision to detailed criticism and declined to follow it.

In 2001 Strasbourg had another strike-out case before it (*Z v United Kingdom*[8]). The applicants had claimed against a local authority for negligence in failing to protect them from ill-treatment by their parents. The claim had been struck out on the ground that the local authority owed no duty of care. Before the Strasbourg Court the applicants relied on *Osman.* The court referred to Lord Browne-Wilkinson's decision in *Barrett* and remarked (para 100):

> The Court considers that its reasoning in the *Osman* judgment was based on an understanding of the law of negligence which has to be reviewed in the light of the clarifications subsequently made by…the House of Lords.

In effect, Strasbourg graciously accepted that they had got it wrong. The applications were dismissed.

This was the first example that I know of what I have come to describe as 'dialogue' between our court and Strasbourg.

Now I am going to give you two examples of dialogue with the Strasbourg Court where the court refused to budge and we had, ultimately, to fall into line. The first is in the field of housing law. Article 8 of the convention provides that 'everyone has the right to respect for his private and family life, his home and his correspondence'. That right is not absolute. A public authority can interfere with it if it is proportionate to do so for the protection of the rights and freedoms of others.

In England local authorities own residential premises which they lease to tenants. The respective civil law rights of the landlord and tenant are governed by complex legislation. It is designed to strike a balance between the rights of the tenant and the rights of others, notably the tenant's neighbours and others

on the housing list who are waiting for a home. The tenant is given security of tenure, subject to conditions. If the conditions are breached the local authority can terminate the lease. When the lease is terminated, the tenant becomes a trespasser and can be evicted provided that the authority obtains a possession order from the court. Possession actions used to be summary proceedings. If there was no issue as to the termination of the tenancy, the possession order was granted as of right.

Harrow London Borough Council obtained a possession order against a Mr Qazi upon the lawful termination of his tenancy. Mr Qazi challenged this on the ground that it interfered with his right to respect for his home. He argued that, even though he had become a trespasser, he must be given the right to challenge the making of a possession order on the ground that it would be disproportionate to permit the council to exercise its legal right to evict him.

The case went up to the House of Lords (*Harrow London Borough Council v Qazi*[9]) and split their Lordships. The majority held that the article 8 right to respect for the home could not be relied upon to defeat proprietary or contractual rights. They held that the council showed no lack of respect for Mr Qazi's right to a home when it exercised its legal right to recover possession. Mr Qazi's only possible remedy would have been to bring separate proceedings for judicial review of the council's decision to terminate his tenancy.

After this decision the Strasbourg Court gave judgment in respect of a claim by the Connors family (*Connors v UK*[10]). The Connors were gypsies. They were given a licence by the local authority to pitch their caravans on a gypsy site, but this licence was withdrawn after the family had been alleged to have indulged in anti-social behaviour. They were evicted pursuant to a court order. They applied for permission to seek judicial review of the council's decision to evict them and were refused this. They had greater success before the Strasbourg Court. That court held that their article 8 right to respect for their home had been infringed. Their eviction had lacked the necessary procedural safeguards because they had enjoyed no right to challenge on grounds of proportionality the council's decision to evict them.

Encouraged by this decision another group of gypsies, who had been evicted as trespassers from land owned by a council, challenged the possession order on the ground that it infringed their article 8 rights.

Their appeal went up to the House of Lords, together with an appeal from a decision that I had delivered, as master of the rolls, ruling against a family that sought to challenge a possession order on the same ground. We held that we were bound by *Qazi,* but expressed the view that *Qazi* was in conflict with the Strasbourg decision in *Connors.*

The House of Lords in *Kay v Lambeth London Borough Council*[11] dismissed the appeals. Lord Bingham held (para 28) :

> …it is ordinarily the clear duty of our domestic courts…to give practical recognition to the principles laid down by the Strasbourg court as governing … Convention rights… That court is the highest judicial authority on the interpretation of those rights…

The majority held, however, that the making of a possession order against a defendant who had no legal right to remain on the premises could only be challenged on the ground that the relevant law was not compatible with the convention. No challenge could be based on the personal circumstances of the defendant.

In *Doherty v Birmingham City Council*[12], the House of Lords modified its previous decisions to the extent of holding that a defendant could challenge, on conventional public law grounds, a local authority's decision to evict him in the possession proceedings themselves rather than having to bring separate proceedings for judicial review. But this right did not extend to permitting a proportionality challenge based on the defendant's particular circumstances.

The unsuccessful appellants in *Kay* took their case to Strasbourg (*Kay v UK*[13]). They succeeded. The court applied its reasoning in an earlier case called *McCann v United Kingdom*[14]. In that case it ruled:

> The loss of one's home is the most extreme form of interference with the right to respect for the home. Any person at risk of an interference of this magnitude should in principle be able to have the proportionality of the measure determined …notwithstanding that, under domestic law, his right of occupation has come to an end.

And so, inevitably, the Supreme Court had to reconsider the House of Lords jurisprudence. We did so, sitting

nine strong, in *Manchester City Council v Pinnock*[15]. Lord Neuberger wrote the judgment of the court. He said (para 47):

> This court is not bound to follow every decision of the European Court. Not only would it be impractical to do so: it would sometimes be inappropriate, as it would destroy the ability of the court to engage in the constructive dialogue with the European Court which is of value to the development of Convention law…Of course we should usually follow a clear and constant line of decisions by the European Court…But we are not actually bound to do so….
>
> Where, however, there is a clear and constant line of decisions whose effect is not inconsistent with some fundamental substantive or procedural aspect of our law, and whose reasoning does not appear to overlook or misunderstand some argument or point of principle, we consider that it would be wrong for this court not to follow that line'.

And so, finally, we capitulated and held that, before making a possession order, a judge had to consider any issue of proportionality that was raised having regard to all the material facts.

Lord Irvine, who as lord chancellor promoted the Human Rights Act, gave a speech for the Bingham Centre on 14 December last year, in which he attacked our subservience to the Strasbourg Court. He described *Pinnock* as the culmination of a 'notorious line of cases'.

He complained that we had held that the Strasbourg Court's requirements had to be met 'even where parliament had established a tenancy regime which was specifically intended to provide for an expedited eviction procedure in order to protect the rights of those in greater need of the public sector accommodation and the rights of neighbours not to be subjected to anti-social behaviour'. I shall say more about that speech later. First I want to deal with a line of cases that Lord Irvine attacked with equal vigour.

In one of the law lords' finest moments, they struck down regulations introduced after 9/11 which provided for the indefinite detention without trial of aliens suspected of terrorism. Parliament riposted by inventing control orders. Control orders permitted restrictions to be placed on terrorist suspects that fell short of the 'deprivation of liberty' that would violate article 5 of the convention. To justify the imposition of a control order the secretary of state often had to rely upon information that could not be made public because it would injure national security. To meet this problem parliament had introduced a system of closed evidence, which could not be disclosed to the terrorist suspect, but would be disclosed to a special advocate whose duty it was to represent the terrorist suspect's interests.

A control order was placed on a terrorist suspect known as MB. The control order was justified by the home secretary as being necessary to prevent MB travelling to Iraq to fight against British and other coalition forces. But the reasons for suspecting that he was about to behave in this way were not disclosed to him.

They were put before the court as closed material. He challenged the control order on the ground that the admission of closed material was contrary to his convention right to a fair trial under article 6 of the convention.

At first instance the judge accepted his argument and made a declaration that the relevant legislation was incompatible with the convention. The home secretary appealed to the Court of Appeal. I presided as lord chief justice, together with Sir Anthony Clarke, who had succeeded me as master of the rolls and Sir Igor Judge, who was to succeed me as lord chief justice. We allowed the appeal. We held that reliance on closed material was permissible under article 6 provided that appropriate safeguards were in place to protect the individual. We ruled that the use of a special advocate, together with the relevant rules of court, provided appropriate safeguards.

MB appealed to the House of Lords (*Home Secretary v MB*[16]). There was copious citation of Strasbourg authorities. There was a dispute as to whether Strasbourg had approved the use of closed material and special advocates. MB's appeal was dismissed. The House held that the use of closed material would not automatically make a trial unfair. It depended on the circumstances. Sometimes disclosure of material which the home secretary wished to keep closed would be essential if the trial was to be fair and the home secretary would be required to choose between disclosing the evidence or not relying on it. Usually it would be necessary in the interests of a fair trial to disclose the gist of the case against the suspect.

Lord Brown suggested, however, that there might

be some cases where the closed material was so compelling that the court could, without the risk of injustice, found its decision upon it on the basis that it would have made no difference if it had been disclosed to the suspect.

This decision of the House of Lords was not generally well received, though no doubt it pleased the home secretary. The reasoning of their lordships was said to be unclear. In particular it was not clear whether the majority of the House had accepted Lord Brown's 'makes no difference' test.

In these circumstances it is not surprising that permission was given to AF, AN and AE, three further terrorist suspects who had been made subject to control orders, to appeal to the House of Lords (*Secretary of State for the Home Department v AF, AN and AE*[17]). What was perhaps surprising is that the Court of Appeal itself gave leave to appeal against its own decision, observing that it was not sure that it had correctly interpreted the decision of the majority of the House of Lords in MB. I can summarise that interpretation as follows. The appropriate test of a fair trial is what is fair in all the circumstances. The suspect should be provided with as much information as possible, if necessary by giving him the gist of the case against him.

If even this cannot be done because of the demands of national security, he must be provided with a special advocate.

In such a case there is no principle that the hearing will be unfair unless the suspect is given an irreducible minimum of allegation or evidence against him.

This finding was of critical importance, because in the case of each appellant, the grounds for suspecting him of involvement in terrorism were contained almost exclusively in the closed material.

By the time that these appeals came before the House of Lords, I had succeeded Lord Bingham as the senior law lord, so that I presided over the appeals. A week before the hearing, the Grand Chamber of the Strasbourg Court gave judgment in a case called *A v United Kingdom*[18]. That case involved applications by no less than 11 aliens who had been detained as terrorist suspects under the first batch of legislation that followed 9/11. Among the matters of which they complained was the use of closed material, and the Strasbourg Court dealt with this in great detail. It referred to the decision of the House of Lords in MB and the decision of the Court of Appeal in *AF* itself. In giving my judgment I summarised the most material part of the Grand Chamber's decision as follows (para 59):

> The controlee must be given sufficient information about the allegations against him to enable him to give effective instructions in relation to those allegations.
>
> Provided that this requirement is satisfied there can be a fair trial notwithstanding that the controlee is not provided with the detail or the sources of the evidence forming the basis of the allegations. Where, however, the open material consists purely of general assertions and the case against the controlee is based solely or to a decisive degree on closed materials the requirement of a fair trial will not be satisfied, however cogent the case based on the closed materials may be.

Lord Rodger resorted to Latin – 'Argentoratum locutum, iudicium finitum, thankfully adding the translation 'Strasbourg has spoken, the case is closed'.

I held that in circumstances where the Grand Chamber had dealt fairly and squarely with the point at issue, its decision was definitive and that we had to follow it. All my colleagues, and exceptionally we had sat nine strong, agreed. Lord Hoffmann did so with great reluctance, ending his judgment (para 74) 'This, however, is what we are now obliged to declare to be the law'. Lord Rodger resorted to Latin – '*Argentoratum locutum, iudicium finitum*, thankfully adding the translation 'Strasbourg has spoken, the case is closed'.

I have referred to the lecture in which Lord Irvine objected to this decision. He said that the attitude of the House of Lords ran counter to the effect of section 2 of the Human Rights Act. That only required a court to 'take account' of the Strasbourg jurisprudence. This left the court free to make up its own mind on the application of the convention. Not only free to make up its own mind, but obliged to do so.

He said that section 2 obliged the court to confront the question of whether the relevant decision of the Strasbourg Court was sound in principle and should be given effect domestically. The domestic court was bound to decide each case for itself.

Even a recent and closely analogous decision of the Grand Chamber could not absolve a judge from deciding a case for himself. It was not open to him simply to acquiesce to Strasbourg. Lord Irvine has not been alone in this point of view. It echoed views repeatedly expressed by Professor Francesca Klug and Helen Wildbore (see, for instance, their article in European Human Rights Law Review 2010[19]) This is what they said about our decision in *AF:*

> A number of the judges in *AF* profoundly disagreed with the decision of the ECHR and believed that it fundamentally failed to strike the right balance between the Article 6 rights of the terrorist suspects and the Article 2 and 3 rights of the potential victims of any terrorist atrocity. If that disagreement and their estimation of its likely adverse consequences for the national security of the UK were serious enough, then under section 2 the judges were not obliged to follow, and should not have followed, the Strasbourg Court's decision. The point is of foundational importance. It would strike at the very heart of the integrity of our Courts if the Human Rights Act obliged them to declare our law to be something which they regard as fundamentally unsound in principle and damaging to the interests of the people of Britain simply because of the latest decision of the Strasbourg Court. Section 2 emphatically does *not* impose upon our judges so invidious an obligation.

This purple passage was over the top. The reality is that most of us in *AF* reached the conclusion that the Strasbourg Court had got it right.

But it is not only those outside the court who have attacked the 'no more and certainly no less' or 'no less and certainly no more' approach to following Strasbourg. Lord Kerr, who was lord chief justice of Northern Ireland and who moved from that office to become a founder member of the Supreme Court has declined to adopt this approach. In *Ambrose v Harris (Procurator Fiscal)*[20] Lord Hope expressed the opinion that parliament did not intend to confer on the courts of the United Kingdom the power to give more generous scope to convention rights than that found in the jurisprudence of the Strasbourg Court. In this year's Clifford Chance lecture Lord Kerr publicly stated his disagreement with this proposition. He criticised a statement of mine in *Smith v Minister of Defence* that we should not hold that the armed forces of a state fell within its jurisdiction for the purposes of the Human Rights Convention, even when they were outside the territorial jurisdiction of that state, unless and until Strasbourg so held. In *Ambrose v Harris Procurator Fiscal* he dissented from the majority because he could not agree with the statement of Lord Hope that parliament did not intend to confer on the courts the power to give a more generous scope to convention rights than that found in the jurisprudence of the Strasbourg Court.

Lord Wilson, who has recently joined the court from the Court of Appeal, has also placed a question mark on the 'no more and certainly no less' approach. In his judgment in *Sugar v BBC* he said that he would welcome an appeal in which it would be appropriate for the court to consider whether it might now usefully do more than shadow the Strasbourg Court in the manner hitherto suggested – no doubt sometimes in aid of further development of human rights and sometimes in aid of their containment within proper bounds.

Our present coalition government has not criticised the Supreme Court for failing to give a more generous interpretation of the Human Rights Convention than Strasbourg. We have, however, come in for some criticism for the way that we have interpreted the convention. Let me give you an example. In April 2010 we gave judgment in an appeal by the secretary of state for justice – i.e. the lord chancellor – against a judgment of the Court of Appeal in favour of two sex offenders (*R(F) v Justice Secretary)*[21]. The first had been sentenced when he was only 11 years of age. The second was an adult offender. The nature of their offences had the automatic result under the *Sexual Offences Act 2003* that they were, in effect, put on a sex offender's register, which carried with it some quite exacting requirements such as the obligation to report in person to a police station in the event of making a trip abroad or leaving home for a period. They each brought judicial review proceedings claiming a declaration that the Sex Offences Act was incompatible with their article 8 rights to respect for their private life in one respect only.

This was that the Act had no provision under which an individual could apply to be taken off the register on the ground that he no longer posed a risk. You were on the register for life. The Divisional Court made the declaration sought. The Court of Appeal dismissed the secretary of state's appeal, as did we when the case reached the Supreme Court. We examined the Strasbourg jurisprudence and looked at the position in other countries. We reached the conclusion that some

who had committed sexual offences in the past would be able to show that they no longer posed a risk and that there was no justification for an absolute bar of the right to apply to be taken off the register. When we gave this decision the Labour Party was still in power. If they did not like our decision they were under no obligation to change the law, albeit that if they did not do so they might be in breach of the United Kingdom's obligations under the Human Rights Convention. They decided, however, to change the law. When the coalition succeeded them, officials prepared some different proposals for legislative change so as to give sex offenders the right, after a lengthy period, to apply to be taken off the register. When ministers discovered these proposals they were concerned that they would not be popular with the public. So they decided to blame the judges, giving the false impression that we were forcing these changes on them. They did so by a concerted attack. The prime minister and the home secretary each said that they found our decision 'appalling' and the Home Office minister in the House of Lords made a similar statement. The home secretary stated 'It is time to assert that it is parliament that makes our laws and not the courts'. This attack on our court was unjustified and inappropriate.

I do not believe that there was any malice in it. It merely demonstrated that ministers, newly in power, did not appreciate the convention under which ministers do not attack judicial decisions, and judges do not attack government policy. I believe that the lord chancellor had a word with his colleagues and that they are now better informed.

Nonetheless, there is in the United Kingdom a body of opinion, that includes the government, that believes that the Strasbourg Court has been extending its empire into realms that should be left to the individual member states. Strasbourg in theory accords to individual states what it calls a 'margin of appreciation' as to how they comply with the convention. Our court considered a challenge to the practice of the police retaining indefinitely DNA samples of those convicted of, or charged with, criminal offences. We held that this was a justifiable and proportionate interference with the right to private life, because the practice resulted in criminals being caught who would otherwise have got away with their crimes. To our dismay, and that of the government, Strasbourg held that we were wrong and that limits had to be placed on DNA retention. Unfortunately the Strasbourg Court did not spell out what those limits were.

We have signed up to a protocol which guarantees the right of free elections at reasonable intervals by secret ballot.

...there is in the United Kingdom a body of opinion, that includes the government, that believes that the Strasbourg Court has been extending its empire into realms that should be left to the individual member states.

The government has been incensed that, in a case called *Hirst v United Kingdom*[22], the Strasbourg Court held that we have breached this protocol by imposing a blanket ban on anyone who is in prison being allowed to vote.

More recently the Strasbourg Court has provoked ministerial dismay and public anger by ruling that it would offend the human rights of a gentleman called Abu Qatada if we deport him to his own country, which is Jordan. He is an Islamic radical cleric whom the Jordanians wish to try on charges of terrorism. We do not want him in our country. He objected to being expelled to Jordan on the grounds that he would risk being tortured there and that he would not receive a fair trial because evidence obtained by torture would be admitted against him. The United Kingdom government obtained specific assurances from Jordan that he would not be tortured and the Supreme Court ruled that the possibility that evidence obtained by torture would be used at his trial was not a bar to his deportation. Strasbourg did not agree. They held that the UK could properly rely upon the Jordanian assurances that he would not be tortured, but that he could not be sent to a country where there was a likelihood that evidence obtained by torture would be used against him. So at the moment we are stuck with him.

Cases such as these have resulted in some organs of our media launching a virulent attack on both the Strasbourg Court and the European Convention itself.

'Strasbourg has neither authority nor legitimacy' says the *Daily Telegraph*; 'The European Court of Human

Rights must mend its ways or Britain should quit' trumpets the *Daily Express*.

Britain has currently the presidency of the Council of Europe and David Cameron has taken advantage of this to try to get agreement to some reforms to the Strasbourg Court. 'Prime Minister tells Euro judges to stop meddling in British Justice' was how the *Mail on Sunday* trailed a speech to be made by Cameron at Strasbourg a few weeks ago. Happily the trailer gave a false impression of the quite balanced speech that Cameron actually delivered. '*Menace sur la Cour Européene des droits de l'homme*' 'the European Court of Human Rights under threat' was the headline in *Le Monde*. In fact, on the face of it, what Cameron is proposing makes a lot of sense. Because individual citizens of the member states have an individual right to petition the Strasbourg Court, there are now over 152,000 cases pending. Cameron is proposing that cases should be screened and that the European Court should only hear applications that raise an issue of principle. If no defect is alleged in the system for protecting convention rights in the member state or in the legal principles applied by the domestic court to the applicant's case, but the applicant simply alleges that the court misapplied those principles, his application should not be entertained.

In short, the Strasbourg Court should not act as a final court of appeal in human rights cases, but only entertain applications that raise issues of principle. The only problem with this is that it will open the door to member states where the rule of law is not as well respected as in the United Kingdom; paying lip service to the convention principles, but not applying them in practice.

Parallel with these developments the government is considering replacing the current Human Rights Act with a British Bill of Rights, under which there will be no requirement for our courts to follow Strasbourg jurisprudence. It would not be right for me to express in public any doubts that I might have about this proposal, but what I can suggest is that concerns about our slavishly following the Strasbourg jurisprudence are out of date. In some recent cases we have gone further than the Strasbourg Court. Let me give you three examples. In *R (Limbuela) v Secretary of State for the Home Department*[23] we held that article 3, which prohibits inhuman or degrading treatment, imposed a positive duty on the state to provide subsistence to asylum seekers.

In *EM (Lebanon) v Secretary of State for Home Department*[24] we held that it would involve a breach of the right to respect for family life guaranteed by article 8 for a mother and daughter to be deported to Lebanon because they would be separated on their return. And in *R (G)(Adoption)*[25] we held that a blanket ban in Northern Ireland on homosexual couples jointly adopting infringed article 8. Each of these decisions was without precedence in the Strasbourg jurisprudence. They were in fact decisions of the House of Lords shortly before the Supreme Court was set up.

Because individual citizens of the member states have an individual right to petition the Strasbourg Court, there are now over 152,000 cases pending.

More significant is a decision of the Supreme Court that I delivered that refused to follow a clear statement of principle of the Strasbourg Court. It is called *R v Horncastle*[26]. Let me start with the Strasbourg jurisprudence. The relevant decision was one against the United Kingdom in relation to a gentleman called Al Khawaja. He was a consultant physician who had been charged and convicted on two counts of indecent assault on two female patients. One of them had subsequently committed suicide, but not before she had made a full statement to the police. That statement was essentially the only evidence on the count that related to her. It received support from similar fact evidence. The trial judge allowed it to be given in evidence under the *Criminal Justice Act 1988*, which gave the court discretion to admit the statement of a witness who had died.

Mr Al Khawaja applied to Strasbourg, alleging that his right to a fair trial under article 6 had been infringed by the admission of this hearsay evidence.

The 4th Section of the court upheld his application. They applied a line of Strasbourg jurisprudence to the effect that a conviction could not be founded on hearsay if this was the sole or decisive evidence against the defendant. The United Kingdom invited the Strasbourg Court to refer this case to the Grand Chamber for

reconsideration. The Strasbourg Court agreed to do this, but deferred the Grand Chamber hearing pending the decision of the Supreme Court in *Horncastle,* for this raised the identical issue.

In *Horncastle* the defendants were charged with causing grievous bodily harm with intent. The victim gave a witness statement to the police describing the circumstances of the attack, but died of other causes before the trial. The trial judge admitted the statement in evidence under the *Criminal Justice Act 2003*, which made detailed provision for the circumstances in which hearsay evidence could be admitted in a criminal trial, which were subject to a number of safeguards. The hearsay statement provided evidence that was decisive in leading to the defendants' convictions. They appealed, unsuccessfully to the Court of Appeal and then on to the Supreme Court. The appeals were heard with other appeals raising the same issue. We sat seven, rather than the usual five, and I invited the lord chief justice, Lord Judge, to be one of our number. The defendants naturally relied on the 'sole or decisive' principle of Strasbourg jurisprudence. They argued that our duty under section 2 of the Human Rights Act 'to take account' of this jurisprudence meant that we should apply the principle. We declined to do so. We dismissed the appeals.

I subjected the Strasbourg jurisprudence to critical analysis. I found no discussion of principle that justified the sole or decisive rule. I then summarised the position as follows (para 91):

> The sole or decisive test produces a paradox. It permits the court to have regard to evidence if the support that it gives to the prosecution case is peripheral, but not where it is decisive. The more cogent the evidence the less it can be relied upon. There will be many cases where the statement of a witness who cannot be called to testify will not be safe or satisfactory as the basis for a conviction. There will, however be some cases where the evidence in question is demonstrably reliable.'

I then gave this example:

> A visitor to London witnesses a hit and run road accident in which a cyclist is killed. He memorises the number of the car, and makes a statement to the police in which he includes not merely the number, but the make and colour of the car and the fact that the driver was a man with a beard. He then returns to his own country, where he is himself killed in a road accident. The police find that the car with the registration number that he provided is the make and colour that he reported and that it is owned by a man with a beard.
>
> The owner declines to answer questions as to his whereabouts at the time of the accident.

I suggested that parliament, when formulating the relevant legislation, had put in place safeguards against unfairness from the use of hearsay evidence that were less draconian than Strasbourg's sole or decisive rule.

As to the duty to follow Strasbourg jurisprudence I said this (para 11):

> The requirement to 'take into account' the Strasbourg jurisprudence will normally result in the domestic court applying principles that are clearly established by the Strasbourg court. There will, however, be rare occasions where the domestic court has concerns as to whether a decision of the Strasbourg court sufficiently appreciates or accommodates particular aspects of our domestic process. In such circumstances it is open to the domestic court to decline to follow the Strasbourg decision, giving reasons for adopting this course. This is likely to give the Strasbourg court the opportunity to reconsider the particular aspect of the decision that is in issue, so that there takes place what may prove to be a valuable dialogue between the domestic court and the Strasbourg court. This is such a case.

And I concluded my judgment:

> I have taken careful account of the Strasbourg jurisprudence. I hope that in due course the Strasbourg court may take account of the reasons that have led me not to apply the sole or decisive test.

I waited, with bated breath, to see what the Grand Chamber did when they reconsidered *Al Khawaja.* They referred to *Horncastle* and went on to say this about the 'sole or decisive' rule:

> It would not be correct, when reviewing the question of fairness, to apply this rule in an inflexible manner. Nor would it be correct for the court to ignore entirely the specificities of the particular legal system concerned and, in particular its rules of evidence, notwithstanding judicial dicta that may have suggested otherwise… To do so would transform the rule into a blunt and indiscriminate instrument that runs counter to the way in which the court approaches the issue of the overall fairness of the proceedings, namely to weigh in the balance the competing interests of the defence, the victim, and witnesses, and the public interest in the effective administration of justice.

The court considered the statutory and common law safeguards that exist in relation to the admission of hearsay evidence under our system and concluded that they were 'in principle strong safeguards, designed to ensure fairness'.

The court went on to reverse its decision in *Al Khawaja*, holding that the admission of the hearsay evidence had not infringed the defendant's article 6 right to a fair trial.

I believe that this has been a very significant development in the relations between our court and the Strasbourg Court. Shortly before the Strasbourg Court delivered its judgment in *Al Khawaja,* Sir Nicolas Bratza, the president of that court, delivered a paper on 'the Relationship between the UK courts and Strasbourg'[27]. He referred to the reaction in the UK to the 'prisoners' votes' case and remarked 'The vitriolic, and I am afraid to say, xenophobic fury directed against the judges of my court is unprecedented in my experience, as someone who has been involved with the convention system for over forty years'. He went on to comment on the *Ullah* approach and its reverse 'no less and certainly no more' as suggesting 'a position of deference from which it is difficult to have an effective dialogue. It is not' he said 'the way in which I or my fellow judges view the respective roles of the two courts.' He went on to commend my judgment in *Horncastle,* concluding 'I firmly believe that such dialogue can only serve to cement a relationship between the two courts which, whatever criticisms may be levelled against the Strasbourg Court, is a sound and solid one'. And that, I think, is a good note on which to end this lecture.

Endnotes

1. (1978) 2 EHRR 1
2. [1930] AC 124
3. (1989) 11 EHRR 439
4. (1996) 23 EHRR 413
5. [2004] UKHL 26; [2004] 2 AC 323
6. [2007] UKHL 26; [2008] AC 153
7. [2001] 2 AC 550
8. (2002) 34 EHRR 3
9. [2003] UKHL 43; [2004] 1 AC 983
10. (2004) 40 EHRR 189
11. [2006] UKHL 10; [2006] 2 AC 465
12. [2008] UKHL 57; [2009] 1 AC 367
13. [2011] HLR 13
14. (2008) 47 EHRR 913
15. [2010] UKSC 45; [2011] UKSC 6; [2011] 2 AC 104
16. [2008] UKHL 46; [2008] 1 AC 440
17. [2009] UKHL 28; [2010] 2 Ac 296
18. (2009) 49 EHRR 625
19. 6, 621-630
20. [2011] 1 WLR 2435
21. [2010] UKSC 17; [2011] 1 AC 331
22. (2006) 42 EHRR
23. [2006] 1 AC 396
24. [2009] 1 AC 1198
25. [2009] 1 AC 173
26. [2009] UKSC 14; [2010] 2 AC 373
27. (EHRLR 2011, 5, 505-512)

Australia on trial

By Bruce Kercher

It is widely believed that the Myall Creek murder trials in 1838 resulted in the first executions of Europeans for the murder of Aborigines. Recent work in the archives and in colonial newspapers has uncovered earlier cases. As far as we know at present, the hideous distinction of being the first white man to be hanged for killing an Aborigine belongs to a man named John Kirby. In 1820, he was hanged for the murder of Burragong, alias King Jack, a 'native chief' of Newcastle. Kirby and an accomplice named John Thompson were escaped prisoners, who were captured by Aborigines. Kirby killed Burragong as he was being escorted back to town.

Europeans were convicted of killing Aborigines as early as 1799. In that year, Edward Powell a constable, and four others took part in a punitive raid, in a tit for tat response to Aboriginal attacks. They were found guilty but not hanged. Aborigines were sometimes convicted and executed for killing or attacking whites too: the first, apparently, was a man named Mow-watty, in 1816. Well before the Myall Creek trials in 1838, it was very firmly established that the colony's Supreme Court had power to try inter-racial killing, and even inter se killing among Aborigines.

There was a vast gap between stating the law and ensuring that it was enforced. In 1827, Lieutenant Nathaniel Lowe of the 40th regiment was placed on trial for the murder of an Aboriginal man named Jacky Jacky. Lowe's counsel, WC Wentworth and Robert Wardell, made a formal argument that the law had no jurisdiction on the frontier, that the only relevant principle was an eye for an eye. The Supreme Court rejected this, but that was not the end of the case. Lowe was then put on trial before a jury of seven of his brother military and naval officers. Despite the strength of the case against him, he was acquitted after only five minutes' deliberation. As the *Australian* newspaper reported it on 23 May 1827, 'Loud and general applause accompanied this announcement of the verdict. The numerous friends of Lieutenant Lowe crowded round to congratulate him on the happy termination of the trial. A second burst of applause was given as he triumphantly left the court.'

Hundreds of other cases show a similar ambiguity about the application of law in the Australian bush. The colony's basic law should have been the law of England, but what was suitable to Jane Austen and her family, did not always work in Australia. It was a more egalitarian place, one in which land was available for the taking (from Aborigines) and in which the outcasts of English and Irish society were able to make lives which would have been impossible had they not been transported.

This was evident in the first civil trial in Australia. Henry and Susannah Cable (or Kable) were two convicts whose luggage had gone missing on the voyage of the first fleet. In July 1788, they successfully sued a ship's master, Duncan Sinclair. English law would not have allowed them to hold property, let alone sue to recover compensation for its loss. Both had been sentenced to death and subsequently transported. The civil death called attainder should have lasted until the expiry of their sentences, but the Sydney court overlooked that. As a result, the colony was less a jail than a place of exile. Prisoners were able to earn an income and live relatively independent lives. Henry Kable went on to a vigorous career as a merchant (followed by a crash).

From its first civil case, then, the rule of law was in force in New South Wales, but it was not always strictly English law. The formal law required that English law should have been in force, but its ambiguities and the flexibility in the application of the reception rule, resulted in something different. Colonial people sometimes refused to obey the received laws of England. The judges in Lieutenant Lowe's case stated the law, but the jury apparently had a different view of the legal position of Aborigines. Sometimes this resistance to law had the effect of changing the formal law, squatting being the best example. The governors set formal limits to settlement, beyond which settlers were not meant to work. Mass refusal to obey these limits was not put down by legal power, but was managed through administrative means. The government issued licences to occupy squatting runs, followed eventually by the pastoral leases which still cover vast areas of Australian land. Thus the initiative for new law was not always taken in court rooms or legislative chambers. These conflicts were eventually mediated in the courts however, where we heard the stories of a new society, with sometimes tenuous connections to 'home'.

The uncovered colonial cases are being placed at Macquarie University's Colonial Case Law website, and will form part of Austlii's new Australian Legal History Library. The colonial newspapers are increasingly being placed online by the National Library of Australia.

Some recollections of a golden age

By John P Bryson QC

I worked in the law from 1954 until 2011 in many positions from junior clerk to the Court of Appeal, and had opportunities to observe many barristers and judges, their abilities and their styles. There is a ceaseless tide at bench and bar; when seven years have passed the array of ability and leading personalities has changed: many are still there, but the kaleidoscope has been shaken. Some stay at the top for decades, but there is always room at the top. I first saw cases fought out in 1955; I went to the bar myself in 1966. To me it seems that there was a golden age from about 1960 to about 1980 when men who had served in the Second World War were at the ascendancy of their careers – distinguished for learning – but there are always those, distinguished also for powers of expression which I attribute in part to education centred on language and literature including the Latin studies which they themselves belittled: distinguished most for untroubled and well-based self-confidence, fearlessness which I attribute to war service and the experience of survival. Every age is a golden age to someone, but this was my observation. The bar is always led by splendidly able people who seem to have been formed by nature for that purpose, and I have never lost my wonder at them, but in those years the leaders of the bar were golden for me. Reflections like these have led me back to the background of the legal world I entered.

When the war ended in 1945 I was eight years of age. The war had been the main event in the news for as long as I could remember, but I had little idea of what it was. Children were not told the horror of it, and news and public discussion maintained a determined optimism and portrayed the thing as if it were a great adventure story. It was a crime to spread alarm and despondency, and soldiers were often told 'Maintain a positive outlook and a cheerful disposition.' Wartime publications usually exemplify this. All adults must have known the falsity of this, as friends departed overseas and were reported dead, wounded or captured. Widows and the wounded must have been within everyone's close knowledge. My mother's cousin died while training and she did not tell me of him for twenty years. So far as I understood in my childhood innocence, it could all have been a story in the *Boys' Own Paper*. Over the next twenty years or so the works published about the history of the war became more real and I gradually came to know what I had lived through and the danger of it all, still by far the greatest danger of my whole lifetime. The Cold War was far less threatening.

I have quite strong recollections of the impact of war on life in Sydney during the war and during the long period when its effects continued. I heard many anecdotes from lawyers who practised in those days: for some, their minds were full of it for decades. I remember some wartime scenes, which I saw with the eyes of a child and did not understand until many years passed. I remember seeing a huge ship, which I was later told was the *Queen Mary*; it seemed to fill the harbour when viewed from Circular Quay. I remember travelling on the Manly ferry and passing through the narrow submarine gate. I remember seeing Captain Collins and the crew of HMAS *Sydney*, returned from the Mediterranean, marching in Macquarie Street through a cheering crowd. This must have been 11 February 1941when a history book says they were honoured in this way. The ship and crew, under another captain, were lost in November of that year. I remember seeing a display of captured German tanks and guns in the grounds of Government House, where the public was rarely admitted.

To me it seems that there was a golden age from about 1960 to about 1980 ...

At my first school at Avoca near Bowral in 1942, kindergarten training included practising evacuation from the schoolroom to a slit trench in the playground. For a few months our family lived on a farm a mile from the school. The rural roads bore much military traffic, preparing against a feared incursion by the Japanese to the port and steelworks on the coast. The farmer worked under controls which required him to supply the army with potatoes, and rabbit skins for felt hats. After a few months our family returned to the city. At my next school in Burwood there were elaborate covered trench shelters and dugouts in the playground. My father became an air raid warden, with a steel helmet and a whistle. He was trained to deal with incendiary bombs by picking them up with a long-handled wooden shovel and rake. As well as teaching high school he was required to work shifts in factories, and spent many evenings bottling tomato sauce. He was also required to work on the wharves, for which he wore a blue singlet and learned to wear a wharfie's

hook on his shoulder. He described to me sorting out a shipload of potatoes which had been kept at sea far longer than was good for them and required to be examined one by one to reject those which had rotted. My mother who had left teaching on her marriage 10 years earlier was recalled and resumed her career, with great success.

Every window bore blackout paper and reinforcement tapes. Signs identifying suburbs and railway stations were removed to baffle any invader. Buses carried shields to direct the glare of their headlights downwards, and many buses were painted in camouflage colours. In the city signs pointed to the nearest air raid shelter. The submarine net stretched across Sydney Harbour from Bradleys Head, with a small gate for shipping through which the Manly ferry passed, as did the Japanese submarine when it arrived. Manly Beach was strewn with coils of barbed wire, and to reach the water it was necessary to follow a roundabout track through several gaps in the wire.

The war greatly accelerated social change, enhanced ability and devalued social position.

Infrastructure works around Sydney suffered no war damage, but they were in a neglected state when the war began. There was energetic construction of roads and railways in the 1920s, but relatively little happened after the Harbour Bridge was completed. Defence of Sydney against invasion presented strategic nightmares; there were few roads in or out. There was no road bridge over the Hawkesbury River, and all motor traffic crossed on the ferry at Peats Ferry. The Hawkesbury River railway bridge was foundering, and trains crossed it very slowly. The bridge was guarded by elderly soldiers, ruthless and toothless. A new rail bridge and road bridge were constructed during the war and completed about the time it ended. Bells' Line of Road was reconstructed and made trafficable: for some years it was open only to military traffic. The Mount Kiera Road was constructed: until then the only descent was at Bulli Pass.

The Americans and their determined ways gave Sydney some severe shocks. They brought with them an amplitude of resources beyond what anyone here had ever seen, reinforced by determination and directness. If they needed something they insisted, not at all politely, and they got what they insisted on. They pursued their military necessities. They felt no embarrassment at the display of their resources. When General MacArthur and the American army arrived in Sydney and established their headquarters they needed many telephones and told the Postmaster General's Department what they required. The PMG usually took several years to install a telephone, and they explained to the Americans how difficult it was to give them what they wanted. The Americans were not willing to wait, but sent their trucks around suburban streets to remove telephones from public phone boxes, and installed them in their headquarters. In some ways they behaved as if Sydney were a conquered province. If their own troops misbehaved on leave their military police were ready with firearms.

When the war began a social revolution was already under way in New South Wales. No-one gets shot or frightened in Australian revolutions, but they happen all the same. When my father attended East Maitland Boys' High School about 1915 there was no other country high school in the state system. All other high schools were in Sydney or Newcastle, and there were few. Public education was significantly improved and new high schools began to be established in the 1930s. The education standards of the general public improved, and this eventually had an impact on advocacy as jurymen developed their critical faculties. Reform of the Legislative Council in 1933, when members appointed for life were replaced by members indirectly elected, is an indication of a kind that the profound conservatism of society was breaking down, or was becoming less profound. The war greatly accelerated social change, enhanced ability and devalued social position. The war brought cruel losses of highly talented people with a strong sense of public responsibility, but it also brought the great advantage of the inflow into higher education of many people who otherwise would not have seen university, and they enhanced the community's stock of talents. The social revolution continued; indeed it has continued rapidly all my life, and its main driver has been ever-increasing prosperity. There is far more for everybody now, more opportunities and more resources, and people live at about four times the rate at which people lived in the 1940s, as I remember it.

During the war there were economic controls of such

severity that it is difficult to depict them to anyone who has not lived under such stringency. The economy was marshalled into war production, manufactures for the armed services and food for the Allied Forces in the Pacific and for Britain. Rationing of consumer goods took effect by stages early in the war. The high point arrived about 1942 when there was severe rationing of all clothing and footwear, significant foods such as milk, bread, butter and meat, and liquid fuel, particularly petrol. Many products disappeared: there were few sweets and no chocolate, and any flavour of ice-cream other than vanilla was forbidden and stayed so until 1949. There was no new crockery, and whatever old stock there was had to serve the market until the war ended: cups, saucers and plates were manufactured out of bottle glass. Everything was in short supply, and bottled beer and lemonade could only be bought on production of an empty bottle in exchange.

Those who had backyards grew as much food as they could, and there were door to door sellers of rabbits, which existed in plague numbers and were not rationed. No chicken meat could be had, unless you kept your own, which chicken thieves made difficult. Suspicious characters surreptitiously sold hams which turned out to be wombat. Rigid price controls covered practically everything that one might wish to buy. Purchase of half a pound of butter at the corner store, if they had any and they often did not, required production of a ration book and scissors to cut off the coupons. Tea was severely rationed, although the price of tea was subsidised, to encourage consumption of products of the British Empire; coffee, which came from Brazil, was practically unobtainable for much of the war. Emergency legislation regulated an astonishing number and range of aspects of the economy, cream filling in cakes was forbidden, as were pink icing, waistcoats, trouser cuffs and ladies' corsets. Racehorses could not be transported by vehicles and had to walk between racecourses, and permission from Canberra was needed to purchase an alarm clock. The lengths of broom handles and of shirt tails were prescribed. Evening dress could not be sold, and could not be dry-cleaned. A permit was needed to travel interstate, or to take a long train journey.

Rationing of petrol had severe effects on the economy overall. Milk and bread delivery men used horses and carts. Many businesses could not function, and commercial travellers used elaborate gas producers bolted onto their cars, burning coke or charcoal to produce explosive gas which wore their engines to destruction. Cars could not be replaced. (Coke was a by-product of the coal used in production of town gas.) Many people placed their cars on blocks and left them unused for four or five years. Petrol rationing became a huge administrative task, and fraudulent dealing with petrol tickets and stealing fuel became industries. Great power was in the hands of public officers who had discretion to issue petrol ration tickets in emergencies, and rumours of corruption surrounded such people. Parliamentary candidates had an entitlement to petrol tickets so that they could campaign, and some nominated for office and forfeited their deposits to get tickets at a cheaper rate than the black market. At that time practically all petrol was imported from the Gulf of Mexico, either from the United States or Mexico, by ships which had to pass through the Panama Canal and then cross the Pacific, taking huge diversions southward to stay well away from warlike activities; with practically complete success. Fuel ships to Australia were fairly safe from submarines, whereas losses in the Atlantic were huge. Early in the war the Australian coast was beset by enemy action, first German raiders, later Japanese submarines, with severe losses. In 1944 German submarines established a base in Koepang, Timor, and did some damage to Australian shipping.

Suspicious characters surreptitiously sold hams which turned out to be wombat.

The regime of rationing, price control and general economic regulation achieved some kind of overall fairness in the distribution of resources; they kept wages and needs in a balance and kept discontent within tolerable limits: mitigated by widespread evasion and dishonesty. Many people seemed to know how to buy petrol tickets on the black market. Liquor of all kinds was officially in very short supply, but many people seemed to know where sly grog, non-rationed liquor, could be purchased at a price. Taxi drivers carried a jockey, who sat in the front seat and claimed to be a paying passenger when the cab was hailed by someone with a destination to which the driver did not wish to go. Building materials were practically unobtainable by the general public. There was a housing construction boom in 1940, but in 1941 the private construction

industry was shut down, for practical purposes completely. The needs of the war created heavy demand for services of builders and manufacturers, and if they were engaged in war production their position was quite privileged. Their workforce was exempted from conscription. Civil conscription, known as Man Power, directed labour into their employment, and they were paid in an extravagant system called 'cost plus,' in which the manufacturer was paid whatever he could convince government officers was his cost of production plus an extra 10 per cent. Manufacturers for war production led a charmed life, with assured payment and an assured workforce. As the army needed almost all manufactures, manufacturers had a highly qualified golden age, soured in various ways. Company tax reached 19s 6d in the pound, and everyone could have done without a world war, whatever they were earning.

As the war went on the volume of civil litigation declined, but the war generated much legal business.

There was rigid control over sales of land and houses. Every sale of real property required the consent of the Commonwealth treasurer. This complicated conveyancing business beyond all measure. After contracts had been exchanged they had to be sent off to a department in Canberra called Land Sales Control which was famous among lawyers for its dilatory responses. However long they took to respond, the terms of the response were reliable; treasurer's consent would be forthcoming only if the price was the value assessed by the valuer general in 1942. 1942 was the year when invasion was feared, all the energetic people who might otherwise have been establishing rural properties or other enterprises were engaged on war service or government tasks, there was practically no market and land values reached their nadir after a long decline beginning in 1929. Few transactions actually took place in accordance with treasurer's approval; solicitors had to be careful to avoid personal involvement in illegalities in which large sums of cash passed from purchasers to vendors in addition to the contracted prices.

Retail price control was enforced with energy and supported strongly by public opinion. Many people in the community took great joy in reporting that they had been charged seven pence, not six pence for half a pound of butter, or eleven pence, not ten pence for a glass of whisky. There were swarms of inspectors about, besetting shopkeepers and publicans with trap orders based on tips from the public in the hope, often satisfied, that they would be sold a glass of whisky for eleven pence, precipitating a prosecution. Punishments could be savage: a publican who sold a bottle of whisky, fixed price £1 1s 6d for £4 was sentenced to six months in prison: see *Ex parte Cullen* 44 SR 324. Presumably the magistrate felt the unavailability of whisky quite severely. Repeated offences against price control resulted in orders which required storekeepers to display banners outside their stores in huge letters: 'This store has been convicted of black marketing.' In my early days I met several barristers who had been elderly even during the war, and had been required to give their time to prosecuting such cases, a complicated matter if one required hotel accommodation in some country town while performing this duty.

It was compulsory to answer an inspector's questions and averment of facts in the information was *prima facie* evidence. The orders which fixed prices were sometimes expressed in complex or obscure ways and required the trader to ascertain further facts and make debatable calculations, and it was not really possible to comply: see Jordan CJ on the retail price of bananas in *Ex parte Ryan* 46 SR 152. Many of the reported cases in the *State Reports* of 1944 to 1947 seem to be about trifling breaches; and many more in the *Weekly Notes*. Price control could be ridiculously heavy-handed: in April 1946, when the war was well and truly over, a 1939 Buick could bring £900 but the seller was prosecuted for selling one for more than the fixed price of £434: *Ex parte Rowston* 46 SR 414. The report is indexed under national security as are all price-control cases, a classification which may have been outside the range of George Orwell's imagination.

As the war went on the volume of civil litigation declined, but the war generated much legal business. There was a proliferation of quasi-judicial boards and enquiries, and much business dealing with the enforcement of National Security Regulations and economic controls, conscription and direction of labour and the treatment of refugees and aliens. Prosecutions abounded. The

regulations and orders made under them were often drafted by unskilled people, and lawyers who could bring knowledge and ability to bear often exposed their weaknesses. Repeatedly decisions of Jordan C J nullified what unskilled draughtsmen had sought to establish. The chief justice seems to have enjoyed exposing ridiculous elements of what came before him. The attack was frequently made by Barwick KC, and the Commonwealth was frequently represented by David Maughan KC and McKillop, around whom Barwick could have run several rings before breakfast, even if he had not had Jordan CJ on the bench. So I was told by Frank Hutley, but I have not seen this particular array of counsel in any of the reported cases.

The war called into existence a huge new administrative machine. Wartime economic controls created a great deal of clerical business, forms to fill in, check and forward to someone elsewhere, far from the applicant, for a decision divorced from close knowledge. After a stagnant decade of widespread unemployment there came to be jobs for all. Many people had to live in poor accommodation, and work in places where they did not want to be in jobs they did not want to do and were not very good at. Some people of very high ability emerged. Rae Else-Mitchell became the secretary of the Commonwealth Rationing Commission at the age of 30. Many people were thrown into positions for which they had only minimal skills, ability or disposition. The War drew into public employment many people with no experience of government, little experience of responsibility, unpleasant attitudes and a persecutory outlook. Administration was characterised by adherence to routine and procedure and conformity with instructions, without imagination or flexibility, by people on whom no discretion was conferred. Interaction between bureaucracy and the public was usually unfortunate. Most clerks at the interface maintained a terse, gruff and unhelpful attitude, underlying which was the reality that there was very little that they could do. Applicants were treated as if they were trying to work the system, and successful applicants were treated as if they had done so.

As the war in Europe ended, the presence in Sydney of British forces, especially the Royal Navy, became evident. There was a huge build-up of Sydney as a naval base for a campaign of reconquest of British territory. British sailors were everywhere. In Burwood, our neighbour, in a grand house with a tennis court, entertained British officers each weekend for tea and tennis. They must have brought their own tea. It was a Home Counties scene. When many years later I read of Joan Hunter-Dunn in John Betjeman's poem I recognised the daughter of the house, who eventually married one of the English officers. He became Australia's most prominent scientist, head of the CSIRO and fellow of the Royal Society, studying stars at Parkes. The war ended a year or so sooner than the British Navy had expected, and they went off to re-establish the empire, with limited success.

One aspect of the economy which remained regulated for a very long time, long after any relation with the war had evaporated, was control over rents and lettings of business premises and houses. Controls over lettings of business premises ended little by little by 1960 or thereabouts; controls over rents and lettings of dwellings continued long after, and were a staple of litigation in my early bar practice, which commenced in 1966. Increases in rents were limited to proven increases in rates and outgoings. Eviction of a tenant was available only on proof of one of a number of stated grounds, which were difficult to prove and easy for a magistrate so minded to assert had not been proved. The landlord had to prove that suitable alternative accommodation was available: suitability was always debatable.

There were people in the legal world who had been prisoners of war, and those who had been captured in Malaya stood out for their impaired general health.

An occupant was further protected by the need for the landlord to pass through several discretionary barriers before succeeding. Sir Charles Bickerton Blackburn, a knight of the realm and chancellor of the University of Sydney, who had occupied a luxury Eastern Suburbs flat for over twenty years at 1938 rent with no more than increases in municipal rates, resisted eviction on the ground of hardship – it would be difficult to find a suitable alternative home in which to display his collection of antique furniture – and he got a patient hearing.

A greater protection for occupants than any other was the high technicality of the process at every stage – fine

points of the drafting of notices to quit were debated in detail, and often with effect, and any point would do to dismiss a landlord's summons. Murder convictions were easier to obtain than eviction orders.

Federal legislation created a statutory right of preference in employment to ex-servicemen, and this accorded with a strong general opinion in society that great assistance should be given to ex-servicemen and great forbearance extended to any shortcomings they had. In the NSW Public Service and in the legal world there were many men who had obviously been impaired by their war service. Even 15 years after the war ended people could be noticed in the public service who seemed to suffer shock and bewilderment, to have lost all force of personality. Little was expected of them and they were left to do whatever they did in unimportant jobs and small niches of the service. Some were obvious alcoholics, of whom no work was to be expected after noon. There was remarkable tolerance of alcoholism in the workplace, and this faded rapidly after about 1975. There were significant numbers of men in the workforce who bore obvious signs of war injuries. It was commonplace to see men at work who had severe permanent injuries, limbs shot off, lost eyes, limps and scars, driving lifts, collecting entrance money at swimming baths, operating switch boxes above tramlines and so forth; and in more responsible positions as well. There were people in the legal world who had been prisoners of war, and those who had been captured in Malaya stood out for their impaired general health. Many were plainly fading away in a process which took twenty or thirty years or so, although there were a few who surmounted this. Reverential awe attended dealings with these men. David Lewis practised at the bar with success and later served as a judge of the District Court although disabled by the loss of a hand and part of his arm. He took all as of course, and his disability had no observable impact on his work or attitude to life. He had several pieces of equipment in his chambers which eased the impact. His telephone handset was held permanently where he could put his ear and he opened the line by pushing a button. The ease with which he treated this disability as normal and overcame it enhanced my horror at it.

The war and earlier economic disasters left a heavy impact on life. Most ordinary equipment of daily life such as railway carriages and tram cars was aged and ramshackle, usually left over from the 1920s. Bunnerong Power Station was decrepit and unreliable. There were continual breakdowns and interruptions to electricity supply. Town gas supply was also unreliable. There were many strikes, in the coal mines, on the wharves, in the railways and electricity supply. The economy depended on coal, there were no reserves and a miners' strike soon came close to closing down the economy.

It seemed to me that those at the bar who had served in the war were imbued with high confidence by their wartime experiences.

Public buildings and government offices were decrepit, long unpainted, and subdivided with wooden panelling, inconvenient workplaces, unsafe and combustible. Hyde Park Barracks contained many court rooms and judges' chambers, discernibly subdivided out of convict barracks. The barracks had a flanking of court rooms and offices made of timber planks, erected during the First World War or earlier, draughty creaking relics, undignified, uncomfortable, inconvenient and unsafe. Some court rooms were made of fibro cement sheeting. There was no warmth in winter and no cooling in summer. A palm tree at the front of the building inspired irreverent remarks about the justice dispensed inside. For more than 10 years after 1945 only one public building was erected in Sydney. The Maritime Services Building on the western side of Circular Quay was built about 1948 in the Stalinist style, an indication of a kind of the direction in which most people felt that Australian society was heading. Only about 1955 did construction of another office building in the City of Sydney take place; the Qantas building in Hunter Street, facing along Elizabeth Street at the intersection. Slowly at first, then in a huge rush, new construction began, and many new office buildings were erected after 1960. Regrets are now expressed at the demolitions, but I am able to say, having worked in one or two of them, that there was little lost when the older government offices were demolished. I go on to say that there was little gained with the new buildings of which the present Supreme Court building is a prime example.

The telephone system was primitive. If you had a

Opening of Law Term service at St James Church, 1948. Photo: Gordon Short / Fairfaxphotos

telephone you could only dial a number yourself for Sydney suburbs – Avalon and Palm Beach were trunk calls. To call a country town or interstate you had to speak to the exchange and book your call. The exchange would take half an hour or so to connect and ring you back when they had done so. You had to tarry by the telephone for that half hour, and the telephone charges were high.

When I came to the bar in 1966, the Bar Common Room and lunch in the Common Room were very strong institutions, very useful for maintaining good personal relationships among barristers, a good point of contact for doing business, a good place to avoid if you had something to be ashamed of. It was a good place for the elderly to reminisce and instruct: to pass on knowledge and legends from the depths of leather armchairs, and to reinforce continuity and institutional memory. In my early years an elderly barrister who had grown up in the world of graziers and farmers at Gunnedah told me: 'When we came back from the war our attitude to everybody changed. We would not bow to the matrons.' I had no idea what this could mean, and when I said so he told me that before the war when young gentlemen who wanted to be thought respectable arrived at the Gunnedah Races they would present themselves in front of the Members' Stand, raise their hats and bow to the matrons, who occupied the front row of the Members' Stand dressed in finery, the mothers and wives of the most prominent in the Race Club, graziers, farmers and committee men. No doubt they commented to each other on the behaviour and prospects of the young men and noted absences. He said 'When we came back from the war we knew we didn't have to do that any more.' It seems to me that attitudes like this were widespread among those who had fought in the war, gone overseas and risked their lives in the defence of Australia. They had a much better claim to respect and social prominence than almost anybody else.

Success at the bar comes most readily to those with a strong constitution, a clear mind, a firm honest character and an unremitting work habit. There seemed to be many who had these attributes, although there were a few walking wounded. It seemed to me that those at the bar who had served in the war were imbued with high confidence by their wartime experiences. They had seen and participated in conflict and danger, they had seen many people including some of the best people they knew perish, had seen death and grave wounds strike at random, and they had survived. The experience of being a survivor confirmed their confidence in themselves permanently. They had little more to fear from anything, and they behaved accordingly. This affected courtroom demeanour. This was not true for everybody, but it was true for many, and their abilities were released by it.

Most successful barristers seemed to fall within a number of broad groups. There were patrician gentlemen of polished manners and profound learning, often with independent means. There were clearheaded and determined modern men with a strong address to the business in hand. There were happy-go-lucky hail-fellow-well-met chappies who sought to convey to the jury that their opponent's case was a joke of scarcely believable effrontery. There were pub ruffians who sought to enlist the jury in their paranoia against their clients' opponents. There were also a few wealthy idlers for whom the bar was a convenient platform for lives of dignified leisure. One gentleman used his bar chambers as the business office from which he managed an extensive trust estate of city properties in the interests of his many relatives. The bar was not so large as to prevent everybody from knowing everybody else and knowing what sort of behaviour could be expected or feared of each colleague. Part of the background in which everybody acted and spoke to everybody else was knowledge of what everybody had done in the

war. I heard no boasting and no rebukes, but there was a general awareness of whether or not so-and-so had 'heard the bugle.'

The transformations of prosperity could not be understood by someone who had not lived through them. In my school days few people we knew had motor cars or refrigerators. The telephone was down at the Post Office. Nothing was disposable. Every empty container was hoarded. Burwood was a prosperous suburb, but no-one had anything to spare. Radio sets cost several weeks' pay, and no household had more than one. There was no such thing as a restaurant: there were two or three in the city. Many women made most of their families' clothes, with paper patterns and knitting needles. Much shoe repair was done at home, not very well. In the lower ranks of the public service, where my working life began, clerks wore shirts made by their wives, and some wore their old army boots. No-one bought sandwiches, which came from home in a paper bag. The workers of today as they go to the city on the trains seem to me like a fairy tale by the old standards, dressed like princes not paupers. They carry electronic toys and telephones, and buy coffee in containers which they soon throw away. Sixty years of growing prosperity, with a few slight set-backs, have transformed everyday life beyond any old reformer's dreams. Vast rivers of revenue flow to Canberra out of fountains of wealth, highly efficient collection and a high degree of compliance. The most pressing political problem is to devise ways of spending it all, and the available talents are equal to this.

In the lower ranks of the public service, where my working life began, clerks wore shirts made by their wives, and some wore their old army boots.

As I passed through my schooling I imbibed an understanding, never explicitly taught to me, that Australia was proceeding along a gentle but inevitable evolution into a socialist society. I was never directly taught that this would and should happen; it was simply in the air as the general state of opinion. I encountered no passionate commitment by anyone towards attaining this outcome, and obviously there were many for whom this was not in the air. The shape of the future was described in novels and writings of which my high school teachers told me, without any overt advocacy. *Looking Backward* by Edward Bellamy is the one that I recall, although I never troubled to read it. The expected outcome was spoken of, in a phrase common at the time but now attributed to Chifley as if he had coined it, as 'The Light on the Hill'.

As I made my way at work and university through the fifties the real state of the world presented itself to me. My scene moved from education and the public service to legal practice. In the first world, minds were drifting towards a vague, distant, splendid future, illuminated at a height. In the second, minds were engrossed with the pursuit of present rights and interests in the context of everyday realities. My world changed and I changed in it. I studied the law, lived and worked, and I saw how life actually goes. Things were not going to develop that way, human motivations are different and the pursuit of advantage brings out more resources for everyone than planning and public service methods. Pursuit of one's own interests produces satisfaction of the needs of others. Observing and working with the bar was a great part of my change in outlook. Hard-working realists dispelled vague ideas about the future and firmed up my grasp of the present. Plainly most of the population now thinks the same way, although they usually do not talk that way. Indeed the conviction that one has radical opinions on the verge of being dangerous is widespread in Australia, among the wealthy as well as among the poverty-stricken, and judged by conduct and outcomes is usually delusional.

The barristers of my golden age lived through the war, saw the succeeding adversities of severe economic conditions, government controls and threats to civil peace and order. They saw these adversities pass with relatively little trouble and be succeeded by decades of unprecedented prosperity, more people, more resources, better access to justice and a strong propensity of governments to refer ever more conflicts and disputes to judicial forms of resolution. There were wide extensions of judicial review, new courts and tribunals and new things for a much larger legal profession to do. They confidently rode the crest of all this, and their confidence proved to be justified.

Farewell to the Hon Justice Clifford Einstein

The Hon Justice Clifford Einstein retired from the Supreme Court on 3 May 2012, after nearly 15 years service as a judge.

Justice Einstein came to Australia with his family from South Africa in 1963. He won a Commonwealth scholarship to the University of Sydney, where he undertook a combined arts and law degree. After working as a solicitor at Minter Simpson (now Minter Ellison) he came to the bar in 1973. In 1974 he joined the 10th Floor of Wentworth Chambers, which in due course merged with 10th Floor Selborne. He took silk in 1987.

While still at the bar Einstein J was involved in many well known cases, particularly in the area of equity and trusts. In a number of these cases he was led by Daniel Horton QC, including *Hospital Products Limited v United States Surgical Corporation & Ors* (1984) 156 CLR 41, *United Dominions Corporation Limited v Brian Pty Ltd* (1985) 157 CLR 1, *Timber Engineering Co Pty Limited v Anderson* [1980] 2 NSWLR 488 and *Catt v Marac Australia Limited* (1986) 9 NSWLR 639

Einstein J was appointed to the Supreme Court on 1 September 1997. He sat in the Commercial List of the Equity Division. During his fifteen year tenure he heard innumerable cases. A few may be singled out for mention.

The *Idoport* litigation was the longest over which Einstein J presided. The main proceedings commenced on 24 July 2000. Ultimately the defendants succeeded after the proceedings had continued for a number of years. His Honour's decision on the issue of security for costs, *Idoport Pty Limited v National Australia Bank Limited* [2001] NSWSC 744, is still regularly cited, including at appellate level.

Another lengthy and significant case was *Baulderstone Hornibrook Engineering Pty Limited v Gordian Runoff Limited*, known as the *Third Runway* case. The matter went to the Court of Appeal where Einstein J's decision was upheld.

Anyone who appeared before Einstein J could not help but notice, and appreciate, his invariable courtesy, patience and calm. There was never a cross word. Even at his swearing in as a judge his 'calm and unflappable disposition' was remarked upon by the then president of the Bar Association, David Bennett QC – a comment which proved prescient over the next fifteen years.

The following is a speech given by the Hon Justice Bergin CJ in Eq at a ceremony on Thursday, 3 May 2012 to mark Einstein J's retirement.

The staunch maintenance of judicial independence while performing duties as part of a high-powered team is not a given.

But you have made it look that way.

You have been a pivotal part of the development of the Commercial List of this Court so that it now has not only a national but also international reputation as the court of choice in this region for the determination of complex commercial litigation.

We are extremely lucky to have enjoyed so many years of your company and lovely personality. Idiosyncratic at times and conforming at others. An example of your idiosyncratic nature was when you piloted a scheme for increasing the productivity of the commercial judges of the court. You entered Court A and pressed a button on a tape recorder that played your voice delivering a reserved judgment while you adjourned to Court B to commence the next case. We were most grateful that this practice did not take hold.

An example of your conforming side was your insistence on the equitable application of the rules to the frivolity of the egg and spoon race at the Equity judges' annual picnic – we look forward to your continued umpiring at this annual event (the next picnic being on Sunday 17 June 2012 at an exotic location, this time on the north shore).

Your compassion and concern for others has been to our enormous benefit. This combined with your extraordinary work ethic saw you presenting to the chief judge, the list judge, the duty judge the Common Law List judge to see if you could assist with the work load of the court or to relieve others who needed respite. You have always been up to date. You have seen it as your duty to deliver judgments expeditiously.

This has been an exquisitely successful aspect of your judicial life.

Your strength and resilience have been called upon in recent times and true to form you are demonstrating that you can get through the work and the tough times.

There are a couple of other aspects of your personality upon which I would like to touch if I may – that is your well known attributes of calmness and unflappable disposition and your unfailing courteousness. These have stood you in such good stead during your judicial life. It is interesting that the former Commonwealth solicitor general (when president of the Bar Association and preparing to speak on behalf of the bar at your swearing in) decided to research these aspects of your personality. He was able to trace the source of these attributes to events in South Africa when you were a young lad. He concluded that these aspects of your personality developed by reason of the fact that you were a young golfer.

Regrettably you abandoned the game at the age of 15 but happily I understand that you have now resumed your golfing career.

Clifford we both know that when you step onto a golf course to enjoy that magnificent game, one's spirit becomes free. Like here – it is there that you can maintain your independence whilst being part of a team.

On behalf of those with whom you have served the court and the community so well we congratulate you on such a fine judicial career and thank you for your wonderful service. We wish you every happiness for the future.

To Clifford Einstein.

The Hon Justice Stephen Campbell

Stephen Campbell SC was sworn in as a judge of the Supreme Court of New South Wales on 2 May 2012. Attorney General Greg Smith SC spoke on behalf of the New South Wales Bar, while Ms Ros Everett, junior vice-president of the Law Society, spoke on behalf of the solicitors of New South Wales.

The Hon Justice Stephen Campbell was born in Glasgow in 1957, the son of a plumber working in the shipyards on Clyde-Bank. Seeking a better life for their children, the Campbell family migrated to Australia in 1966, and after brief stays in Adelaide and Brisbane, settled in Sydney's Sutherland Shire.

His Honour attended Kirrawee High School, which he described as 'a fine government school, staffed by dedicated teachers'. His Honour served as school captain and around that time developed an ambition to be a barrister.

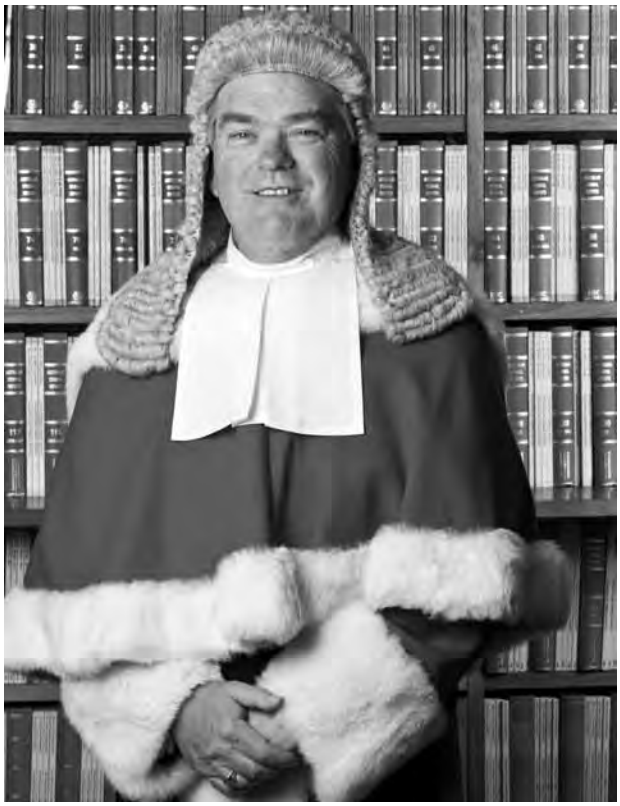
His Honour's legal career began when he answered a *Sydney Morning Herald* advertisement for a legal clerk at Messrs Francis White Barnes & McGuire. There, he gained his first experience in workers' compensation claims, as well as common law claims for personal injury. His Honour then worked, briefly, as a solicitor advocate for the State Rail Authority of New South Wales before moving to the firm of Curwood & Derkenne.

Justice Campbell was called to the New South Wales Bar in 1985 and read with Larry King, of whom his Honour spoke fondly during his speech-in-reply:

> I was not very happy doing solicitor's work and I came to the bar … I need to say that I read with Larry King (now SC) and Larry is not only a wonderful advocate, a good lawyer and the very best of blokes but he is also the epitome of everything a pupil master should be. It is no wonder he had a legion of readers, many of whom have taken silk. It is always one of my proudest boasts that I was the first of Larry's readers.He was generous to a fault; he was the only Senior Junior during those early days for whom I was inveigled to do some devilling work who insisted on paying for it on 'the noggin'. This was, as you can imagine, a great help during those early months of exceedingly insipid cash flow.

His Honour took a room in Wardell Chambers and built up a practice based on liability work, including industrial and motor accidents, occupier's liability, double-insurance cases and policy wording interpretation. His Honour took silk in 2002.

The attorney general described it as 'quite fitting'



that Justice Campbell will serve in the Common Law Division. He added:

> You have also maintained a strong interest in workers' compensation matters through your appellate practice. You have appeared frequently in the District Court, Supreme Court and in the New South Wales Court of Appeal. You have also appeared before the High Court on occasion, most recently in *Zheng v Cai* and *Adeels Palace v Moubarak*. And he appeared as counsel assisting the ICAC in Operation JAREK, one of the largest and most complex investigations in the commission's history.

Similarly, Ms Ros Everett, junior vice-president of the Law Society, emphasised the tremendous work his Honour had done on behalf of injured litigants in need of compensation:

> From personal injury cases in the Supreme Court such as representing a former erotic dancer for complications arising from breast enlargement surgery to counsel assisting the ICAC inquiry into Hunter Council kickbacks, your Honour has also gone public on the need to overhaul the greenslip compulsory insurance scheme to divert large profits from insurers to fund compensation for people injured in road accidents.

As is often the case at swearing-in ceremonies, the attorney general referred to his Honour's sporting interests. The attorney said:

> You can speak knowledgeably about most sports, but true to your Scots heritage, you have a particular passion for golf. I am not sure why. You openly admit to being the worst golfer at two separate clubs. When I first heard this, I assumed your Honour was being humble, or 'umble. I doublechecked with your colleagues, you were not lying.
>
> You have been a member and then chair of the Bar Association's Common Law Committee for a number of years. In your time, you have drafted numerous submissions to government, proposing changes to the Workers Compensation Act, Motor Accidents Compensation Act and Civil Liability Act. Your colleagues on the committee describe you as a charming man and a fine lawyer. They praise your calm manner and strong work ethic. You have even been known to take a complex query on common law while putting on the 15th green. That might help explain your golf game.

Justice Campbell responded to the speeches, which he said were 'a testament to the ingenuity of the profession'. He concluded:

> I am conscious that today I join one of the world's great legal institutions. It is great not only because of its nearly 200 years of continuous service in the administration of justice and maintenance of the rule of law in our free and democratic society; it is also a great institution because of the accomplishment, scholarship, and conscientiousness of the men and women who constitute it. Contemplating my new colleagues I confess to feeling a little hesitant about my ability to measure up to the high standard which they each set in their service to the people of New South Wales. In accordance with the oaths I have taken today, may I assure you all that for the whole term of my appointment I will strive to emulate their example.

The Hon Justice Richard Button

Justice Button was sworn in as a judge of the Supreme Court of New South Wales on 12 June 2012.

Richard Button SC was sworn in as a judge of the Supreme Court on 12 June 2012, following a distinguished career as a public defender.

His Honour was born in Sydney in 1961. He received his school education at Eastwood Public School and then at Barker College at Hornsby. By the time he had completed school, he already had, along with Latin and ancient history, a firm interest in the criminal law. Button J enrolled in the combined Arts and Law course at the University of Sydney in 1979.

Button J pursued a wide range of interests during his time at university, the first three years of which were spent on campus as a student at Wesley College. Theatre was one such interest. His Honour directed a mostly acclaimed production at Wesley of Alex Buzo's *Rooted*, and appeared as Moon in a student production of *The Real Inspector Hound*. Sporting interests were more off the field than on, particularly following a mild concussion suffered whilst playing rugby for Wesley in a match which, although his debut, proved also to be his swansong. In particular, Button J was an early supporter in Australia of American Football. He was a regular diner at a Mexican restaurant in Chatswood (which he referred to as 'The Gridiron Restaurant'), the

Photo: Courtesy of the Supreme Court of NSW.

owner of which screened NFL games in a back room for other like-minded devotees.

After graduating from the university, Button J was admitted as a solicitor in 1984. His first job was in commercial litigation, working in the Legal Department of the State Bank (then located at 1 Oxford Street, Whitlam Square – the same building in which the public defenders are now located). After 18 months at the bank, his Honour moved into his chosen field of criminal law, as a solicitor employed by Legal Aid NSW. His three years at Legal Aid proved to be an excellent preparation for the bar.

Sporting interests were more off the field than on, particularly following a mild concussion suffered whilst playing rugby for Wesley in a match which, although his debut, proved also to be his swansong.

There was ample opportunity to instruct defence counsel of the highest calibre (including Virginia Bell), and soon enough the chance to personally conduct a jury trial presented itself when the counsel briefed announced, some ten minutes before the trial was to commence, that he could not go on. Before too long, Button J decided that he would go to the bar.

His Honour was admitted as a barrister in 1989. He read with Winston Terracini. There was a variety of work at first, often last minute briefs not only in criminal matters but also family and workers compensation cases, and occasionally small commercial matters. During his remarks at the swearing-in, his Honour recalled one such matter. It was:

> some sort of costs argument in the Supreme Court. I prepared myself as best I could, and then at Court met my opponent for the usual pre-hearing discussion. He was obviously an experienced commercial solicitor, and knew a great deal about the matter. I felt that in our discussion I gave a good impression and acquitted myself rather well. As we sat down together, waiting for our matter to be called on, I glanced over as he was making a file note. I could not help noticing that it read: 'Button for the Defendant. Knows nothing of the matter'. To add insult to injury, I do not believe that I was ever paid for my sterling performance.

Button J was appointed as a public defender in 1991 and remained in that office until his appointment as a judge. His Honour spoke fondly of his time there:

> Little needs to be said about how happy and fulfilled I was at the Public Defenders – the fact that I stayed there for 21 years speaks for itself. The work is difficult and stressful but very rewarding, the esprit de corps is very high, and the support staff are excellent. The Public Defenders Chambers is an institution with a storied past, a notable present, and a glittering future. It has been my privilege to be a small part of all that.

Button J has the distinction of being the first serving public defender to be appointed to the Supreme Court.

From 1996 until 1998 Button J was seconded as a director of the Criminal Law Review Division within the NSW Attorney General's Department. In this position he had close involvement in various issues of law reform, including the Model Criminal Code project where His Honour had the chance to work with a number of leading judges and academics in the field. His Honour has also served on a number of committees, and has been a representative of the senior public defender on the DNA Review Panel.

After his return to the public defenders, Button J built a reputation as an accomplished advocate, who effectively combined a deep understanding of the principles of the law with thorough preparation of the case at hand. As Bernie Coles QC, speaking on behalf of the bar, succinctly put it:

> Your Honour is one of the most highly respected and accomplished practitioners at the New South Wales Bar. You have extensive experience in all aspects of conducting criminal cases. There can be no doubt that your Honour's appointment is an excellent one and the bar congratulates you.

His Honour took silk in 2005, and in 2010 was appointed one of two deputy senior public defenders.

Over the years, Button J conducted a great many trials including murder trials and a very lengthy terrorism trial in the Supreme Court at Parramatta (which His Honour described as undoubtedly the highlight of his career as an advocate), as well as sentence hearings, and countless appeals in the Court of Criminal Appeal.

His recreational interests include sailing, swimming, jazz and dancing, and American Football.

By Rowan Darke

District Court appointments

His Honour Judge Christopher Hoy SC was sworn in on 16 April 2012.

Judge Hoy SC completed his secondary education in 1974 and went to work in the NSW Public Service for the next 12 years. During that time, he occupied a variety of positions, including that of chamber magistrate and clerk of the court; senior legal officer (prosecuting and advising) in the Department of Corrective Services; legal officer in the Industrial Relations Division of the NSW Public Service Board and bills clerk in the attorney general's ministerial office.

His Honour attained a bachelor of legal studies at Macquarie University in 1983 and was admitted as a solicitor of the Supreme Court of New South Wales on 3 May 1985. In the following year he joined the firm of AS Lamrock and Son, in Penrith, as a litigation solicitor. His practice covered criminal work, civil litigation, administrative law, liquor licensing, industrial disputes and government appeals and tribunals.

His Honour was called to the bar in April 1989. He licensed a room at Lachlan Macquarie Chambers in Parramatta and read with David Higgs and John Shaw. After 12 months in Frederick Jordan Chambers he moved to 12th Floor Selborne Chambers, where he remained until his appointment to the District Court.

His practice grew to encompass criminal law and administrative law, with a heavy emphasis on appearing as counsel assisting coronial inquiries and statutory tribunals, such as the Police Integrity Commission.

His Honour was appointed senior counsel in 2008.

Speaking on behalf of the New South Wales Bar, President Bernard Coles QC said:

> Your Honour has given your time and expertise, and generously so, for the betterment of the profession, through the Bar Practice Course and the Continuing Professional Development Program. You have coached junior barristers in the art of advocacy; taught cross-examination to the readers; chaired or presented CPD seminars on topics as diverse as 'Securing Payment of Barristers' Fees' to 'The Repeal of the Justices Act'.

Your Honour has made an invaluable contribution to the justice system through your ongoing membership of the Bar Association's Criminal Law Committee (2000-2004; 2010 -), and Professional Conduct committees 1 and 2.

There can be no doubt that your Honour's appointment is an excellent one and the bar congratulates you.

The Hon Justice Griffiths

On 23 April 2012, Justice Griffiths was sworn in as a Federal Court judge. Chief Justice Keane, Attorney-General Roxon, the solicitor-general, Mr Gageler, and Mr Dowd (on behalf of the Law Society) spoke at the ceremony.

Justice Griffiths grew up in the Riverina – born in Narrandera, primary school in Grong Grong and high school in Wagga Wagga. Justice Griffiths still retains a property in the Southern Highlands, and is a reputable Angus and Murray cattle breeder.

Justice Griffiths then went to ANU where he graduated with a degree in arts and law, and the university medal in law and the ACT Supreme Court judge's prize. Professor Zines was his mentor at ANU, who encouraged him to pursue further study, a LLM from Harvard University, then a MA and PhD from Cambridge University. For four years, he was a fellow of Emmanuel College at Cambridge. His other great mentor in law was the late Professor Sir David Wiliams, his PhD supervisor. He was awarded the York prize for his doctoral thesis Judicial Restraint and Activism in Judicial Review of Administrative Action for Abuse of Discretion.

He returned to Canberra where he was appointed director of the Federal Administrative Review Council. He then moved to Sydney and became a solicitor and a year later a partner at Blake Dawson Waldron, practising administrative law, competition law, environmental law and planning law.

In 1994, he was called to the bar and the 11th Floor, and was known as a forceful and tenacious advocate. He took silk after six years, practising administrative law, competition law, environmental and planning law, commercial law and Aboriginal land rights. He was involved in a number of landmark cases ranging from a matter with the Australian Crime and Corruption Commission and Metcalf which concerned a request by the ACCC for injunctive relief to restrain Metcash

from completing the majority share sale agreement of the Franklin supermarket chain, to an animal welfare case involving an appeal to the Administrative Appeals Tribunal of the Minister's decision to allow eight Asian elephants to be imported for captivity in Australian zoos.

In 2009, he became a member of the Judicial Commission of New South Wales and since 2010, chairman of the Human Rights Committee of the New South Wales Bar Association. He has also authored several articles and papers, including co-writing a chapter on administrative law in Butterworths' Court Forms, Precedents and Pleadings.

By Therese Catanzariti

Stuart Marsh (1958–2012)

The following eulogy was delivered by Duncan Stuart on 16 April 2012.

The words of Stephen Gallet, a nineteenth century Quaker, epitomise Stuart's life:

> I shall pass this way but once
> Any good therefore that I can show
> to any human being
> let me do it now
> Let me not defer or neglect it
> For I shall not pass this way again

Stuart was hardworking, compassionate and helpful. He was not a religious man but had his own moral compass. He set a course according to his own stars and stayed true to that course throughout his life. Above all else he liked people and people liked him.

Stuart Bruce Marsh was born on the 2nd April 1958 at St Mona's Hospital in Cremorne.

He was the second of the four children of Bruce and Isobel Marsh.

He grew up in Allambie Heights in a loving and boisterous household. The family would engage in lively political discussions in which the children were encouraged to express their views. It was here that the seeds of Stuart's social consciousness and advocacy took hold.

Stuart was an avid sportsman. While still in primary school he played representative soccer for Manly Warringah. Although he excelled at soccer he also played rugby union and rugby league. Through high school he would play soccer on Saturday, league on Sunday and union for the school during the week.

In summertime he was more often than not found playing cricket or tennis. With a northern beaches upbringing he also swam. In later years golfing became his favourite sport and he would play every weekend.

His competitive streak developed both on the playing field and in the classroom. He was combative with his brothers and friends whether playing backyard cricket or seeking academic success.

He attended the local primary school and Manly Boys' High School.

He matriculated in 1975 with a scholarship to study Arts at Sydney University. His Honours thesis was in English Literature. He took a year off in 1980 and travelled the world. In 1981 he returned to Australia and undertook a Diploma of Education.

In the early 1980's he worked as a high school teacher but soon decided that teaching was not his vocation. He enrolled in Law at the University of NSW.

Throughout the period of his studies in law he supported himself with an array of part-time jobs. He worked as an Assistant Magistrate in the Local Court, drove cabs and worked as a bar manager, most notably at the Rex at Kings Cross and at the Journalists Club in Surry Hills.

During these years he interacted with the full spectrum of humankind. It was here that he further developed his passionate commitment for a fair go that would later influence his legal career.

Once his studies had been completed he worked as a solicitor at PV McCulloch & Buggy. When introducing himself to a judge for the first time he described himself as, 'the human face' of the firm. In 1994 he was made partner.

Since embarking on his legal studies it had always been his intention to become a barrister and in 1999 he eventually answered a call to the bar. It seemed the perfect stage on which to promote his ideas of social justice and indulge in his love of advocacy.

He was known in chambers as 'the Big Fella'. He established a lively practice and was a sought after advocate. He had a reputation for his feisty representation when on his feet and his personal touch with his clients.

When submitting on the veracity of a witness he was wont to say, 'Your Honour, that evidence is about as plausible as me finding a fish in my milk'.

Stuart's social conscience was reflected in his pro bono work and he regularly volunteered for the Duty Barrister scheme run by the

NSW Bar Association at the Local Court Downing Centre.

Stuart met his wife Amiranti in 1998. They married in 2000 and settled down in Turramurra where they raised their family. He was a loving husband who was devoted to his two daughters.

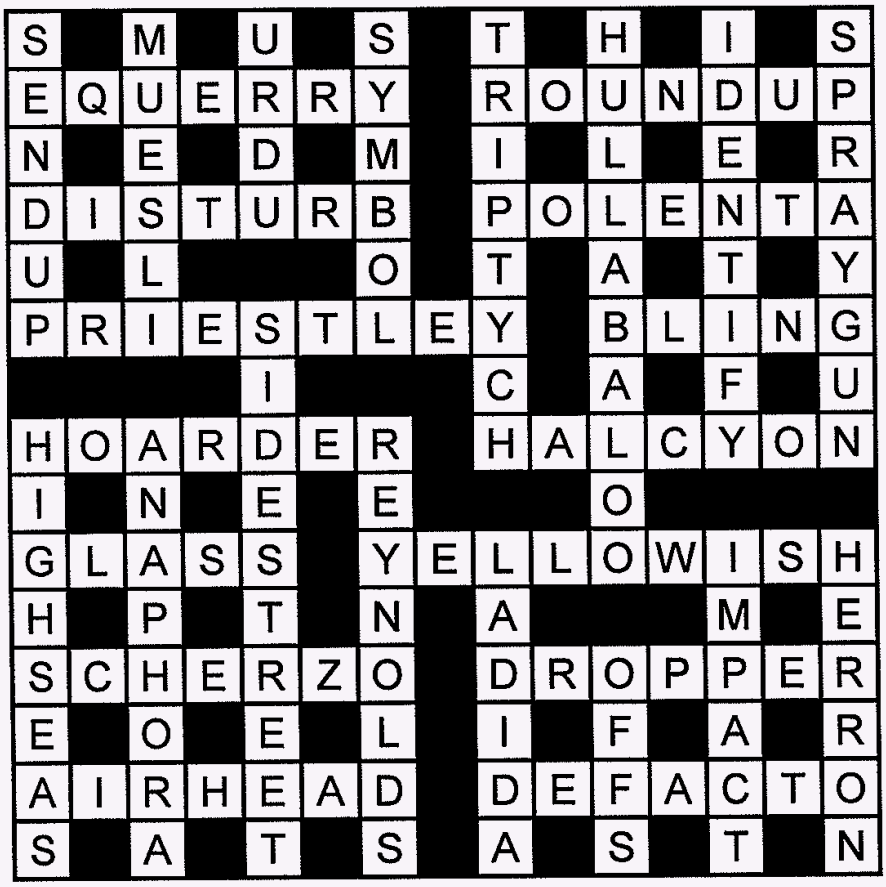
Stuart was always a people person. He always had a kind word, a funny story or an exchange of repartee for everyone. He made everyone feel at home. He was always ready to help those in need and defend those who were being exploited. Anybody that he met remembered him. He was universally liked.

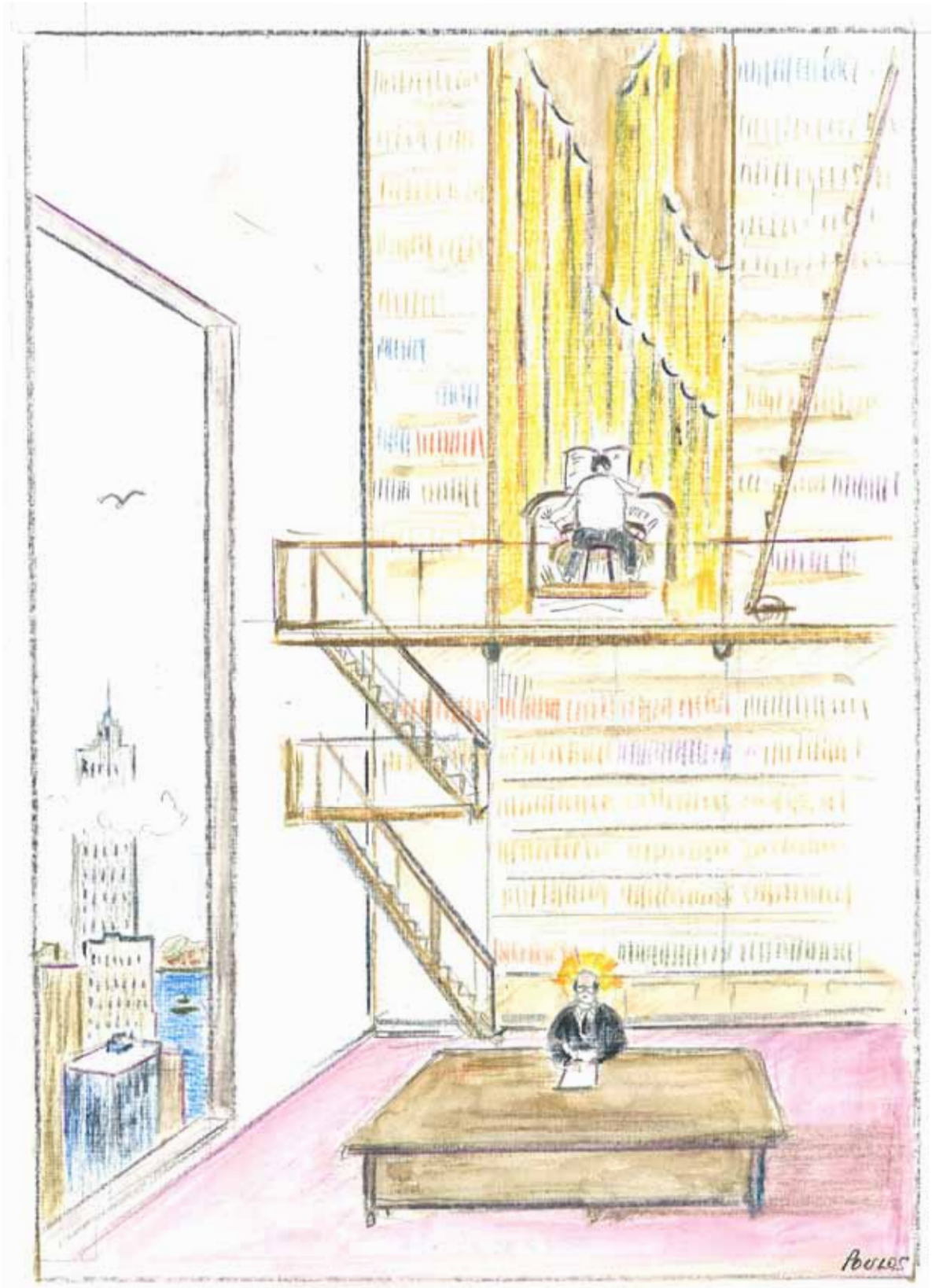
If we have a purpose in life to give, to help and protect those in need, and to bring happiness to others Stuart acquitted himself well. In a life cut short at the age of 54 he achieved much more than others who have lived a score of years longer.

Stuart had a big heart. It gave out on him when he was at home with his family on Easter Saturday. He died on 11th April 2012.

He is survived by his wife Amiranti and their two children, Madeleine and Elizabeth.

Crossword solution





'... chambers were in large commercial buildings where the rack rent was extraordinary and there was no capital gain – was it useful to have a view of the Harbour, rather than a dead pigeon at the bottom of the light well?'

Bullfry changes rooms

By Lee Aitken (illustrated by Poulos QC)

'No, no, no Bob – the mirror on the ceiling has to go!' (What use to him now was a mirrored ceiling in chambers? Much better, if so inclined, always to pay cash, and say your name is 'Hardinge Giffard').

'And where will you put your skull?'

'I think on top of the fireplace, above the Madame Recamier. I like it to look back at me and let me know what it is thinking – a little like the 'Lord of the Flies' – and don't forget Bob, that its former occupant while still with us was one of the greatest jurists in the Commercial List, as well as one of its most malevolent. Let us strive for an impression of genial squalor'.

He thought back to another celebrated time (commemorated in an after-dinner speech by a senior jurist) when the chambers of a pre-eminent advocate had been sold on a walk-in walk-out basis. There, the cheap vinyl chairs had been covered in the congealed sweat of 'nervous litigants and incompetent solicitors who had ventured in for advice.' Jackson QC had taken the room and said to the clerk, 'Bill, these chairs have to go – whatever you get above $50 for them, you can keep'. And Bill, did get rid of them – he sold them as a job lot to a feared Commercial Division judge for $75 who was 'quite happy with them'.

He had always liked his old chambers. Three quick steps and he was into the lift and heading to the duty judge. It had been all he could do (given the GFC) to persuade his cautious lender to advance the readies for the extra shares this new extravagance required. And was it really worth it? Did solicitors care where a conference was held? A lot of the newer chambers were in large commercial buildings where the rack rent was extraordinary and there was no capital gain – was it useful to have a view of the Harbour, rather than a dead pigeon at the bottom of the light well? As a matter of 'branding', no doubt, it was nice to be in Megalopitan Bank Tower with other Titans of industry, and the larger firms of solicitors. But what sort of goodwill did Bullfry inspire? Was it not Lord Macnaghten who has spoken evocatively of 'cats, dogs, and rats' in terms of goodwill; with Bullfry's client base it was regrettably a little more Kiplingesque, in terms of animal metaphor – more 'as the dog returns to its vomit, and the sow returns to her mire'.

But the division in types of chambers presaged the various Ages of Man at the modern bar – first the reader's room on a bespoke floor; then the Annexe where you were fattened up while waiting for a dead man's shoes, then into a 'broom closet' (700 shares), then something larger, and finally a 'double' with a mirrored ceiling – and then – back to the annexe as the practice died and one decided to take some capital gain out of the building before it collapsed in rubble around one's ears. Finally, the ultimate indignity – as a 'floater' in the annexe, coming in without hope, or expectation, of any brief, day after day – all the old instructing solicitors long since retired, with the second Mrs Bullfry's adjuration ringing each morning in your ears – 'I didn't marry you for lunch, Jack'. Perhaps, at the very end, a small 'mediation' practice assisting the larger banks to avoid the consequences of too much 'asset lending'.

He looked sadly at the back of the door where the name plates of former occupants had been proudly assembled – the dead are many at the Sydney Bar – the patinaed plaques took him back to a golden age when school fees were tax deductible and an accountant with a 'dry Slutzkin', or infra-structure bond, always to hand, solicitors would only brief when money was held in trust, and the Bar Common Room was athrong as a long Friday lunch turned into night, and Tony brought forth yet another bottle of red from his cellar.

Was he too old? The floor's new 'business consultant' had urged him recently to 'get something on the website and update your CV'. He had long ago noticed that there was a direct inverse correlation between the forensic experience of the writer, and the length of any *curriculum vitae*. Ms Blatly (his favourite junior, both in and out of court) had in a playful mood suggested to him that he should titivate his one line entry (which merely recorded when he had commenced practice).

Some of the younger members of the floor (usually with two or three lines of post-nomial initials to their credit) had a CV which naively recorded every matter in which they had thus far appeared: e.g. '*Ex parte* before Jitton FM (unled)' but that seemed to be taking things too far.

And he had stoutly resisted any attempt to add a photograph to the site – the ravages of nearly sixty Australian summers on top of too much adolescent testosterone had left him with a puce, and pock-marked visage which an unkind admirer had once likened to the sunny side of the gibbous moon.

'Would the skull be appropriate for Ms Blatly as part of her paraphernalia?'

Besides, what would an accurate character assessment on the web-site record?

'You wouldn't need me if it wasn't very difficult; usually polite to a recalcitrant appellate court; best to be instructed before lunch; cash preferred, but any form of portable property considered'.

Anybody who had already instructed him knew what to expect. It was impossible over a sufficiently long period of time at the bar to conceal one's true character from either colleagues, or the court, since the daily strain of the business provided ample scope for each and every flaw and foible to be magnificently exposed.

Like *Lear's* Kent (although he was long past forty-eight) he had always landed in trouble because of his candour. He thought back to a recent encounter. He had had the misfortune to run across a former bitter opponent, lately elevated to a lesser court, who was taking himself even more seriously (if that were possible) now he was on the bench than he had while at the bar, where he had only ever acted for secured lenders – a gloss on the cab rank rule which Bullfry had never quite understood.

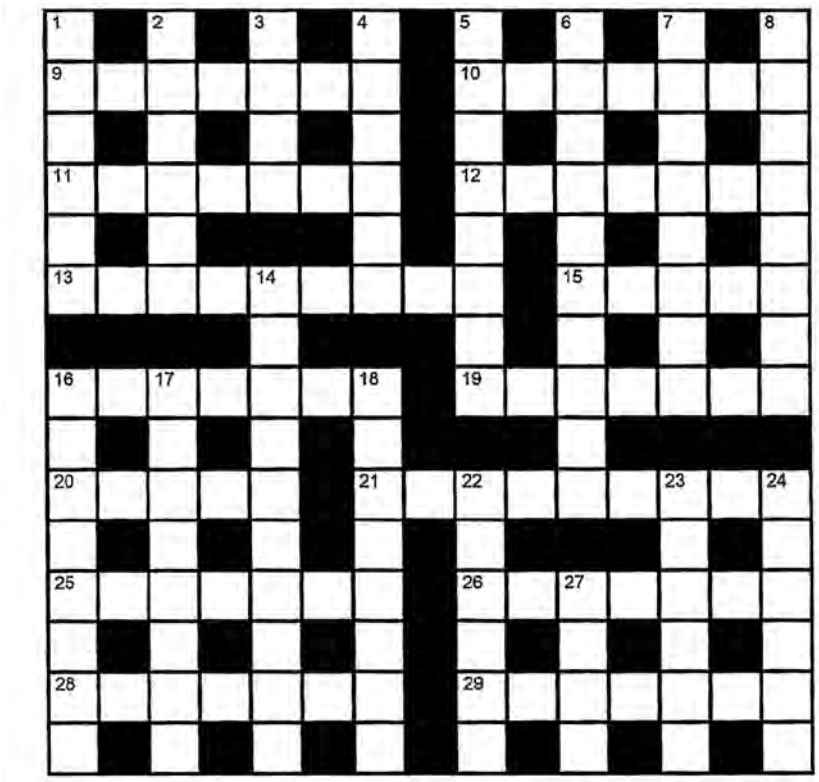
'Ah, Bullfry, I had to defend you recently with respect to certain rumours regarding your unusual personal life. And I hear that you have been saying nasty things about me behind my back'.

'As to the second matter, judge, it would be more accurate to say that I simply join in the general laughter whenever your name is mentioned. And as to the first, please to remember that in my case the 'rumours' are always TRUE!'

How long before his own name joined the plaques on the back of the door? Would the skull be appropriate for Ms Blatly as part of her paraphernalia?

Crossword

By Rapunzel



Across

9 Londonderry squire rides London off (unstable stable officer). (7)

10 Take half or more to one (do run up set differently). (5,2)

11 Princesses back champagne to break peace. (7)

12 Meal prepared on plate. (7)

13 Former appeal judge strikes spritely note. (9)

15 Blockhead fish sparkles. (5)

16 Frost the German collector. (7)

19 The days of the home unit boom in the 70s: 155 CLR, 153. Kingfisher. (7)

20 Greek leader? Scottish girl? Former appellate judge. (5)

21 Oily Welsh disposition is jaundiced. (9)

25 School loses 'o', 'o' and left zero in lively movement, lively movement. (7)

26 Eye curer. "Doctor Work through Abbreviation"? (7)

28 Vaccillating I heard a vacant man. (7)

29 Marriage without marriage, or fact in god (Lat abl)? (2,5)

Down

1 Do this with the devil around closing... a satire. (4,2)

2 Sound stable row lies half off nuts! (6)

3 Old city duffs loud sounds off when speaking in Pakistan. (4)

4 Representation lobs my way. (6)

5 Picture on alter hit crypt by mistake. (8)

6 Shell abalone without one... spectacles? Uproar! (10)

7 A forensic dentist's own job description? (8)

8 Bookie hooks onto sci-fi weaponry to make atomizer. (5,3)

14 Stir rested site, where appeal judges (in NSW, but only sometimes) found? (4,6)

16 Ultraconservatives heard upon the ocean. (4,4)

17 Harp on a... a... Harp on a... a... Harp on a... a... ragged rehtorical device. (8)

18 Tidied up lyres don former appellate judge. (8)

22 The French, of the Italian and by the Italian. Fancy schmancy! (2-2-2)

23 I married power in point for effect. (6)

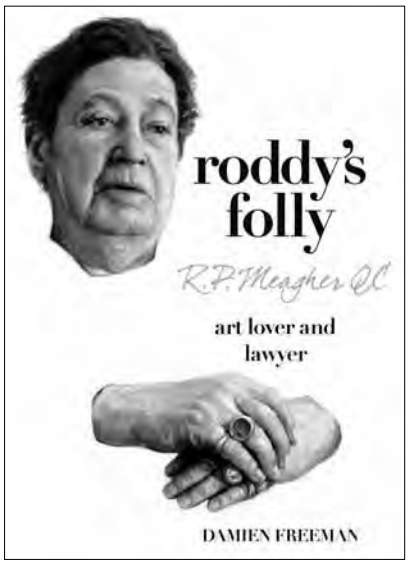
24 Former CJ (or ship-shape RN hero). (6)

27 'Kills': children drop former NSW judge, or snobs lose head? (4)

Solution on page 95

Roddy's Folly

By Damien Freeman | Connorcourt Publishing | 2011



I briefed Roddy Meagher, but only once. I had a glimpse of the man – the delightfully chaotic eccentricity of his chambers, the authority of his words, a certain languor – but I was, of course, a long way from knowing him.

Having read Damien Freeman's biography *Roddy's Folly: R P Meagher QC - Art Lover and Lawyer,* I am better informed. I have a better sense of the fragments of Meagher's life. It is hard to say how much closer I am to knowing the man.

In part, that is because it is a confusing book. Freeman describes the book as a biography. Perhaps naively, I expected a study of Meagher's life (or, having regard to the title, at least part of it). In important ways, it is not.

Freeman has a background in philosophy, art and law. It intrudes. Rather than doing his best to describe the relationship between Meagher and Meagher's wife, Penny, Freeman takes the road less (I suspect only once) travelled. He sets out a lengthy answer to a question which may have been *What is love?* (loosely related to a pamphlet found in Meagher's desk). He then asks the question *Did Roddy love Penny in the way Baron von Gagern recommends ?* There are, of course, clues to an answer to that question but why the author would not simply ask the question *How did Roddy love Penny?* is baffling.

The same otherworldliness is seen in Freeman's consideration of Meagher's art collection. Meagher collected art. Freeman provides this advice by way of introduction:

> Collection is a subcategory of accumulation: it is intentional accumulation. It is accumulating (or keeping an extant accumulation intact) for some purpose; because the objects share some common value, or because they acquire some special value once accumulated, a value that several objects lack individually. So, for any collection, we can identify some principle that guides the accumulating.

At the best of times, ramming life into theoretical constructs has its frustrations. Freeman comes up with these observations:

> To the extent that Meagher's accumulating had some purpose, it constitutes a collection.
>
> Meagher's principle for collecting is aesthetic.
>
> *The collection's diversity is one of its most obvious features. Does this fact reveal anything about its collector?* [Meagher himself replies by saying, quite understandably, *It shows I have general interests.*]
>
> This all boils down to the belief that if you like a work of art, then you should buy it.

Those statements are each personal to Meagher but they come at various points in the 21 pages which are devoted to what might be called a theory of art collection exemplified by that of R P Meagher.

The other difficulty which arises from erecting these theoretical edifices is that they feed speculation rather than perception. Freeman often concludes his analysis by suggesting that *it is likely that, for Meagher..* or *there would no doubt be something appealing ..* or *Meagher would, no doubt, feel...* There is an honesty in framing his conclusions in that way, particularly since most of Meagher's opinions, expressed in the book, are contained in public statements or are secondhand or speculative, but the process is strangely circuitous. Freeman, for example, establishes that Meagher is a fan of Hilaire Belloc and G K Chesterton. He then sets out in some detail the philosophical approaches of those two men. He then speculates as to whether those views were held by Meagher.

I have said that, in important ways, this is not a study of the life of Roddy Meagher. What we end up knowing is that Damien Freeman is well read. He is probably a fine philosopher. He is certainly a student of art. He is an admirable researcher. But the book suffers, as did Patrick White according to Meagher, from a lack of rhythm. Freeman feels the need to use up his research notes, no matter how lacking in illumination of his subject. He says in his introduction that he hopes to show the reader *something about (Meagher's) life that defies articulation; something that can be shown but not said.* But then is unrestrained in taking up argument, seemingly on behalf of his subject.

And therein lies the rub. Freeman builds no trust with his audience. From the bleeding obvious to the deeply philosophical, there is rarely an opportunity to simply reflect on the man. It is clear that Meagher was a classicist who believed strongly in the type of education which he received at Riverview. Whether he would now feel that *the modern Jesuit had abandoned scholarship - and lost the balance between reason and passion, between emotion and intellect*, is as idle as it is obvious. When he accounts for Meagher's jurisprudence or political and social conservatism, it reads like the Freeman Doctrine with Meagher as the chief inspiration.

Freeman is at his best in argument. He is not a natural storyteller and he does not tell one. He sets out a series of theses. For most of the book, the argument seems more important than the subject; the cerebral more important than the emotional, the what more important than the why. I was left in a curious position. I had a perception of Meagher as a man holding to principles and beliefs, conveying them by embittered humour, a man who put a joke above a friendship, a man unable ultimately to do justice to his prodigious intellect or his position or his own emotions. And, with the benefit of the knowledge of the deep affection in which he was held by his friends, a certainty that the perception was wrong.

The obituary Dyson Heydon delivered at Meagher's funeral is referred to by Freeman and is reproduced at (2011) 85 ALJ 524. It is thoughtful and well-crafted but it is also a moving defence of a friend. As part of that defence, Heydon comments that it is … *at least unfortunate that many people took the mask to represent the whole man*. I am sure Freeman sees behind the mask but I am less confident that his readers do.

It is a pity. The book is well-researched and there are moments when we get to see the person – the relationship which Meagher had with his dog, Didier, the breakdown of his relationship with Bill Gummow, the curious relationship he had with Michael Kirby which is made even more intriguing by a number of cartoons, drawn by Kirby during idle moments on the bench and reproduced in the book. But for the most part we see the folly (at its height, a self-destructiveness) without really understanding why.

In the final part of the book, Freeman deals with what he calls *Personal Intuitions.* It sets out some of Meagher's beliefs and opinions, largely derived from public statements and judgments. It gathers together the opinions of Meagher in a way that does provide a basis for judgment. But then Freeman takes us down a by-now-expected, but curious, path. He debates the merits of the opinions and beliefs. Meagher becomes the springboard for Freeman's scholarship.

In the end, Freeman draws the strands together and declares eccentricity to be the key to understanding Meagher. He led a life of personal authenticity coloured by true eccentricity.

Like most of the book, it's a theory. It takes you to the mask. But not far enough behind it for my satisfaction nor far enough to account for the very warm affection, even love, that was felt for Meagher by Dyson Heydon and many other of his friends.

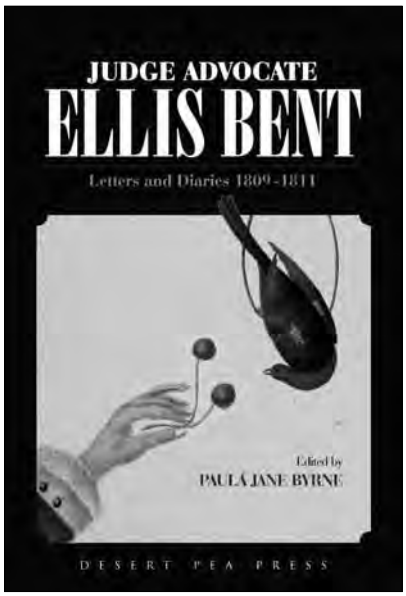
When I began reading the book I wondered whether some part of the explanation for the paradoxes so evident in Meagher's life might lie in his formative years. Freeman speculates that Meagher's life growing up in Temora *would have been a fairly solitary one.* Meagher's brother, Chris, thought that Meagher may have been *the subject of a lot of taunts* at school. A family friend described him as *a very, very lonely boy.* Perhaps a mixture of humour and intellect were employed initially as coping mechanisms. However, if you are looking for further insights into issues of that type, *Roddy's Folly* will disappoint. Freeman provides evidence of Meagher's early years in a part simply entitled *Halcyon Days.*

In fairness, it might be said that the book was intended to focus on Meagher as art lover and lawyer. That would be fine except that one of the strongest and most welcome aspects of the book is an independent consideration of Meagher's wife. The book wants to get there. It never quite arrives.

Reviewed by David Alexander

Judge Advocate Ellis Bent: Letters and Diaries 1809–1811

Paula Jane Byrne (ed) | Desert Pea Press | 2012



Ellis Bent, one of our first judge advocates – his predecessor was the drunken and dissolute Richard Atkins – sailed to New South Wales on *HMS Dromedary*, with his wife Eliza and baby son. Governor Lachlan Macquarie was also on board, he was on his way to replace the deposed Governor Bligh.

The *Dromedary* arrived in Port Jackson on 28 December 1809. As Bent wrote to his mother, in one of the pieces reproduced in this collection: 'Thanks be to God! Safely arrived at the place of our destination, the place where we are able to pass some few of the next years of our life after a voyage of nearly eight months. It would be impossible for me to make you fully aware of the sensations I experienced on arrival with a mixture of anxiety, of fear, of joy, of hope as I never before felt'.

This book assembles Bent's letters and journals from his voyage to New South Wales and his first years in the colony, from 1809 to 1811. Reading his letters to his mother and brother we can almost hear Bent's voice: the tone is relaxed, intimate, precise and full of domestic detail. For example he describes in a letter to his mother dated 22 May 1809 a typical day on *HMS Dromedary* in the early part of the voyage. Breakfast was at 8, and consisted of coffee, tea, hot rolls, eggs and cold meat. Bent goes on:

> At one we take some Bread and Cheese for Luncheon with Glass of Porter – at 4 we dine – our dinner is good and well cooked. Yesterday we had Soup, Boiled Beef, Roast Ducks, Curry and Asparagus, Broccoli and Plum Pudding – Port and Sherry and a dessert of Raisins.

At nine o'clock the Bents had supper and by ten thirty they were in bed – Eliza and the baby shared a cot, Ellis slept in a couch bed belonging to the Captain.

Soon after his arrival in New South Wales Bent encountered Governor Bligh, still resentful and enraged following his abrupt removal from office some eighteen months before, and Bligh's daughter, Mrs Putland, who seems to have been equally formidable: 'Her temper is as evident as that of her father and that is more violent than I could have conceived'. According to Bent the hapless Mr Putland, who had recently died, had been treated by his wife and father in law, 'like a Pig or a Dog'. Bent concluded dryly, 'they are a pretty pair and I cordially wish they were in England'.

Bent described also his duties as a judge advocate, and his frustration at the state of the system bequeathed to him by Atkins was obvious:

> I have no one whatever to give me assistance, or competent to advise me on any question of law. I have found everything in my department in the utmost confusion, and that all law business had been done in the most slovenly irregular, illegal manner conceivable…

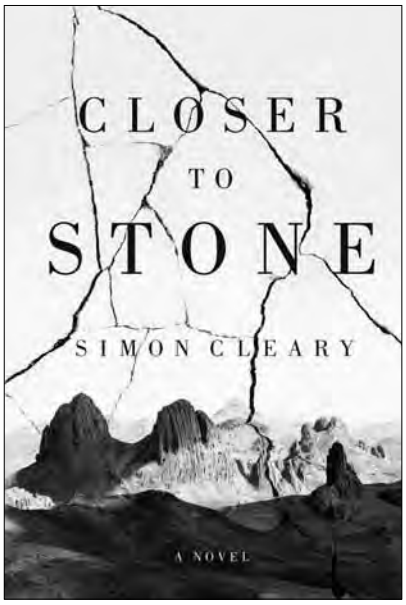
Bent did not prosper in the colony. He suffered from rheumatism and pleurisy, and died on 10 November 1815, at the age of thirty two, in penury and after a long period of illness. He left Eliza with five children, all under eight years old. Despite the fact that Bent had, by this time, fallen out with Macquarie, the Governor was generous enough to arrange for Eliza to be granted a pension.

This collection of Bent's writings was edited by Paula Byrne. The letters and diaries Dr Byrne has collated tell us much, not just about Bent, but about the colony of which he was a quiet witness. This short but lively book is a welcome addition, and will be of great interest to legal historians (amateur and otherwise) and to anyone interested in the establishment of Australian law.

Reviewed by Jeremy Stoljar

Closer to Stone

By Simon Cleary | University of Queensland Press | 2012



Simon Cleary is a barrister at the Queensland Bar. He is also the author of two novels. His first, the *Comfort of Figs*, which was published in 2008, tells the story of a group of people whose lives intersected with, or were affected by, the building of the Story Bridge in Brisbane.

His second, *Closer to Stone*, was recently published by University of Queensland Press. It is very different. It is set in North Africa, in the 1990s. When the story starts, Sebastian Adams, known as Bas, has just landed in Casablanca. He is 20 years old and from a small town in Queensland; he has never travelled outside Australia before.

We learn that Bas has come to Africa to look for his brother Jack, who is a soldier with a United Nations peace keeping force. Jack has gone missing.

Bas sets out by bus for the Western Sahara in search of his missing brother. The reader is caught up in the story immediately and irrevocably: what has happened to Jack? Is he a deserter, run off from the army, gone AWOL (a possibility their father back in Australia angrily discounts)? Is he injured somewhere, or killed even? Is he ill? And why is no one looking for him?

Cleary spent time travelling in the Western Sahara during the early 1990s, and the local knowledge shows. Bas watches from his bus window as the broken down landscape turns slowly into desert:

> The slums stretched for miles. Along unguttered roads and unpaved paths women trudged with water containers hanging from each arm. In places I saw burning sewage: thin towers of smoke linking city and sky. Dogs raking piles of rubbish with their front paws. Bare footed children balancing on the tops of overflowing industrial bins, their splayed toes holding fast to the steel edges while they pause in their rummaging to watch the bus pass.

Bas is a sculptor, by profession and by instinct. We see him at work, taking pieces of stone and chipping away at them, trying to uncover, or shape, something that he senses could emerge from the rock, a dragon, for example, or a crescent moon. He is pensive, an observer, an artist who feels most comfortable with a chisel in his hand, very different from his confident and outgoing older brother Jack – it is only later in the book that a different, less sympathetic, side of Bas emerges.

Bas encounters many people along the way; some help him in his search for his brother, some don't. He meets Lieutenant-Colonel Andrew Grose, Jack's commanding officer, an enigmatic and menacing figure:

> Grose looked at me.
>
> 'You will not find him,' he said. 'You don't have it in you. You don't have what it takes.'
>
> Then he leant forward, his giant head and shoulders looming, the breath from his nostrils on my face.
>
> 'You are not your brother,' he whispered.

He meets Sophia Maddison, an American woman who has been working as a teacher in the Sahara. It turns out that she knew Jack, and she joins Bas on his search.

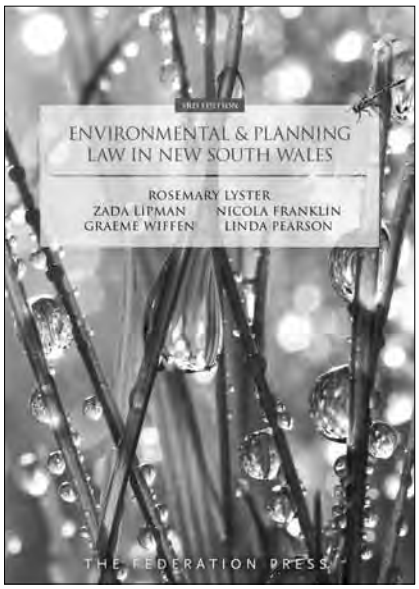
I will not say too much about the dramatic and terrible events that unfold – readers of this book will want to do that for themselves. In the end the story is about much more than the search for a missing soldier. At that time Islamic fundamentalism was on the rise, it was becoming a social and political force in a way that was only fully realised by the events of September 2001. As the years pass Bas slowly, and at time painfully, has to come to terms with what he has seen in northern Africa.

In this fine and engrossing book, Simon Cleary has managed to create both a page turner and a serious look at the clash between fundamentalism and the west – from one person's perspective at least. But at its heart the book, as its title suggests, is about a sculptor, Bas Adams, a young Australian dropped into a terrifying situation, and an artist slowly chipping away the outer layers to uncover himself.

Reviewed by Jeremy Stoljar

Environmental & Planning Law in New South Wales (3rd ed)

By Rosemary Lyster et al | Federation Press | 2012



The five authors, all well known and respected commentators in environmental and planning law, preface their work with the understatement:

> Writing a book entitled *Environmental and Planning Law in New South Wales* in the 21st century is, by anyone's account, a challenging project.

Despite the difficulty of the task it sets out to perform, this book provides a current and comprehensive overview of environmental and planning law as it operates in New South Wales. The 16 chapters cover subjects as diverse as land use planning, development control, environmental impact assessment, energy and climate law, water, biodiversity, heritage, pollution and contaminated land. In addition to covering the daunting list of New South Wales legislation which controls matter of planning and environmental protection, there is discussion of the Commonwealth environmental protection regime and even of some of the emerging issues in international environmental law.

This third edition appears only three years after the second edition was published and follows the same format. Those three years have seen significant development in this area of law, particularly to the planning regime, including the repeal of Part 3A of the *Environmental Planning and Assessment Act 1979* following an election promise by the new state government last year. New developments have been thoroughly incorporated into the new edition up to the date of publication. With a comprehensive review of the state's planning system well under way, it remains to be seen how different this whole area of law, and planning law in particular, will become as we head into 2013.

Covering a wide range of topics of both practical and more academic interest, this book's greatest strength is as a text book, and it is in that context that previous editions have already established it as the classic introductory text in the field. It will also remain a favourite reference for those working in the planning and environmental fields who do not have a legal background. A detailed table of contents, reliable index and useful list of abbreviations are user friendly features which have been retained from the second edition.

Given the breadth of subjects covered, it is inevitable that there is a limited level of detail and analysis of specific topics and issues. Some chapters cover topics which do not appear frequently or directly in environmental litigation and will be of more academic than practical interest to the practitioner on a day to day basis. The new or occasional practitioner in environmental and planning law will find this book particularly useful as a starting point for their own research. In a field abundant with jargon and acronyms, newer practitioners may find it helpful that common terms are explained rather than treated as assumed knowledge.

Several of the chapters contain historical and background information which anyone with a genuine interest in planning and environmental policy will enjoy. The history of the planning regime can be helpful in understanding a system which can seem complex and sometimes strange to those who did not watch it evolve. Those who endeavour to keep up with recent developments and future policy directions in the field as a whole will appreciate overviews such as those set out in the last chapter entitled 'Corporate Social Responsibility'.

There is no question that this book would have been a challenging project, and undoubtedly it would have been impossible to please all of the wide range of potential users of such a book. Despite that, this book stands out as a valuable resource for anyone seeking an introduction to and comprehensive overview of environmental and planning law in New South Wales.

Reviewed by Fenja Berglund

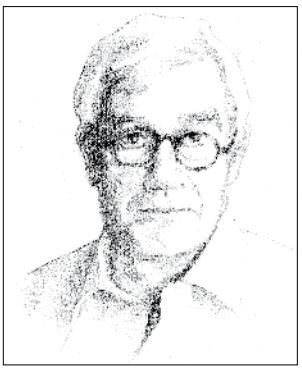
By Julian Burnside

Soothsayers

SOOTHSAYER. Beware the ides of March.
CAESAR. What man is that?
BRUTUS. A soothsayer you beware the ides of March.
CAESAR. Set him before me let me see his face.
(Shakespeare, *Julius Caesar*, Act I, sc. I)

Brutus subsequently dismissed the man as 'a dreamer', but he had special knowledge and a motive for putting Caesar off the scent.

The original meaning of *soothsayer* is literally 'truth sayer'. *Sooth* as a noun is an old Anglo-Celtic word for truth. It has had many forms including *soth, south, suth, swth, suith* and *soyth*. From as early as 950 it is found in such works as *Beowulf*, the *Lindisfarne Gospel* and the *Old English Chronicles*. It was also used in phrases with modern equivalents which more or less follow the old pattern: *in very sooth* (in truth), *sooth to say* (to tell the truth), *to come to sooth* (to come true) and *by my sooth* (upon my honour).



Although the root of the word is *truth*, and many soothsayers made their fame and fortunes by purporting to tell the truth about the future, their predictions were often based more in optimism than reality. They provided the template for sorcerers and politicians. They were not the same as oracles, even if they seemed to be in the same caper: oracles were the agency through which the gods revealed their will. They provided the template for gospellers and priests.

Soothsayers are referred to often enough in classical literature, but not so much lately. You will find references to them in translations of Aristophanes, Herodotus, Sophocles and Thucydides, and in Homer, Plotinus, Plato and Plutarch. Chaucer mentions a soothsayer in *The Knight's Tale*; the OED2 gives quotations from a handful of other English writers up to the mid-18th century. Rudyard Kipling refers to a soothsayer in *Kim*, and Washington Irving mentions one in *Alambra*, and makes it clear that this brand of truth teller was not to be trusted: 'I would advise you, O prince, to seek that raven, for he is a soothsayer and a conjurer, and deals in the black art, for which all ravens, and especially those of Egypt, are renowned.'

The other use of *sooth* is the old but recognisable exclamation *forsooth*. Originally, it was a genuine declaration of the truth of a statement. Shakespeare used it this way frequently:

Prince. How long hast thou to serve, Francis?
Fran. Forsooth, five years…' (*Henry IV*, Part I)

I more incline to Somerset than York:
Both are my kinsmen, and I love them both.
As well they may upbraid me with my crown,
Because, forsooth, the King of Scots is crown'd. (*Henry IV*, Part I)

SIMPLE. Ay, forsooth.
QUICKLY. Does he not wear a great round beard, like a glover's paring-knife?
SIMPLE. No, forsooth; he hath but a little whey face, with a little yellow beard, a Cain-colour'd beard.
QUICKLY. A softly-sprighted man, is he not?
SIMPLE. Ay, forsooth; but he is as tall a man of his hands as any is between this and his head; he hath fought with a warrener.
(*The Merry Wives of Windsor*)

For some curious reason, Shakespeare uses forsooth much more often in *Henry VI*, Part II (1590) and in *The Merry Wives of Windsor* (1598) than in any other of the 21 plays in which he uses it.

Since Shakespeare's time forsooth has become less common. Perhaps he wore it out. It was used by John Locke (*A Letter Concerning Toleration*, 1689), by Tom Paine (*The American Crisis*, 1780), by Mark Twain (*The Prince and the Pauper*, 1881), several times by Rudyard Kipling (*The Jungle Book*, 1894; *The Second Jungle Book*, 1895; and in *Kim*, 1901). Jack London used it a few times in *White Fang*, 1906 and once in *White Heel*, 1907. And it still lives at the edge of memory as the stereotypical exclamation of low-level entertainments with pretension.

Edgar Allen Poe used it in 1832:

'I lie,' forsooth! and 'hold my tongue' to be sure!' (*Loss of Breath* 1832).

It was a neat oxymoron: a self-contradictory statement. *Oxymoron* is an odd word. The *moron* bit is easy to guess at, but the *oxy* bit only evokes echoes of *oxygen*. Improbable as it may seem, *oxymoron* and *oxygen* are directly linked. The Greek root *oxy-* means 'sharp, keen, acute, pungent, acid'. Oxygen is so called because it was originally thought to be the essential integer in the formation of acids, and on the same pattern *hydrogen*

is so called because of its role in creating water. Thus *oxymoron* (sharp + stupid) is a word which is an example of itself.

Oxymoron's opposite is *tautology*. A tautology is a word or (more commonly) a statement which repeats itself or which involves self-referring logic. In the TV quiz *Mastermind*, the following exchange occurred:

> Q: What is a tautology?
> A: Repeating the same thing twice.

This unwittingly impeccable answer is cited by Alex Buzo as the genesis of his entertaining book *Tautology* (Penguin Books, 1981). Buzo's note at the start of the book discloses that he had been on a campaign to eradicate tautologies from our public speech, but had failed. The book is wonderful collection of snippets gathered during his campaign. Until I looked at *Tautology* again recently, I had forgotten that it had been a subject of general discussion and interest in the 1980s.

The OED2 defines *tautology* as:

> A repetition of the same statement. The repetition (esp. in the immediate context) of the same word or phrase, or of the same idea or statement in other words: usually as a fault of style.

(A purist might think that the first part of this is itself tautologous. A repetition of a statement is necessarily a repetition of the same statement. Repetition of a different statement would not be repetition at all. Perhaps within the depths of the OED staff someone is having a tiny joke).

There are two distinct forms of tautology. One is a statement which repeats itself in different words. Examples from Buzo's book include 'detached aloofness', 'pregnant mothers-to-be', 'wandering nomad' and 'Bargain Basement downstairs'. It is still common to hear people speak of 'new innovations'.

A tautology can also involve a much subtler kind of repetition, where the statement involves a logical circularity. In *Dietrich's case*, Gaudron J had to deal with the question whether the expression 'fair trial according to law' was a tautology. She said that it was not:

> In most cases a trial is fair if conducted according to law, and unfair if not. If our legal processes were perfect that would be so in every case. But the law recognizes that sometimes, despite the best efforts of all concerned, a trial may be unfair even though conducted strictly in accordance with law. (177 CLR at 362)

There is a substantial overlap between *tautology* and its less-known relative *pleonasm*. The OED2 defines *pleonasm* as:

> The use of more words in a sentence than are necessary to express the meaning; redundancy of expression (either as a fault of style, or as a figure purposely used for special force or clearness…

This is the fault, so common in legal drafting, that the High Court had in mind in *Muir v The Open Brethren* (96 CLR 166). The court had to deal with a testamentary provision for:

> relieving cases of need and distress and in assisting persons in indigent circumstances and in particular… in assisting and relieving persons who have been or shall be adversely affected by the effects of the War in which the British Commonwealth of Nations is now engaged…

They said:

> There is a considerable amount of tautology in the provision. The same conception of poverty is referred to by the words 'need', 'distress' and 'indigent'. It is hard to distinguish between 'relief' in the case of 'need and distress' and 'assistance' in the case of indigency.

Pleonasm would have been more accurate, but would have sent the reading public in frenzied hordes to the dictionary. *Tautology* has taken the field for itself. *Pleonasm* rarely finds its way into the law reports. In *R v Johnson* (1991), Millhouse J referred to *pleonasm* as 'an elegant but not often heard word'. In *Anstee v Coltis Pty Ltd* (1995) Nielson J used pleonasm un-self-consciously and without explanation, but perhaps that reflects the elevated linguistic standards of the NSW Compensation Court. In *Southern Cross Interiors Pty Ltd v DCT* (2001), Palmer J referred to 'a surfeit of pleonasms', which might be either a pleonasm or a tautology, depending on your attitude. In the federal jurisdiction, pleonasm has only been used once in a judgment. Lindsay FM, with a very delicate eye to the distinction, said:

> …the Tribunal's characterisation of the religious violence in Nigeria as 'random and sporadic' is, if not tautologous, then, at least, a pleonasm. (*SBWD v Minister for Immigration* (2007) FMCA 1156)

But the high point must surely be the decision of

the NSW AAT in *Re Adam Boyd Munro and Collector of Customs* (NSW) (1984)

> (The draftsman) has used the three words 'costs, charges and expenses'. As they are used in an Act of Parliament, we cannot assume that each is synonymous for the other. Taken together they appear to indicate that the area of money involved should be widened rather than narrowed and that a broad view should be taken of the diminution of the wealth of the importer if that is brought about with, or is in any way related to the transportation of the goods. Together the three words form a pleonasm put together for the sake of emphasis. Looked at another way, they could be regarded as a statutory heniadys (sic).

The tribunal no doubt intended *hendiadys:* 'A figure of speech in which a single complex idea is expressed by two words connected by a conjunction; e.g., by two substantives with and instead of an adjective and substantive.' *Hendiadys* is obscure enough that it does not rate a mention in the first edition of *Fowler's Modern English Usage* (1926), but it does appear in the second edition (1968) and the third (1996). It is a literary device, mostly poetic, in which several words are joined by 'and' instead of subordinating one to the other. Fowler gives as an example: *nice and cool* instead of nicely cool. By this device, a single idea is being expressed in two words, one of which could sensibly have been used to qualify the other in order to convey the same idea. *Hendiadys* is not apt to describe expressions such as might and main or whisky and soda, where the parts are of equal value (well, linguistically at least. I would argue that whisky is the greater part of whisky and soda). Much less is it available to describe a repetitive concatenation of words, which is just a *pleonasm*.

The true meaning of *hendiadys* was recognised by Beaumont, Wilcox and Lindgren JJ in *Airservices Australia v Monarch Airlines* (1998):

> … even if s 67 is treated as analogous to a 'hendiadys' (i.e., a single idea expressed in two sets of words with the conjunction 'and') …

And it was even more accurately explained, and illustrated, by Heydon J in *Victims Compensation Fund Corporation v Brown* (2003):

> …hendiadys – an expression in which a single idea is conveyed by two words connected by a conjunction, like 'law and heraldry' to mean 'heraldic law'.

Forsooth.

Mason's miscellany - continued from back page

reported of the consequences:[7]

> Mr Darvall then struck Mr Windeyer forcibly with the brief which he held in his hand, on the neck or face. Mr Windeyer instantly started to the floor with his fists clenched and his arms squared at Mr Darvall; when – as he was striking, but before he struck, a blow – an officer in attendance placed himself between the parties.

Aghast at such behaviour, Stephen committed the two counsel to the custody of the sheriff and adjourned for two hours while he consulted his colleagues. When he returned, the two combatants did not dispute his account of what had happened in the face of the court, but they tendered apologies. Unmoved, Stephen sentenced Darvall to 14 days imprisonment, Windeyer to 20; and each was placed on a good behaviour bond for two years. The two lawyers spent Christmas behind bars.

Endnotes

1. The Hon J J Spigelman AC, 'Bicentenary of the coup of 1808' (2008) 30 Aust Bar Rev 129 at 138.
2. *R v Robert Atkins, Thomas Chambers and Henry Milton* (1828) *Dowling's Select Cases*, 306.
3. Antony E Simpson, 'Dandelions on the Field of Honor: Dueling, the Middle Classes, and the Law in Nineteenth-Century England' (1988) *Criminal Justice History* 99 discusses how the rules of honour were observed more than those of law. Convictions were very rare and, when they happened, capital punishment was reserved for the foreigner or the man who broke the conventions of honour in some heinous way.
4. L Robson, *A History of Tasmania*, OUP, 1983, vol 1, pp 296–7, 468-9; McLaren, *Dewigged, Bothered and Bewildered*, p 161.
5. *Penton v Calwell* (1945) 70 CLR 219 at 248.
6. Darvall later took silk and served as attorney-general for New South Wales before resigning from politics and returning to England.
7. See Bennett, *Sir Alfred Stephen*, pp 157–8.

Mason's miscellany

Duellers and brawlers in the law

Duelling was a popular and sometimes fatal diversion for 'gentlemen' until the mid nineteenth century. Spigelman CJ described it as 'the principal form of alternative dispute resolution' of the Rum Corps.[1] Those who participated, including the seconds, were liable as principals to murder if death resulted[2] although convictions were rare and death sentences rarer.[3] Sir John Jeffcott was the founding judge of the South Australian Supreme Court. His involvement in a fatal duel saw him prosecuted for murder but acquitted when no evidence was tendered, all this in between colonial judicial appointments. Australian society aped yet lagged behind England in this felonious practice. Duelling came to an abrupt end around the 1840s in England but lingered on later here.

There are several recorded instances of Australian lawyers getting involved in duels. The former attorney-general, Saxe Bannister's parting shot before sailing to England in 1826 was at the leading barrister Wardell in a duel from which both men emerged uninjured. William Charles Wentworth challenged Commissioner Bigge to a duel over the latter's suggestion that he, Wentworth, had written an anonymous poem defaming Lieutenant-Governor Molle. Indeed, Wentworth became so dangerously agitated that the under-secretary of state had to place him under police restraint.

William Lyttleton was the police magistrate of Norfolk Plains in Van Diemen's Land in the 1820s. A wealthy settler, William Bryan, was angered at Lyttleton's conviction of one of his servants for cattle stealing. Bryan challenged Lyttleton to a duel, sending the challenge through a man named Lewis. Montagu J fined Lewis £150 and sent him to gaol for 18 months.[4] Hugh Cokeley practised for a time as a barrister in Hobart Town. He became crown solicitor in the 1830s. He was always in financial difficulties and narrowly escaped conviction for embezzlement in 1842. He sailed to New Zealand to take up private practice in Wellington. In 1844, after a legal dispute, he mortally wounded a fellow lawyer in a duel.

One of the earliest lawyers to practise in the Swan River Colony (later Perth) was William Nairn Clark. He got into a dispute with a merchant named Johnson whom he alleged to have defrauded a client. Clark approached him and his associates in a Fremantle street, stating: 'you are a scoundrel and a blackguard, and if it were not for motives of prudence, I would give you a sound drubbing.' Johnson challenged him to a duel which took place the following day. Both duellists fired a single shot. Johnson was struck near the hipbone and died the next day, declaring that he had no complaint at what had happened. Clark and the two seconds were charged with murder with Clark being kept in prison until his trial. At that trial he represented himself and was able to obtain acquittals for all the accused.

Charles Kingston QC was at various times attorney-general and premier of South Australia around the turn of the twentieth century and he played a leading part in the federation movement. When he was first elected premier, he was on a good behaviour bond for organising a duel in Victoria Square, Adelaide. It was his response to being called 'a coward, a bully and a disgrace to the legal profession' by Sir Richard Baker, a conservative member of the Legislative Council.

Although duelling was stamped out in the nineteenth century its code was still being advocated by Rich J in the 1940s when he described a libeller's invitation that the victim sue him as 'an invitation to the adversary to substitute for methods of unregulated and desultory combat a duel to be fought in legal form with every weapon which the law allows, and as involving no promise that if it is accepted the challenger will fire in the air'.[5]

Actual violence was threatened from the bench in an episode involving Montagu J and Alfred Stephen, then the attorney-general in Van Diemen's Land and later to become chief justice of New South Wales. Montagu commenced hearing a case whose prosecution by information lay under the law officer's control. Stephen ambled into court to be greeted with a judicial tirade probably unequalled in Australian legal history. It culminated:

> Sir, in your official capacity I shall always treat you with the courtesy and respect due to you. Were you elsewhere I should treat you after your conduct with even less courtesy than a dog or a cur as your conduct richly deserves. I say this, Sir, as an English gentleman, and only as such – perhaps in the capacity of a Judge I had better be silent.

Perhaps indeed!

In 1846 two prominent Sydney barristers were committed to prison for punching each other in court. In an otherwise pedestrian debt action before Stephen CJ, Richard Windeyer took umbrage at his opponent, John Darvall,[6] calling his client 'a fellow'. Windeyer protested that his client was at least an honest fellow – more than could be said for Darvall's client. As the judge tried to hose things down Windeyer repeated his assertion, adding that Darvall was a liar. As Stephen

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