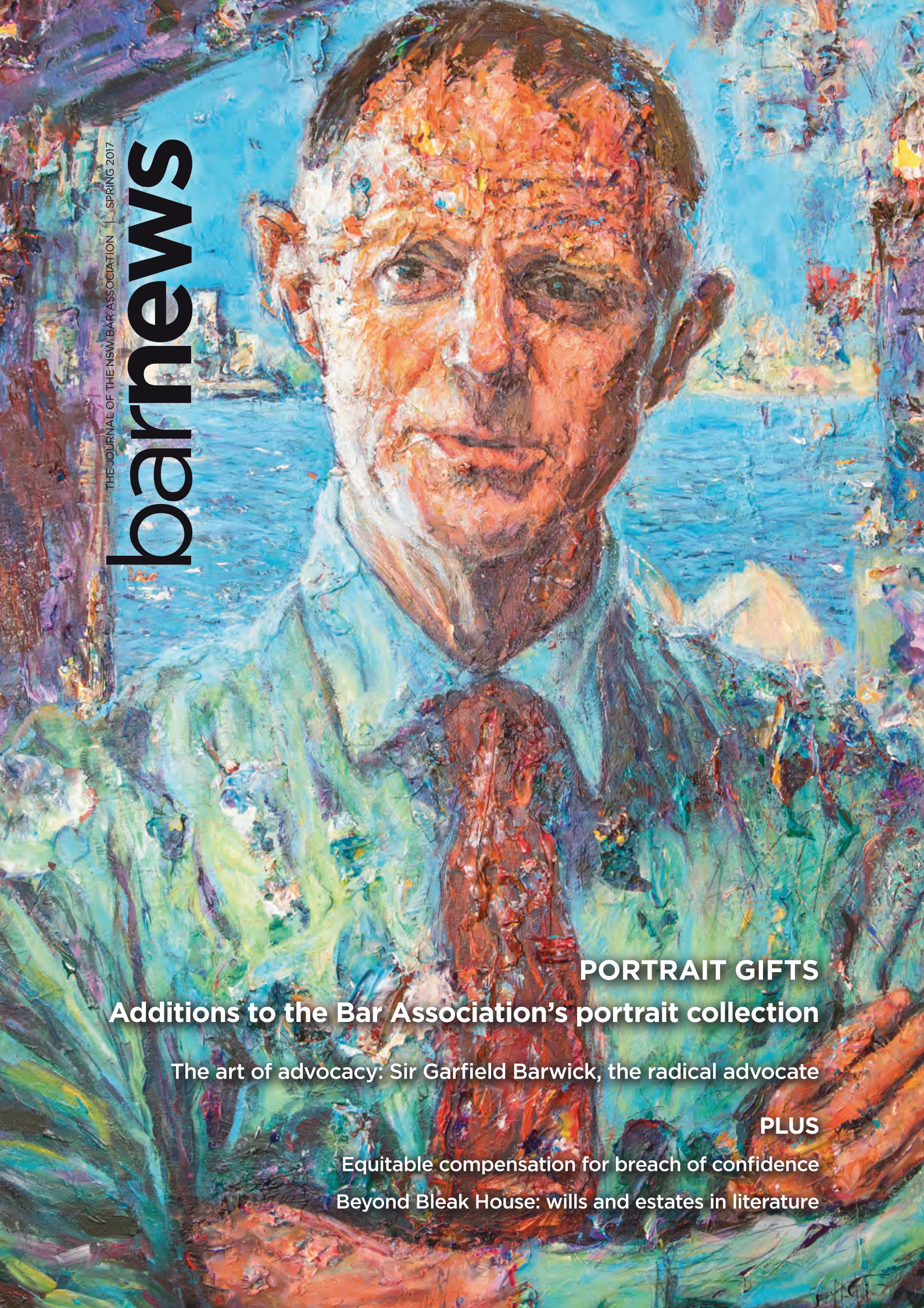

barnews

THE JOURNAL OF THE NSW BAR ASSOCIATION | SPRING 2017

PORTRAIT GIFTS

Additions to the Bar Association's portrait collection

The art of advocacy: Sir Garfield Barwick, the radical advocate

PLUS

Equitable compensation for breach of confidence

Beyond Bleak House: wills and estates in literature

THE JOURNAL OF THE NSW BAR ASSOCIATION | SPRING 2017

barnews

Contents

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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: Portrait of the Hon Justice Gageler by Tomas Maceiras Prego

EDITOR'S NOTE

Every now and then *Bar News* has the opportunity to publish an important piece of bar history. This issue's article by Sir Anthony Mason on the late Sir Garfield Barwick is one such piece.

It is not easy now to appreciate Barwick's significance during his time at the bar. These days the bar is much larger and more diversified. New chambers have opened up. Barristers practise in different geographical areas and in different specialities. They don't all know each other. There is no one dominant figure, the way Barwick was. There may not be again.

Barwick practised at the New South Wales Bar from 1927 till 1958. He went on to become both attorney-general of the Commonwealth and chief justice of Australia. He died in 1997, aged 94

Sir Anthony Mason knew Barwick well. While still a law student he watched Barwick on his feet in court. In due course he was briefed as Barwick's junior in many matters, as his article relates. Through this article we can glimpse Barwick the barrister at work: confident, eloquent, precise, extraordinarily efficient. Few lawyers have had so long and illustrious career as Sir Anthony Mason. He says of Barwick: 'In my long experience in the law he was the finest advocate I ever heard. This view was widely shared.'

Elsewhere in this issue we look at the important question of a barrister's role in mediations. We are delighted to include an address on this topic by the chief justice, the Hon T F Bathurst AC, entitled 'Off with the wig'. Among other things, the chief justice observes that in the light of recent decisions of the High Court it is unlikely that the conduct of a barrister in a mediation will be protected by the advocate's immunity. David Ash has also contributed an article which examines comprehensively all aspects of a barrister's work in mediations.

Geoffrey Watson SC has contributed another excellent piece on legal history, this one examining the version of justice meted out to Bob White, an African-American accused of raping a white woman in Texas in 1937. Jane Needham SC has a piece on succession law, with diversions into Dickens, Trollope and Harry Potter. This issue also includes an examination of the law of equitable compensation for breach of confidence by Dr Peter Turner, with commentary by the Hon Justice Mark Leeming.

Since the last issue there has been a changing of the guard at Bar Council. *Bar News* thanks the outgoing president, Noel Hutley SC, for all his work during his time in office. And we congratulate and thank the incoming president, Arthur Moses SC, on taking over the post and wish him the very best of luck in meeting the challenges that will come his way. Arthur's inaugural column as president appears on the next few pages.

This will be my last issue as editor. I would like to thank all those who have contributed to *Bar News* over the years, most particularly the various members of the committee, past and present who have given so generously of their time. *Bar News* is the New South Wales Bar's journal of record. It has been a privilege to have been in charge for the last five years and to have served on the committee for quite a number of years before that. I wish the incoming editor, Ingmar Taylor SC, the best of luck in his new role.

Jeremy Stoljar SC
Editor

The future of the New South Wales Bar: a time to reflect and act

By Arthur Moses SC

It is an honour and a privilege to be entrusted with the role of president of the New South Wales Bar Association, which I first joined in 1993 as a 24 year old. I am mindful that I follow in the footsteps of giants of the New South Wales Bar, including Tom Hughes QC, Bret Walker SC and Ian Barker QC who have each mentored me over the years. I look forward to working with my colleagues on Bar Council to promote the administration of justice and improve the practices of barristers.

I acknowledge the service and dedication of our former president, Noel Hutley SC who has served on Bar Council since 2013 when we were both elected. At my first Bar Council meeting as president on 11 May 2017, I moved that Hutley SC and Justin Gleeson SC be awarded life memberships of the Bar Association. The motion was passed by universal acclamation of the Bar Council. Gleeson SC has returned to the New South Wales Bar after his service as Commonwealth solicitor-general. He was awarded life membership because of his distinguished service to the law and extensive work for the Bar Association. Hutley SC and Gleeson SC are held in high esteem by the New South Wales Bar. Each richly deserve their awards of life membership.

I assume the presidency at a time when the New South Wales Bar is undergoing change. The policy dilemma for Bar Council is that the bar might not be changing fast enough. Over the past 14 years the total number of practising barristers in NSW has increased by only 221. During this same period, the total number of practising solicitors in NSW has increased by more than 13,400. While the New South Wales Bar has not grown much, numerically speaking, it has grown older. Nearly one-third of practising barristers are aged 60 or over. Most of those are men. It is an aim of my presidency to recruit younger practitioners and more women to the bar. This is vital to ensuring the New South Wales Bar remains the largest and strongest independent bar in Australia. It is also an aim of my presidency to ensure that the Bar Association provide barristers with assistance in their practice development and open up new sources of work through engagement with in-house solicitors employed by corporations.

The policy dilemma for Bar Council is that the bar might not be changing fast enough.

It is timely to reflect on why we exist as an independent bar and note some of the work that the Bar Council and our staff under the leadership of Professor Greg Tolhurst is undertaking to assist the bar. I spoke about some of these matters when I was invited to address the Tasmanian Bench and Bar Dinner in May of this year.

Role of the independent bar in Australia in the proper administration of justice

The existence of a skilled, respected and independent bar remains as fundamental to the proper administration of justice as ever before. The fact that it is possible for a justice system, such as the United States to work without an independent bar does not explain the importance of the bar as an institution, which enhances the administration of justice. On this issue, Chief Justice Mason stated:

> the adversary system can function without the establishment of an independent bar. Just how well it can function is another question. [1]

Sir Owen Dixon, described by Sir Anthony Mason as 'Australia's greatest lawyer', said the following, when sworn in as chief justice of Australia:

> [B]ecause it is the duty of the barrister to stand between the subject and the Crown, and between the rich and the poor, the powerful and the weak, it is necessary that, while the bar occupies an essential part in the administration of justice, the barrister should be completely independent and work entirely as an individual, drawing on his own resources of learning, ability and intelligence.[2]

There are, of course, many good reasons underpinning the observations of two of Australia's greatest jurists. One reason is that having an independent bar facilitates the application of the cab rank principle, which may otherwise be difficult, if not impossible, to apply in the context of a 'fused' profession.

Barristers cannot pick and choose their clients and for good reason. Unpopular or offensive people or persons associated with unpopular causes would be left without representation in courts of justice. Justice would not be done. Far less would it be seen to be done.

In *Giannarelli v Wraith,*[3] Justice Brennan pointed out that the cab rank rule was of ancient origin. A similar rule could be found, amongst other places, in the law of medieval France. Justice Brennan said:

> It is difficult enough to ensure that justice according to law is generally

> available; it is unacceptable that the privileges of legal representation should be available only according to the predilections of counsel or only on payment of extravagant fees. The profession would become the puppet of the powerful. If the cab rank rule be in decline - and I do not know that it is - it would be the duty of the leaders of the bar and of the professional associations to ensure its restoration in full vigour.[4]

Robert French AC, our former chief justice, gave a speech in Darwin on 18 May 2017 as part of Law Week on access to justice and made the point that without it the rule of law was diminished. It still remains our duty as leaders of the bar in 2017 to ensure the cab rank rule is adhered to.

Barristers are better advocates than solicitors by virtue of their specialisation

A second reason why the administration of justice is better and more cost effective when served by an independent bar is the efficient conduct of litigation by virtue of the specialisation of barristers as advocates. The observations of Chief Justice Warren Burger of the Supreme Court of the United States as to the quality of advocacy in England and Wales in which there is an independent bar, as compared to the United States is instructive. In his lecture at the Fordham University Law School in New York, Chief Justice Burger said:

> For twenty years, I have watched advocates conduct trials in more than a dozen countries, and nowhere have I seen more ardent, more effective advocacy than in the courts of England.[5]

The independent bar promotes a better judiciary

Thirdly, the existence of an independent bar leads to the appointment of experienced lawyers as judicial officers which contributes to the effective administration of justice. Again, in his lecture at the Fordham University Law School, Chief Justice Burger also observed:

> Another difference is that judges of trial courts of general jurisdiction are selected entirely from the ranks of the ablest barristers. Thus there is little or no on-the-job learning for trial judges as is all too often the case in the United States courts, both State and Federal. Only with the highest qualifications can a trial advocate enter into the selection of English judges. As a result, an English trial is in the hands of three highly experienced litigation specialists who have a common professional background.[6]

This is not to suggest that judges should only be drawn from the ranks of the bar or that there are not great judges who have been appointed who only practised as solicitors. However, experience gained in the courtroom from the other side of the bar table makes it easier, compared to other lawyers, to make the transition into judicial office.

Finally, as politicians retreat from their defence of democratic traditions, including the role of an attorney-general in defending the judiciary from attack, the bar has an increasingly important role to play in defending the judiciary. I am not suggesting that judges and courts should not be the subject of vigorous and even trenchant attack for their decisions or their conduct where it is appropriate to do so. That is an important part of a liberal democracy such as ours.[7] However, when the judiciary is subject to personal attack or misinformation, as occurred recently with the attacks on the Victorian Court of Appeal[8], the bar must step up.

The importance of the bar stepping up to the role of defending the judiciary cannot be underestimated. As Justice Keane has observed, the bar is the natural ally of the judiciary.[9] I share the views of Justice Keane.

THE FUTURE

In order to ensure that the bar remains the arm of the profession in Australia which provides specialised advocacy services, each of us needs to contribute to the teaching and mentoring of our colleagues. We also need to educate clients and solicitors that briefing counsel at an early stage of proceedings to provide advices on evidence and prospects, assists in the proper governance of proceedings in order to ensure that costs are not unnecessarily incurred by the parties or the justice system.

Justice Rares noted that it was vitally important that barristers undertook the important tasks of finalising court documents and submissions, rather than solicitors because of their specialisation which allowed the work to be done in a cost effective and timely manner.

Of course, the greatest threats to the future of the bar these days do not come from the legislators, but rather some law firms that continue to cannibalise the work which junior counsel should routinely be retained to do.

The bars in each state/territory need to highlight their efficiency and skill in order to educate in-house solicitors and clients so that questions can be raised as to why their services are not being used at an early stage of proceedings.

On this topic, Justice Rares of the Federal Court in *Armstrong Scalisi Holdings Pty*

Arthur Moses SC, 'The future of the New South Wales Bar: a time to reflect and act.'

Ltd v Piscopo (Trustee), in the matter of Collins[10], in a decision delivered in March this year has assisted us in this task. That decision received coverage in *The Australian* [11], *The Sydney Morning Herald* [12] and the *Australian Law Journal.*[13] Justice Rares noted that it was vitally important that barristers, rather than solicitors, undertook the important tasks of finalising court documents and submissions because of their specialisation which allowed the work to be done in a cost effective and timely manner.

Engagement with the Association of Corporate Counsel

The New South Wales Bar has been working with the Association of Corporate Counsel in order to encourage more direct briefing of the bar by in-house solicitors. In-house solicitors now make up approximately 25 per cent of the legal profession in NSW and are the fastest growing sector of the national legal profession. The Bar Association's Practice Development Committee, under the leadership of Liz Cheeseman SC has spent a considerable amount of time and effort on this relationship. We will continue to engage with the Association of Corporate Counsel, including attending a conference later this year at which members of the New South Wales Bar will address the attendees.

A survey, recently commissioned by the NSW Barristers Clerks Association, complements that work nicely and suggests areas for further cooperation and research. It's particularly valuable to gain insights into the expectations corporate counsel have when searching for specialist expertise in our increasingly competitive legal services market. The Bar Association is now focussing on new and better ways to promote the intellectual capital of local barristers online, such as through 'Find a Barrister' (find-a-barrister.nswbar.asn. au). Similar search facilities are being developed for accredited arbitrators, mediators and evaluators. The message that I have been delivering to in-house counsel is to brief counsel early and often, particularly junior counsel. The New South Wales Bar has an array of talented, experienced and hard-working junior counsel who are more cost-effective than law firms. This observation was made succinctly by Justice White in *April Fine Paper Macao Commercial Offshore Ltd v Moore Business Systems Australia Ltd.*[14]

The message that I have been delivering to in-house counsel is to brief counsel early and often, particularly junior counsel.

In a usual case of commercial litigation, counsel, at least junior counsel, should be briefed early. Where there is work that can be done either by the solicitor or by junior counsel, and, as often happens, junior counsel is more experienced than the solicitor and charges at a significantly lower rate, then the solicitor's duty to his or her client is to ensure that the work is done at the lower cost. That general statement is, of course, subject to the ability of the individual legal practitioners involved. But very often one sees work done by a solicitor in a firm which could be done equally well or better at a fraction of the cost by junior counsel with considerably more experience as a litigation solicitor and with more expertise. It is a judgment I quote often when addressing audiences on the virtues of briefing junior counsel early.

Escrow Payment Service Project

The Bar Association has also been working together with the National Australia Bank on an Escrow Payment Service Project. Fee security and speed of payment remains a real problem for the bar, especially junior barristers. Client funds held by a mutually trusted stakeholder as security for timely payment of professional fees and disbursements would solve this problem without the need for trust accounts to operate. If the project is successful, this would also allow barristers to accept direct briefs without having to deal with the obligations in clause 15 of the *Legal Profession Uniform Law Application Regulation 2015*.

Strategic Plan

The Bar Council approved a new Strategic Plan for the New South Wales Bar Association on 27 July 2017 with a view to ensuring that it better serves the current membership of the bar. The Bar Association has a number of roles which include but are not limited to promoting the administration of justice, investigating and determining matters relating to the conduct of barristers and providing services to barristers. Each of these roles are equally important. However, the Bar Council is examining how the Association can provide services to members which better assists them in their practices.

The staff at the Bar Association are preparing a number of proposals for new and improved services and benefits under the leadership of Chris Winslow who is now the co-ordinator of services and benefits. There will soon be an increase in the capacity of our Fee Recovery Service. It has received relatively little attention in recent years, but the Bar Association helps to recover on average $100,000 per year in unpaid solicitors' fees. Fee recovery clinics on the last Friday of each month in one of the Bar Association's conference rooms will commence shortly to assist members of the bar to recover unpaid bills.

Innovation and technology

The Innovation and Technology Committee under the leadership of Michael Green SC was established in June 2017. Part of the mission of the

committee is to formulate strategies and improvements for practice through the use of technology which enhance the competitiveness of the independent bar whilst meeting the needs of clients.

Legal Aid rates

We will continue to seek an increase in Legal Aid rates paid to barristers. An increasing number of our colleagues are working an excessive number of unpaid hours to subsidise an under-resourced justice system. This has a detrimental effect on the health of barristers and a disadvantageous effect on their working lives.

More opportunities for junior counsel to be briefed by the NSW DPP and to perform work for the Public Defenders Chambers

There has been an increase in criminal prosecutions and cases pending before the District Court of NSW. The Bar Association encourages members of the private junior bar to consider accepting briefs to appear in matters for the NSW DPP as well as assist the Public Defenders Chambers. The Bar Association will work with the NSW DPP and the Public Defenders Chambers to identify possible opportunities and the terms upon which barristers can be retained to undertake work which is unable to be undertaken by these agencies. Such work provides an important opportunity for barristers to contribute to work in the public interest as well as obtain invaluable advocacy experience.

Quality of Working Life Survey

The bar at times can be stressful. The results of the Quality of Working Life Survey, which was undertaken earlier this year, are currently being examined. A working group has been established by the Bar Council to oversee further interrogation of the data to be included in the final report. Once that is done, engagement with stakeholders will commence in order to provide a response to the results of the survey. Of course, the Bar Association, through the director of BarCare, Jenny Houen, and the Benevolent Association, continue to support barristers who encounter personal misfortune or require some form of assistance. The treasurer, Andrew Bell SC, is currently working on initiatives to highlight the accessibility of funds to assist members who require assistance.

CONCLUDING REMARKS

The bench and the bar have a unique relationship. It is important that we do not forget that the bench and bar are related in important ways. Justice Spence of the Superior Court of Justice (Ontario) at the Twelth Colloquium on the Legal Profession in 2009 expressed the relationship better than I can articulate it when he said:

> As a judge, I start to think about this question of the independence of the bar in relation to the independence of the judiciary. These two institutional frameworks are related in important ways. The underlying principle was succinctly expressed in an exchange between then Chief Justice Rehnquist of the United States and Chief Justice Lamer of Canada during a dialogue in which they took part at Duke University in the Spring of 1991. In response to a question as to what institutions are fundamental to the preservation of a free society, Chief Justice Rehnquist replied: 'an independent judiciary' and Chief Justice Lamer added 'an independent bar', because as he put it, 'you can't have one without the other' What is at stake is, of course, the right of citizens to enjoy the benefits and protections afforded by the law. The independence of the legal system is the institutional underpinning of those rights.[15]

It is why the courts expect much of us and why we should ensure we maintain a strong and large independent bar to serve the community. I look forward to working with each of you to achieve this aim.

Thank you

This is the final *Bar News* edition under the editorial guidance of Jeremy Stoljar SC. I wish to thank Jeremy for his sterling service to the New South Wales Bar during five years as editor. As a former member of Jeremy's committee, I know first hand of the hard work he has undertaken in order to ensure the high quality of the publication. He has continued, and built upon, the fine work of his predecessors, such as Andrew Bell SC, Justin Gleeson SC and Ruth McColl SC (as she then was). Along the way, he has discovered some new and talented writers at the bar. 'Advocata', in particular, offers readers a witty insight into the work-life balance by a female junior barrister. Jeremy is, of course, an author himself, having published in 2011 *The Australian Book of Great Trials*. I wish Jeremy every success in any future literary endeavours. The bar is grateful for Jeremy's stewardship of the *Bar News*. Like every other member of the bar, I look forward to the editorship of Ingmar Taylor SC, someone who has contributed a number of excellent articles to our journal over many years.

Arthur Moses SC, 'The future of the New South Wales Bar: a time to reflect and act.'

Endnotes

1 Mason, Anthony, 'The independence of the bench; the independence of the bar and the bar's role in the judicial system' (1993) *Australian Bar Review* 10(1), 1-10.

2 Address upon taking the oath of office in Sydney on 21 April 1952, reprinted in *Jesting Pilate*, 1965, p 245.

3 (1988) 165 CLR 543 at 580.

4 (1988) 165 CLR 543 at 580.

5 Warren E Burger, 'The Special Skills of Advocacy', *Fordham Law Review*, Volume 83, Issue 1, 227 at 229. This article was delivered as the Fourth Annual John F. Sonnett Memorial Lecture on Nov. 26, 1973, at Fordham Law School in New York.

6 Warren E Burger, 'The Special Skills of Advocacy', *Fordham Law Review*, Volume 83, Issue 1, 227 at 228-229. This article was delivered as the Fourth Annual John F. Sonnett Memorial Lecture on Nov. 26, 1973, at Fordham Law School in New York.

7 *Ambard v Attorney-General for Trinidad and Tobago* [1936] AC 322 at 335; [1936] 1 All ER 704.

8 Calla Wahlquist, 'Coalition ministers will not face contempt charges after court accepts apology', *The Guardian*, Friday 23 June 2017, https://www.theguardian.com/australia-news/2017/jun/23/coalition-ministers-no-contempt-charges-court-accepts-apology

9 The Hon Justice P A Keane, 'The idea of the professional judge: the challenges of communication', Speech to the Judicial Conference of Australia Colloquium, Noosa, 11 October 2014.

10 [2017] FCA 423.

11 Chris Merritt, 'Federal court urges law firms to send more work to bar', *The Australian*, 12 May 2017, http://www.theaustralian.com. au/business/legal-affairs/federal-court-warns- law-firms-of-fines-over-extra-costs/news-story/b0e0cf91d7fe564fc5b0f61009ace6c1

12 Michaela Whitbourn, 'Judge takes aim at 'incomprehensible' $239,485 bill', *Sydney Morning Herald*, 2 May 2017, http://www.smh.com.au/national/judge-takes-aim-at-incomprehensible-239485-bill-20170502-gvx3wn.html

13 (2017) 91 ALJ 427.

14 [2009] NSWSC 867 at [26].

15 James M Spence, 'Why The Independence of the Bar Matters', delivered at Queen's University, 10 March 2009, pp 1-2.

Direct or indirect pecuniary interest under s 44(v) of the Constitution

Peter Strickland reports on *Re Day* [No 2] [2017] HCA 14

In *Re Day [No 2]* [2017] HCA 14 (*Re Day*), the High Court sat as the Court of Disputed Returns. The central issue was whether Robert John Day AO, who had been elected as a South Australian senator in the Commonwealth Parliament, had any direct or indirect pecuniary interest in any agreement with the Public Service of the Commonwealth within the meaning of s 44(v) of the Constitution. If he did, it meant that his election was invalid and there was therefore a vacancy in South Australia's representation in the Senate.

Additional questions which the court had to consider included, if there were a vacancy, by what means and in what manner that vacancy should be filled.

The court held that Mr Day had an indirect pecuniary interest within the meaning of s 44(v). It also held that the resulting vacancy should be filled by applying, by analogy, the provisions of s 273(27) of the *Commonwealth Electoral Act 1918* (Electoral Act). This meant filling the vacancy with a special count of the ballot papers by counting each vote 'above the line' for the Family First party as a vote for the other Family First candidate.

Background

Mr Day was elected to the Senate as a senator for South Australia at the 2013 federal election. His term commenced on 1 July 2014.

The interest in question concerned a lease entered into between Fullarton Investments Pty Limited (Fullarton Investments), which was the registered proprietor of premises at 77 Fullarton Road, Kent Town (premises), and the Commonwealth on 1 December 2015. One of the benefits accruing to Mr Day as a senator was the provision of office accommodation within his electorate. The purpose of the lease was to provide Mr Day with that accommodation. Mr Day occupied an office in the premises from April 2015.

Fullarton Investments was the trustee of the Fullarton Road Trust, whose beneficiaries included the Day Family Trust. The trustee of the Day Family Trust was B&B Day Pty Limited (B&B Day), and the beneficiaries of the Day Family Trust included Mr Day. On 24 April 2014, B&B Day had sold the Premises to Fullarton Investments for $2.1 million and provided vendor finance in relation to that purchase. B&B Day had a loan facility from a bank of $1.6 million, secured by a mortgage over the premises. Mr Day and his wife had given a guarantee and indemnity in relation to that loan.

On 26 February 2016, Fullarton Investments directed the Commonwealth to pay the rent due under the lease to 'Fullarton Nominees', which was a business name owned by Mr Day, to be deposited into a bank account of Mr Day.

Mr Day's nomination for the 2016 federal election was declared on 10 June 2016; he was declared elected to the Senate on 4 August 2016. Subsequently, he resigned from the Senate on 1 November 2016.

The central issue

Section 44(v) of the Constitution provides that:

> Any person who: …
>
> (v) has any direct or indirect pecuniary interest in any agreement with the Public Service of the Commonwealth otherwise than as a member and in common with the other members of an incorporated company consisting of more than twenty-five persons;
>
> shall be incapable of being chosen or of sitting as a senator or a member of the House of Representatives.

There was no dispute that the lease was an agreement with the Public Service of the Commonwealth and that Mr Day was not a party to the lease. The question was whether Mr Day had an indirect pecuniary interest in the lease.

Decision on the central issue

The court had previously considered s 44(v) in *In re Webster* (1975) 132 CLR 270. In that case, Barwick CJ construed s 44(v) by reference to its perceived purpose, which his Honour took to be the same as that of a provision of the *House of Commons (Disqualification) Act 1782* (UK) (**1782 Act**). That purpose was said to 'secure the freedom and independence of Parliament from the Crown'.[1] Mr Day submitted that this decision should be followed with the effect that he was not disqualified from being elected as a senator, because the Commonwealth could not exert any influence over him by anything it could do under the lease.[2]

This submission was rejected by all members of the court, which held as follows.

First, while the 1782 Act was the progenitor of s 44(v), it was the not the 'precise progenitor'. The references in s 44(v) to 'pecuniary interest' and the exception for shareholdings in companies with more than 25 members were not included in the 1782 Act. Those different words reflected a broader concern with personal interests which was discussed during the Convention Debates.[3] As such, the purpose of s 44(v) is wider than merely protecting the freedom and independence of parliamentarians from the Crown. It includes prevention of financial gain which may create a conflict of interest and duty.[4]

Secondly, the proper construction of s 44(v) proceeded from an understanding that parliamentarians have a duty to act in the public interest, uninfluenced by considerations such as personal financial gain.[5] The court held also that the interpretation in

Peter Strickland, 'Direct or indirect pecuniary interest under s 44(v) of the Constitution.'

Webster could not be supported because it was narrower than the meaning which the text conveyed as a matter of ordinary meaning.[6]

Thirdly, the construction in *Webster* was unsatisfactory because it adopted a criterion for disqualification that was vague and unduly evaluative.[7] Section 44(v)'s 'blunt and limiting effect on democratic participation tells in favour of an interpretation which gives the disqualification … the greatest certainty of operation that is consistent with its language and purpose'.[8]

Accordingly, s 44(v) was to be construed as having a broader purpose, which includes preventing direct and indirect pecuniary interests that conceivably could influence parliamentarians in the performance of their duty by reason of the effect of that interest on their private concerns.[9]

As to what constitutes a 'pecuniary interest', the court held this to be an interest 'sounding in money or money's worth'[10], which can include avoiding a monetary loss.[11] An *indirect* pecuniary interest in an agreement with the Public Service requires a 'personal connection' to the agreement.[12] This looks to the practical effect of the agreement in question on a person's pecuniary interests.[13] In this regard, both Gageler J and Nettle and Gordon JJ[14] endorsed the view of Gavan Duffy J in *Ford v Andrews* (1916) 21 CLR 37 at 335 that:

> A man is directly interested in a contract if he is a party to it, he is indirectly interested if he has the expectation of a benefit dependent on the performance of the contract; but in either case the interest must be in the contract, that is to say, the relation between the interest and the contract must be immediate and not merely connected by a mediate chain of possibilities.

For example, if a parliamentarian's spouse is employed by the Public Service, the parliamentarian would not have an indirect pecuniary interest in the spouse's employment agreement, because the connection is not immediate.[15]

In the case of Mr Day, the fact that the rent was directed to be paid into a bank account of Mr Day was sufficient to give him a relevant indirect pecuniary interest in the lease.[16] He also had an indirect pecuniary interest because payment of the rent would have the practical prospect of reducing Mr Day's contingent liability to the bank (which arose from the guarantee).[17] Further, Mr Day had the prospect of receiving, through the sequential exercise of discretions, some or all of the funds that Fullarton Road Trust might receive under the lease.[18]

How was the vacancy due to Mr Day's disqualification to be filled?

Section 360(1)(vi) of the Electoral Act permits the court to declare that any candidate elected to the parliament in fact was not duly elected.[19] That carries with it the incidental power to order a special count by which the true result of the polling is given effect – that is, the true legal intent of the voters.[20]

In the case of deceased candidates, section 273(27) of the Electoral Act provides that each vote indicated for the deceased is counted as a vote for the next candidate in order of preferences. By analogy, a vacancy for a disqualified candidate could be filled by a special count of the ballot papers in the same way.[21] If the vacancy due to Mr Day's disqualification were to be filled in that way, the only other Family First candidate would be elected.

That result was opposed by Ms McEwan, who was the fourth South Australian candidate for the Senate on the Australian Labor Party's ticket. Ms McEwan submitted that 'above the line' votes for Family First should be disregarded, because s 168 of the Electoral Act required a group to comprise two or more members. That is, since Mr Day's candidacy was invalid, Family First was ineligible to be a group, meaning that votes above the line for Family First ought not to be counted.[22]

Ms McEwan's submission was rejected. This is because her approach would have distorted voter intentions.[23] Keane J also held that, alternatively, Ms McEwan did not demonstrate that it would distort voter intentions to allocate Mr Day's votes to the other Family First candidate.[24] His Honour held further that nothing in s 168 of the Electoral Act indicated that votes 'above the line' for a group are invalidated where one of two members of the group is subsequently disqualified.[25] The effect of an 'above the line' vote is to vote for members of the group in order of preference below the line, which means there is no substantive difference between a vote above the line, and a vote below the line. Accordingly, it was correct to count the votes in order of the next preference, which in this case, was the other Family First candidate.[26]

The court therefore held that the resulting vacancy should be filled by applying the provisions of s 273(27) of the Electoral Act by analogy, meaning that the above the line votes for Mr Day were to be treated as votes for the other Family First candidate.[27]

Endnotes

1 *Re Day [No 2]* [2017] HCA 14 at [14] per Kiefel CJ, Bell and Edelman JJ.
2 *Re Day [No 2]* [2017] HCA 14 at [15] per Kiefel CJ, Bell and Edelman JJ.
3 *Re Day [No 2]* [2017] HCA 14 at [31] and [33] per Kiefel CJ, Bell and Edelman JJ. See also Nettle and Gordon JJ at [271], [273].
4 *Re Day [No 2]* [2017] HCA 14 at [39] per Kiefel CJ, Bell and Edelman JJ, at [98] per Gageler J, at [275] per Nettle and Gordon JJ. See also Keane J at [161] and [165].
5 *Re Day [No 2]* [2017] HCA 14 at [49] per Kiefel CJ, Bell and Edelman JJ.
6 *Re Day [No 2]* [2017] HCA 14 at [161] per Keane J. See also Nettle and Gordon JJ at [247].
7 *Re Day [No 2]* [2017] HCA 14 at [98] per Gageler J.

Peter Strickland, 'Direct or indirect pecuniary interest under s 44(v) of the Constitution.'

8 *Re Day [No 2]* [2017] HCA 14 at [97] per Gageler J.
9 *Re Day [No 2]* [2017] HCA 14 at [260], [264] per Nettle and Gordon JJ. See also at [39], [48] per Kiefel CJ, Bell and Edelman JJ, at [183] – [184] per Keane J.
10 *Re Day [No 2]* [2017] HCA 14 at [54] per Kiefel CJ, Bell and Edelman JJ, at [111] per Gageler J, at [252] per Nettle and Gordon JJ.
11 *Re Day [No 2]* [2017] HCA 14 at [111] per Gageler J, at [252] per Nettle and Gordon JJ.
12 *Re Day [No 2]* [2017] HCA 14 at [66] per Kiefel CJ, Bell and Edelman JJ.
13 *Re Day [No 2]* [2017] HCA 14 at [54] per Kiefel CJ, Bell and Edelman JJ, at [192] per Keane J.
14 *Re Day [No 2]* [2017] HCA 14 at [108] per Gageler J, at [254] per Nettle & Gordon JJ.
15 *Re Day [No 2]* [2017] HCA 14 at [256] per Nettle and Gordon JJ.
16 *Re Day [No 2]* [2017] HCA 14 at [13], [76] per Kiefel CJ, Bell and Edelman JJ, at [88] per Gageler J, at [195] per Keane J, at [279] per Nettle and Gordon JJ.
17 *Re Day [No 2]* [2017] HCA 14 at [89] per Gageler J, at [280] per Nettle and Gordon JJ.
18 *Re Day [No 2]* [2017] HCA 14 at [90] per Gageler J.
19 *Re Day [No 2]* [2017] HCA 14 at [206] per Keane J, at [292] per Nettle and Gordon JJ.
20 *Re Day [No 2]* [2017] HCA 14 at [206]-[207] per Keane J.
21 *Re Day [No 2]* [2017] HCA 14 at [77] per Kiefel CJ, Bell and Edelman JJ, at [293] – [294] per Nettle and Gordon JJ.
22 *Re Day [No 2]* [2017] HCA 14 at [79] – [80] per Kiefel CJ, Bell and Edelman JJ.
23 *Re Day [No 2]* [2017] HCA 14 at [78] per Kiefel CJ, Bell and Edelman JJ, at [210] per Keane J.
24 *Re Day [No 2]* [2017] HCA 14 at [210]-[211] per Keane J.
25 *Re Day [No 2]* [2017] HCA 14 at [209] per Keane J.
26 *Re Day [No 2]* [2017] HCA 14 at [298], [301] and [303] per Nettle and Gordon JJ.
27 Gageler J at [93] agreed with the reasoning of the other members of the court as to the means and manner of filling the vacancy.

Limits of advocates' immunity confirmed

James Foley reports on *Kendirjian v Lepore [2017]* HCA 13

The High Court decision of *Kendirjian v Lepore* [1] confirms that advocates' immunity does not apply to the giving of negligent advice (or the negligent failure to give advice) in connection with resolving proceedings.

The High Court's decision confirmed that negligence in connection with the settlement of proceedings is not conduct which is 'intimately connected with work in court', and accordingly any claim for negligence relating to such conduct will not be barred by advocates' immunity.

Car accident proceedings

In November 1999, Mr Kendirjian was injured in a car accident. He commenced proceedings in 2004. The other driver admitted fault, and accordingly the proceedings only concerned an assessment of damages.

On the first day of the trial, a settlement offer of $600,000 plus costs was made by the defendants. This offer was rejected.

Ultimately, Mr Kendirjian obtained judgment for $318,432.75 plus costs. Mr Kendirjian appealed to the NSW Court of Appeal. The appeal was unsuccessful.

Negligence proceedings

In October 2012, Mr Kendirjian commenced proceedings in the District Court in negligence against his legal representatives in the car accident proceedings.

The essence of Mr Kendirjian's claim in negligence was that his legal representatives did not inform him of the substance of the settlement offer, only the fact that an offer had been made, and rejected the settlement offer without his instructions. He sued his legal representatives for the difference between the settlement offer and the result he ultimately obtained.

Decisions below

Mr Kendirjian's legal representatives applied to the District Court for summary dismissal of the proceedings, on the basis that the claim was doomed to fail by reason of advocates' immunity.

The District Court granted the legal representatives' application, and summarily dismissed the proceedings.

Mr Kendirjian appealed from the summary dismissal to the Court of Appeal. The Court of Appeal affirmed the decision of District Court and dismissed the appeal.

In dismissing the appeal, the Court of Appeal applied its earlier decision of *Donnellan v Woodland* [2], in which the Court found (in seriously considered *obiter dicta*) that the giving of negligent advice, or negligent failure to give advice, in relation to potential settlement would lead to a decision to continue or not continue with the case, and would accordingly affect the conduct of the case. For this reason, an action seeking to impugn such conduct would be barred by advocates' immunity.[3]

The decision was appealed to the High Court.

Intervening decision of High Court

After the Court of Appeal confirmed the summary dismissal of the proceedings, but before the appeal to the High Court was heard, the High Court delivered its decision in *Attwells v Jackson Lalic Lawyers Pty Limited* [4].

In *Attwells,* the High Court declined to overrule its earlier decisions in *D'Orta* [5] and *Giannarelli* [6], and declined to abolish advocates' immunity. The High Court confirmed the principle in *Giannarelli*, that advocates' immunity extended to 'work done out of court which leads to a decision affecting the conduct of the case'.[7]

However, while the High Court in *Attwells* maintained advocates' immunity, it limited the scope of the immunity. The High Court found that the immunity extended only to conduct outside of court which gave rise to the resolution of that case by the court.[8] The immunity did not extend to advice which contributed to the making of a voluntary agreement, such as a settlement agreement. There needed to be a 'functional connection' between the conduct outside of the court and the determination of the case, in order for the practitioners to have the benefit of advocates' immunity.[9]

High Court

Following the decision in *Attwells*, the first respondent consented to the appeal being allowed. However, the second respondent resisted the appeal, on the basis that the reasoning in *Attwells* could be distinguished, or alternatively that *Attwells* should be re-opened.

The High Court found that *Attwells* could not be distinguished. The differing feature of *Attwells* relied upon by the second respondent was that the present case would necessarily involve calling into question the correctness of the judgment of the District Court in the car accident proceedings, which would offend the principle of finality of litigation.

This argument was rejected by the High Court[10], which found that judgment would not be called into question. Rather, the court found that whether the conduct of the legal representatives was negligent would be assessed at the time of the conduct (the first day of the final hearing), and would not involve any consideration of whether the final decision of the District Court in the car accident proceedings was right or wrong.[11]

All seven members of the High Court declined to re-open *Attwells*. The second respondent sought to draw a distinction

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between the principle of the scope of advocates' immunity stated in *Attwells* (citing the remarks of McCarthy P in *Rees v Sinclair* [12]), and the principle as articulated by the High Court in *Giannarelli*. The High Court found that any such distinction was 'illusory' and 'artificial'.[13]

Endnotes

1 [2017] HCA 13 (29 March 2017).
2 (2013) ANZ ConvR 13-001; [2012] NSWCA 433.
3 *Kendirjian v Lepore* [2015] NSWCA 132 at [27]-[28].
4 (2016) 90 ALJR 572; 331 ALR 1; [2016] HCA 16.
5 *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1; [2005] HCA 12.
6 *Giannarelli v Wraith (1988)* 165 CLR 543.
7 Id at 560.
8 *See at [52], [59] per French CJ, Kiefel, Bell, Gageler and Keane JJ.*
9 *See at [5] per French CJ, Kiefel, Bell, Gageler and Keane JJ.*
10 *Edelman J, with whom Kiefel CJ, Bell, Gageler and Keane JJ agreed.*
11 *At [34] per Edelman J.*
12 [2005] HCA 12; (2005) 223 CLR 1 at 25-26 [61]-[64].
13 *At [38]-[39] per Edelman J, with Nettle and Gordon JJ also agreed as to this aspect.*

VERBATIM

In June 2017 Martin Shkreli stood trial in the United States on charges relating to securities and wire fraud. Mr Shkreli became very well known in the States in recent years while he was chief executive officer of a pharmaceutical company at a time when the company drastically increased the price of various drugs, making them unaffordable for many. A recent issue of *Harper's Magazine* included the transcript of the jury selection process at the outset of Mr Shkreli's trial, during which the Court ended up excusing more than two hundred potential jurors. Benjamin Brafman is Mr Shkreli's attorney. In case anyone is not familiar with the Wu-Tang Clan, it is a well known hip hop group from New York. Now read on ...

THE COURT: Juror Number 144, tell us what you have heard.

JUROR NO. 144: I heard through the news of how the defendant changed the price of a pill by up-selling it. I heard he bought an album from the Wu-Tang Clan for a million dollars.

THE COURT: The question is, have you heard anything that would affect your ability to decide this case with an open mind. Can you do that?

JUROR NO. 144: I don't think I can because he kind of looks like a dick.

THE COURT: You are Juror Number 144 and we will excuse you. Come forward, Juror Number 155.

JUROR NO. 155: I have read a lot of articles about the case. I think he is as guilty as they come.

THE COURT: Then I will excuse you from this case. Juror Number 10, please come forward.

JUROR NO. 10: The only thing I'd be impartial about is what prison this guy goes to.

THE COURT: Okay. We will excuse you. Juror 28, do you need to be heard?

JUROR NO. 28: I don't like this person at all. I just can't understand why he would be so stupid as to take an antibiotic which H.I.V. people need and jack it up five thousand percent. I would honestly, like, seriously like to go over there —

THE COURT: Sir, thank you.

JUROR NO. 28: Is he stupid or greedy? I can't understand.

THE COURT: We will excuse you. Juror 41, are you coming up?

JUROR NO. 41: I was looking yesterday in the newspaper and I saw the defendant. There was something about him. I can't be fair. There was something that didn't look right.

THE COURT: All right. I'm going to excuse you. Juror Number 59, come on up.

JUROR NO. 59: Your Honor, totally he is guilty and in no way can I let him slide out of anything because —

THE COURT: Okay. Is that your attitude toward anyone charged with a crime who has not been proven guilty?

JUROR NO. 59: It's my attitude toward his entire demeanor, what he has done to people.

THE COURT: All right. We are going to excuse you, sir.

JUROR NO. 59: And he disrespected the Wu-Tang Clan.

Interpretation of ambiguous clauses

Catherine Hamilton-Jewell reports on *Ecosse Property Holdings Pty Limited v Gee Dee Nominees Pty Limited* [2017] HCA 12

A recent decision of the High Court has provided clarity in relation to the way in which courts should interpret ambiguous clauses in contracts.

It was not disputed that the clause the subject of the proceeding was ambiguous. In those circumstances, the High Court construed the term by reference to the commercial purpose sought to be achieved by the terms of the agreement – that is, the ambiguous clause was to be construed in a manner consistent with the commercial objective of the agreement.

Facts

On 19 November 1988, Westmelton (Vic) Pty Limited (Westmelton) and Mr Peter Morris entered into a memorandum of agreement for a lease, whereby Mr Morris was to lease from Westmelton 12.5 hectares of part of a larger parcel of land near Melton, in Victoria. Westmelton was the registered proprietor of the estate in fee simple of the larger parcel of land. The lease was a 99 year 'farm' lease.[1]

Relevantly, at the time that the lease was entered into:

- Subdivision for sale of the larger parcel of land was prohibited by local planning restrictions, such that a sale from Westmelton to Mr Morris of the leased area was not possible;
- Westmelton was in receivership; and
- The memorandum of agreement for the lease was prepared by adapting the terms of a standard form memorandum of agreement for a farm lease. Handwritten and typewritten deletions and insertions were made on the standard form document by solicitors acting for the parties.

Clause 4 of the memorandum of agreement (with deletions from the standard form agreement shown as struck through) read as follows:[2]

> 4. AND also will pay all rates taxes and assessments and outgoings whatsoever ~~excepting land tax~~ which during the said term shall be payable by the ~~Landlord or~~ tenant in respect of the said premises (~~but a proportionate part to be adjusted between Landlord and Tenant if the case so requires~~).

Clause 13 of the memorandum of agreement, which was an addition to the standard form agreement, read as follows:[3]

> 13. The parties acknowledge that it was the intention of the Lessor to sell and the Lessee to purchase the land and improvements hereby leased for the consideration of $70,000.00 and as a result thereof the parties have agreed to enter into this lease for a term of ninety-nine years in respect of which the total rental thereof is the sum of $70,000.00 which sum is acknowledged to have been paid in full.

In 1993, Ecosse Property Holdings Pty Limited (Ecosse) purchased the land from Westmelton, subject to the lease, thereby becoming the lessor under the lease. In 2004, Gee Dee Nominees Pty Limited (Gee Dee) took a transfer of the lease from Mr Morris, thereby assuming the rights and obligations of the lessee under the lease.

In 2013, Ecosse commenced a proceeding against Gee Dee in the Supreme Court of Victoria seeking a declaration that the lease, on its proper construction, provided that Gee Dee, as lessee, was liable to pay all rates, taxes, assessments and outgoings whatsoever in respect of the land, including land tax.

Gee Dee counterclaimed in the proceeding for a declaration that the lease, on its proper construction, provided that the lessee was not liable to pay rates, taxes, assessments and outgoings levied on the lessor in respect of the land.

The central issue for determination was the proper construction of cl 4 of the lease.

Proceedings below

The primary judge (Croft J) made the declaration sought by Ecosse, namely that the lease obliged the lessee to pay all rates, taxes, assessments and outgoings whatsoever in respect of the land.

Gee Dee appealed to the Victorian Court of Appeal. The Court of Appeal (Santamaria and McLeish JJA, Kryou JA dissenting) allowed the appeal and preferred the lessee's construction of the lease. Santamaria and McLeish JJA considered that the striking-through of the words 'Landlord or' in the printed text of cl 4 indicated that the parties had considered and rejected the possibility that the lessee should pay rates, taxes, assessments or outgoings levied on or otherwise payable by the lessor in respect of the land.[4] In dissent, Kryou JA (agreeing with the primary judge) treated cl 13 as indicating that the parties intended the lease to place the lessee in a position as close as possible to the position of owner and occupier of the leased land such that the tenant was liable to pay all rates, taxes and assessments in respect of the land the subject of the lease.[5]

By a grant of special leave, Ecosse appealed to the High Court.

The decision of the High Court

It was not in issue in the proceeding or on the appeal that cl 4 of the lease was ambiguous and that the competing constructions offered by Ecosse and Gee Dee were both open on the language of the clause. Nor was it in dispute that the clause was to be determined by reference to what a reasonable person in the position of the original parties would have understood by that

language. It was also accepted that, given the ambiguity of cl 4, the High Court could have regard to the words struck out in the standard form document and which remained legible on the face of the document, as an aid to construction of the term.

By majority (Kiefel, Bell and Gordon JJ, Gageler J agreeing, Nettle J dissenting), the High Court held that Ecosse's construction of the lease was to be preferred and overturned the decision of the Court of Appeal (essentially reinstating the decision of the primary judge). Their Honours held that, on its proper construction, the lease obliged the lessee to pay all rates, taxes and assessments during the term of the lease. In arriving at this conclusion, emphasis was placed on the commercial purpose of the lease which was informed, in the majority's view, by cl 13 of the lease. The majority found that it was the intention of the parties to place the lessee in as close a position as possible to the conditions which would have existed following a sale of the land.

Noting that the outcome of the appeal was not going to turn on any 'contested question of contractual or interpretive principle'[6], the High Court confirmed the well-established principles of contractual interpretation which are to be deployed in construing a commercial contract. Namely:

- The terms of a commercial contract are to be understood objectively by what a reasonable business person would have understood the contract to mean, rather than by reference to the subjectively stated intention of the parties.[7]
- This requires the reasonable business person to be placed in the position of the parties.[8]
- It is from this perspective that the court considers the circumstances surrounding the contract, and the commercial purpose and object to be achieved by it.[9]
- It was permissible for the purposes of construing ambiguous language in an agreement, to have recourse to words and clauses deleted from a standard form agreement, but which remain legible on the face of the document.[10]

The majority, applying the joint judgment in *Electricity Generation Corporation v Woodside Energy Limited* (2014) 251 CLR 640, held that the High Court was entitled to approach the task of construction of the clause on the basis that 'the parties intended to produce a commercial result, one which makes commercial sense' and that this required the construction to be placed upon cl 4 to 'be consistent with the commercial object of the agreement'.[11]

Gageler J noted that in construing the 'clumsily tailored variation of an ill-fitting off-the-shelf precedent'[12], the choice between the competing constructions came down to deciding what was 'more reasonable considered as a matter of 'commercial efficacy or common sense' '.[13] Although in dissent, Nettle J agreed that a 'commercial contract is to be construed objectively according to business common sense'.[14]

In considering the commercial objective of the parties, the majority were drawn to cl 13 which stated that the parties had intended to enter into a sale and purchase agreement. It not being possible to convey a freehold estate in the property the subject of the lease, a leasehold for 99 years for a fixed sum (which was to be the sale price) was conferred. The majority considered that the 99-year lease was as close an approximation to the desired outcome that could be arranged.[15]

The majority concluded from cl 13 that the intention of the parties was to place the lessee in the position it would have been in, had the land been sold. With that in mind, the majority were of the view that it made no sense for the lessor to remain liable for payments of rates, taxes and other outgoings over the term of the lease.[16] For this reason, the construction of cl 4 of the lease put forward by the lessor was to be preferred.

In dissent, Nettle J was not satisfied that cl 13 evidenced an intention to, as far as possible, replicate a possible conveyance of the land. Rather, in his Honour's view the natural and ordinary meaning of the clause was that, although it was the parties' intention to enter into a sale and purchase agreement in relation to the land, when that was not possible, the parties resolved to enter into a 99-year lease. Nettle J was not satisfied that the parties intended to effect a transaction equivalent to the sale and purchase.

Agreeing with the majority of the Court of Appeal, Nettle J was of the view that the phrase 'payable by the tenant' in cl 4 limited the kinds of rates and taxes to which the clause applied, namely those for which the lessee was liable *qua* tenant.[17]

Finally, Nettle J concluded:[18]

> Poor drafting may justify a court in being more ready to depart from the natural and ordinary meaning of the terms of a contract, and no doubt, the poorer the drafting, the less willing a court should be to be 'driven by semantic niceties to attribute to the parties an improbable and unbusinesslike intention'. But poor drafting provides 'no reason to depart from the fundamental rule of construction of contractual documents that the intention of the parties must be ascertained from the language they have used interpreted in the light of the relevant factual situation in which the contract was made'.
>
> …
>
> The court is not authorised under the guise of construction to make a new contract for the parties at odds with the contract to which they have agreed.

Catherine Hamilton-Jewell, 'Interpretation of ambiguous clauses.'

Endnotes

1 *Ecosse Property Holdings Pty Limited v Gee Dee Nominees Pty Limited* [2017] HCA 12, at [31].
2 *Ecosse Property Holdings Pty Limited v Gee Dee Nominees Pty Limited* [2017] HCA 12, at [35].
3 *Ecosse Property Holdings Pty Limited v Gee Dee Nominees Pty Limited* [2017] HCA 12, at [35].
4 *Gee Dee Nominees Pty Limited v Ecosse Property Holdings Pty Limited* [2016] V ConvR ¶54-879 at 65,289 [5], 65,308 [121]-[125].
5 *Gee Dee Nominees Pty Limited v Ecosse Property Holdings Pty Limited* [2016] V ConvR ¶54-879 at 65,293 [33], 65,294-65,295 [40]-[42].
6 *Ecosse Property Holdings Pty Limited v Gee Dee Nominees Pty Limited* [2017] HCA 12, per Gageler J at [45].
7 *Ecosse Property Holdings Pty Limited v Gee Dee Nominees Pty Limited* [2017] HCA 12, per Kiefel, Bell and Gordon JJ at [16], Gageler at [45], Nettle at [73].
8 *Ecosse Property Holdings Pty Limited v Gee Dee Nominees Pty Limited* [2017] HCA 12, per Kiefel, Bell and Gordon JJ at [16].
9 *Ecosse Property Holdings Pty Limited v Gee Dee Nominees Pty Limited* [2017] HCA 12, per Kiefel, Bell and Gordon JJ at [16].
10 *Ecosse Property Holdings Pty Limited v Gee Dee Nominees Pty Limited* [2017] HCA 12, per Nettle J at [73].
11 *Ecosse Property Holdings Pty Limited v Gee Dee Nominees Pty Limited* [2017] HCA 12, per Kiefel, Bell and Gordon JJ at [17].
12 *Ecosse Property Holdings Pty Limited v Gee Dee Nominees Pty Limited* [2017] HCA 12, per Gageler J at [51].
13 *Ecosse Property Holdings Pty Limited v Gee Dee Nominees Pty Limited* [2017] HCA 12, per Gageler J at [52].
14 *Ecosse Property Holdings Pty Limited v Gee Dee Nominees Pty Limited* [2017] HCA 12, per Nettle J at [77].
15 *Ecosse Property Holdings Pty Limited v Gee Dee Nominees Pty Limited* [2017] HCA 12, per Kiefel, Bell and Gordon JJ at [18].
16 *Ecosse Property Holdings Pty Limited v Gee Dee Nominees Pty Limited* [2017] HCA 12, per Kiefel, Bell and Gordon JJ at [26].
17 *Ecosse Property Holdings Pty Limited v Gee Dee Nominees Pty Limited* [2017] HCA 12, per Nettle J at [90].
18 *Ecosse Property Holdings Pty Limited v Gee Dee Nominees Pty Limited* [2017] HCA 12, per Nettle J at [98], footnotes and references omitted.

Children's wishes

Martha Barnett reports on *Bondelmonte v Bondelmonte* [2017] HCA 8

This case arose out of what is known as an international parental child abduction of two teenage boys who had been living in Australia but who were taken to the United States of America by their father. The High Court of Australia dismissed a challenge by the father to an interim parenting order made by Watts J which required the return of the two boys, aged nearly 17 and 15 at the time of the interim hearing, from New York to Sydney pursuant to the *Family Law Act* 1975 (Cth) ('Act').

Factual background

The mother and father to three children, two boys and a younger girl, had agreed to interim parenting orders on 25 June 2014 which provided, *inter alia*, that the parents would have equal shared parental responsibility and that the children would live with the parents as agreed between the parties or at the children's own election. The orders also provided for each of the parents to be able to take the children overseas for holidays so long as particular conditions were met.

Orders had been made on 2 November 2016 for the progression of the parenting dispute including for the children to participate in a Child Responsive Program, which required the children to attend upon a family consultant for interview for the provision of a family report.

In January 2016 the father took the boys overseas where they remained as at the date of the interim hearing, 8 March 2016, in breach of the June 2014 Orders.

The mother sought the return of the children, whereas the father resisted the application.

The proceedings below

Justice Watts of the Family Court made interim orders to the effect that notwithstanding that the boys had indicated they wished to remain overseas with the father, the boys should return and in the event the father returned with them, the boys would live with him. The interim orders further provided that in the alternative and in the event the father did not return, the boys could elect to live with the mother, or in accommodation provided by the father with appropriate supervision services, or to live with the mothers of two close friends of the boys ('the fourth option').

His Honour was minded to make the interim orders because his Honour considered that the actions of the father had impacted the views of the boys and therefore placed lesser weight upon those views. His Honour was troubled that the stated wishes of the boys did not appear to consider their connection to their sister, their mother, their friends and school in Australia. Justice Watts determined that a family report in Australia would be able to look at all these factors and that a 'wishes report' conducted overseas would have little utility as the boys were under the influence of their father.

The majority of Full Court of the Family Court of Australia (Ryan and Aldridge JJ) upheld the determination of Watts J. Justice Le Poer Trench dissented and determined that the first instance decision was erroneous due to a lack of evidence regarding the views of the children and the lack of particulars of the living arrangements in the fourth option in the event the father elected not to return with the boys.[1]

The High Court's decision

The father's challenge to the Family Court's orders rested on two alleged errors of the kind referred to in *House v The King*[2], namely:

- failure to take into account a material consideration, being the views of the children; and
- taking into account an irrelevant consideration, namely the availability of the fourth option when the persons involved were strangers to the proceedings.

In a joint judgment delivered by Kiefel, Bell, Keane, Nettle and Gordon JJ, the High Court determined that there was no error at law and dismissed the appeal.

With respect to the first challenge, the High Court noted that the focus placed by the father upon consideration of the children's wishes 'elevated the views expressed by a child to something approaching decisive status.'[3] The court noted that the views of the children were taken into account, but that they are but one consideration amongst a number of statutorily prescribed considerations in s 60CC of the Act. The High Court considered that his Honour had identified as the relevant factor the extent to which the boys' views had been influenced by the father as a matter which affected the weight to be given to their stated preferences.[4]

Furthermore, the High Court clearly stated that it was not incumbent on the court at first instance to ascertain the views of the boys with respect to the alternate proposals: 'The term "consider" imports an obligation to give proper, genuine and realistic consideration but this cannot affect or alter the terms of the provision so as to require a child's views to be ascertained.'[5]

With respect to the fourth option, the High Court accepted the submissions of the independent children's lawyer that the Act provided the court with power to make parenting orders in favour of a parent of a child 'or some other person' and the mothers of friends of the boys were persons who were therefore able to be subject to parenting orders upon the application of the mother.[6] The High Court rejected the submission that there was not enough known regarding these persons in circumstances of the making of interim orders in a situation of some urgency.[7]

Conclusions:

There are at least three messages to be taken from this decision:

1. Children's views, like any other subsection 60CC(3) factor, must be considered but no one factor is decisive in determining the child's best interests;
2. Parenting orders can be made with respect to non-parties, and even persons not related to children, so long as the application is brought by a person contemplated in section 65C of the Act; and
3. A person's flagrant disregard for parenting orders can be a relevant matter as it was in this case as it 'evinced an attitude towards the responsibilities of parenthood that, if left unchecked, would likely send a poor message' to the children.

Endnotes

1 *Bondelmonte v Bondelmonte* [2016] FamCAFC 48 at [209].
2 (1936) 55 CLR 499 at 504-505.
3 *Bondelmonte v Bondelmonte* [2017] HCA 8 at [34].
4 *Bondelmonte v Bondelmonte* [2017] HCA 8 at [41].
5 *Bondelmonte v Bondelmonte* [2017] HCA 8 at [43].
6 *Bondelmonte v Bondelmonte* [2017] HCA 8 at [50].
7 *Bondelmonte v Bondelmonte* [2017] HCA 8 at [51].

Portrait Gifts

On 3 August 2017, the Bar Association was presented with two portraits of Justices Virginia Bell AC and Stephen Gageler AC. Justice Bell's portrait was donated by a group of senior criminal silks and Justice Gageler's portrait was donated by members of his former Chambers, Eleven Wentworth, and his former clerk, Paul Daley OAM.

Both portraits are by the Sydney-based but Cuban born artist Tomas Maceiras Prego (www.tomasmprego.com) who

trained in portraiture at the National Arts School and the Higher Institute of Arts in Havana.

Both portraits capture the rich and vibrant personality of their respective subjects. They will be added to the Bar Association's impressive portrait collection and will hang in the Common Room.

The donations of the portraits represent the continuation of a fine tradition which not only honours the achievements of their subjects but contributes to the history and spirit of the New South Wales Bar.

Bar Practice Course 01/2017

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Fourth Row: Barry Apelbaum, Zoe Alderton, Jaehyun Park, Troy Rollo, Joshua Wyner, Manu Jaireth, Alicia Lyons, Mark Davies, Michael Clark, Joe Edwards

Third Row: Jesse Kennedy, Ken Brotherson, Marco Nesbeth, Katharine Jeffreys, Juliet Behrens, Pandelis Tiliakos, Lesly Bewsher, James Leaver, Craig Birtles, Philip Boncardo, Daniel Thomas

Second Row: Lauren Ticehurst, Eli Ball, Peter Strickland, Merrilyn Davis, Talitha Hennessy, Sevinch Morkaya, Belinda Epstein, Bronwyn Byrnes, Leanne Rich, Catherine Hamilton-Jewell

Front Row: Meg O'Brien, Michael Forgacs, Joanne Smith, Jayneil Shandil, Bernice Ng, Sally Traynor, Jesmini Ambikapathy, Danielle New, Rose Khalilizadeh, Lucy Saunders, Benjamin Hancock

Photo: Murray Harris Photography

The 2017 Bench and Bar Dinner

The 2017 Bench and Bar Dinner was held on Friday, 5 May 2017 at the Hyatt Regency Sydney.

The guest of honour was the Hon Patricia Bergin SC. Ms Senior was Michelle Painter SC and Mr Senior was Robert Newlinds SC.

1 Robert Newlinds SC, the Hon P A Bergin SC, Michelle Painter SC and Noel Hutley SC

2 Fiona McLeod SC, Jennifer Batrouney QC and William Alstergren QC

3 Sandra Foda, Joanne Little and Felicity Rogers

4 The Hon P A Bergin SC

5 Noel Hutley SC

6 Mark Auld and S Fendekian

7 CRC Newlinds SC

8 Peter Braham SC and Stevenson J

9 Attorney General Mark Speakman SC

10 M Bennett

11 Wai K Soon, Michael Sciglitano and C Lin

12 Ingmar Taylor SC
13 Kavita Balendra
14 Julia Baird SC
15 Sandy Dawson SC

16 Attorney Mark Speakman SC and Jennifer Batrouney QC
17 The Hon Justice M Beazley, Michael Tidball
18 Ross Glover and Joanne Little

19 The Hon P A Bergin SC
20 Full house at the Hyatt Regency Sydney
21 CRC Newlinds SC as Mr Senior

Off with the wig: Issues that arise for advocates when switching from the courtroom to the negotiating table

The Hon T F Bathurst AC Chief Justice of New South Wales
Australian Disputes Centre, 30 March 2017[1]

Twenty five years ago, when alternative dispute resolution was really just coming on to the scene, Sir Laurence Street was anxious to amend the already entrenched acronym 'ADR' so that it read '*additional* dispute resolution' rather than '*alternative* dispute resolution': 'It is not in truth "Alternative"' he urged, 'It is not in competition with the established judicial system. It is an additional range of mechanisms within the overall aggregated mechanisms for the resolution of disputes'.[2] Perhaps it is fair to say now that ADR has evolved to the stage not merely of being additional or supplementary but complementary and integrative.

With a specific focus on mediation, ADR now has the capacity to intrude at almost every stage of the litigious process. In some jurisdictions, mediation is a compulsory precursor to commencing litigation; for example, in the family law jurisdiction, native title jurisdiction and unfair dismissal cases under the *Fair Work Act 2009* (Cth). Under the *Civil Dispute Resolution Act 2011* (Cth) parties are required to file a 'genuine steps' statement, outlining what steps have been taken, including via ADR, to resolve the dispute before commencing litigation in the Federal Court or the Federal Magistrate's Court.[3] In the Supreme Court, informal settlement conferences have been employed in family provision cases where the estate is valued at less than $500,000 with the aim of settling cases before there has been significant expenditure on court proceedings.

Adele Carr has suggested that mediation can and should be used more regularly to resolve interlocutory disputes.[4] This is supported by the recent Federal Court Central Practice Note, issued last year, which states that 'ADR options should be viewed by the parties not only as a means of possible resolution of the whole dispute, but also as a means of limiting or resolving issues by agreement and of resolving interlocutory disputes.'[5] Carr cites, as an example of how mediation can be used within the litigation process, an order directing litigants to mediate to determine the evidence to be adduced at trial.[6] This is particularly useful in high volume commercial cases which threaten to waylay the courts with indiscriminate reams of documentary evidence.

There have recently been proposals for a form of mediation in criminal proceedings in an endeavour to resolve the ever-increasing backlog in the courts. What is effectively plea bargaining has never found much favour in this country compared to, say, the United States, but it will be interesting to see where it leads.

Although neither the *Supreme Court Act 1970* (NSW) nor the *Uniform Civil Procedure Rules 2005* (NSW) mandate the taking of any steps to resolve the dispute prior to commencing proceedings, most cases in the Supreme Court are sought to be mediated prior to their being set down for hearing. In 2015, the Supreme Court referred 1070 cases to mediation, with 518 of those referrals being to court-annexed mediation. Fifty one per cent of those cases were settled with a further twenty five per cent still negotiating. Carr has also noted that mediation can even be used after litigation has resolved the dispute in order to preserve relations and reputations and avoid a further appeal.[7]

All this points to a need for advocates not only to appreciate the differences between their role as litigator and as representative in mediation but also to transition smoothly and quickly between the two modes of dispute resolution. As Donna Cooper has repeatedly urged:[8]

> A key strength for the successful lawyer is the ability to switch hats and transform from adversarial court advocate one day, highlighting the strengths of a client's position, to dispute resolution advocate the following day, participating in collaborative problem-solving and encouraging a client to move away from a position, think creatively and accept compromise.

The aim of this paper is to canvass some issues that advocates should keep in mind when moving from litigation to mediation and back again. I want to first address the ways in which advocates need to shift gears when moving from a litigation to a mediation terrain, employing different models of advocacy in each setting. I will then move to consider how a lawyer's ethical duties may manifest themselves differently despite having the same essential content in both venues. Finally, I will discuss the extent to which practitioners are covered by advocate's immunity from suit when representing clients in mediation, particularly in light of the recent High Court decisions in *Attwells v Jackson Lalic Lawyers*[9] and *Kendirjian v Lepore*.[10]

Advocacy models

Commentators frequently cite the distinction between adversarialism and non-adversarialism as the key difference between litigation and alternative dispute resolution. Fears that lawyers will 'colonise the mediation process'[11] via assertive adversarial tactics have prompted various legal bodies to issue non-binding guidelines outlining the appropriate role for lawyers representing clients in mediation. For instance, the Law Society of New South Wales' *Professional Standards for Legal Practitioners in Mediation* states that the role of a legal practitioner is

> to participate in a non-adversarial manner. Legal practitioners are not present at mediation as trial advocates, or for the

> purpose of participating in an adversarial court room style contest with each other, still less with the opposing party. A legal practitioner who does not understand the non-adversarial settlement focus of their role and participate appropriately is a direct impediment to the mediation process[12.]

Meanwhile, the Law Council of Australia's *Guidelines for Lawyers in Mediations* provides that 'mediation is not an adversarial process to determine who is right and wrong. Mediation should be approached as a problem solving exercise.' It goes on to highlight that 'the skills required for a successful mediation are different to those desirable in advocacy … a lawyer who adopts a persuasive rather than adversarial or aggressive approach … is more likely to contribute to a better result'.[13]

But the dichotomy between adversarial and non-adversarial approaches is not quite as helpful, nor is the reality as antithetical, as it may initially appear. Indeed, a lawyer who 'adopts a persuasive rather than adversarial or aggressive approach' is also more likely to succeed in a courtroom than an advocate who trenchantly stands by their weakest arguments and makes no concessions or who bullies their opponent. Bobbette Wolski argues that the fear of lawyer advocates in mediations 'is based on misconceptions about the nature of advocacy (and of associated terms such as zeal), and on a fragile distinction between adversarial and non-adversarial behaviour'.[14] In both contexts the object is to persuade, albeit the object of persuasion is different. So what are some more helpful distinctions between a lawyer's advocacy style in court and in mediations?

While aggression is unlikely to be appropriate in either context, the tone, demeanour and language adopted in both settings is likely to change. For instance, a lawyer may engage in questioning the opposing client in mediation if its aim is to promote full and frank disclosure but they are not going to cross-examine the opposing client with the purpose of eliciting statements beneficial to their client's case.[15] Legalese and legal arguments may also be dropped in favour of more user-friendly terminology that encourages the opposing client to engage and understand.[16]

Wolski suggests that the distinction critics are really trying to articulate is one between 'the competitive tactics thought to be associated with positional negotiation on the one hand, and on the other, the cooperative tactics thought to be associated with interest-based negotiation'.[17] This captures another popular conceptual division between litigation and mediation, namely that the former is rights-based while the latter is interests-based. To this end, lawyers acting in mediations should ensure that they have a proper handle not only of the law and their clients' legal prospects but also of 'the underlying causes of conflict and of the client's underlying interests'.[18] This will be necessary in fuelling creative options for compromise that will be mutually satisfactory to both parties.

So, in a mediation setting, lawyers will still seek to persuade but they will adopt a *style* of advocacy that is cooperative rather than competitive and the *content* of their argument will expand to include non-legal interests as well as rights. A third aspect of advocacy that legal practitioners will need to consider is the *role* that they will take in the mediation. As Donna Cooper has highlighted, the role of lawyers in litigation 'tends to be fairly fixed'.[19] The processes of oral and written argument follow a structured format and while a lawyer takes instructions from their client, they are the sole representative and spokesperson when it comes to trial. In mediation, however, there are a spectrum of roles that a practitioner might adopt and the choice of role will depend on the nature of the dispute, the power dynamics at play, the client's wishes and a host of other factors.

Olivia Rundle has famously categorised five ways in which lawyers may participate in mediation.[20] This ranges from the absent advisor, who assists the client to prepare but does not attend the mediation, to the advisor observer, who attends the mediation but does not participate, to the expert contributor, who participates but only to the extent of providing the client with legal advice, to the supportive professional participant, who directly participates in concert with the client, and finally, the spokesperson, who speaks for, and negotiates on behalf of, the client. It is only the final model that replicates the lawyer's role in court. It is important that advocates give consideration to these roles before entering mediation so as not to either hijack the process or leave their client insufficiently supported.

In light of these distinctions between the style, content and role of advocacy in litigation and mediation, it may well be desirable for junior barristers to undergo training on the skills required for representing clients in mediation and how this differs from the traditional courtroom environment.

Ethical duties

The second topic I want to consider is the ways in which a lawyer's ethical duties may be fulfilled in the different contexts. It is important to note that despite repeated calls for new or supplementary rules covering lawyers in ADR settings,[21] the only binding ethical duties governing advocates in mediation are those that govern them in litigation and indeed in everyday life. That does not mean, however, that the fulfilment of an ethical duty may not manifest itself in different ways. To illustrate the point I will refer to just two examples: the duty to act in the client's best interests and the duty of honesty owed to opponents.

The obligation to act in a client's best interests is relatively

well-understood in the litigation setting where it is fulfilled by presenting a client's case in the best possible light and where there is no obligation to assist an adversary.[22] In the mediation setting, however, there are competing considerations that help to shape the duty. First, there is a greater need for cooperation with the opposing party. Acting in the client's best interests does not mean defending their initial or most favourable position at all costs; often the client's best interests will be served by reaching a compromise and avoiding hostility.[23]

In fact, it will often be the case that acting in the best interests of a client involves exerting some pressure on the client to accept a settlement offer. In *Studer v Boettcher*,[24] a client brought a claim against his solicitor for negligence alleging that he had been pressured into accepting an unfavourable settlement offer. While the solicitor had initially been hopeful of being able to settle the case for a lower amount, once the opponent's evidence came to light in mediation, the solicitor altered his advice. The New South Wales Court of Appeal found that the solicitor had 'acted professionally and properly in the interests of the appellant in bringing considerable pressure to bear on [the client] to settle on the best terms then available' and was satisfied that 'this was in the [client's] best interests'.[25]

That being said, there is a fine line to be drawn between 'permissible persuasion and impermissible coercion'.[26] This brings me to a second consideration that may affect the duty to act in a client's best interests in mediation, namely, the need to allow for party self-determination. Self-determination has been described as the 'most fundamental principle of mediation'.[27] In *Studer v Boettcher*, Justice Fitzgerald explained how this principle interacted with the duty to act in a client's best interests. He stated:

> Although it is in the public interest for disputes to be compromised whenever practical, a lawyer is not entitled to coerce a client into a compromise which is objectively in the client's best interests … a legal practitioner should assist a client to make an informed and free choice between compromise and litigation, and, for that purpose, to assess what is in his or her own best interests.[28]

While the legal content and source of the duty remains the same inside and outside the courtroom, the fact that a client has a greater level of personal involvement in mediation can complicate the traditional duty in a situation where the advocate is no longer acting as sole representative.

Turning to the duty of honesty owed to opponents, the duty of honesty prohibits a lawyer from knowingly making false statements to an opponent in relation to a case, including its compromise.[29] While the duty does not generally require positive disclosure,[30] exceptions lie where the failure to disclose constitutes taking advantage of an obvious error to secure a benefit with no supportable foundation in fact or law;[31] where disclosure is required to qualify a statement or avoid a partial truth;[32] and where disclosure is necessary to correct a statement previously made to an opponent where the practitioner now knows the statement to be false.[33]

Because of the more informal setting in which mediation takes place, where evidence is not tendered as formal exhibits and a degree of puff and bluster is customary, if not obligatory, some practitioners are led to believe that the duty of honesty to an opponent does not apply in full force.[34] To the contrary, there may in fact be thought to be a stronger reason for enforcing the duty in mediation settings where 'there is no impartial adjudicator to "find the truth" between the opposing assertions'.[35]

The seminal case regarding a practitioner's duty of honesty to an opponent in mediation is that of *Legal Services Commissioner v Mullins*.[36] Mr Mullins represented a quadriplegic client in mediation who was seeking damages from an insurer. Central to the value of the claim were reports which calculated the claimant's future care needs and their costs, work-life assessment and future earning capacity. A few weeks prior to mediation commencing, the client discovered that he had cancer and began chemotherapy treatment. He asked that his lawyers not disclose this to his opponent unless legally obliged to. Mr Mullins came to the view, on the advice of the instructing solicitor, Mr Garrett, that so long as he did not positively mislead the opponent about his client's life expectancy, he would not be violating any professional ethical rules.

The Queensland Legal Practice Tribunal found that the actions of both Mr Mullins and Mr Garrett constituted professional misconduct and they were fined accordingly.[37] While some academic commentary suggests that the outcome in *Mullins* imposes a higher duty of honesty or candour in mediation settings,[38] the decision affirms the rule that practitioners are obliged to correct earlier statements they now know to be false.[39]

What this case shows is not that there are different duties applying to advocates in litigation as opposed to mediation but that the same duty may feel more onerous in an informal setting. Advocates should be mindful that the same exacting standards apply to their conduct in mediation and that 'the need for ethical decision-making … transcends the curial process'.[40]

Advocate's immunity

But there is another reason why advocates should be particularly scrupulous about their conduct in mediations; this is because advocates in mediation are unlikely to be afforded the same immunity from suit as advocates in litigation. For advocates

who are representing their clients across litigation and mediation settings, the question may arise of at what point the immunity drops off. As Chief Justice Mason first articulated, 'it would be artificial in the extreme to draw the line at the courtroom door' but 'where does one draw the dividing line?'[41]

Of course, any examination of the proper bounds of advocate's immunity begins with a discussion of the High Court judgments in *Giannarelli v Wraith*[42] and *D'Orta-Ekenaike v Victoria Legal Aid*.[43]

In *Giannarelli*, Chief Justice Mason held that 'the immunity must extend to work done out of court which leads to a decision affecting the conduct of the case in court', also approving the test adopted by the New Zealand Court of Appeal in *Rees v Sinclair*, that the line is drawn 'where the particular work is so intimately connected with the conduct of the cause in Court that it can fairly be said to be a preliminary decision affecting the way that cause is to be conducted when it comes to a hearing'.[44] The majority in *D'Orta-Ekenaike* approved of these formulations.[45]

A question that has attracted considerable attention recently, and is relevant to this discussion, is whether advice or representation provided out of court in the process of settlement or mediation falls within this definition. This question came before the New South Wales Court of Appeal in 2014 in the case of *Jackson Lalic Lawyers Pty Ltd v Attwells*.[46] Attwells was one of three company directors who had guaranteed the company's indebtedness to a bank. Jackson Lalic Lawyers acted for the guarantors in recovery proceedings brought against them by the bank. The guarantors' liability was limited to $1.5 million but the solicitors negotiated a settlement which stipulated that the guarantors pay $1.75 million and advised the guarantors to sign a consent order which made the full amount of the company's debt enforceable on the guarantors' default, advising that this would have essentially no effect. The Court of Appeal determined that, in compliance with the test in *Giannarelli* and *D'Orta-Ekenaike*, advice which led to a case being settled was work done out of court which led to a decision affecting the conduct of the case in court and was thus intimately connected with the conduct of the proceedings.[47]

The decision was appealed to the High Court and special leave was granted, but before it could be heard, another case concerning immunity for negligent settlement advice reached the New South Wales Court of Appeal. In *Stillman v Rusbourne*,[48] Mr Stillman sued the solicitors who had represented him and his company in court-ordered mediation. He claimed that the solicitors had been negligent in their advice and representation in the course of the mediation resulting in settlement terms, effected through a consent judgment, that were excessively disadvantageous and which eventually resulted in the company's liquidation and Mr Stillman's bankruptcy.

The majority of the Court followed the Court of Appeal decision in *Jackson Lalic* and found that the immunity extended to the circumstances of that case. Justice Basten, however, disagreed. He argued that the touchstone of the immunity was the exercise of judicial power, or more specifically, a judicial determination on the merits.[49] Where there has been no judicial determination on the merits but merely a consent order, he found that the principle of finality which underpins the immunity was not sufficiently engaged, because re-agitating the issues in a consensual settlement agreement does not undermine public confidence in the administration of justice.[50]

The High Court decision in *Attwells v Jackson Lalic Lawyers Pty Ltd*[51] resolved the debate, with the majority of the court finding that advocate's immunity does not extend to negligent advice provided by a lawyer which leads to a settlement agreement between the parties, even where that agreement is embodied in a consent order. The court emphasised two relevant distinctions which help to elucidate where the line is to be drawn, albeit still leaving some room for shades of grey.

First, as Justice Basten presaged, whether the immunity was engaged or not turned on an understanding of what the principle of finality was truly trying to protect. On the one hand, Justice Gordon, in dissent, found that that 'the issue was resolved by understanding that there was a final quelling of the controversy between the parties'.[52] On the other hand, the majority held that:

> The immunity is not justified by a general concern that disputes should be brought to an end, but by the specific concern that once a controversy has been finally resolved by the exercise of the judicial power of the State, the controversy should not be reopened by a collateral attack which seeks to demonstrate that the judicial determination was wrong[53.]

Underlying the majority's understanding of the principle of finality is a concern with protecting public confidence in the judicial officers of the state. But as Justice Nettle raised as a concern, also in dissent, even where parties have consented to orders it may remain 'for the court to be satisfied that it is appropriate so to order'.[54] A challenge to advocate's advice in that context would 'involve calling into question the rectitude of the court's order'.[55] The majority expressly acknowledged this situation but stated that it was not necessary to consider such cases in the instant case.[56]

A second important distinction that was drawn by the majority was between work that has an intimate connection with the judge's determination of the case and work which has an historical connection.[57] The majority stated that '[a]dvice to commence proceedings … advice to cease litigating or to continue litigating

does not itself affect the judicial determination of a case'.[58] That advice to commence proceedings is not covered by advocate's immunity is a generally uncontroversial proposition, as Justice Gordon stated '[a]dvice of that kind is not work done for the final quelling of a controversy … [it] starts a controversy'.[59] The case before the court also settled the question of whether advice to cease litigating through settlement attracted the immunity, deciding that it did not. However, after *Attwells*, it could have been argued that there was still a degree of controversy as to whether advice to continue litigating attracts the immunity. Indeed, this is what was put forward by the respondent in *Kendirjian v Lepore*,[60] a judgment that was handed down by the High Court in March.

In *Attwells*, the majority thought it would be 'difficult to envisage how advice not to settle a case could ever have any bearing on how the case would thereafter be conducted in court, much less how such advice could shape the judicial determination of the case'.[61] At that stage, the court's attention had not been drawn to the 2012 decision of a five-judge bench of the New South Wales Court of Appeal in *Donnellan v Woodland*.[62] In that case, while the court failed to find negligence, it unanimously held that negligent advice concerning an offer of compromise which had 'the effect of deciding to continue with proceedings' was 'a decision that affect[ed] the conduct of the case in court' and thus attracted the immunity.[63]

Interestingly, Justice Basten in *Stillman*, who found on the same side as the majority in *Attwells* concerning advice to cease litigation, drew a distinction between advice to cease and to continue litigating, no doubt feeling himself bound by *Donnellan*, a case on which he sat. He argued that the point of distinction was that advice to cease litigating 'does not affect the conduct of the trial in a practical sense, because there is no trial, whereas [advice to continue litigating does because] the matter proceeds to trial and final judgment'.[64]

In *Kendirjian*, a client brought proceedings against his solicitor and barrister claiming that they had been negligent in their advice relating to a settlement offer. The lawyers had rejected the offer as being too low but had not advised their client of the specific amount of the offer nor had they acted on his express instructions. The court refused to distinguish the case from *Attwells* or to reopen the decision on that point.[65] It agreed that the facts were indistinguishable from *Donnellan* but held that the decision in *Donnellan* was inconsistent with what the High Court had decided in *Attwells*.[66]

It is worth noting that the proposition has garnered sustained criticism from Justices Nettle and Gordon. In both cases, Justice Nettle was of the opinion that allowing a negligence action for advice not to settle gave rise to the possibility of a challenge to the findings of the court;[67] in *Kendirijan*, he nevertheless felt himself bound by the decision in *Attwells*.

Meanwhile Justice Gordon echoed these concerns,[68] but also raised another interesting possibility; namely, that in determining a case in which a lawyer has allegedly acted without instructions, the court might first need to consider whether the decision should be set aside before considering advocate's immunity.[69]

In any event, it is now clear that 'the giving of advice *either* to cease litigating or to continue litigating does not itself affect the judicial determination of a case'[70] and as such, does not attract immunity. With these successive strong stances against allowing the immunity to extend to situations surrounding settlement, advocates should be put on warning that immunity from suit will not protect them from negligent advice or representation provided at mediations.

The confidentiality of mediation communications is also a factor that permeates each of the topics discussed so far. For instance, can an advocate 'use mediation confidentiality as a shield to exclude damaging evidence' of their own negligence?[71] While a party or mediator can claim confidentiality, can a solicitor or barrister rely on the protection of confidentiality in the face of the parties' waiver? Such an outcome may seem perverse, yet the Californian Supreme Court found that it was unavoidable in the face of the plain language of that jurisdiction's statute.[72]

Similarly, going back to the earlier discussion surrounding the duty of honesty, under what circumstances can a party adduce evidence of communications in mediation to bring a case of misleading or deceptive conduct? In a 2011 Federal Court case, Justice Lander found that an exception to confidentiality in the *Evidence Act 1995* (Cth), and at common law, extended to the situation where the impugned evidence showed that an agreement should be set aside on the grounds of misleading or deceptive conduct,[73] but it was also conceded that the situation may have been different had the mediation been court-ordered and thus subject to s 53B of the *Federal Court of Australia Act 1976* (Cth) which provides absolute protection for evidence of anything said in mediation.[74]

In NSW, s 30 of the *Civil Procedure Act* has been held to override the *Evidence Act* where the confidentiality of communications in mediation is concerned.[75] That provision states, in reasonably strong language, that 'evidence of anything said or of any admission made in a mediation session is not admissible in any proceeding before any court or any other body'. While Justice Ball in that case noted that common law exceptions existed, he cited the England and Wales Court of Appeal in *Unilever plc v Procter & Gamble Company* which held that such exceptions apply 'only to the clearest cases of abuse of a privileged occasion'

such as where 'the exclusion of the evidence would act as a cloak for perjury, blackmail or other "unambiguous impropriety"'.[76]

Confidentiality is crucial for preserving the efficacy and integrity of mediation but it can produce some thorny issues and the proper extent of its exceptions remains a live question.

In a dispute resolution environment where advocates must learn to wear two hats, it is important that they are attuned to the nuances in duties and immunities that apply in each role. I hope that this discussion draws attention to some of those distinctions and ultimately helps to foster a body of well-rounded advocates who can operate effectively across the increasingly diverse realms of dispute resolution that exist today.

Endnotes

1 I express thanks to my Research Director, Ms Bronte Lambourne, for her assistance in the preparation of this address.
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17 Wolski, above n 13, 38.
18 Cooper, 'Representing clients from courtroom to mediation settings: Switching hats between adversarial advocacy and dispute resolution advocacy', above n 7, 154.
19 Ibid 156.
20 Olivia Rundle, 'A Spectrum of Contributions that Lawyers Can Make to Mediation' (2009).
20 *Australasian Dispute Resolution Journal* 220.
21 See e.g., Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report No 89 (2000) 296-8.
22 Dr Samantha Hardy and Dr Olivia Rundle, Mediation for Lawyers (CCH Australia Limited, 2010) 217.
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24 [2000] NSWCA 263.
25 Ibid [53] (Handley JA).
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27 Wolski, above n 13, 30 citing James J Alfini, 'Mediation as a Calling: Addressing the Disconnect between Mediation Ethics and the Practices of Lawyer Mediators' (2008) 49 *South Texas Law Review* 829, 830.
28 [2000] NSWCA 263, [74]-[75].
29 *Legal Profession Uniform Conduct (Barristers) Rules 2015* (Cth), r 49; *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (Cth), r 22.1.
30 See Bobette Wolski, 'An evaluation of the rules of conduct governing legal representatives in mediation: Challenges for rule drafters and a response to Jim Mason' (2013) 16 *Legal Ethics* 1, 9-12; Bobette Wolski, 'The Truth about Honesty and Candour in Mediation: What the Tribunal Left Unsaid in *Mullins' Case*' (2012) 36 *Melbourne University Law Review 706, 716-8.*
31 *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (Cth) r 30.1, see e.g., Chamberlain v Law Society of Australian Capital Territory (1993) 43 FCR 148.
32 *Lam v Ausintel Investments Australia Pty Ltd* (1989) 97 FLR 458, 475; see also *Legal Practitioners Complaints Committee v Fleming* [2006] WASAT 352, [73].
33 *Legal Profession Uniform Conduct (Barristers) Rules 2015 (Cth) r 50; Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (Cth) r 22.2; *Legal Services Commissioner v Mullins* [2006] QLPT 12.
34 G E Dal Pont, Lawyers' Professional Responsibility (6th ed, Thomson Reuters, 2016) 709 [21.60].
35 *Legal Practitioners Complaints Committee v Fleming* [2006] WASAT 352, [76].
36 [2006] QLPT 12 *(Mullins).*
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38 See e.g., Hardy and Rundle, above n 21, 223.
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40 Gino Dal Pont, 'To disclose or not to disclose' (2007) 45 *Law Society Journal* 28, 29.
41 *Giannarelli v Wraith* (1988) 165 CLR 543, 559.
42 (1988) 165 CLR 543 (*Giannarelli*).
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44 *Giannarelli* (1988) 165 CLR 543, 560 citing *Rees v Sinclair* [1974] NZLR 180, 187.
45 *D'Orta-Ekenaike* (2005) 223 CLR 1, [86] (Gleeson CJ, Gummow, Hayne and Heydon JJ).
46 [2014] NSWCA 335 (*Jackson Lalic*).
47 Ibid [37]-[38] (Bathurst CJ).
48 [2015] NSWCA 410 (*Stillman*).
49 Ibid [8], [20]-[21].
50 Ibid [21].
51 [2016] HCA 16; (2016) 90 ALJR 572 (*Attwells*).
52 Ibid [104].
53 Ibid [34].
54 Ibid [68].
55 Ibid.
56 Ibid [61].
57 Ibid [46].

58 Ibid [50].
59 Ibid [128].
60 [2017] HCA 13 (*Kendirjian*).
61 *Attwells* [2016] HCA 16; (2016) 90 ALJR 572, [48].
62 [2012] NSWCA 433.
63 Ibid [229].
64 *Stillman* [2015] NSWCA 410, [49].
65 *Kendirjian* [2017] HCA 13, [18].
66 Ibid [27].
67 *Kendirjian* [2017] HCA 13, [5]-[7]; *Attwells* [2016] HCA 16; (2016) 90 ALJR 572, [72].
68 *Kendirjian* [2017] HCA 13, [11]; *Attwells* [2016] HCA 16; (2016) 90 ALJR 572, [129].
69 *Kendirjian* [2017] HCA 13, [13].
70 Ibid [32] (emphasis added).
71 *Cassel v Superior Court* (2011) 51 Cal 4th 113 (2011), 2.
72 Ibid.
73 *Pihiga Pty Ltd v Roche* (2011) 278 ALR 209, [97], [131].
74 Ibid [114]-[115].
75 *Woollahra Municipal Council v Secure Parking Pty Ltd (No 2)* [2015] NSWSC 452, [25]; *Rajski v Tectran Corporation Pty Limited* [2003] NSWSC 476, [16]; *Tony Azzi (Automobiles) Pty Ltd v Volvo Car Australia Pty Ltd* (2007) 71 NSWLR 140, [19].
76 *Unilever plc v Procter & Gamble Company* [1999] EWCA Civ 3027, [23].

Mediation and advocacy

By David Ash[1]

Litigation is run by the state. Mediation is run by parties. This century, the state has brought mediation into the litigation process, a move which has produced inconsistencies and tensions of which much has been written. This paper focuses on something else, on how barristers can in fact draw upon their training in litigation to become more effective advocates in mediation. It is based upon a talk given by the author at the Bar Association on 28 June 2017.

Litigation is the forum through which the state exercises its power to quell disputes. Mediation is the forum through which the parties exercise their right to resolve disputes. In 21st century New South Wales, submission to the first forum carries an implied consent to the second. The key rationales are self-determination and a belief that if mediation is successful, the parties are satisfied and the state saves money.

This paper addresses five things:

- By way of a short overview:
  - Dispute evolution in the last 50 years;
  - The unchanged role of the advocate; and
- In greater detail:
  - Advocate's immunity & mediation;
  - Ethics & mediation;
  - Advocacy skills relevant to mediation.

Dispute evolution in the last 50 years

In 1906 the American legal scholar and long-time dean of Harvard's Law School Roscoe Pound delivered a speech to the annual convention of the American Bar Association. Its title was 'The Causes of Popular Dissatisfaction with the Administration of Justice'. In it he said:

> The most important and most constant cause of dissatisfaction with all law at all times is to be found in the necessarily mechanical operation of legal rules.

Seventy years later in Minnesota the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice took place. Unsurprisingly it is remembered as the Pound Conference. From it Professor Frank Sander is credited with coining the phrase 'Alternative Dispute Resolution'.

Mediation as a form of ADR was picked up by many common law countries over the following decades:

- Informally through the work of individuals (most famously in NSW Sir Laurence Street) and organisations (of which LEADR, now the Resolution Institute, and the Australian Commercial Disputes Centre, now the ADC, are locally the best remembered);
- Formally through civil practice reform (in Anglo-Australian parlance, Lord Woolf's Access to Justice Reports which were embedded in the Antipodes via NSW's *Civil Procedure Act 2005* and its cognates in other States and Territories).

The change is seminal, but that is all the more reason not to see mediation (or ADR generally) in isolation. Since 1976, other changes have radically affected society's perception of, and practitioners' approaches to, litigation and to disputes in general. For example:

- The development of administrative law. The premise has not changed: the state makes a decision only reviewable on a question of law. However, the widespread inculcation of procedural fairness has meant that while the process remains investigative, adversarial approaches have become a norm.
- The separate development, particularly at a state level where constitutional constraints are less marked, of executive determination of previously judicial controversies. The rise and rise of NCAT is the obvious example.
- The renaissance of commercial arbitration. International and supranational arbitration practices are integral to many large commercial practices.
- There is a recognition of the value of, and implementation of, an idea of community justice.
- The development of a separate jurisprudence (and for that matter, a separate mediation regime) in the area of family law.

Three less obvious but profound changes:

- Fewer barristers in Parliament. In 1964, a prime minister who had himself been one of Australia's great advocates oversaw the retirement of his former master, regarded by judicial peers as one of the common law's greatest judges, and his replacement with one of the common law's greatest advocates.
- Less money for the determination of disputes. The public purse is tightening. The current view of the state is that mediation is cheaper than litigation and must by this fact alone be promoted.
- The supremacy of the corporation as the basic economic unit both globally and locally.

Many barristers in the 21st century may never have a natural person as a client. Natural persons generally bring a moral element to a dispute. The statutory frame of the corporation is amoral. This produces a range of new outlooks. For one corporate officer, a dispute may be no more than a chose in action or a contingent liability. Another may have come to own the dispute, unwittingly relying on the dispute to define their own place in the corporation's hierarchy.

Whether we see disputes as something to be quelled or as something to be resolved, the very idea of a dispute must be affected in the result. The rise and rise of the corporate client is particularly relevant for two reasons:

- In litigation, a notice of appearance filed by and continuing instructions from, a solicitor provide a line of communication which usually frees the barrister from inquiring into any authority to settle. The more intimate and more urgent environment of the mediation can throw up problems in relation to authority to settle, if not foreseen and anticipated beforehand.
- We shall shortly see that s 56 of the Civil Procedure Act covers court-ordered mediations. Section 56 not only impose duties on clients and their legal advisers. It also provides a profound qualification to the idea of the independence of the corporate person, something hardwired into our way of thinking for well over a century. Because in the case of a corporate client, a duty is also owed by persons (including parent companies) who provide financial assistance or other assistance to the corporation or who exercises any control or influence over the corporation's conduct of the proceedings.

The unchanged role of the advocate

Advocacy is often described as the art of persuasion. Thesarus.com includes in its many synonyms for 'persuade', the terms 'cajole', 'coax' and 'gain the confidence of'. Many may regard the first two as necessary items in the forensic persuader's toolbox but I think that they are wrong. I think Sir Owen Dixon had the third synonym squarely in his sights when he described advocacy as tact in action.

Webster's Dictionary circa 1913 says of tact:

> Sensitive mental touch; peculiar skill or faculty; nice perception or discernment; ready power of appreciating and doing what is required by circumstances.

Webster's Online Dictionary gives:

> a keen sense of what to do or say in order to maintain good relations with others or avoid offense

Dixon meant the first and I agree. Dixon, I note in passing, had one of the hardest mediation gigs of the 20th century; he came to the subcontinent pursuant to the United Nation's Security Council's 1950 resolution on the Kashmir dispute; the mediation failed, but no mediator before or since has come so close to success.[2]

In 1837 the founder of Webster's Dictionary was concerned by his daughter's news that the spirit of abolition was among her and her sister and wrote:[3]

> Eliza, slavery is a great sin & a great calamity—but it is not our sin, though it may prove to be a terrible calamity even to us in the north. But we cannot legally interfere with the south on this subject—& every step which the abolitionists take is tending to defeat their own object. To come to the north to preach & then disturb our peace, when we can legally do nothing to affect their object, is, in my view, highly criminal, & the preachers of abolitionism deserve the penitentiary.

Dealing with children requires tact. The first two sentences provided Eliza & Julia with it. But to my mind, the last is adversarial persuasion in its most misconceived form, tending – with no small irony – to defeat the writer's object. Later, Abraham Lincoln would be charged with leading the North through that great calamity; his description of tact was 'the ability to describe others as they see themselves'.

Locally, we can recall Sir Paul Hasluck's remark about Barwick when the latter was Attorney: Unlike other lawyers who told you why you couldn't do something, Barwick looked for how you could.

In summary, the heading of this section is 'The unchanged role of the advocate'. If you regard forensic advocacy as getting the decision-maker to adopt your client's point of view, when you go to a mediation you will have to change your role. If you regard advocacy as the art of aligning the decision-maker's point of view with your client's interests, then the only difference for an advocate is the identity of the decision-maker. In litigation, it is the judge. In mediation, it is the client and the other party. As for the mediator, they facilitate, they do not decide.

Advocate's immunity & mediation

On 16 December 2015, the Court of Appeal determined *Stillman v Rusbourne [2015] NSWCA 410*. The respondent solicitors had acted for the appellant client in civil proceedings which settled at mediation. The client later sued the solicitors. His claim was summarily dismissed and he appealed.

The majority dismissed the appeal. The work done by the respondents fell within orthodox understandings of the advocate's immunity being work that led to a settlement and thus affected the conduct of the case in court: Gleeson JA at [11]; Simpson JA at [19]. While mediation does not, of itself, involve the exercise of judicial power, it is a step in the process towards the exercise of judicial power, which is exercised when judgment is entered.

Justice Basten in dissent found that advocates' immunity is rooted in the fundamental need of the administration of justice for finality of judicial determination of controversies between parties. In the present case, consent orders were entered prior to

commencement of a trial, reflecting a settlement reached by the parties out of court; the judicial determination of the controversy on its merits did not take place. There was no justification for extending advocates' immunity to the conduct of the respondents in the course of the mediation which lead to the settlement: [8]; [17]; [30]; [47].

On 2 September 2016, three members of the High Court gave judgment to the effect that, with the consent of the parties, special leave was granted, the appeal was allowed and the original application by the defendants was dismissed, with the defendants wearing costs in the three courts.

What happened between 16 December 2015 and 2 September 2016 was that the High Court delivered its reasons in *Attwells v Jackson Lalic Lawyers Pty Ltd*.[4] The Victorian Court of Appeal summarised the effect of the decision in March this year:[5]

> In Attwells the High Court clarified the scope of the doctrine of the advocate's immunity. The majority (French CJ, Kiefel, Bell, Gageler and Keane JJ) recognised that the foundation of the immunity relates to the exercise of judicial power. The protection afforded by the immunity arises out of the connection between a lawyer's work and the judicial determination of a controversy for which a court is responsible. It does not extend to the compromise or settlement of a proceeding, even where that settlement is recorded in consent orders by a court, because the substantive resolution of the dispute does not involve the exercise of judicial power by a court.

As the most recent appointee to the High Court has observed, the non-extension cuts both ways:[6]

> In Attwells, a majority of this Court held that the advocates' immunity from suit did not extend to negligent advice which leads to a compromise of litigation by agreement between the parties. As the majority joint judgment explained, by the same reasoning it is difficult to envisage how the immunity could ever extend to advice not to settle a case.

Finality is fundamental to our judicial system: autrefois acquit; res judicata; Anshun; the list goes on. It may be useful to see the different jurisprudence as an attempt to evolve and extend the idea to include a party-owned resolution which was the subject of dissent and ultimately rejection, a rejection in which the orthodoxy of judicial ownership reasserted itself.

In any event, the reality is that for more than a decade, the immunity has expanded almost without check. And it is just that, an immunity, a right in one class of possible defendants to a claim in tort to call in aid a complete defence not available to other classes. Particularly in the context of a mediation, it is difficult to see how a legal adviser should be immune from suit while, say, an accountant is not.

Before closing this section on the immunity, I look at the pleaded facts in Stillman. I am considering only the as yet untested allegations summarised in the publicly available reasons of the Court of Appeal.

A third party commenced proceedings against a company and a natural person, in relation to rental payments on equipment owned by the third party and used by the company. The company and the person retained lawyers. The proposed defence was that the agreement between the parties was not a lease of equipment, but rather a joint venture agreement in which profits and losses would be shared.

In the negligence action later brought by the person against the lawyers, the allegations were that from mid-2006 to mid-2007, the lawyers' advice had been that there was a sound basis in fact and law to defend the proceedings; that mediation had taken place in July 2007 resulting in unfavourable terms; that in the course of the mediation, the lawyers' advice had changed and the clients had been pressured to accept terms which were excessively disadvantageous; that the terms had included a contingent consent judgment against the clients, not to be entered if a debt repayment plan was met; that the natural person became seriously injured, with the result that neither he nor the company had not been able to meet the plan; and that the company had gone into administration, the natural person had entered bankruptcy, and the trustee in that bankruptcy had subsequently assigned the chose in action comprising the claim against the lawyers to the natural person.

The two allegations as to conduct are the giving of an advice of a sound basis to defend and the changing of that advice during the mediation. Whether or not those allegations will be established in this particular case is irrelevant for current purposes; for the hypothetical respondent practitioner, allegations could be met by establishing that the mediation was duly prepared for in two respects, first, by retesting their own assessment of the defence, and secondly, by prepping the client prior to the mediation about its process, in particular its urgency and intimacy.

Advocacy is the art of aligning the decision-maker's point of view with your client's interests, and that this holds true in mediation even though one of the decision-makers is that client.

Ethics & mediation

Barristers owe fiduciary and general law duties to their clients, they owe professional obligations to society and its relevant institutions (usually a court), obligations which include

procedural fairness, and – more recognised now than in the past – they owe obligations to themselves.

In New South Wales, the primary written sources for these obligations are two:

- The *Legal Profession Uniform Conduct (Barristers) Rules 2015* made by the Legal Services Council; and
- The Civil Procedure Act.

The Barristers Rules

Rules of particular relevance:

- The Rules are made in the belief that barristers owe their paramount duty to the administration of justice and that barristers owe duties to the courts, to their clients and to their barrister and solicitor colleagues: Rules 4(a) and 4(c).
- Barristers' work includes representing a client in a mediation: Rule 11(d).
- A barrister has an overriding duty to the court to act with independence in the interests of the administration of justice: Rule 23.
- Under 'Duty to the client', Rule 36 provides:

  A barrister must inform the client or the instructing solicitor about the alternatives to fully contested adjudication of the case which are reasonably available to the client, unless the barrister believes on reasonable grounds that the client already has such an understanding of those alternatives as to permit the client to make decisions about the client's best interests in relation to the litigation.

Unless the context requires otherwise, 'court' is defined when used in the Rules to include mediations: Rule 125. I have already suggested that litigation – the state-sponsored regime of dispute quelling – and mediation – the private process of resolution – do not sit side-by-side with easily categorised comfort. It will not come as a surprise that this is so in the ethics arena. We shall shortly see that most mediations which we as barristers engage in, are mediations in the course of litigation already commenced in a traditional court. If that is so, there can be no issue that the duty to that court remains overriding and rule 125 does not operate to carve out or to impose some kind of subordinate or collateral duty to 'a mediation' whenever a generalised 'duty to the court' is spelt out.

More difficult is Rule 36. A brief arrives. It identifies a dispute between the client and another person and provides copes documents and statements. It seeks an advice. It is otherwise silent. Is this a 'case' to which the obligation in Rule 36 applies? If not, at what stage is there such a case? Put in the context of the premise for the rule, at what stage is 'fully contested adjudication' a living thing which founds the basis for an alternative?

The difficulty is not only temporal. There is also the issue of the extent to which non-legal matters must be considered. For the barrister's duty under this rule appears not to be confined to legal factors affecting a fully contested adjudication or the alternatives. It extends to a reasonable assessment of the matter from the client's point of view, a point of view which – it is reasonable to suppose – is not usually a lawyer's point of view.

The absence of an immunity and the rise of plaintiff lawyers targeting professionals makes it likely that Rule 36 is to be litigated sooner rather than later, in particular the words 'best interests in relation to the litigation'. A barrister who receives a brief must consider at the outset and at appropriate intervals whether the obligation to inform has been triggered and whether the barrister has sufficient information to properly discharge the obligation.

The Civil Procedure Act

Part 4 is headed 'Mediation of proceedings', and s 25 defines mediation as:

> … a structured negotiation process in which the mediator, as a neutral and independent party, assists the parties to a dispute to achieve their own resolution of the dispute.

Note that both the heading and the section make clear that mediation under the Act remains in the perimeter of the proceedings; ownership of the dispute is with the state and not with the parties; it is not the parties' resolution of their own dispute, but the parties' own resolution of a dispute which has previously been brought into the state's aegis. Hence also the complementary proposition, that nothing in Pt 4 prevents parties to proceedings 'from agreeing to and arranging for mediation of any matter otherwise than as referred to' in Pt 4: see s 34(a).

I observe in passing that the very definition of mediation is yet another example of the difficulty in finding language which accommodates two different philosophies and regimes. We are already in 'proceedings', yet we are now informed that there is a separate 'process' within. The pedant can reflect on this and go nowhere; I recommend reflection on the common root verb 'procedere', to 'go forward', and to do so in each case.

Part 4 will be engaged if there is an order for referral by the Court: s 26(1). If you are briefed to appear in a mediation, it is prudent to determine whether or not the mediation is a court-referred mediation.

In relation to family provision matters, s 98 of the *Succession Act 2006 (NSW)* provides:

> (2) Unless the Court, for special reasons, otherwise orders,

it must refer an application for a family provision order for mediation before it considers the application.

My uninformed view is that a Court making a reference under s 98 of the *Succession Act* is putting in train a mediation falling within Pt 4 of the Civil Procedure Act, but you may wish to reflect on this if it arises in a brief held by you.

So does it matter whether a mediation falls within Pt 4 of the Civil Procedure Act? Yes.

For example, Pt 4 prescribes a number of rules, in particular in relation to privilege and confidentiality. These rules may not apply to mediations which are not founded upon a referral: see eg *Lewis v Lamb [2011] NSWSC 873*.

Importantly, there is the power of the court to determine questions about compromises and settlements. Section 73 gives a general power, but specifically does not limit the jurisdiction 'that the court may otherwise have in relation to the determination of' any question: s 73(2). Section 29 is in Pt 4 and provides:

> (1) The court may make orders to give effect to any agreement or arrangement arising out of a mediation session.
>
> (2) On any application for an order under this section, any party may call evidence, including evidence from the mediator and any other person engaged in the mediation, as to the fact that an agreement or arrangement has been reached and as to the substance of the agreement or arrangement.
>
> (3) This Part does not affect the enforceability of any other agreement or arrangement that may be made, whether or not arising out of a mediation session, in relation to the matters the subject of a mediation session.

As I read the sections, any rules of evidence including privilege which apply to a court determining questions under s 73 do not apply to an application for an order under s 29.

As to professional obligations, there are two primary consequences when a mediation falls within Pt 4:

- Section 56 provides that

  > (1) The overriding purpose of this Act and of rules of court, in their application to civil proceedings, is to facilitate the just, quick and cheap resolution of the real issues in the proceedings.
  >
  > …
  >
  > (3) A party to civil proceedings is under a duty to assist the court to further the overriding purpose and, to that effect, to participate in the processes of the court and to comply with directions and orders of the court.
  >
  > (4) [A barrister representing a party in the proceedings…] must not, by their conduct, cause a party to civil proceedings to be put in breach of [that] duty.

- Section 27 provides that:

  > It is the duty of each party to proceedings that have been referred for mediation to participate, in good faith, in the mediation.

Even without s 56, it is unlikely that an advocate in a court-ordered mediation can avoid an implied duty to assist their client in the discharge of this statutory duty of good faith.

Advocacy skills relevant to mediation

What is the skill base necessary for an advocate representing a client at a mediation? Before running through a checklist of matters, a recap:

- A mediation is where the parties decide, not the judge.
- A mediator facilitates that process and is not a decision-maker.
- If advocacy is tact in action, the art of aligning the decision-maker's point of view with your client's interests, then your tact is necessarily addressed to the two decision-makers, your client and the other party.
- Rule 36 is a continuing obligation : from no later after accepting a brief to appear at a mediation to no earlier than its end (whether by settlement or abandonment), you must be satisfied that you are continuing to inform the client or the instructing solicitor about the alternatives to fully contested adjudication of the case which are reasonably available to the client, unless you believe on reasonable grounds that the client already has such an understanding of those alternatives as to permit the client to make decisions about the client's best interests in relation to the litigation.

Much is written about whether advocates contribute to mediation, which is after all a process owned by parties and not by lawyers. In the jargon, mediation empowers parties. If you are briefed to appear at a mediation, be a Barwick and give informed advice on how to, not how not to; as one US commentator said, ''[d]on't call me, call my lawyer' are sometimes the most empowering words imaginable".[7] Anyone can define compromise in terms of each party losing. Instead, try considering in terms of advocacy as tact in action. You may find that the advocate's role in compromise involves understanding why one party's point of principle is simply unintelligible to the other party.

The referral

A duty to consider mediation is not a duty to mediate. That said, it is probably not sufficient to say judiciously to a judge 'My client doesn't wish to take on the job of resolving the dispute; they want you to do your job and quell it'. While each case will be different, your essential argument is founded on either s 56 or s 27: either an order will not give effect to the overriding purpose or an order has no or little prospect of allowing the parties to achieve their own resolution of the dispute. Note that s 98 of the Succession Act is founded on a different discretion, a higher bar presumptively in favour of the process. Finally, note that a duty to consider mediation is ongoing.

In the Supreme Court, read Practice Note SC Gen 6. Paragraphs 5 to 8 explain:

> 5. Part 4 of the CPA permits the Court at any stage of the proceedings, by order, to refer parties to mediation where, in the opinion of the Court, mediation appears appropriate. The Court's power does not depend on the consent of the parties, or of any of the parties.
>
> 6. It is not the intention of the Court that mediation will be ordered in all proceedings.
>
> 7. The parties themselves may, at any time, agree to mediation, nominate a mediator and request the Court to make the appropriate orders.
>
> 8. The Court may consider ordering mediation on the motion of a party, or on referral by a registrar, or on the Court's own motion. Where mediation is ordered, the parties will usually agree on the person to be the mediator. If they do not:

- the Court may select the mediator to be appointed or may appoint the mediator pursuant to the Joint Protocol set out in this Practice Note;
- the Court may refer the proceedings to a registrar or other officer of the Court certified by the Chief Justice as a mediator to meet with the parties to discuss mediation and report back to the Court with a recommendation as to whether the proceedings are suitable for mediation; or
- the Court may decide against ordering mediation.

Compare paragraph 8.3 of the District Court's Practice Note DC (Civil) No 1:

> Matters allocated a hearing date will generally be referred to mediation unless the parties can satisfy the Court that mediation is not appropriate.

Paragraph 8 of the Local Court Practice Note Civ 1 provides for mediation. However, query whether it would usually be appropriate having regard to quantum. The Land & Environment Court practice notes make detailed references to mediation which must be tailored to the particular type of proceeding.

The orthodox view is that a mediation best occurs before either party has spent significant funds, or after both parties have put their pleadings on, or after both parties have put their evidence on; this is not rocket science; (usually) any other stage holds an information imbalance (or a justifiable apprehension of one, which is as bad). You should check the timing of and the basis for the mediation. Is it upon an agreement only? Or is it upon a court order? Are there parameters? If there are (not) parameters, is there anything you should do? In this day and age, the alteration of consent orders, by consent may be doable by email to an Associate or to the Registrar, copied to the other party.

The mediator

Common complaints – less common these days but still made – are 'The mediator didn't read the documents / refused to bash the other side's head / was useless.'

There are good and bad mediators. There are good and bad judges too. One tried and true weapon in the armoury for dealing with bad judges is a mastery of courtroom procedure. The same is true in mediation. Understand the process:

- Is the mediator meant to read documents? Why? What do they need to decide? Won't information get in the way of their primary business of facilitation?
- Is the mediator's role truly to bash the recalcitrant party's head? Who decides what is recalcitrant? What does the bashed party then think about the mediator's neutrality?
- While a particular mediator may appear as 'useless', do we know a 'useful' one when we see them?

You must understand the process your client has instructed you to appear at.

Many people expect that a mediator, especially one who has held high a judicial post, will evaluate and advise the parties. This is not mediation. It is neutral evaluation.[8] Neutral evaluation is a process of assessing a dispute in which the evaluator seeks to identify and limit the issues of fact and law that are in dispute and, by that process, assist the parties to resolve the dispute. Senior counsel and retired judges are frequently retained by disputing parties for this purpose. It can be highly effective. It may be what you should be seeking. But to repeat, it is not mediation.

That said, a lawyer may be a useful person to mediate. Traits an experienced lawyer can bring to the role of mediator are the ability to be respected and gain the confidence of the parties and the

legal representatives; the ability to remain calm; professionalism; keeping confidences; courtesy; and an eye for fairness and even-handedness.[9] I note in passing two separate things:

- Seniority as a lawyer is no guarantor of these traits. Some of us are so inculcated with the idea that adversarial litigation means that you have to be adversarial, that we leave ourselves no room to develop our advocacy. The idea is wrong and probably always was; it is rather like judges believing that they should be judgmental, surely one of the worst qualities a judge can have?
- We as lawyers are familiar with the idea of a person, a senior practitioner or a judge, 'commanding' respect. Try the exercise of uncoupling the ideas of command and respect.

A barrister should keep a list of five mediators whose contact details they can pass to instructing solicitors. Only use an accredited mediator.[10] Examples of sources:

- Your own experience.
- Word of mouth.
- Mediators listed with the bar.[11]
- Accredited members of chambers.

The last is to be used with common sense. A mediator is not a decision-maker, but an appearance of neutrality is as important as neutrality itself. In litigation, the decision-maker has more likely than not come from a chambers environment. In mediation, it is unlikely that either decision-maker has an informed appreciation of the set-up.

The pre-mediation conference

Time and cost permitting, compliance with r 36 means a conference with the client and the instructing solicitor well prior to the mediation and not on the morning. While the client may not be able to be comfortable with the process, they should at least have an idea of what is in store. Apart from such advice and discussion about the issues of the case – ie the issues which would be live if the matter went to court – you should consider:

- Confirming the venue;
- Confirming the starting time and – importantly – the finishing time (everyone at the mediation may have a different understanding of this; clarify it as soon as reasonable possible);
- Walking the client through the likely course the mediation will take, including the likely delay and waiting;
- Advising the client of the role of the mediator and of what the mediator's role is not;
- Confirming the costs to date and the likely costs to hearing, for all parties;
- Confirming that the person attending the mediation has authority to settle;
- Confirming any history of offers and counteroffers and confirming whether or not any offer or rejection of an offer should be made in the opening; which is a good time for…
- Asking the client what their own expectations are, reminding them (and yourself) that mediation is the province of the client and the other party, something which should also inform you about your role (for example, have you courteously and professionally confirmed with the client that they want you to talk in any opening or joint session, or have you just assumed this?); and
- Noting that litigation is uncertain and preparing the client for the possibility that in the urgency and intimacy of a mediation, at least in private session, you, the instructing solicitor and the client may be expressing different views at different times, and noting that courteous and informed disagreement resolved in private is hardly a novel concept.

I think a reference to the mediation agreement itself and to the confidentiality undertaking to be signed by all present is useful. Apart from the fact that they should not be regarded as formalities, they can as pieces of paper provide a visual reassurance for the client.

Mediation jargon which you may hear from time to time is BATNA / WATNA, or 'best alternative to a negotiated agreement' / 'worst alternative to a negotiated agreement'.

A good mediator is in the business of getting parties to get a clear idea of what this means for them, and to the extent possible for the other side. Likewise a good advocate must be able to give informed advice on this. You must be able to remind the client of the weakness in the client's own case and be able to get the client to put themselves in the other party's shoes.

I have spent some time on the pre-mediation conference. However, you should always keep in mind the client you actually have and reasonably tailor your advice accordingly. Don't overwhelm an unsophisticated client and don't lecture a sophisticated client. Above all, honour the fact that this is their forum for their dispute; the mere process of honouring should increase your value to the client in the forum.

Position papers

Position papers cause much angst. They shouldn't. A position paper is a short and as best can be neutral – preferably very short and very neutral – document which tells the mediator the facts including the amount in issue; which puts your client's point of

view; which acknowledges the other side's point of view; and which proffers, expressly or implicitly, good faith. My own view is that mediation is a forum where positions and issues should only be raised if both parties wish to raise them, bearing in mind always that the mediator is not there to determine them.

Other material

Why are you sending the mediator material that they almost certainly don't need to read? What is the difficulty in stating in the position paper:

The matter is set for hearing in [xxx] for three days // The matter is not yet set for hearing but the expectation is three days plus. The pleadings are joined and the affidavit evidence from five witnesses in total has been served. The plaintiff / the defendant does not anticipate trawling through the material or any part of it during the mediation. However, it is available if the mediator wishes to review it prior to the mediation.

As to your own conduct at the mediation

Be on time. I think everyone should endeavour to be there 15 minutes early and I think you should be the one to introduce the client and the rest of you to the mediator. The mediator should be asking your client, as one of the two people who own the forum (and who are paying the mediator) how they wish to proceed or at the least suggesting how things should proceed, and you and your client should already have worked out whether you yourself are contributing from this stage.

Whether you are naturally taciturn or naturally talkative, you should appear professional at all times.

Assume that the other party is taking your measure as the person who will conduct any litigation and will cross-examine them. If you come across as someone the other party would rather not face, you have improved your client's position.

In and around courts, we tend to act collegiately with our colleagues. A mediation is not a court; it is a forum which belongs to the client and the other party. Apart from anything else, they are paying the money for it. Talking at length with the other legal representatives is something your client may misinterpret. As for spending lengthy amounts of time with the mediator, my view is that this is not a good look. Judges and barristers used to have morning tea to the exclusion of solicitors and never mind the client. Its time has come and gone. Let it be.

Opening

If you have instructions to open, you do so. You can address as many people as are your audience, but you must address only one, and that is the other party. You may regard your task as explaining why they will lose. I suggest instead that you use tact in action. You must use language appropriate to and that will be remembered by, the person.

Argument on the issues is unlikely to move anyone, and you should tailor your remarks accordingly. You should be brief. There is one thing that pops up from time to time: where your team believes there is a killer point which the other side just doesn't get. You must determine whether it is a killer point and even if it is, whether it is the type of point to be made in this forum at this time. If it is such a point, putting it deftly may well deposit considerable pressure into the other room. And if the point is worth making it is worth making in the opening. A mediator is likely to be reluctant to be a conduit for a piece of legal advice, and merely delivering it lawyer to lawyer is not advocacy in the sense we have discussed, as it is not being delivered to the (relevant) decision-maker.

It is worth recalling at this stage whether your client is making or rejecting an offer, through you at the opening. Some mediators, especially court-appointed mediators on a tight timeframe, try to extract whether one or other of the parties has an opening offer. Each mediation will have its own dynamic, but I think you should carry your client's default instructions from the conference.

Private sessions

Private sessions take on a life of their own. Resist the temptation to be hurried by a mediator.

I have suggested that you assume the other party is looking at you to see how you might run the case in court. Assume that the client is doing the same.

Mediations are urgent and intimate environments and the number of closed doors behind which consensus can be got are limited. Be aware of how your client may perceive any difference of opinion between yourself and your instructing solicitor. If another professional adviser such as an accountant is present, be aware of how you may test their advice in front of the client. Differences of opinion can be expected; whether they are dealt with professionally is a matter for you and other advisers. In any matter, or at least a matter where greater than usual difficulties are anticipated, have you discussed with your instructing solicitor the best way for both of you to discharge your separate obligations to the client?

If an offer is with the other side, the private session is an ideal time to update your understanding of the applicability of r 36.

Meeting the other legal representatives

A mediator may suggest that the legal representatives meet. I think you need a good reason not to do this. What is there to lose? As to whether you should seek your client's permission or at

least advise them, I leave this for you. My own view is that you should.

A mediator may suggest that the parties meet without legal representatives. This is a deeply individual thing and I can give no firm rule. Ultimately and of course it is a matter for the client, but I do caution that a symptom of a severe power imbalance can be one party's belief that there is no imbalance. Even if there is no power imbalance, the lawyer in me is reluctant to advise the client that they should settle without referring back to me. In any event, you and the client should talk things through with the mediator. Maybe you should urge that the mediator be present. If there is a meeting between the parties and if your client reports that there is an outcome, the legal representatives should immediately confer with or without the mediator to clarify whether their respective clients hold consistent recollections.

And while we are dealing with power imbalances…

The expression 'power imbalance' is peculiarly democratic. One really has to infer that there is something inherently wrong or unfair about one party being less powerful than the other. Be that as it may, it is a useful shorthand for an undoubted truth. Mediation is not a panacea. An under-resourced party in litigation is as under-resourced in the mediation as in any other part of the proceedings. All the more reason to use the mediation as an opportunity. One thing worth remembering: if the other party is an institution who is regularly involved in litigation – a bank or an insurer are the obvious examples – do not assume that the institution has a singular response to all its litigation. I spoke earlier about the importance of finality in our legal system. But while an institution wants finality in a particular piece of litigation as much as the next party, it is also in the business of managing many pieces of litigation, with the result that the risk of a particular result in a particular case is not a confined risk. An informed and appropriate reference to that contingency can often make up for all the imbalance in the world. By the bye, no competent institution simplistically regards itself as the deep-pocketed litigant who will succeed come what may. Apart from anything else, the first thing a competent institution is doing is assessing who is funding a plaintiff: is it the plaintiff's own money, or a contingency arrangement, or a deep-pocketed parent, or a litigation funder? If an institutional defendant is competently assessing power imbalance, a plaintiff should be doing so as well.

Dealing with the mediator

The mediator is not determining anything. The mediator is facilitating something in a forum owned by two other people, the parties. If you carry your client's instructions within the forum, you are bound to act in good faith, or at the least carry your client's good faith, but that does not extend to acceding to suggestions that you do not think are in your client's interests.

That said, the mediator may be an excellent sounding board. Don't pass up an opportunity to say things to an independent person trained to listen and to listen in confidence. Don't expect an advice, though.

Terms of settlement

Terms should be in writing. Experience tells us that a settlement at mediation should usually be just that, a binding agreement. If there is further detail to be done, so be it, but there should be an agreement. For the latest from the Court of Appeal on *Masters v Cameron*, you should look at *Feldman v GNM Australia Ltd* [2017] NSWCA 107. And don't forget the other pitfall in rushed settlements: have the parties in fact accorded or satisfied or both or neither?

As to the stage at which the parties need to look at terms, there are two extremes and many things in between. There is the 'let's get a figure and everything else will follow' school and the 'let's get a frame before we talk about figures'. I use the word 'figure[s]' because usually although far from always, an amount of money to be paid by one party to the other party is a central if not the only issue.

It is unfortunate to reach a figure only to find an issue about whether judgment should be entered, and embarrassing if a figure is reached and one side is of the view that the figure is the settlement and nothing else is on the table.

My own preference is for a frame from the outset, no matter how simple the settlement. From the outset, give a complete offer. Subsequent offers can be to the effect 'New figure, same other terms'. Mobile phones have cameras. Your instructing solicitor or someone should use them.

Refer again to my discussion of ss 29 and 73 above.

If the matter doesn't settle, so be it. There should be a clear understanding of where the matter stands. If there is an open offer, the offer and any other relevant matters should be confirmed in writing by the instructing solicitor as soon as possible. I think a useful attitude is to work out what the next set of directions should be to progress the matter to hearing; litigation, like death, can focus the mind.

In any event

Uniform Civil Procedure Rules r 20.7 provides:

> Within 7 days after the conclusion of the last mediation session, the mediator must advise the court of the following:
>
> - the time and date the first mediation session commenced, and

- the time and date the last mediation session concluded.

With private mediators, this can be forgotten or ignored, as the assumption is that it is left to the parties. The assumption is usually well-founded but the parties and the mediator should understand who is doing what.

A report

An advocate has a duty to accurately report to their instructing solicitor their appearance at court, up to and including the taking of judgment. The duty may extend to identifying the next step to be taken.

The duty is all the more important upon an informal and confidential mediation, whether successful or not. Your report may turn out down the track to be the only record.

The report is an appropriate vehicle to record other material matters. The materiality will vary, but possible examples are a chronology of offers and any significant areas of disagreement within private sessions.

Conclusion

Wherever law and mediation are discussed, there is angst about inconsistency and misunderstanding. In particular, there is a concern among mediators – including legally-qualified mediators – that the legal profession and the judiciary are engaged, consciously or unconsciously, in a process of capture; the very things that make mediation what it is are being lost in a process of legalisation.

If this is true, it can be overstated. Any area of human intercourse is prone to regulation; it is Tacitus and not some fleeting populist who first observed the more laws a government produces, the more corrupt it becomes. Preaching is for preachers, it is sufficient for the practitioner to remember Murray Gleeson's observation that the rule of law is not the rule of lawyers.

More profound than mere inter-professional rivalry is the development of law in a democratic age. Barristers and judges are administrators of justice, an idea much older than universal suffrage. As we have seen, the domestic court stands at the apex of this ancient system. Mediation – along with all manner of extra-curial species such as community justice, NCAT and international arbitration – does not so much challenge the role of the apex as invite each of us to re-examine the edifice.

The idea that disputes in their public form are discrete items of justiciability which fall to be ruled upon by the third arm of government has undergone profound change, some for the good and some for the bad. An identifiable academy of Australian learning has developed. A standard text is Laurence Boulle's *Mediation: Principles, Process, Practice*, now in its third edition. Boulle is a professor at ACU's Thomas More Law School. Had Catherine of Aragon and Henry VIII been subject to mandatory family dispute resolution, would More have kept his head? Donna Cooper provides some good examples of how not to do things in her recent article 'Lawyers behaving badly in mediations: Lessons for legal educators'.[12] In it, she picks up Olivia Rundle's delightful identification of five species of lawyers and discussion of how each can contribute to their client's cause.[13] Each of these sources is valuable, although the starting point in a given jurisdiction must always be its rules, so you can understand in what particular way it has chosen to embrace this valuable but still newfangled tool.

Endnotes

1 David Ash is a mediator and barrister practising from Frederick Jordan Chambers in Sydney. He is happy to receive written comments and queries about the paper addressed to d.ash@fjc.net.au.

2 A G Noorani, The Dixon Plan, Frontline – India's National Magazine, Oct 12-25 2002, Vol 19(21), www.frontline.in/static/html/fl1921/stories/20021025002508200.htm.

3 commons.wikimedia.org/wiki/File:Noah_Webster_letter_to_Eliza_Webster_on_abolitionism_1837.jpg.

4 [2016] HCA 16; (2016) 331 ALR 1.

5 *Spralja v Bullards* [2017] VSCA 32 (3 March 2017), [46].

6 *Kendirjian v Lepore* [2017] HCA 13, Edelman J, [18].

7 Tina Grillo, The Mediation Alternative: Process Dangers for Women, 100 Yale LJ 1545 (1991), p 1599, cited in Bryan Clark, Lawyers and Mediation, 2012, Springer, 115.

8 For an example of a template for this process as distinct from mediation, see www.aat.gov.au/steps-in-a-review/alternative-dispute-resolution/neutral-evaluation-process-model.

9 Drawn from Clark, p 118.

10 At msb.org.au/mediators.

11 nswbar.asn.au/briefing-barristers/adr/baradr.

12 (2014) 25 ADRJ 204, available on Austlii.

13 Olivia Rundle, 'A spectrum of contributions that lawyers can make to mediation' (2009) 20 ADRJ 220, available on Austlii. The spectrum is considered in a practical context by Kathy Douglas & Becky Batagol in 'The role of lawyers in mediation: insights from mediators at Victoria's Civil and Administrative Tribunal (2014) 40(3) MonLR 758, available on Austlii.

Equitable compensation for breach of confidence

The New South Wales Bar Association-Parsons Seminar was presented by P G Turner, University of Cambridge, in the Bar Common Room on 30 March 2017. The Hon Justice Mark Leeming spoke in reply.

Australian lawyers and judges have brought about two developments in the law of confidentiality which are of special importance for my purposes today. In talking of the law of confidentiality, I speak – as the billing suggests – not of obligations defined by statutes or which subsist in the law of contracts. Instead I speak of confidentiality arising on principles of equity. The first development was the recognition in 1984 by the High Court of Australia – some years ahead of the House of Lords – of:

> an equitable jurisdiction to grant relief against an actual or threatened abuse of confidential information not involving any tort or any breach of some express or implied contractual provision, some wider fiduciary duty or some copyright or trade mark right *(Moorgate Tobacco Co Ltd v Philip Morris Ltd (No 2)* (1984) 156 CLR 414, 437-8).

In New Zealand, that conclusion had already been reached in a now little-noticed decision of 1978 (*AB Consolidated Ltd v Europe Strength Food Co Pty Ltd* [1978] 2 NZLR 515, 520-1), but it was only reached in 1988 in England (*A-G v Observer Ltd* [1990] 1 AC 109, 255 (HL)) and in 1999 in Canada (*Cadbury Schweppes Inc v FBI Foods Ltd* [1999] 1 SCR 142, [19]-[28]).

The second development in which Australian lawyers and judges have led is on recognising that the kinds of 'relief against an actual … abuse of confidential information' include compensation. The Australian cases soon recognised that this is not 'damages' in an undefined sense, of the sort granted by the English Court of Appeal in *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* (1948) 65 RPC 203. The Australian cases also soon recognised that this was not 'damages' under Lord Cairns' Act either, though such relief had been awarded by the Full Court of the Supreme Court of Victoria in *Talbot v General Television Corp Pty Ltd* [1980] VR 224. The Australian cases recognised that this 'compensation' is exclusively equitable relief, granted by reference to distinct equitable principles: it is, to use a convenient term, 'equitable compensation'.

I wish to suggest that Australian lawyers and judges will be instrumental in a further development of the law of confidentiality, namely to work out what those distinct principles of equity are. There are two reasons for that.

First, the decisions of courts in influential foreign common law jurisdictions – especially Canada, England and New Zealand – are (I say with great respect) affected by certain misunderstandings. The Australian cases are largely free of those misunderstandings.

Secondly, while the Australian case law is in that sense 'further ahead', it presents its own difficulty. When the Australian cases say that equitable compensation for breach of confidence is to be 'restitutionary' or restorative in nature (following the principles of relief for breach of trust in Street J's famous judgment in *Re Dawson (dec'd)*), what do they mean?

THE POSITION ABROAD

By way of a mental holiday for my no doubt busy audience, let me direct attention to matters abroad. To Australian lawyers conversant with equitable principles, it can come as a surprise to learn that equitable compensation is a far less familiar remedy in common law countries beyond our shores.

England

The scene in England is set by the words of Arnold J, whose learning in intellectual property law and related topics gives his judgments quite some weight. In dealing with a claim of equitable compensation for breach of confidence in the 2012 case of *Force India Formula One Team Ltd v 1 Malaysia Racing Team Sdn Bhd* [2012] EWHC 616 (Ch), the learned judge said:

> It is very difficult to find a clear, accurate and comprehensive statement of the principles applicable to the assessment of damages or equitable compensation for breach of confidence. The case law is very confused, and none of the existing commentaries deal[s] entirely satisfactorily with it. (at [374])

As that comment betrays, the outward sign of confusion in the English cases has often been a loose usage of the word 'damages'. But the underlying malady is quite different. It is not merely the misuse of a word. It is the confusion of distinct ideas: the confusion of *forms* of action with *causes* of action.

In his Cambridge lectures, delivered around the turn of the twentieth century, Professor Maitland had said that '[t]he forms of action we have buried, but they still rule us from their graves' (*The Forms of Action at Common Law* (CUP 1965), 2). Between 1940 and 1970, Lord Atkin, Lord Denning MR and Diplock LJ all declared the irrelevance of the old forms of action to the work of a twentieth century judge. The forms should have been plainly irrelevant to the equitable obligation of confidentiality given that they were abolished over 70 years before that obligation in its modern form was actively developed in English law (from the 1940s onwards). Indeed, the new action was an *equitable* action: the forms of action only lay at common law.

But in this case Maitland was right. Diplock LJ said in *Letang v Cooper* [1965] 1 QB 232, 242-3 that a cause of action 'is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person'. Recognising a new equitable 'cause of action' for breach of confidence should not, alone, have indicated anything about the kind of relief that would be available: in particular, since a cause of action exists where there is simply a claim to some relief,

recognising an equitable cause of action for breach of confidence should not have implied that damages or compensation were necessarily available forms of relief. It is striking, therefore, that as soon as the English judges began speaking of a 'cause of action' for breach of confidence, they began assuming that a remedy called 'damages' was available. In so doing, they slipped into the thinking of the forms of action: in particular, the *ostensurus quare* writs for the recovery of damages in trespass, case, trover and assumpsit (as distinct from the *praecipe* writs of debt, detinue, covenant and account). In this way, they unthinkingly assimilated the new equitable liability to a common law liability in contract or tort. Unlike Australian courts, before English courts can confront the question of how to elaborate the 'restitutionary' principle of equitable compensation for breach of confidence, they will have to move these obstructions out of the way.

Canada

In Canada, different problems attend the cases, although they too are rooted in the confusion I have just described. As a result of the confusion of *forms* of action with *causes* of action, a view was formed that the juridical basis of the new equitable action was not merely unclear, but was mixed. It was said to be *'sui generis'*: a phrase, Binnie J truly said in a leading Canadian case that 'tends to create a frisson of apprehension or uncertainty amongst lawyers': *Cadbury Schweppes Inc v FBI Foods Ltd* [1999] 1 SCR 142, [28]. In his important book, *Breach of Confidence* in 1984, Dr Gurry argued that the equitable obligation has such a mixed basis. In *Lac Minerals Ltd v International Corona Resources Ltd* [1989] 2 SCR 574, the Supreme Court of Canada adopted his analysis.

The consequences have been several.

The most important was to invest Canadian courts with discretion to decide what is the 'appropriate' remedy in a particular case. This is an unusually wide discretion. Because the basis of the equitable action was 'multi-faceted' – facets of property, trust, contract, tort were all mentioned – there was no telling which facet might appear in a given case; nor, accordingly, what relief might need to be given. This discretion was, or is – if it still exists – arguably wider than the equitable discretion enjoyed by English judges of equity since at least the seventeenth century.

A further consequence was the Canadian judges' adoption of an explicit form of legal realism. Rather than look to the legal incidents of the equitable obligation when deciding on the proper form of relief, the Supreme Court said that the judges should look to the 'underlying policy' of the law, namely of protecting confidences.

The difficulties of these and other consequences of the Supreme Court's view that equitable obligations of confidentiality have no single juridical root will be apparent. Since the obligation is an equitable obligation of conscience, conscience – rather than property, trust, contract or tort – is that on which analysis must focus when deciding the proper relief. Looking to underlying policies is of no help. To perceive a policy in a body of decided cases and thence to conclude that the reasoning in fact used to decide those cases should be discarded and the policy applied at large is contrary to legal method.

Perhaps for these reasons, the Supreme Court of Canada has since abandoned the *'sui generis'* or conglomerate theory of confidentiality and has declared that it is a purely equitable obligation: *Cadbury Schweppes* at [20]. That, with respect, is a desirable development. But it leaves the problem that a so-called 'full range' of equitable remedies is available to relieve a breach of confidence (at [76]) and yet no indication is given of how equitable compensation might be quantified and delimited.

New Zealand

The final stop in this mental tour abroad is New Zealand. The availability of equitable compensation for breach of equitable obligations of confidence has been established longer in New Zealand than in Australia, Canada or England. But the principles by which it is awarded are not clear. Following the Canadian courts, the courts of New Zealand have been attracted to a wide discretion to decide on the proper form – and, one assumes, the proper measure – of equitable relief. The New Zealand courts have also been influenced by notions of the mingling of law and equity, which do not correspond with the Australian legal position.

Thus, one returns to the Australia where the position is that:

1. the obligation of confidentiality is recognised as purely equitable;
2. equitable, not common law relief, is in principle available;
3. equitable compensation is one of the available forms of equitable relief; and
4. it is accepted that the award of equitable compensation is and ought to be subject to principles and doctrines, rather than pure discretion.

However, as I foreshadowed at the beginning of my remarks, the Australian position presents its own problem. What is that problem and how will Australian lawyers and judges be called on to test and develop the law?

THE AUSTRALIAN PROBLEM

'Restitution'

Shortly stated, the problem presented by the Australian cases concerns the word 'restitution'. For present purposes, no question

arises in relation to the special sense given to the word 'restitution' by writers in the field of restitution for unjust enrichment, where 'restitution' is defined as a claim that depends on a person's receipt of a transfer of wealth. Rather, the present concern is with the word 'restitution' in its more traditional sense of restoring parties to a prior position.

Restitution in that sense has become central to claims of equitable compensation for breach of confidence by an extension of the reasoning of Street J in the breach of trust case, *Re Dawson (dec'd)* (1966) 84 WN (Pt 1) (NSW) 399, where the learned judge said (at 404):

> The obligation of a defaulting trustee is essentially one of effecting a restitution to the estate. The obligation is of a personal character and its extent is not to be limited by common law principles governing remoteness of damage.

Since equitable obligations of confidentiality have been derived from the wider set of obligations owed by trustees – including trustees' obligations of confidence – the obligation of defaulting trustees has been extended to defaulting confidants. Thus, Australian cases maintain that the obligation of a defaulting confidant in equity is essentially one of effecting a restitution. That is maintained in the analysis of Gummow J in *Concept Television Productions Pty Ltd v Australian Broadcasting Corpoation* (1988) 12 IPR 129, 136 and *Smith Kline & French Laboratories (Australia) Ltd v Department of Community Services and Health* (1990) 22 FCR 73, 83, and later analyses such as that of Philippides J in *Ithaca Ice Works Pty Ltd v Queensland Ice Supplies Pty Ltd* [2002] QSC 222, [14]-[16].

If I may, I would, with great respect, suggest that seeking a 'restitution' is indeed a proper objective of relief in equity for breach of confidence: unlike the objectives of some other forms of relief, including some common law remedies, this objective is consonant with the fact that obligations of confidentiality are obligations of conscience. For instance, while the doctrine of mitigation is consonant with the objectives of awards of damages for breach of contract, it is dissonant with obligations of conscience. A contract party can be expected, by acting in self-interest, to mitigate his or her loss by procuring a contract on equivalent terms with another promisor. However, a confider cannot sensibly be required to mitigate his or her loss by seeking another confidant to keep the secret. Similarly, it would be odd to suppose that an obligation of conscience might be discharged by pointing to unforeseen events or the claimant's own fault in a way that engages common law (and statutory) rules in, for example, the law of contract and the tort of negligence.

Unelaborated principles

But the objective of 'restitution' requires further elaboration than has been made so far in the Australian cases of compensation for breach of confidence.

The fact that the 'restitutionary' obligation in confidence cases is derived from *Re Dawson (dec'd)* is significant. So is the fact that Re Dawson was a case of a breach of trust. One can accept that a defaulting trustee's obligation 'is essentially one of effecting a restitution to the [trust] estate'. Nevertheless, one might ask, 'How is restitution to be made in equity where there is no trust estate?' Equitable obligations of confidentiality require no trust or trust estate. If a breach of confidence does not deplete a trust estate, what is a defaulting confidant to make restitution of? Further, breaching a confidence in equity does not vitiate a transaction: 'restitution' by means of rescission is not in point.

The farthest one can take the proprietary analogy is perhaps to say that confidential information has some proprietary characteristics – it may be property for the purposes of section 51 (xxxi) of the Commonwealth Constitution – and that, where the breach of confidence is in passing a trade secret to a third party, the third party receives something possessing proprietary characteristics. In that case, perhaps the obligation to make 'restitution' might be analogous to relief for breach of trust in requiring the confidant (and perhaps the recipient, on principles analogous to the first limb of *Barnes v Addy*) to pay a sum equal to the value of the trade secret.

Even that analogy begs questions, because the obligation may be only to make good any diminution in the value of the trade secret. And, of course, a breach of confidence may occur without transferring the information. The breach may consist in the unauthorised use of the information. What 'restitution' is to be made then? The analogy from trust law is incomplete; the gap requires to be filled by further consideration of what the obligation of conscience involves when the objective is to effect a restitution. As I hope to have shown, Australian lawyers and judges are likely to have to consider that problem before their counterparts abroad.

The limits of the 'restitution' objective are even firmer where the confidence relates, not to commercial or 'proprietary' confidences, but to personal information. Here, I must confess, the lead has already been taken by the English courts. One must acknowledge that the line between commercial confidences and personal information cannot be precise. However, there is a difference of quality between the two kinds of confidences, and that difference can be seen in the kinds of grievance pursued in the two kinds of case and, I suggest, in the forms of relief which can properly be awarded in the two kinds of case.

If compensation is to be granted for harm to purely personal interests suffered through breaches of confidence, that

development would be congruent with the law of torts. Diverse though it is, the law of torts is the natural home for an action for compensation where the kinds of harm suffered relate to purely personal interests and where, inevitably it seems, the harm can be done in a manner that is hurtful or highly embarrassing to the claimant, or so as to offend public morals or terribly misuse public power. The nature of breaches of privacy – of purely personal obligations of confidence – seems inherently closer to the nature of several of the harms to which the law of torts is addressed. Equity's traditional concern with specific relief, however, places its concerns outside the law of torts. Its new-found jurisdiction to award compensation is not, in truth, an exception to that: so much is clear from the fact that, in compensation cases, courts of equity have continually reinforced the 'restitutionary' objective of equitable monetary relief.

In this regard, the lead has already been taken by the English courts in distinguishing the action for breach of confidence, in equity, from what is now, it seems, a tortious action for misuse of private information. Whether the same will occur in Australia, by accepting the invitation issued by the High Court in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, also lies in the hands of the adventurous advocate – and the hapless Australian judge.

A response by the Hon Justice Mark Leeming.

May I make six comments in response to Peter Turner's excellent, not to mention timely and provocative, paper?

First, on the point well made by Peter Turner as to the notable Australian contribution to the efflorescence of the remedy, may I add a reference to an Australian journal article, written some 35 years ago in the *Melbourne University Law Review*: 'The Equitable Remedy of Compensation'.[2] The title may seem a little unimaginative, but it was and is important to emphasise the equitable nature of the remedy. The author introduced his theme as follows:

> This remedy is generally believed to be defunct except as an ill defined possibility where certain fiduciary obligations are breached. The general misconception that an award of monetary compensation is beyond the pale of Equity has led to confusion in many cases. The writer hopes to lessen that misconception and contribute to an increased understanding of the potential use of this remedy.

A lot has changed since then. A little surprisingly, the article was picked up by the Supreme Court of Canada in *Canson Enterprises Ltd v Boughton & Co*,[3] in a way which anticipated some of the themes of Peter Turner's presentation today, focussing on restitution in the non-technical sense used by Street J in *Re Dawson (decd)*: 'the obligation of a defaulting trustee is essentially one of effecting a restitution to the estate'.[4] A quarter of a century ago, one of the most junior members of the Supreme Court of Canada, said:

> As Professor Davidson states in his very useful article 'The Equitable Remedy of Compensation' (1982) 13 Melb UL Rev 349 at 351, 'the method of computation (of compensation) will be that which makes restitution for the value of the loss suffered from the breach'.

The present Chief Justice of Canada, as she now is, was correct to describe the article as useful, and correct to pick up the prescient and non-technical language of restitution. Her Ladyship was of course incorrect to refer to the author as a professor; Ian Davidson, now of course senior counsel practising in this building, and sitting in the front row of the audience today, was then a newly admitted solicitor. In short, this is not the first time that there has been an important Australian influence upon international developments in common law legal systems in relation to equitable compensation.

Secondly, I share Peter Turner's opinion that there is no reason to think that all cases of equitable compensation for breach of confidence should fit in the same procrustean bed. For one thing, as Peter observes, and as Sir Frederick Jordan might have said,[5] there are confidences and confidences. One example may be seen in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd,* where a unanimous High Court said that:[6]

> Certain types of confidential information share characteristics with standard instances of property. Thus trade secrets may be transferred, held in trust and charged. However, the information involved in this case is not a trade secret.

The High Court held that if the third parties who were sued, Mrs Margaret Elias and her daughters, Sarah and Jade, had received confidential information which was confidential, it would still not have been property which was knowingly received by them for the purposes of the first limb of *Barnes v Addy*.[7] At the same time, the High Court appears to have acknowledged that there were some species of confidential information which were sufficiently proprietary to sustain such a claim to relief.

Thus it may be seen that there can be no all-embracing theory applicable to all types of confidential information. That leads to the third point, which is a more general one. The nature of the legal system is that it is replete with overlapping causes of action and remedies.[8] That is true of confidential information just as much as other areas of the law, including in what may be the most common circumstance where such a claim arises, namely, between parties who are in contractual relations. If the parties

expressly or impliedly promise to keep information confidential (expressly in, for example, a non-disclosure agreement or employment contract, or impliedly in, for example, a solictor's or accountant's retainer) then there may be a question whether there is any room for an equitable duty which sounds in equitable compensation. The remedy for breach of a contractual promise to keep information confidential will be damages, not equitable compensation – perhaps, even if absent the contract an obligation of confidence would have been recognised by the parties in respect of the same information. This is in substance the converse of the proposition made by Deane J in *Moorgate Tobacco* with which Peter Turner commenced.[9]

But that is not to say that there may not be scope to contend that the parties' promise did not exclude reliance on their rights in equity; after all, we have no difficulty recognising that directors and employees may subject themselves to overlapping fiduciary and contractual duties, nor that contract is often the source of a fiduciary obligation (consider a partnership deed or a trust deed).

There are at least two ways in which this overlap may play out in cases of confidential information. If the contractual confidence is tersely drafted (a single clause in an employment contract) or implied, then there may be ample scope to contend that it does not displace rights in equity. Alternatively, if the parties have gone so far as to elaborately define and protect their confidential information in a formal contract, then that may sustain an argument that it is all the more unlikely that their objective intention should be taken to be to have denied to themselves such additional protection as equity accords.[10] In recent years, divergent views have been expressed in such cases.[11]

The points to note for present purposes are that it will be essential in a claim for equitable compensation to identify clearly the equitable (and non-contractual) confidence sought to be vindicated, and that in turn may require a closer attention to be given to the underlying rights, to the extent they have contractual force. Otherwise the difficulties to which Peter Turner has referred may arise.

Fourthly, I turn to the elephant in the room, which is, as Neil Williams SC and Surya Palaniappan recently observed,[12] statute. Statute provides rich opportunities, as well as pitfalls, in relation to the content and application of the principles underlying equitable compensation.

I will focus largely, but not exclusively, on Victorian statutes. Some statutes deal in terms with remedies. The Victorian equivalent of Lord Cairns' Act has been amended to include claims based in equity,[13] and one view – perhaps a controversial one – is that the reasoning in *Giller v Procopets* justifying a pecuniary award to a plaintiff whose confidential information was vindictively abused by her former partner – is best regarded as being justified under that statute.[14] There is a fine analysis by Professors Katy Barnett and Michael Bryant on this statute, whose title is self-explanatory: *Lord Cairns' Act: A case study in the unintended consequences of legislation*.[15] In any event, while Victorian litigants will in future cases understandably be inclined to rely upon that decision in framing their case, a narrower approach may be required by s 68 of the *Supreme Court Act 1970* (NSW), which preserves the original language of Lord Cairns.

More importantly, there are many statutes which either recognise and are to be construed in light of equitable confidential information (s 183 of the *Corporations Act* is the most obvious example) or else create new rights to confidentiality and privacy. Of the latter, some speak in terms to pecuniary claims. For example, s 13 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) creates a right against arbitrary interference with a person's 'privacy, family, home or correspondence', but s 39(3) provides that 'A person is not entitled to be awarded any damages because of a breach of this Charter', although s 39(4) ensures that the section does not affect any right a person may otherwise have to damages.

Such a provision is apt to stand in the way of the creation of a statutory tort sounding in damages. But there are many other statutes which are less squarely directed against pecuniary remedies. There is a useful paper by Professor Neil Foster and Ann Apps 'The neglected tort – Breach of statutory duty and workplace injuries under the Model Work Health and Safety Law'[16] -touching upon the opportunities for combining statutory norms with a tortious cause of action.

My fifth point is to say something about the statutory backdrop, and in particular, the Civil Liability Act. Importantly, I do so not because I necessarily endorse the suggestion that tort is the best natural analogy for many of the claims in this area (although I do agree with the congruence to which Peter Turner has pointed). I do so because it may be quite short-sighted to think that that Act is inapplicable to equitable claims.

Section 5A of the Civil Liability Act provides that Part 1A – which is headed 'Negligence' – applies 'to any claim for damages for harm resulting from negligence, regardless of whether the claim is brought in tort, in contract, under statute or otherwise'. Not only is that language ('any', 'regardless of whether' and 'or otherwise') broad, but many of those terms are defined, and defined in counterintuitive ways. In particular, 'Negligence' does not mean negligence; it means 'failure to exercise reasonable care and skill'.[17] It would be wrong to think that Part 1A applies only to actions for negligence, or for that matter only to actions at common law. Although the statutory label 'negligence' is

suggestive, even if regard may be had to the defined term,[18] the words 'under statute or otherwise' dictate that 'negligence' is not confined to common law.[19]

'Harm' is defined circularly but broadly to mean harm of any kind, including personal injury or death, damage to property and economic loss, and personal injury includes pre-natal injury, impairment of a person's physical or mental condition and disease.

At the very least it seems arguable that a publication of confidential information which occurs because of a failure to take reasonable steps to, say, prevent personal information like credit card details or health records from being stored securely, would fall within those definitions.

There is a similar broad definition in s 28 which is in Part 3 titled 'Mental harm':

> This Part (except section 29) applies to any claim for damages for mental harm resulting from negligence, regardless of whether the claim is brought in tort, in contract, under statute or otherwise.

The same reasoning applies to the effect of that definition upon this Part, noting that negligence is re-defined – in identical terms – in s 27. Most particularly, s 31 within that Part provides:

> There is no liability to pay damages for pure mental harm resulting from negligence unless the harm consists of a recognised psychiatric illness.

That statutory intervention may have significant conequences. Let me illustrate one, once again by reference to *Procopets*, where it was statuted that:

> the term 'nervous shock' - and its modern synonym 'recognised psychiatric illness' - should also be discarded, based as they are on the unsustainable assumption that a clear line separates 'psychiatric illness' from other (lesser) types of mental distress).[20]

In cases to which the Civil Liability Act applies, that cannot be so. Of course, *Procopets* was a case of *intentional* dissemination of confidential information, to which the provisions of the Civil Liability Act referred to above would not respond, but nevertheless it remains a good example of the need to rationalise the reformulation of principle with the statutory landscape.[21]

Sixthly and finally, the upshot is that it may be convenient – for practical, as opposed to theoretical purposes – to delineate three broad classes of cases of breaches of confidence. The first is cases involving a recognised proprietary confidence; in such cases, a plaintiff is apt to have a range of well-established property-based rights against wrong-doers and third parties in addition to personal rights. The second is intentional cases involving the use or dissemination of confidential information. These will fall outside the Civil Liability Act but may overlap with, or be analogous to, tortious claims in trespass, defamation, injurious falsehood and perhaps even malicious prosecution (to which, once again, statute may apply). The third is non-intentional cases, where the provisions of the Civil Liability Act may have an important role.

It may be helpful to have regard to those analogies when framing and evaluating submissions as to equitable compensation; this may be seen as one aspect of coherence. The point is not to look at the quantum of pecuniary relief which issues,[22] but the underlying values and principles vindicated by relief. There may be a very large question as to the extent to which equity's concern for conscience, which is central to its protection of confidential information, overlaps with or is opposed to the principles underlying these similar common law rights. Perhaps the most interesting and valuable aspect of Peter Turner's paper is provoking thought about this, which may be seen as an aspect of coherence. Whether or not that be so, there seems to be no reason to think that the next four decades of Australian equitable compensation will be lacking in interest or complexity.

Endnotes

1 'Judge of Appeal, Supreme Court of New South Wales; Challis Lecturer in Equity, University of Sydney.
2 (1982) 13 Melb Uni L Rev 349.
3 [1991] 3 SCR 534 at 547-548.
4 [1966] 2 NSWR211 at 214.
5 Cf *Ex parte Hebburn; Re Kearsley Shire Council* (1947) 47 SR (NSW) 416 at 420.
6 (2007) 230 CLR 89; [2007] HCA 22 at [118].
7 (2007) 230 CLR 89; [2007] HCA 22 at [118].
8 See for recent examples *Fistar v Riverwood Legion and Community Club Ltd* (2016) 91 NSWLR 732; [2016] NSWCA 81 at [48]-[51] and *Perera v Genworth Financial Mortgage Insurance Pty Ltd* [2017] NSWCA 19 at [44].
9 *Moorgate Tobacco Co Ltd v Philip Morris Ltd (No 2)* (1984) 156 CLR 414 at 437-8.
10 In Australia, that includes the possibility of an account of profits, a remedy unavailable in Australia for breach of contract: *Hospitality Group Pty Ltd v Australian Rugby Union Ltd* (2001) 110 FCR 157 at [158]-[159]. Although in England an account of profits is available 'when, exceptionally, a just response to a breach of contract so requires': *Attorney General v Blake* [2001] 1 AC 268; [2000] UKHL 45 at 284, the consequence may be a lessening of the occasions in which it is ordered even in cases where there are breaches of contractual and equitable confidences: see for examples *Vercoe v Rutland Management Ltd* [2010] EWHC 424 (Ch) and perhaps also *One Step (Support) Ltd v Morris-Garner* [2017] QB 1; [2016] EWCA Civ 180 at [49]-[51].
11 Without seeking to be exhaustive, see *Optus Networks Pty Ltd v Telstra Corporation Ltd* [2010] FCAFC 21; (2010) 265 ALR 281 at [29]-[38] and *Del Casale v Artedomus (Aust) Pty Ltd* [2007] NSWCA 172; (2007) 73 IPR 326 at [118].
12 N Williams and S Palaniappan, 'Statutory Construction for Advocates', paper present to NSW Bar Association, 28 February 2017.
13 *Supreme Court Act 1986* (Vic), s 38.
14 (2008) 24 VR 1; [2008] VSCA 236.
15 (2015) 9 *Journal of Equity* 150.
16 (2015) 28 *Australian Journal of Labour Law* 57.

17 Section 5.
18 See *Owners of 'Shin Kobe Maru' v Empire Shipping Co Inc* (1994) 181 CLR 404 at 419.
19 See *Paul v Cooke* (2013) 85 NSWLR 167; [2013] NSWCA 311 at [39]-[41].
20 (2008) 24 VR 1; [2008] VSCA 236 at [31].
21 See for example *CAL No 14 Pty Ltd (t/as Tandara Motor Inn) v Motor Accidents Insurance Board* (2009) 239 CLR 390; [2009] HCA 47 at [39]-[41] and M Leeming, 'Theories and Principles Underlying the Development of the Common Law' (2013) 36 UNSWLJ 1002.
22 Cf *Gulati v MGN Ltd* [2017] QB 149; [2015] EWCA Civ 1291 at [50]-[74] (comparisong between damages for misuse of private information and personal injury damages).

Southern-style justice: the trials of Bob White

By Geoffrey Watson SC

In the 1920s-1930s race relations in the United States reached their nadir. The Ku Klux Klan had re-emerged – its membership peaked in the late 1920s. Nowhere was racism more prevalent than in and around the criminal justice system. It is almost as though there were two complementary justice systems – an official *judicial* system and what might (euphemistically) be called an *extra-judicial* system. Both were accepted to have their own place and role. I am not so sure there was much practical difference between them. It is true that the extra-judicial system produced lynchings and castrations; but the judicial system included biased police and prosecutors presenting false or incomplete evidence to prejudiced judges and jurors. Both systems led to the imposition of the death penalty on African-Americans in unusually high numbers. Neither alternative was attractive.

The stories of injustice are legion. Some are well-known – the most infamous being the story of the Scottsboro boys. But no episode better exposes the deep hypocrisy of Southern-style justice than this lesser-known story – the story of the different treatment of Bob White and 'Dude' Cochran

The incident, arrest and indictment

Bob White was a 27 year old illiterate farmhand, working as a cotton picker on a plantation near Livingston in Polk County in Texas.

During the evening of 10 August 1937, a white woman, Ruby Cochran, was raped at her home in Livingston. Ruby's husband was a wealthy and powerful farmer, W S 'Dude' Cochran.

The rape occurred in complete darkness, and Ruby could not identify her assailant beyond saying that she thought he was barefoot, had 'very offensive breath' and was 'undoubtedly a negro'.

The next day Dude and two of his brothers went with a local lawman and rounded up 16 African-American men who worked on nearby plantations. Bob White was one of those men. It is not clear why these particular men were selected, and it may have been at random. There was certainly no proper authority to seize them like this – they were not under arrest, and there was no power to arrest them. The men were taken to a nearby property where they were paraded in front of Ruby, but she said she could not identify her assailant by sight. White, like the others, was then asked about his whereabouts at the time of the attack (so much for the right to remain silent). White explained that he was at his mother's – 15 kilometres away, and that he had witnesses to support that.

Each man was then told to repeat a short sentence which Ruby said had been used by her attacker – the words were 'I don't care what they do to me; I don't care what happens to me'. After Bob White spoke, Ruby said his voice 'was the same' as her assailant.

That was enough for Dude Cochran. He had his man.The men apart from White were released. White was taken to Polk County gaol where he was kept illegally – he was not under arrest and no charges were laid against him, no doubt because the evidence was insufficient. To charge White required something more, preferably a confession. So White was kept in isolation and, of course, denied access to a lawyer. According to White (and later accepted to be the fact) he was taken out of his cell each night for a week, taken into some local woods where he was handcuffed, whipped and savagely beaten. One night he was suspended from a tree in chains until he passed out. At dawn on the seventh day, he capitulated. After being kept awake all night, White marked a crude X onto a typed confession. White was crying as he did so. He was incapable of reading the text he was signing.

It was accepted that White had been taken into the woods so that his interrogators could have a little 'privacy'.

A charge of rape was laid on the basis of White's 'confession' – and rape was a capital offence. An all-white grand jury was hastily convened and returned a true bill of indictment.

The first trial

White was arraigned to stand trial in Livingston. No local lawyer would defend him, and a courageous attorney from Houston, J P Rogers, volunteered. Rogers is something of a hero in all of this.

There was no prospect of White getting a fair hearing in Livingston – it proved difficult enough just to keep him alive for long enough so he could get to a trial. At one stage more than 100 deputies were on duty to protect White from a lynching (eventually the town's long-serving sheriff was removed from his office because of his role in *protecting* White).

The trial was a travesty. The judge and the jury were all white local males. In fact, the only non-white allowed in the courtroom was the accused – all black persons were excluded from the courthouse and its surrounds. The gallery was packed with enraged locals – friends of Dude and Ruby. A noisy mob surrounded the outside of the courthouse.

J P Rogers did the best he could in difficult circumstances. Apart from the 'confession', the evidence against White was very weak, so Rogers challenged the confession. He got admissions that White had been taken at night and into the woods (although no admissions were made about the violence, it was accepted that White had been taken into the woods so that his interrogators could have a little 'privacy'). Rogers also pointed out to the jury that fingerprints and a footprint taken from the crime scene did

not match White. He called White's alibi witnesses – but they were obviously never going to be believed given their skin colour[1].

The prosecutor did little to ease tensions. During his address he pointed the jurors toward the packed gallery – 'Look at this courtroom; it is crowded with Polk County people demanding the death penalty for Bob White'. No doubt that was true, but it is difficult to see how it would have been relevant to the jury's deliberations.

Unsurprisingly the jury convicted. White was immediately sentenced to death by electrocution.

White challenged his conviction and succeeded on two grounds: *White v State* 135 Tex Crim 210 (1938). One ground was an indirect effect of the decision to exclude black people from the courthouse: Rogers had attempted to move for a change of venue to get away from Livingston, and gave the papers to White's uncle to file – but he was black, and refused entry to the court precincts and the application could not be filed in time. The other ground was based on the prosecutor's inflammatory address to the jury – which was held to be 'undoubtedly prejudicial'.

So the Texas Court of Criminal Appeals set the conviction aside – but it did so quite reluctantly: the judges prefaced their order with these words – 'However much we may regret to reverse cases of this character ...'.

White was remanded for a new trial.

The second trial

The second trial was removed from the Livingston hothouse, to be heard 80 kilometres away in a court in the town of Conroe in Montgomery County.

This change of venue has all the elements of the old frying pan/fire dilemma: Conroe is a town with a sickening history of lynchings, racial prejudice, and judicial corruption. But I suppose that whether it was Conroe or Livingston did not matter: this was never going to be a fair fight if the fight was going to be fought in Texas.

The trial proceeded and ended as expected. White was convicted a second time and received his second death sentence.

A second appeal to the Texas Court of Criminal Appeals failed: *White v State* 139 Tex Crim 660 (1939). With the assistance of the NAACP, White set off to the Supreme Court of the United States.

The case got into the Supreme Court in an unusual way. The key to White's argument was that his 'confession' had been improperly obtained. That is hard to establish on an application for certiorari to the US Supreme Court because normally only the decision of the court below is examined, and then only examined for legal error. Bill Douglas was on the court at that time and he described how the chief justice, Charles Evans Hughes, read White's claim and 'smelt a rat'. Hughes called for all of the records in relation to the matter. When these became available they clearly established that the claims of police brutality were true.

The Supreme Court not only unanimously allowed White's appeal, it ruled that his confession had been coerced and could not be admitted into evidence because that would violate White's entitlement to due process ensured by the Fourteenth Amendment: White v Texas 310 US 530 (1940). The Supreme Court set aside the conviction and remitted the matter for another new trial.

Little did the members of the Supreme Court know it, but they had just imposed their own death sentence on Bob White.

The third trial

Given that his 'confession' was no longer admissible against him, White's prospects of an acquittal were pretty good at his third trial. In a way he must have been looking forward to the third trial – by this time he had been in gaol for nearly four years.

White's biggest problem was that his prospects of success looked much too good to Dude Cochran.

The third trial opened in Conroe on 11 June 1941. It did not last for long. A jury was selected and around noon the judge called for a recess. The judge was still on the bench and the jury was just shuffling out as Dude Cochran slowly walked forward, drew a .38 pistol, and shot Bob White in the back of the head. White would have been dead before he hit the ground.

There were dozens of eyewitnesses, including the judge. At first there was stunned silence. Then the gallery erupted in cheers. Men came forward to shake Cochran's hand, while others slapped him on the back.

The next day a journalist at the *Conroe Courier* covered the story. He described how the town's response to this cold-blooded murder was one of 'general satisfaction'.

The fourth trial – the trial of Dude Cochran

Once the formal congratulations were completed, Cochran was arrested and charged with murder. He was immediately released on $500 bail.

Everything now happened at high speed. The local district-attorney, W C 'Cleo' McClain, appointed himself to conduct Cochran's trial. This was a tremendous stroke of 'luck' for Dude – Cleo and Dude were good friends.

The next day a journalist at the Conroe Courier covered the story. He described how the town's response to this cold-blooded murder was one of 'general satisfaction'.

Cochran's trial started on 16 June 1943, only five days after he had murdered Bob White. I know this will sound odd, but I have looked at a number of sources and it is not actually clear whether the prosecution led any evidence against Cochran. The whole trial, including empanelling the jury, took less than three hours. We do know that District-Attorney McClain did address the jury, and he made some remarkable statements while he did so. McClain explained how the US Supreme Court had interfered with due process by ruling White's confession inadmissible:

> When the case was reversed it looked like the end of the road as far as the law was concerned. The state proceeded to trial again last week, knowing it would not have the use or benefit of White's signed confession. The state's case was based on circumstances which, without the confession, would have been insufficient to sustain a conviction.

These matters, according to the prosecutor, necessitated and justified the action by Cochran – and even *forced* Cochran to act:

> It was unfortunate that Mr Cochran was forced to do that which was done. It was his wish that the law handle the matter. In my opinion the guilty party got justice, but it was unfortunate that it had to be at Mr Cochran's hands.

McClain then told the jurors what he would do:

> If I were going into that jury room, I wouldn't hesitate, I wouldn't stand back a minute in writing a verdict of not guilty.

And then he told them what they should do:

> I ask you to return a verdict finding Mr Cochran not guilty.

In case you are confused, I will remind you that this is the prosecutor speaking, not the defence counsel. It is disgraceful when you think about it: here is a district-attorney, representing the State of Texas, using judicial proceedings as the means to approve and even encourage extra-judicial punishment. And it is so richly ironic – in this case the extra-judicial punishment was actually dispensed by Cochran in a courtroom, in the course of judicial proceedings.

The gallery warmly applauded McClain's address and the jury retired. Briefly. Newspaper accounts vary: one I read said the jury was out for two minutes before acquitting Cochran; another said it took less than a minute.

I am afraid I need to leave you with a very dark image. When the acquittal came through the Texans went wild. After 15 minutes of a *hootin'* and a *hollerin'*, those good ol' boys hoisted Dude Cochran up onto their shoulders and carried him out of the court, and down into and around the Conroe town square. A banquet was organised. At precisely that same time Bob White's body was nearby, still lying in the Conroe City morgue – his wife and his mother were too scared to claim his body, because they knew if they identified themselves there could be deadly reprisals. Bob White's remains were eventually sent to a pauper's grave.

Endnotes

1. Before going further, it is interesting to note that some important evidence was later found which suggests that White could not have been the assailant. White was suffering an active STD which, it would have been expected, would have been transmitted to his victim. Tests on Mrs Cochran were negative for the disease. This was not revealed to the defence or to the jury.[2]

Beyond Bleak House: wills and estates in literature

Jane Needham SC[1] presented the Sir Ninian Stephen Lecture on 24 May 2017.

When people ask me what kind of work I do, they almost invariably respond 'that must be awful' (unless they are a Sydney taxi driver, when they start asking me about how to overturn a failed NCAT application revoking their security licence to carry a firearm). And it can indeed be awful – the third family provision mediation in three days where the unresolved grief and anger is sometimes unbearable, or the hearing at which the judge takes an unjustly optimistic view of your adult child's ability to earn his or her own living, and you have to explain to your client – again – about Calderbank[2] offers and indemnity costs orders. There are bad days.

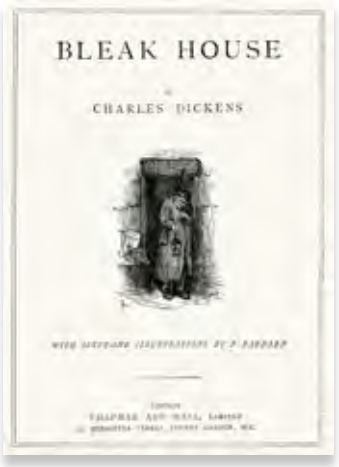
But succession law calls into mind Tolstoy's observation - each unhappy family is unhappy in its own way.[3] The rite of passage of death and property transfer has a universal application. Everyone has relatives and everyone's relatives die, and every generation has to deal with the shuffle of assets, responsibilities, and – what is sometimes even more important – the perceptions as to who is now the 'head' of the family.

I have a mental list of answers to the question I ask each of my clients – 'what do you want out of this litigation?'. If they say 'a lot of money' then we all know where we stand. Occasionally it's framed, although generally not expressly, as revenge of some kind – against 'dad's new wife' (usually a widow of 20 + years) or the stepchildren, for ransacking the personal items of the recently deceased. Very often it is an item of minor value, such as 'grandma's engagement ring' which was given to a daughter-in-law, not the daughter. In a diminishing way in this digital age, it can be the family photograph album. I once had a mediation which hung on who would get the kitchen clock – finally, my party's support person offered to buy a new clock, my party happily accepted, and we settled. I have no doubt that the offer was called upon. I've also had cases where the trigger for the proceedings was the gift of Dad's Kangaroos rugby league jersey to one of the children – 'he doesn't even follow the Rabbitohs!' was the forlorn cry. The saddest was a woman who said her motivation was 'to be accepted once more as a member of the family'. That, I couldn't begin to promise.

These kind of complex family relationships are woven through history. We're fascinated by the Tudors and their predecessors the Plantagenets and Yorks. Each chapter of history involves an issue of inheritance law, which then was bound up in perceptions about primogeniture and male succession lines. There is much of that concept in society today – I think in particular about some correspondence with the only surviving son of a testator, who shared the bulk of the residuary estate with his niece, the only child of his deceased brother. He persisted in referring to himself as 'my father's principal surviving heir' (which, given he had a larger share than his niece, was possibly technically correct) and relied on that status to require the executor to provide him with items left to the testator's spouse, to which he was not entitled; his father's personal items, and even the family plot.

The passion with which some people regard inheritance is of course a staple of literature. Oddly enough I know very few estate lawyers who have actually read *Bleak House*.[4] Oddly enough for a daughter of a man who named his first son Charles after Dickens, I have been unable to finish it.

Bleak House is famous for its depiction of the Chancery dispute of *Jarndyce v Jarndyce*, which when finally determined, has costs which have entirely consumed the estate. I do like the description of how long the case had taken: 'The little plaintiff or defendant



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who was promised a new rocking-horse when *Jarndyce and Jarndyce* should be settled has grown up, possessed himself of a real horse, and trotted away into the other world.' The litigation was described by one of the characters as 'the family curse'. There is a lately discovered will, revoking previous ones, and a character named Lady Dedlock. All most Dickensian.

'Jarndyce' has become both a term of denigration for those who spin out litigation, and the pleased squeak of a barrister receiving a lengthy brief. Much depends on one's perspective of course.

The title of this talk is, however, 'Beyond Bleak House' – what else is out there for lovers of literature and family disputes?

We are told to 'write about what we know', and barristers often stray into literature, including my chambers colleague Littlemore QC.[5] He, however, does not know much about succession law – Harry Curry is, of course, a criminal defence lawyer. Wilkie Collins, on the other hand, did. He trained as a barrister, and his heroine in *The Woman in White*[6] cannot leave her marriage settlement of £20,000 to anyone other than her husband or her child. In a somewhat complex plot, the heroine Laura is drugged

and placed in an asylum under the name of her dying illegitimate half-sister Anne, who is buried as Laura, so that Laura's husband can inherit the fortune. Laura needs to escape the asylum, but her insistence that she is not Anne is seen as proof of her insanity. The plot thickens with a number of dodgy rectifications of official documents and gravestones, and the discovery of illegitimate half-siblings and secret marriages, before one of the best-named characters in literature, Count Isidor Ottavio Baldassare Fosco, is killed by a member of an Italian nationalist society and the son of Walter and Laura properly inherits the family house.

Slightly less fantastical plot points arise in *The Last Will and Testament of Henry Hoffman*, by John Tesarsch,[7] a Melbourne barrister, which was published in 2015. It was described by a reviewer in *The Australian* as 'a detailed wrangle over probate'.[8] I downloaded it onto my Kindle for a recent holiday but failed to read past the sample – it felt just a little too much like work to be read on a Great Barrier Reef island. The story feels like it is inspired by the Brett Whiteley[9] saga – a seemingly rational will is post-dated by a handwritten one, which is hidden due to the fact that the entire estate was left not to the children of the deceased but to 'a mystery woman'. Those of you who practise in estate law know that this kind of thing doesn't happen very often; testators tend to be boringly predictable. Our lives would be a little more exciting with more mystery women.

A number of succession-themed literary works feature aspects which are not commonly found in the Probate List of the Equity Division. Agatha Christie, in *Motive v Opportunity*,[10] a short story featuring Miss Marple, featured as a plot point a bequest in a will written in disappearing ink. A book I have not read, Catherine Aird's *A Going Concern*,[11] includes a will, a codicil, the appointment of a great-niece as executor who has only met the testatrix once, a precatory trust and the testatrix's request for a police presence at her funeral after a detailed medical examination of her body to rule out murder.

Most wills in literature – as in life – are not so exciting. Possibly the most famous of dull succession themes in novels is Jane Austen's *Pride and Prejudice*[12] – a wonderful tale of marital necessity forced by the fact of daughters not being able to inherit an estate in tail. I have read that book many times – and not just because I was named after Austen. (My sister is named Emma, and I have a brother with a middle name Henry after Henry James. You can tell my parents' taste in books did not progress much beyond the 19th century). The book is interesting in how it tackles discussion of the issue of the limited nature of Mr Bennett's landholding – there is very little explanation of it, and most of it is done by the book's ditziest character, Mrs Bennett, who basically wails about it loudly and often. A contemporary Austen reader, it is assumed, would need no explanation of the ins and outs of property law and succession.

An example of this kind of exposition appears in chapter 13. The scene is Mr Bennett telling his family about a letter he received from the Reverend Mr Collins, his cousin.

> About a month ago I received this letter, and about a fortnight ago I answered it, for I thought it a case of some delicacy, and requiring early attention.[13] It is from my cousin, Mr. Collins, who, when I am dead, may turn you all out of this house as soon as he pleases.
>
> 'Oh! my dear,' cried his wife, 'I cannot bear to hear that mentioned. Pray do not talk of that odious man. I do think it is the hardest thing in the world that your estate should be entailed away from your own children; and I am sure if I had been you, I should have tried long ago to do something or other about it.'

Jane and Elizabeth attempted to explain to her the nature of an entail. They had often attempted it before, but it was a subject on which Mrs Bennet was beyond the reach of reason; and she continued to rail bitterly against the cruelty of settling an estate away from a family of five daughters, in favour of a man whom nobody cared anything about.

Possibly the most famous of dull succession themes in novels is Jane Austen's Pride and Prejudice

Of course, in such a circumstance Mrs Bennett could have an interesting notional estate argument, since most estates in tail were re-settled by the heirs shortly after turning 18, on the promise of an increased income, to avoid the rule against perpetuities. But these circumstances would not now arise, because s 19(1) of the *Conveyancing Act 1919* deems an instrument creating an estate tail to create an estate in fee simple, neatly making *Pride and Prejudice* very much a period piece. The same is true in the land where it was set; fee tail was abolished in the UK in 1925, by the Law of Property Act.

There are reflections of the entail in that classic of modern times, *Downton Abbey*,[14] which opens in 1912, before the abolition of fee tail. There, the great house of the Crawley family, Downton Abbey, is held in estate tail. Lord Grantham has three daughters, and luckily the eldest of them is engaged to marry Patrick, her first cousin and Lord Gratham's heir. He, however, drowns in the Titanic. Eventually the problem is solved – although not without plot complexities and many one-liners from the Dowager Countess – by= Mary marrying, and having a son with, the next heir to the title and the land. Matthew Crawley is much maligned within the nobility as being a 'mere solicitor'. He is enough of a solicitor at least to have a will, leaving everything to his wife. Not

before time; in the third series, he dies tragically, just after the birth of his son, in a car accident. As he had previously bailed out his father-in-law by using an inheritance from his dead fiancee's father, and was a half-owner of Downton, the inheritance issues are muddied further, with property and titles going every which way (but mainly to the males).

Rather disappointingly for one interested in intestacy and limited estates, this issue isn't much further explored, the writer Julian Fellowes being far more interested in the accuracy of the cutlery[15] than with succession law. In contrast with Austen, the issues would need to be carefully explained in order for them to be comprehensible. The television viewer of the early 21st century cannot be assumed to have a decent grasp on feudal succession law, let along the grounding supplied by a good reading or three of *Pride and Prejudice*.

An interesting article in the *Vanderbilt Law Review*, En Banc, by JB Ruhl, 'The Tale of the Fee Tail in Downton Abbey',[16] traces the fee tail back to the mediaeval concept of marigatium, or a grant of land to a woman on her marriage with reversion to the grantor should she not have children of that marriage. The author notes that the legal issues are, as in Austen, raised in conversational exposition; between the Countess of Grantham, Cora, and her mother-in-law, the Dowager Countess, and between the Earl and his daughter Mary.

The Anthony Trollope novel, *The Kellys and the O'Kellys*,[17] has estate law at its core. Trollope's novels revolve around money – where it goes, who deserves it, how it is managed, and what it means. In the novel, Lord Cashel manoeuvres to gain his ward Fanny's inheritance for his son despite the clear conflict of interest that entails. Barry Lynch has so keenly looked forward to his father's estate that when he finds out it has been left in equal shares to his sister and himself, he begins to fantasise about her death. Fantasies turn into threats and then into a vague plan without Barry ever quite choosing to commit murder. Had he made that choice, Barry would, of course, be subject to the forfeiture rule – that a person criminally responsible for a person's death may not inherit, whether by will or intestacy. I note that the forfeiture rule is called the rather more entertaining 'slayer rule'[18] in the US.

Forfeiture cases are fortunately rare in our courts.[19] They do however make interesting literature. Ian McEwan's recent novella, *Nutshell*,[20] revolves around the planned murder of John, a poet, by his wife, Trudy, and her lover, John's brother, Claude. In a plot twist that will not surprise Sydney residents, the ramshackle house John himself inherited is now worth £8M, and his wife and her lover want to kill him to inherit it. The hook in this plot is that the book is narrated by a foetus – John and Trudy's child. A *Guardian* review describes the book as 'This is a short novel narrated by a foetus who is also Hamlet'.[21] This was a fascinating read, although I enjoyed his The Children Act[22] much more; that novel centred on a High Court, Family Divison judge who needed to decide whether a young man, a Jehovah's witness, should receive a blood transfusion. It seems McEwan has a taste for drama with a legal touch.

Sirius had been disowned by his parents for failing to be a sufficiently Dark Wizard, but his older brother Regulus died intestate, and so Sirius inherited the Black family fortune and thus was able to leave it to Harry

Even the Harry Potter novels have a plot hook relying on a will. Harry is, by the standards of his friends, quite wealthy, because he inherited his parents' fortune of Galleons, Sickles, and Knuts. In the sixth book, *Harry Potter and the Half-Blood Prince*,[23] Harry's godfather, Sirius Black, is killed by his cousin Bella Lestrange, but has the forethought to make a will leaving everything to Harry. Sirius had been disowned by his parents for failing to be a sufficiently Dark Wizard, but his older brother Regulus died intestate, and so Sirius inherited the Black family fortune and thus was able to leave it to Harry – coincidentally providing a schoolchild trying to save the wizarding world with access to a magical property in London from which to base his endeavours. Apparently the laws of wizard succession trump the not inconsiderable powers of He Who Must Not be Named, because the discovery of the will (only a week after Sirius' death) meant that the Dark Lord was unable to find or enter the house. As Elizabeth Cooke notes in her chapter in *Responsible Parents and Parental Responsibility*,[24] reprovingly entitled 'Don't Spend It All At Once',[25] Harry's inheritance comes with no mention of trusteeship despite the fact that he is only 15 or so when his godfather dies. Cooke links that to Victorian inheritance laws, saying that 'the conservatism of the Ministry of Magic is such that it would be unlikely to sanction the enactment of legislation analogous to the 1925 property law reforms'.[26]

Unusually for modern readers, the definition of 'personal effects' in the wizarding world meant that Harry also inherited a slave – Kreacher, the house-elf. Those of you who have read the middle books in the series will recall Hermione's worthy but tiresome efforts to free the house-elves. Harry – who is at best a morally ambiguous figure – never does free Kreacher. At the end of the series, Kreacher is a house-elf at Hogwarts, a kind of indentured servant below stairs, still bound to obey his master

without question. We know this because after the great battle of Hogwarts, where Voldemort is defeated and against whom Kreacher fought bravely despite his Dark Wizard beginnings, Harry wonders whether Kreacher might bring him a sandwich. Along with being the saviour of the wizarding (and Muggle) world, he remained a slave-owner when he already knew how to free a house-elf – and indeed previously had. This part of the story uneasily reflects the status of African-American slaves who also made up part of their masters' personal property, being bought and sold and left to family members at will.

I will finish this eclectic collection with a helpful suggestion from one of the practitioners in the audience this evening. The Janacek

Kreacher the house elf in Harry Potter and the Order of the Phoenix

opera, *The Makropoulos Secret*,[27] based on a play by Czech playwright Karel Capek, concerns the probate case of *Gregor v Prus*, which, rivalling *Jarndyce v Jarndyce*, has been going on for almost 100 years. The first act opens in a law office, where, perhaps explaining the opera's relative obscurity, there is some discussion of a directions hearing. The denouement of the plot centres around the discovery of a secret will, which allows the case to resolve, in a somewhat odd form of alternative dispute resolution, by the enactment of a mock trial. Mr Moloney suggests that the whole thing could have been sorted out with a well-directed subpoena. I heartily agree.

I have mentioned that today's court cases lack the colour and movement of those in literature. There are, thankfully, exceptions. Most estate lawyers have handled at least one case which, in their heads, would better the most outrageous episode of *Rake*.[28] The most exciting case[29] in which I was involved had all the elements of high drama - unrequited love, a suicide pact, a treasure hunt, and exotic birds. In the testator's will, his long-time but unrequited love, Imelda, received his personal effects. He had written to her before his death to let her know that she had ten years to approach the long-suffering executors to find out what she had been left. He also told her in that letter that he was about to kill himself. A few days later, she received another letter, saying words to the effect, 'that didn't work, I'm going to try something different. Stay out of the bathroom if you come to the house'. No more letters were received. The personal effects included a tin box, found by way of clues in a treasure hunt given to her by the executors. The box contained keys, and part of the dispute was about whether the gift to Imelda was a gift of the keys, or a gift of the contents of the safety deposit box which they opened. Sadly for true love, the gold Kruggerands in the safety deposit box remained with the estate. This will also established a trust for two peacocks – named John and Imelda after his love and her husband - to live at the testator's land in the Daintree, but that was found by Justice White of the Queensland Supreme Court to be invalid as being a non-charitable purpose trust. It was also ineffective in a practical sense because the peacocks departed not long after the testator, the person who regularly fed them, died.

Taking a cue from the peacocks, I will now depart as well. Thank you for your attention.

Image: Everett Collection Inc / Alamy Stock Photo

Endnotes

1 Jane Needham SC is a Sydney senior counsel practising in succession, equity and land law. Her website is www.janeneedhamsc.com.au
2 *Calderbank* v *Calderbank* [1975] 3 All ER 333.
3 *Anna Karenina*, *The Russian Messenger*, Moscow, 1877.
4 Charles Dickens, Bradbury & Evans, 1853.
5 Harry Curry series; HarperCollins, 2011-2014.
6 Harper & Brothers, New York, 1860.
7 Affirm Press, Melbourne, 2015.
8 Miriam Cosic, http://www.theaustralian.com.au/arts/review/tesarschs-expertise-informs-his-engaging-henry-hoffman-novel/news-story/50e7616d0dbadbb229c75604d67aef26, accessed 22 May 2017.
9 *Whiteley v Clune (No 2)*, unreported, Powell J, Supreme Court of New South Wales, 13 May 1993.
10 in the collection The Tuesday Club Murders, Collins Crime Club, 1932, now re-issued by Harper Collins.
11 St Martin's Press, London, 1993.
12 Egerton, Whitehall, 1813.
13 Clearly this passage was written before email.
14 ITV, 2010-2015.
15 See 'The Queen Found A Historical Mistake In Downton Abbey', http://www.cinemablend.com/television/Queen-Elizabeth-Found-Historical-Mistake-Downton-Abbey-83927.html, accessed 24 May 2017.
16 (2015) 68 Vand L Rev 131.
17 Colburn, London, 1848.
18 *Riggs v Palmer*, 115 N.Y. 506 (1889).
19 For one example, see *Troja v Troja* (1994) 33 NSWLR 269.
20 Jonathan Cape, London, 2016.
21 https://www.theguardian.com/books/2016/aug/27/nutshell-by-ian-mcewan-review accessed 22 May 2017.
22 Jonathan Cape, London, 2014.
23 Bloomsbury, London, 2005.
24 eds Rebecca Probert, Stephen Gilmore, Jonathan Herring, Bloomsbury, London, 2009.
25 ibid, ch 11.
26 at 208.
27 world premiere at the National Theatre in Brno on 18 December 1926.
28 Essential Media and others, 2010-onwards.
29 In the Matter of the Will of Boning [1997] 2 Qd R 12.

The art of advocacy: Sir Garfield Barwick, the radical advocate

Address in honour of the Rt Hon Sir Garfield Barwick AK GCMG QC
delivered by The Hon Sir Anthony Mason AC KBE GBM[1*] on 15 March 2017

The object of my address this evening is to present a picture of Sir Garfield Barwick the advocate. In my long experience in the law, he was the finest advocate I ever heard. This view was widely shared. Following his death in 1997, the Law Council of Australia said of him: 'a great barrister, probably the leading appellate advocate our country has produced'.[2]

I do not intend to cover other aspects of Barwick's career – his life in politics, his service as attorney-general and chief justice of the High Court. I should, however, mention that his plan to study law at the university when he left school was not approved by his father, who said to Barwick's mother 'These books will get Garfield nowhere – he needs to be an apprentice and come into the printing business with me.'

The reasons for Barwick's success, though by no means easy to convey in words, also explain why in the title of this address, he is described as 'the radical advocate'. And his success as an advocate enabled him to make an unmatched contribution to the life and fortunes of the New South Wales Bar, as well as his contribution to the reformation of the law as attorney-general of the Commonwealth.

In this address I shall refer to him simply as 'Barwick', for that is how he was known by members of the legal profession in my time. In speaking of him, I shall draw in part on my experiences of working with him as a junior counsel and appearing against him. Unfortunately there are now relatively few lawyers who can now speak from personal experience of Barwick as an advocate.

There are two important points about the era in which Barwick flourished as an advocate. First, Australian law was then largely a reflection of English law. An appeal could be taken from the High Court and State Supreme Courts to the Privy Council in London. There was a prohibition under s 74 of the Constitution against appeals to the Privy Council involving *inter se* constitutional questions, unless a certificate was given by the High Court. But that was all. So, strange as it may now seem, the Privy Council was the ultimate court of appeal in the Australian court system before the appeal to the Privy Council from the High Court was finally abolished in 1975 and from State Courts by the *Australia Act 1986* (Cth.), s 11. The High Court generally followed House of Lords decisions and courts below the level of the High Court followed House of Lords and English Court of Appeal decisions. And our legal text-books were almost exclusively English text-books. Secondly, and this point has great relevance to Barwick's advocacy – in his era advocacy was oral, uncluttered by any requirement for written submissions. Today's requirements for case management and written submissions, which compel a party to present its entire case in those written submissions, restrict the freedom and flexibility which counsel enjoyed in earlier times to frame their case and present oral argument. The judges now read the written submissions before the oral argument begins with the result that they are better equipped to interrogate counsel during oral argument than they were in Barwick's day when the argument took shape as the oral presentation proceeded.

I first encountered Barwick when Bob Ellicott and I, as law students, went up to the old High Court in Taylor Square to hear him argue cases when Sir John Latham was chief justice. What struck me even then was his confidence, his mastery of the materials, his ability to put his points clearly and his remarkable capacity to answer questions persuasively.

I next encountered him when I was briefed as his junior by Clayton Utz & Co., where I was an articled clerk, in an equity suit brought by the 'green chair holders' in the White City tennis courts. Their rights were put at hazard under restructuring proposals by the White City. The green chair holders were licensees not lessees so we endeavoured to establish a negative stipulation against impairment of their rights, based on the old English decision *Stirling v Maitland*[3], an endeavour which ultimately failed in the High Court[4]. In our conferences, held in the late afternoon after he returned from appearing in other cases, he radiated energy with an ability to switch his mind immediately from consideration of one problem to another.

I was instructed in a series of cases with Barwick by J W Maund and Kelynack, a firm which briefed him throughout his career at the bar. In the first of these cases, we acted for Nelungaloo Pty Ltd which had earlier failed in the High Court in its challenge to the compensation payable under reg. 19 of the Wheat Acquisition Regulations.[5] The Privy Council rejected Nelungaloo's appeal on the ground that an *inter-se* question was involved and that it had no jurisdiction under s 74 of the Constitution[6]. We then attempted unsuccessfully[7] to establish a different cause of action against the Commonwealth, involving the interpretation of the Regulations. I suggested an interpretation of an earlier judgment of Sir Owen Dixon that might favour us, though the judgment had an obscure qualification to it. Barwick's response was: 'Young fellow, never cite a case that has got a smudge on it.'

He explained that dealing with such a case would present a distraction from the main thrust of our argument and disrupt its momentum. Better to leave the citation of the case to our opponents and deal with it in our reply when we might use it to our advantage, with the benefit of having the last word.

We were also briefed for Ray Fitzpatrick, the 'Mr Big' of Bankstown. Mr Morgan, the ALP member for Bankstown in the House of Representatives, had called attention in parliament

to some of Fitzpatrick's questionable activities in the Bankstown area. Fitzpatrick then commissioned Frank Browne, a hard-hitting journalist, to attack Morgan in the pages of the *Bankstown Observer*, Fitzpatrick's local newspaper. Fitzpatrick and Browne were summoned to appear before the Privileges Committee of parliament in Canberra. Barwick was unavailable on the day so it was left to me to apply for leave to appear. Leave was refused. Barwick had advised Fitzpatrick to take 'your pyjamas and toothbrush with you'. Barwick, instead of returning a brief, was sometimes content to allow the junior to conduct the case, if the solicitor agreed. Suffice to say that a challenge to the validity of the subsequent committal for contempt by parliament of both Fitzpatrick and Browne failed both in the High Court and the Privy Council. Barwick did not appear in these cases.

Shortly after these events, we were briefed for Fitzpatrick in connection with an order he placed for the manufacture of a blue metal crusher for his blue metal quarrying business. We advised him to assert that there was no binding contract after he was informed by the manufacturer that it was about to begin manufacture of the crusher. Fitzpatrick was sued in the Supreme Court for breach of contract. As was so often the case, there was some doubt whether Barwick could appear as he had a part-heard case in the High Court. Just as senior counsel against us finished his address, Barwick arrived and addressed the judge. You would have thought from his submissions that he had been present throughout the hearing.

When the judge reserved his decision, Barwick said to me, 'We shall win this case. Don't settle it while I am away in London'. While he was away, the solicitors came to see me and said 'We've received a very good offer of settlement. Should we accept it?' I informed them of Barwick's instruction, but, they said, 'we want your advice'. I told them to accept the offer. When Barwick returned from London he said 'Well, young fellow, you did not follow my advice'. I explained the circumstances. Later, just to rub the point in, he told me he had spoken to the judge, whom he knew, and the judge said he would have decided the case in our favour.

Shortly before these events, I appeared with W R Dovey QC and E G Whitlam in a series of prosecutions of witnesses who had appeared before the Royal Commission into the Liquor Industry for giving false testimony on oath. The royal commissioner was Justice A V Maxwell of the Supreme Court, a judge with a sharp mind and a gracious and charming manner out of court, which was not always exhibited in court. It was considered that, as commissioner, he had behaved in an oppressive manner to witnesses and extracted from them by unacceptable means admissions of illegal activities. Barwick's brother was among a large number of hotel licensees who were the subject of adverse findings by the judge.

Barwick appeared for one of the licensees charged with giving false testimony in the commission on oath, Doyle Mallett, the licensee of Gearin's Hotel at Katoomba. Barwick raised a novel point: that the commissioner's appointment had been invalidly extended because it was extended under the *public seal of NSW, not the great seal of NSW* as required by statute. This question was left to the jury. It should not have been. What impressed me about Barwick's advocacy was not his clever point about the invalidity of the extension of the commissioner's appointment, which was ultimately rejected by the full court of the Supreme Court [8], but his attack on the oppressive nature of the commissioner's conduct. I remember him saying to the jury:

> You might well conclude that the only resemblance between this Royal Commission and a court of law began and ended with the furniture in the room in which the Commission was conducted.

Barwick's client was acquitted.

Another case in which we were involved was a case turning on the notoriously difficult transitional provisions of the *Local Government Act 1919* (NSW). We represented a class of local government officers who contested the interpretation placed upon these provisions by their employers, the local government councils. Barwick had given an opinion that our case had 'reasonable prospects of success'. At a conference before the hearing he said to me 'Well, son, we're pushing a wheel barrow full of lead up a steep hill here!'

He made no reply when I responded: 'But the brief contains your opinion stating we have reasonable prospects of success'.

In his lexicon the expression 'reasonable prospects of success' did not mean good prospects of success. It meant that the case had *some* prospects of success and all the more so if he was to argue it. The case was adjourned with the result that Barwick was unavailable so that Else-Mitchell QC had the privilege of losing the case.

I don't want you to think that Barwick lost the case whenever I appeared with him. That was not so. In *Fishwick v Cleland*[9] in the High Court in 1963, one of the last cases in which he appeared as counsel, indeed as attorney-general, the High Court upheld his arguments supporting the validity of the territory legislation imposing taxation in Papua-New Guinea.

Before I discuss his extraordinary success in the Privy Council, I should mention one more case. It was a case in which he did not appear but, as we understood it, he was the architect, as Commonwealth attorney-general, of conditions sought to be imposed on the licensees of Channels 7 and 9 and for whom Bob

Ellicott (led by J D Holmes QC) and I were appearing respectively. We challenged the validity of the conditions on the ground that they were beyond the powers conferred upon the postmaster-general by the *Broadcasting and Television Act 1942*-1960 (Cth.). Our challenge succeeded in the High Court[10]. During the course of the argument by our opponents Maurice Byers QC and John Kerr QC, John Holmes whispered to me 'This is a very ingenious argument – a Barwick point - but fortunately for us – Barwick is not arguing the point'. And Holmes was right. Had Barwick been arguing the point, it would have had added vitality.

Before his appearance for the banks in the *Banking Case* in 1947, in the High Court and the Privy Council, Barwick had effectively established himself as the leader of the Australian Bar. He had achieved this status largely by reason of his success in challenges to the validity of the regulations made under the *National Security Act 1939* (Cth) and his success in a number of important constitutional cases. In these and other cases he had won a reputation for his skill in statutory interpretation and his understanding of constitutional law. It was well-known that judges of the Supreme Court of New South Wales were so dazzled by the ingenuity and persuasiveness of his arguments that they would reserve judgment in an attempt to guard against the possibility that he was leading them into error.

This brings me to Barwick and the Privy Council. Barwick, by reason of his frequent and his successful appearances in that tribunal established for himself in England a reputation as an appellate advocate unequalled by any other Australian counsel and, I would think, unequalled by any counsel outside the United Kingdom. That he was selected as lead counsel for the banks in the *Banking Case* in the High Court and Privy Council was a clear recognition that he was the leading appellate counsel in this country. Barwick's success in the *Banking Case* was his greatest triumph as an advocate. It was the biggest and the most important case in his long career. The hearings in the High Court and the Privy Council each took more than thirty days. And the outcome, so far as it was based on s 92 of the Constitution, was always associated with Barwick's argument.

In *A Radical Tory*, his autobiography, written at the age of 92, when his eyesight was severely impaired as a result of the diabetes from which he suffered for many years, he records how he made an impression on the Privy Council in the course of argument in that case and how that led to his appearing frequently before that tribunal. Ultimately, this led to his developing close ties, as well as close friendship, with leading personalities in the United Kingdom judiciary and legal profession, including leaders of the English Bar.

It is a remarkable story. No Australian counsel has ever established such a close relationship with the English legal establishment. Despite his colonial background, he was highly regarded by English judges and lawyers familiar with his work. And his success in the Privy Council led to an increase in the number of Australian appeals taken to the Privy Council. His reputation with the English legal establishment later played a part in the 1966 change, on his initiative, in the recognition of the right to deliver a dissenting judgment in the Privy Council[11]. The Privy Council judgments had traditionally been unanimous.

His knowledge of, and friendship with, the members of the Privy Council was a critical element in his success. It was not simply that he had a receptive audience. He understood the members of the Privy Council as individuals and their way of thinking, just as he understood the justices of the High Court and the judges of the Supreme Court of New South Wales. But he was made to feel welcome by the Privy Council. He attached great importance to his assessment of a judge because it enabled him to pitch an argument which would most likely appeal to the judge. Of course, when a court like the High Court consists of judges with different views, he would present an argument in a way that was best calculated to appeal to a majority of the court. He liked Justice Starke because he was forthright but said of him:

> He was what you might describe as all wool and a yard wide. He was a very tough human being, very direct and hadn't much room for subtlety. He liked things to be very black and white.[12]

Starke would barge into the argument and in answering him you might lose one of the other judges. So, with Starke's assent, Barwick delayed answers to Starke J's questions until later in the argument. This was an unusual step because Barwick thought it important to answer questions on the run as they were put.

There were two cases in the Privy Council which he won which other counsel would not have won. This is perhaps another way of saying he should not have won these cases. Be this as it may, his success in these cases is testament to his skill as counsel.

The first of the cases was *Ellis v Leeder*[13] in which he appeared without fee. It was an appeal by leave from a unanimous decision of the High Court[14] allowing an appeal from the full court of the NSW Supreme Court dismissing an appeal from Sugerman J. Sugerman J had dismissed an application by the widow under the Testator's Family Maintenance and Guardianship Infants Act 1916-1938 (NSW) on the ground that the estate was 'insolvent and that it would be nothing more than a futility to give it to the widow'.

By his will the testator appointed his lady friend Miss Leeder executrix and trustee. Apart from bequeathing to the widow two items of furniture, he left to Miss Leeder the whole of his estate

which included the rest of the furniture and a cottage valued at £1,000. It was subject to a mortgage to secure a debt of about £887. Miss Leeder claimed that the testator owed her debts amounting to £497, supported by promissory notes. She had lived with him and his family for two years. After she left, the testator spent almost every weekend with her over sixteen years. The rest of his time he lived with his wife. He was an invalid pensioner. The full court of the Supreme Court, in dismissing the appeal by the widow from Sugerman J's decision, rejected an attempt by the widow to lead fresh evidence of a higher valuation of the cottage.

The High Court, in allowing the appeal, held that the application by the widow should have succeeded on the ground that the value of the cottage was more than £1,000 because the *Land Sales Control Act 1948* (NSW) which had restricted the value of the cottage to what it would have been in 1942, no longer applied to the cottage. A majority of the High Court also considered that the full court of the Supreme Court should not have rejected fresh evidence which showed that the cottage was worth well in excess of £1,000 and up to £4,500. The High Court awarded the widow the whole of the estate.

The Privy Council held that the fresh evidence should have been rejected. They mentioned that Sugerman J was the Land and Valuation Judge in NSW, with the implied suggestion, no doubt fostered by Barwick, that his view of the value of the cottage was sound. They held that the High Court should not have interfered with the exercise of discretion by Sugerman J and the full court. Their lordships pointed out that Sugerman J, who saw Miss Leeder give evidence, 'treated her as a witness of truth'[15]. They found that the High Court should not have disturbed his finding on that point and his finding that the debt she claimed was owing.[16]

The decision of the Privy Council was a substantial reverse for the High Court. It occurred in a case where one would not have expected the Privy Council to grant leave to appeal in the first place, but it resulted in the Privy Council reversing the High Court decision on two fundamental points: (a) overruling a trial judge's assessment of the credibility of a witness, a finding not disturbed by the intermediate appellate court; and (b) wrongful interference with a discretion exercised by the trial judge, not disturbed by the intermediate appellate court.

So, in the end, a triumph for Barwick the advocate. How did he manage to do it? The answer is to be found in his account of the case in *A Radical Tory*.[17] In the High Court judgment there appeared this remarkable and morally judgmental passage:

> The respondent '[Miss Leeder]' also produced some promissory notes, but they may be bound up with the illicit cohabitation between her and the deceased and their validity may be doubtful. Her debt is not one – the existence and validity of which had been admitted, nor had it been proved in a court of law. It could not therefore be assumed. No tenderness need be shown to a creditor whose debt grew out of a liaison between her and a married man …….[18]

This passage became a fairly prominent element in Barwick's argument in the leave application and the appeal. The passage excited critical comments during argument from their Lordships who were concerned to learn that adultery had not been an issue before Sugerman J. One Law Lord asked Barwick: 'By the way, is it the law that if I lend my mistress €100 I can never recover it?'

To which Barwick replied that he had no doubt it was not the law but the contrary appeared from the High Court judgment[19].

Barwick's account of the case illustrates his prodigious capacity to identify a chink in the judgment under challenge and to exploit it to the full. The passage was in a joint judgment to which Sir Owen Dixon was a party and it was widely acknowledged that the Privy Council greatly respected Sir Owen's views. Curiously, the Privy Council, in its reasons, referred to the joint judgment as a judgment of Sir Owen Dixon.

The second Privy Council case was *Bank of New South Wales v Laing*[20]. The bank had debited to Laing's current account with the bank, eight cheques amounting to almost £20,000 which Laing claimed bore a signature in his name which had been forged. Laing drew eight cheques corresponding in amount to the eight cheques said to have been forged. They were dishonoured by the bank on the ground that there were insufficient funds in Laing's account. He then sued to recover the amount of the cheques on what was known as a common money count for money lent to which the bank pleaded 'never indebted', hoping thereby to throw the onus on to Laing into the witness box where J W Shand QC (who led Asprey QC and me) was waiting to cross-examine him. New South Wales then still maintained the old common law form of pleading which had been abolished in England by the Judicature Act in 1875 and by similar statutes in other Australian jurisdictions. At the trial Lang's counsel simply tendered in evidence the bank's statement of account which showed that the cheques alleged to have been forged were debited to the account so that there were insufficient funds to meet the eight new cheques.

The trial judge and the full court of the Supreme Court found in favour of Laing on the ground that the defence of 'never indebted' did not allow the bank to establish that it had paid the amount of the cheques said to have been forged and that the bank should have filed a plea of payment.[21] Barwick advised the bank to appeal to the Privy Council. The appeal succeeded.

The Privy Council accepted Barwick's argument that under the common money count for money lent the plaintiff was required to establish that the debt was payable and this meant there must be sufficient money in the current account to meet the plaintiff's demand. The bank statement of account did not show such an amount standing to the plaintiff's credit. And under the plea of never indebted, the bank was able to raise the defence that the debt was not payable due to the absence of sufficient funds.

The Privy Council decision was received with some scepticism in New South Wales. It was thought that the English judges had little or no understanding of common law pleading and that Barwick had advised an appeal to the Privy Council instead of the High Court because the Privy Council was more likely to be receptive to his argument.

Laing v Bank of NSW was a good illustration of Barwick's radical use of the reply, a use for which he was renowned. The ability to make a devastating reply has always been the hallmark of an outstanding counsel. And this was certainly true of Barwick. It was said that he often trailed his coat in opening an appeal and presented his argument in reply. There is an element of exaggeration in this. Counsel is not allowed to split his or her case by presenting part of it in chief and part in reply. The reply must be confined to answering the argument presented by the respondent in the appeal. So, in *Laing v Bank of NSW*, Barwick, in opening the appeal, made only a fleeting reference to the pleading point and presented an argument directed to the nature and incidents of the contract between banker and customer on a current account, leaving the pleading point, what could be raised under the 'never indebted' plea, to his reply. In the argument as reported, in the *Appeal Cases*, it is noted that his opponent, in answer to Barwick's opening address said,'His argument only touched on the main point (the pleading point)'.[22]

His opponent was right.

Some thought that Barwick abused the right of reply by keeping back for reply matters which should have been argued in opening an appeal. There was an element of truth in this claim. Judges were then, and I suspect still are, reluctant to confine counsel's reply with its legitimate scope. This is because the line between answering the opponent's argument and expounding one's case is by no means always clear. In similar fashion, Barwick was inclined to exceed the limits of re-examination of a witness. Barwick would take any advantage that he could. He was always determined to win the case for the client. He wasn't there to help the court except in so far as it would help him win the case.

There are risks in saving your best points for reply, as Barwick himself recognised[23]. The court may come to an adverse conclusion before you make the points. So a decision to leave points for reply is a matter of sensitive judgment, not a decision to be taken lightly. And there is the risk that a judge will raise a point in the appellant's opening address when counsel may have no option but to deal with it there and then.

A notable characteristic of Barwick's advocacy was his desire to establish a dialogue with the bench. Some counsel do not welcome interruptions to their argument. Not so Barwick. He wanted judges to ask questions because he prided himself on his ability to answer immediately a question from the bench rather than ask permission to answer it later, a request that may signify to the court that counsel has difficulty in finding an answer. Barwick regarded the ability to answer a question immediately as a characteristic of Australian counsel generally, but not a characteristic of English counsel. He himself excelled in giving an immediate and persuasive answer. His capacity to do so sprang from a thorough understanding of his case and a capacity to put his point clearly, – if not succinctly. He liked talking rather than listening. It was said of him as a child that he never stopped talking. Age did not slow the flow of words.

He very rarely addressed the court from written notes. He might occasionally have notes by way of headings, only to remind him of the topics to be addressed. He wanted to be flexible. Addressing from a detailed written argument might compromise his flexibility and his capacity to answer an unexpected question or to make a delicate judgment on the run. Likewise, unlike other counsel, he did not read long passages from judgments in the law reports. He confined himself to the use of critical passages to support and elucidate his propositions. The cases authenticated his argument; they were not the argument.

Judges like to think that they are objective and that they do not give way to emotion. Barwick, however, recognised that all judges have in them an element of the juror and he was ever ready, when appropriate, to exploit this element in a judicial personality, not openly because that would provoke resistance, but more subtly by allusive references. The *Ellis v Leeder* High Court judgment and his argument before the Privy Council in that case is a good example.

I draw attention to an interview he gave in 1989 to *Bar News*, when he was aged 86, in which he discussed advocacy. All young barristers should read it, and some older ones as well. It virtually says all that needs to be said about advocacy and it gives examples drawn from his own extensive career.

As the interview makes clear, to be a successful barrister you need certain qualities. They include an agile and nimble mind, a very good memory, an ability to concentrate, an acute sense of relevance and a capacity to focus on the points at issue. You also need tenacity, the desire to win, as well as the capacity to

make sensitive judgments in the course of conducting the case, a capacity which may only come with experience. Barwick had all these qualities in abundance, the quickest mind I have known and, in particular, a determination to win the case.

One outstanding quality he had was to reduce the point at issue, no matter how complex, to a simplified and illustrative example. It was said that he had 'the gift of making the binomial theorem sound like the alphabet. He could make the dullest judge understand.'[24]

He used simplified examples to advance his own case and to destroy the opponent's case. And he would use those examples in response to questions from the bench.

Barwick's great strength was an appellate advocate. He was also an excellent trial lawyer. He appeared not only in the Liquor Commission prosecutions but also in the Petrov Royal Commission and in the Archibald portrait prize litigation involving the award of the prize to Dobell's portrait of Joshua Smith. His case was that the painting was a caricature, not a portrait. His case failed. Barwick did not regard himself as an outstanding cross-examiner in that he did not disintegrate a witness into a helpless wreck in the dramatic fashion of J W Shand QC and J W Smyth QC. But he was adept in eliciting admissions, contradictions and concessions (which went to the probabilities). He always cross-examined on points that would form part of his address. Though not given to excessive modesty, he under-rated himself as a cross-examiner.

Apart from his dedication to his career as an advocate, Barwick had a keen interest in the welfare of the bar and the need to secure long-term accommodation for its members. As president of the Bar Association he played the leading part in bringing about the lease of the land on which Wentworth Chambers now stands and in securing the finance and the subscriptions which enabled the construction of the building. In fact, he organised a group of leaders of the bar, including himself, to take up a shortfall in subscriptions. Barwick played a similar part in the acquisition of the old Selborne Chambers site and the construction on that site of the present Selborne Chambers. The fact is that, but for Barwick's vision and energy, the bar would not presently be occupying either Wentworth or Selborne Chambers. He also personally established the bar's strong connections with the four Inns of Court in London which, at his behest, provided four sets of stone replicas of their heraldic emblems, for incorporation in Wentworth Chambers.

I conclude my remarks by saying that not only was he the finest advocate I have heard, but that he also made a contribution to the life and fortunes of the New South Wales Bar which should never be forgotten.

Endnotes

1 * The Hon Sir Anthony Mason is a former Chief Justice of the High Court of Australia and a Non-Permanent Judge of the Hong Kong Court of Final Appeal.
2 Law Council of Australia, 'Law Council Saddened by Loss of Sir Garfield Barwick', Press Release, 15 July, 1997.
3 (1865) 5 B & S 840 [122 ER 1043].
4 *Howie v NSW Lawn Tennis Ground Ltd.* (1956) 95 CLR 132.
5 *Nelungaloo Pty Ltd v Commonwealth* (1948) 75 CLR 495.
6 *Nelungaloo Pty Ltd v Commonwealth* (1951) 81 CLR 144.
7 *Nelungaloo Pty Ltd v Commonwealth* (No.4) (1953) 88 CLR 529.
8 *Saffron v The Queen* (1953) 88 CLR 523.
9 (1960) 106 CLR 186.
10 *Television Corporation Ltd v Commonwealth* (1969) 123 CLR 648.
11 See Oliver Jones in ed.A Lynch, *Great Australian Dissents*, 2016, Cambridge Uni. Press, Ch.7.
12 '*Bar News* Interviews Sir Garfield Barwick'. NSW Bar Association *Bar News*. Summer 1989, 9.
13 (1952) 86 CLR 64.
14 (1951) 82 CLR 645.
15 (1952) 86 CLR at 73.
16 ibid.
17 *A Radical Tory* at pp.59-60.
18 82 CLR at 652.
19 *A Radical Tory* at 59-60.
20 [1954] AC 135.
21 *Laing v Bank of NSW* (1952) 54 SR (NSW) 41.
22 [1954] AC at 140.
23 '*Bar News* Interviews Sir Garfield Barwick', NSW Bar Association *Bar News*. Summer 1989, 9 at 15.
24 Judge George Amsberg, in D.Marr, 'Barwick', Allen and Unwin, 1980 at 17.

Advanced Trial Advocacy Intensive

22 – 26 January 2018

Sydney, Australia

SUMMARY

• 5 days residential • 42 positions

COST

Early bird ends 29 September 2017

• $3,800 Criminal Brief • $4,000 Civil Brief

After 29 September 2017 full course cost applies

• $4,000 Criminal Brief • $4,200 Civil Brief

IMPORTANT DATES

Applications Close 31 October 2017

Course 22 – 26 January 2018

Advanced Trial Advocacy Intensive, 2017

By Todd Alexis SC*

In the last week of January 2017, the Advocacy Training Council of the Australian Bar Association conducted its annual Advanced Trial Advocacy Intensive in the Federal Court of Australia, Sydney. The course is always well attended and the Intensive in 2017 was no exception, with barristers across Australia, the UK and Singapore participating in the civil and the criminal stream. While the course is recommended for barristers with at least three years trial experience, the seniority of barristers attending the Intensive ranged from two years to 34 years.

The quality and the enormous experience of the coaching faculty is what makes the Intensive so successful. This year, Chief Justice Chris Kourakis, Justice Nye Perram and the Hon Trevor Riley QC (former chief justice of the Supreme Court of the Northern Territory) were complemented by a stellar cast of domestic and international silks who are all leaders in their particular jurisdictions. Together with specialist performance coaches (who worked on voice, movement and impact), each barrister's performance of each stage of the trial process was closely scrutinised (with video replay) and constructively critiqued, with the objective of achieving excellence in trial advocacy.

The civil stream concerned a case of misleading and deceptive conduct and the criminal stream involved co-accused charged with conspiracy to murder. The elements of the trial were broken down with a 'masterclass' on each, followed by demonstrations based on the course materials by the advocacy coaches. This year, there were masterclass presentations on outlines of submissions and opening address, examination in chief, cross examination, expert evidence, objections and re-examination and closing address. A particular highlight was our own (Dr) Phil Greenwood SC explaining the delicacy of an effective cross-examination through the surgeon's eye and a variety of surgical tools (complete with surgical scrubs and rubber).

The barristers then performed (and repeated) each of these elements. The lay witnesses were drawn from the readers of 2016. The expert witnesses (accountants in the civil stream and psychologists in the criminal stream) were all real experts who attended voluntarily to obtain experience in giving oral evidence.

The course culminated in the conduct of a trial on the last day to harness the skills from the week, with feedback from the presiding judge. In the criminal stream, juries were empaneled from volunteer law students. This provided the criminal stream barristers with the truly unique experience of listening to jury deliberations before the verdict was pronounced and then receiving direct comment from individual jurors on their respective performances.

The Intensive is intended to simulate the ordinary pressures placed upon the trial advocate, with emphasis on proper case analysis and

Phil Greenwood SC presented a masterclass on cross-examination

preparation. The week was therefore an intensive one. However, as a residential course, all barristers and advocacy coaches stayed at the Sofitel on Phillip Street near the court and shared lunch and evening meals together and the whole experience provided a wonderful network of friendship and commerardarie. In the result, the barristers' skills improved dramatically and excellence in advocacy was achieved.

At the conclusion of the Intensive, Chief Justice Bathurst gave an address on the importance of advocacy in Australia and presented each barrister with a participation certificate. The celebratory dinner that followed at Bistrode CBD capped off a memorable and rewarding week for all.

The Advanced Trial Advocacy Intensive in 2018 is being held in the Federal Court, Sydney once again during the last week of January. Barristers interested in undertaking the course should consult the ABA's website for more information.

* Todd was the course director of the Advanced Trial Advocacy Intensive in January 2017. He will be the course director of the Intensive in January 2018. He was also the course director for the ABA's Appellate Advocacy Course in the Federal Court, Sydney in 2013 and 2014.

Judge John Walpole Willis (1793-1877)

By Philip Selth OAM

John Walpole Willis (1793-1877) has had a bad press. He was a judge on courts in three countries - Upper Canada, British Guiana, and of the colonies of New South Wales and Port Phillip - and managed to get himself dismissed from two and unwanted in all three. Few judges anywhere have divided opinion so strongly.

The Sydney paper *The Australian* in March 1838 declared Willis 'a very wrong headed man'; his colleague Chief Justice Dowling wrote that some people thought Willis 'cracked'. Manning Clark wrote that 'the slightest suspicion of a challenge to his authority or an outrage to his vanity was followed by a rush of blood to the head and a display of hysterical rage'. Dr John Bennett has described Willis as 'high-handed, egotistical and "over-speaking"', with a short temper and 'warped … personal judgment'.

This is the popular image of Judge Willis, which has been taught to generations of history and law students. However, it is not a balanced picture of this judge. Fortunately for Willis, there is, albeit belatedly, a court of appeal. On this bench sat Max Bonnell, a senior Sydney solicitor who specialises in commercial litigation and international arbitration. His judgment on the case will be cited for many years to come.

As Bonnell shows us in his eminently readable *I like a clamour: John Walpole Willis, Colonial Judge, Reconsidered,*[1] Willis's failings 'were so dramatic, so public, so thoroughly self-inflicted' that they have entirely shaped his legacy. But, and it is a very big and important *but*:

> Willis served as a judge in three unstable societies, each in a delicate state of transition, and in every one he made important, brave decisions in which he insisted that the protection of the rule of law extended to everyone.

Expelled from Charterhouse in January 1809 for having participated in a 'riot' on the school's Founder's Day, Willis was admitted to Gray's Inn November 1811, and was called to the bar in November 1816. He practised as an equity lawyer, and wrote legal texts to embellish his reputation and supplement his income. Willis's concern for his reputation and status in society was to be a constant theme in his life.

In April 1827 Willis managed to get himself appointed by Viscount Goderich a judge of the Court of King's Bench in Upper Canada. He went there on the understanding that he would have responsibility for a new equitable jurisdiction. That didn't happen, mainly because the province was effectively controlled by a small group of influential men known as the Family Compact. Showing his usual lack of political judgment, Willis fell out with Lieutenant-Governor Sir Peregrine Maitland, the colony's legal officers and the Family Compact. In one contentious matter where Attorney-General JB Robinson and Solicitor-General Henry Boulton appeared in a civil matter, Willis told them that:

> A Man cannot, and ought not, in the Administration of Justice, to be engaged on one Side To-day and the other Side To-morrow, whether these services are rendered to a private Individual or to the Public. If a Man, under such Circumstances, does not suspect himself, others will suspect him.

While the principle was impeccable, in the circumstances of the time it was impracticable- and attacking the province's two legal officers in open court unconducive to a harmonious working relationship.

Chief Justice William Campbell left Upper Canada in April 1828. Willis lobbied to replace him. Willis's relationship with the other judge, Levius Sherwood, was 'poisonous'. Willis, on the opening of the 1828 Trinity Term, read a lengthy opinion that held the court could not sit in banco with only two judges. (If that were right, and Willis may well have been correct, a vast proportion of the court's decisions since 1794 were invalid.) Willis always insisted he would never deviate from the letter of the law, but one wonders if he would have prepared this opinion had he been allowed to establish his equity court. But what cannot be questioned is Willis's independence - which cost him dearly. He was removed from office. Maitland wrote to William Huskisson, secretary of state for war and the colonies, telling him of his action, complaining of Willis's 'Want of good Feeling and of sound Discretion' and argued that he had 'manifested a Disposition and adopted a Course of Conduct, utterly incompatible with his Situation as a Judge'. (In a delightful aside, Bonnell tell us that Huskisson died after being run over by Robert Stephenson's *Rocket*, becoming the first known victim of any railway accident.)

Willis campaigned for his reinstatement. The Privy Council held against him. Parliament was deaf to his petitions, and the Colonial Office regarded his incessant barrage of correspondence as a nuisance. His marriage failed. However, Viscount Goderich,

back as secretary of state for war and the colonies after a brief stint as prime minister, perhaps because he had wrongly encouraged Willis to believe an equitable jurisdiction would be created in Upper Canada, in 1831 appointed Willis a judge of the Court of Criminal and Civil Justice in British Guiana. Willis had no choice but to accept the appointment. Goderich told Willis that while his 'personal honour & integrity' were 'clear from reproach', he had to learn from his time in Upper Canada and 'not endanger the substance of justice by too pertinacious an adherence to mere forms, or too punctilious an assertion of you on personal or official capacity', and above all to abstain from all correspondence, public or private, 'upon subjects connected with the Political or Judicial affairs of the Colony'.

British Guiana, too, was effectively controlled by a group of settlers, the sugar planters. Administrative decisions were made by the Court of Policy, comprised of five government officials and five planters (each of whom qualified by owning at least 25 slaves). In the criminal court, the three appointed judges sat beside three 'assessors' appointed from the ranks of planters, and a verdict of guilty could be reached only by a clear majority. The assessors did not find against planters ill-treating their slaves. Willis had more success in reducing the backlog in the civil court.

In Upper Canada, Willis had quarrelled with the local elite and failed to endear himself to the Colonial Office. In British Guiana, he seems to have made a concerted effort to pursue the opposite course. As part of his campaign to build support in England, Willis sent gifts of the local flora and fauna to people such as Robert Hay, the permanent under-secretary of the Colonial Office and to the 13th Earl of Derby, father of Lord Stanley, a future prime minister.

In May 1835 Willis became acting chief justice, and thus a member of the Court of Policy. Almost immediately Willis angered Lieutenant Governor Smythe and alienated any supporters he may have had in England over a dispute concerning the refusal by the manager of a plantation who confined two apprentices to the stocks for lengthy periods to pay the fine imposed by a special justice for his having done so. Willis released the manager pending his appeal. The lieutenant governor saw this as Willis favouring the planters over the government. Willis's apparent tolerance of persons being held in the stocks especially irritated secretary of state for war and the colonies, Baron Glenelg. This put an end to Willis's chances of being appointed chief justice. Claiming to be too ill to continue on the court, Willis returned to England to lobby for another appointment - and to remarry. Surprisingly, in April 1837 he was offered a position as puisne judge of the Supreme Court of New South Wales. The vacancy had arisen following the retirement of Chief Justice Francis Forbes. Willis arrived in Sydney in November 1837.

Willis's colleagues on the bench were Chief Justice James Dowling and Justice William Burton, who thoroughly disliked each other. The three judges cooperated with each other only so long as it took for them to prepare a lengthy letter to Lord Glenelg complaining about the level of their salaries, seeking assurances that their rank would be respected, and that they would be given pensions. In January 1838, while Dowling was absent from Sydney on holiday, Willis and Burton announced that they proposed to introduce a rule of court 'to exclude all persons who have been convicted of felony or misdemeanour from being engaged as clerks in the offices of the solicitors of the court'. Willis always believed that legal practitioners should be of unimpeachable character, and there was public concern about 'the extreme debauchery and entire want of respectability' of many of the colony's solicitors and clerks, but acting in the chief justice's absence was, as Bonnell puts it, 'simply insolent'.

Predictably, Willis was unhappy that the Supreme Court was empowered to deal with both common law and equity claims. But at the beginning he was busy with the criminal list. He 'approached his cases diligently, thoroughly and fairly', although not helped by the fact that at times witnesses were drunk – he committed one to the cells for a month. The tensions on the bench flared up when the court began to hear civil matters. 'It was never enough for Willis to express dissent; he always needed to do so in terms that left no-one in any doubt as to his low opinion of his colleagues on the bench'. Willis suggested to Dowling that he resign for being in breach of the Charter of Justice's prohibition on judges holding 'any other office or place of profit': Dowling, as had Forbes, acted as the judge commissary in the Vice-Admiral's Court, and was entitled to claim fees, although he refused to do so. These and other spats led to lengthy correspondence with Governor Gipps and the Colonial Office. Willis lobbied for a pension and early retirement.

Nor was the profession immune from Willis's intemperate outburst. The press reported that Willis repeatedly interrupted counsel, 'sometimes sneeringly, sometimes pettishly, and always debatingly'. His officiousness at times interfered with the fair dispensation of justices - such as the morning he came on the bench at ten o'clock, called on the first case before he had sat down, and struck out nine case within two and a half minutes while counsel and the parties were still coming into the courtroom. But Willis found in favour of Bob Nichols, the first native-born Australian to be admitted as a solicitor, when a magistrate questioned his right to appear in the Quarter Sessions after the King in Council assented to a rule separating the colony's lawyers into barristers and solicitors. Dowling and Willis found for Nichols, with Stephen dissenting - but Dowling then changed his mind, and without telling Willis, sent a letter

Philip Selth OAM, 'Judge John Walpole Willis.'

to Governor Gipps advising that Nichols had no standing to appear in the Quarter Sessions. Willis was furious. There was a shouting match in the judges' robing room when Willis accused Dowling of supressing the truth in his not telling Gipps of his dissent in the Nichols matter. The long-suffering Dowling formally complained to Gipps.

In October 1840, the Legislative Council passed the Administration of Justice Act, which among other things, provided for a Supreme Court in Equity. All Willis had to do was to keep quiet and the Equity position would be his. He could not help himself, and in a 'charge to the jury' at the opening of the court's criminal sessions not only disagreed with the chief justice's concerns with provisions of the newly enacted Census Act, but accused him of misunderstanding the law. As Bonnell writes: 'A more calculating strategist would have taken every opportunity to ingratiate himself with the chief justice, but this was not in Willis's nature. Instead he adopted the counterproductive approach of insisting that, since he was surrounded by ineptitude, he alone was suitable for the appointment'. Dowling had himself appointed the Equity judge.

Clearly, Dowling and Willis were not going to work together on the bench. But the Administration of Justice Act provided a way out - it had created a resident judge in Port Phillip, to which Willis was happy to be appointed. Dowling was more than happy to see him go to Port Phillip, 'where I pray he may stick and that I may never see his face again'.

Willis believed that, in Port Phillip, he had jurisdiction 'equal in rank and power within its limits' to that of the Supreme Court in Sydney, and that he was not bound by decisions of the Sydney judges. Conflict with his judicial brethren was inevitable. Willis soon fell out with the legal profession. 'Some of Melbourne's barristers were scarcely competent; a few of the solicitors were downright rogues.' He insisted they appear punctual in court, prepared, and only charge reasonable fees. Yet on too many occasions Willis was 'unfair, pedantic and arbitrary. And he had his own, often very unhelpful, ideas about the obligations of lawyers to act as gentlemen'.

In Upper Canada and British Guiana, and now in Melbourne, Willis generally allowed the press considerable freedom to express views that were unpopular with the government. But he was immensely sensitive to criticism of himself. It became commonplace for the editors of Melbourne's newspapers to be summoned before Willis to be given the benefit of his views on articles critical of him.

In July 1841, the Aboriginal man Bonjon became involved in an argument with Yammowing, a Gulidjan man, and settled the matter by shooting Yammowing in the head. Bonjon came before Willis charged with murder. Whether the Supreme Court could try one Indigenous man for a crime committed against another was the critical issue in the case. The Sydney judges had said 'Yes' in earlier cases, but Willis said that he did not consider himself 'bound by the opinion of either Mr Chief Justice Forbes, Mr Justice Burton or Mr Chief Justice Dowling in the present case'. Willis's jurisdictional ruling, Bonnell tells us, was a 'careful demolition of the *terra nullus* fallacy, and its acknowledgment that the Indigenous people were entitled to govern themselves by their own laws and customs, which by law survived colonisation, articulated 150 years before the High Court reached very similar conclusions in *Mabo v Queensland (No. 2)*'. The decision was not motivated by a genuinely sympathetic attitude towards the Aboriginal people, but rather a conscientious and principled application of the law, coupled with a desire to show his superiority over his Sydney judicial brothers. It was a humane, enlightened and progressive judgment, 'yet also one conceived in ambition and spite'. The Crown prosecutor dropped the charges against Bonjon, who was quietly released.

Overall, however, Indigenous Australians received unfair, and cruelly unsympathetic treatment in Willis's court. In his opinion, when Aborigines and colonialists were accused of crimes against each other, English law prevailed. (Willis had been a member of the full court that, in December 1838, dismissed an appeal against the conviction of seven men involved in the Myall Creek massacre.[2]) In December 1941 Willis tried five Aborigines, represented by Redmond Barry, charged with murdering two whalers. (The future Justice Barry would preside over Ned Kelly's trial for murder.) The evidence was largely circumstantial, and Willis's lengthy address to the jury extraordinarily prejudicial. Found guilty, the three women defendants (who included the now well-known Truganini) were discharged into the care of George Augustus Robinson, the protector of Aborigines; the two men were sentenced to death. They were hung in a gruesomely botched public execution, the first held in Melbourne. They were not the only Aboriginal people executed in 1842 after a trial

before Willis. But on rare occasions Willis acted with a greater sense of fairness towards Aboriginal people, such as his support for the appointment of a standing counsel for Aboriginals, as has been made in Sydney. (Barry was appointed standing counsel for Aborigines in January 1942.)

In a charge to the jury at the opening of the law term in October 1942, Willis launched a series of attacks on the colony's administrators (Superintendent Charles La Trobe and the district's sub-treasurer, William Lonsdale) and the Sydney judges. He published his address in the form of a pamphlet dedicated to the secretary of state, Lord Stanley. He held that the newly enacted Melbourne Corporation Act was invalid, because the governor 'had infringed upon the royal prerogative in promulgating and bringing it into operation before the royal assent was obtained'. Thus, the newly elected town council was not legally in existence. Willis passed the buck to his Sydney brethren for their decision.

Willis wanted to return to England - but on a pension. La Trobe, Gipps, his judicial brethren and a large part of the population of Port Phillip wanted him gone. Willis now provided Gipps with the answer. Willis denied a rumour that he had lent a substantial amount of money to William Kerr, the editor of the *Port Phillip Patriot*, the implication being that Willis was seeking to influence the manner on which the newspaper reported on his conduct in office. But in early December a mortgage arrived for processing in the Supreme Court registry in Sydney to secure a loan of £1200 at an extortionate interest rate of 20 % per annum, made by Willis to the *Patriot's* owner, John Pascoe Fawkner. The Executive Council decided against suspending Willis, because it could not be said he entirely lacked the confidence of the community, and if he were to be removed with no replacement Port Phillip would have no judge. Gipps' attempts to delegate the decision for removal to the Colonial Office failed. Willis vigorously defended himself to the Colonial Office. Willis now held the legislation incorporating Melbourne was invalid, and continued to attack Lonsdale. A petition from 18 magistrates, endorsed by La Trobe and the Crown prosecutor, James Croke, called for Willis's dismissal. Dowling advised Gipps that he had the power to remove Willis under the Colonial Leave of Absence Act - and that it was unnecessary to allow Willis to respond. Both decisions were later held by the attorney-general and the solicitor-general in England to be incorrect in law.

On 17 June 1843 Gipps sent to La Trobe 'a writ of Amotion removing Mr Willis from the office of a Judge in New South Wales'. Willis returned to England and sought to have the Colonial Office reverse Gipps' decision. Again, he would go quietly if given a pension. He appealed to the Privy Council. The Judicial Committee found that Gipps did have the power to remove Willis, but that he should have been given an opportunity to be heard before the amotion. Willis was awarded neither costs nor compensation – nor were reasons given for the decision. On 21 September 1846 Queen Victoria signed the warrant that formally terminated Willis's appointment. Willis did eventually receive his pay up until that date. He continued to agitate, unsuccessfully, for the Privy Council to give its reasons, and to receive a pension.

In August 1852 Willis's father-in-law died, leaving him a life time interest in a large, profitable estate. He was appointed to the largely ceremonial position of a deputy lieutenant of the County of Worcestershire and a justice of the peace. He performed these duties seriously and without any of the anger that was a defining feature of his judicial career. He died at the age of 84 on 10 September 1877.

The great strength in Bonnell's *I like a clamour* is the way in which he shows us that Willis's strengths and talents were every bit as significant as his weaknesses and failings. They defy easy classification.

He was an incorruptible, highly-principled bigot; an independent, courageous, rebellious spirit who craved acceptance by the establishment; a judge who counselled forbearance and forgiveness but bristled at the slightest hint of an insult. He was unquestionably, a fine intellectual lawyer; undoubtedly, he was blinkered by vanity and self-importance.

In an age when there was a tacit expectation that a colonial judge would support his administration, Willis embarked on a quixotic mission to entrench the principle of judicial independence. His reward was to be dismissed twice, and denied the pension that might have been bestowed upon a more compliant man.

Regrettably, there are few biographies of Australian judges, and not all are of a high standard. If only there were more like Max Bonnell's *I like a clamour*.

Endnotes

1 Max Bonnell, *I like A Clamour: John Walpole Willis, Colonial Judge, Reconsidered*, The Federation Press, Sydney, 2017, $89.95.

2 Mark Tedeschi, *Murder at Myall Creek*, Sydney, 2016, pp. 177-178.

Federal Court of Australia

On 21 April 2017 Michael Lee SC was sworn in as a judge of the Federal Court of Australia. Noel Hutley SC spoke on behalf of the NSW Bar.

Justice Lee was born in Perth. His Honour's family moved to Sydney when he was two years old, where he completed his primary and secondary schooling followed by a Bachelor of Arts at Macquarie University, and a Bachelor of Laws at Sydney University. In 1989 his Honour was admitted to practice as a solicitor, becoming a partner of Corrs Chambers Westgarth in 1995, specialising in commercial litigation. His Honour was called to the Bar in 2002. In 2011 his Honour was appointed silk.

As both solicitor and barrister, his Honour acted or appeared in some of the most notable cases to have come before the Federal Court of Australia and the Supreme Court of New South Wales. As a solicitor at Corrs, and then later as a barrister, his Honour was involved in two high profile matters in Australian legal history. One was Australia's longest-running defamation proceedings, John Marsden's suit against the Seven television network. In that case, his Honour appeared in the proceedings led by Bret Walker SC. The first day of that hearing coincided with his Honour's first day of the Bar Practice Course. Then, one week following the completion of that course, his Honour delivered the submissions in reply. The other case straddling his Honour's career as a solicitor and as counsel involved the infamous shooting of the New South Wales state member of parliament, John Newman, in which his Honour represented Phuong Ngo.

His Honour has appeared as counsel in a number of high-profile class actions including, among others, the Allco, Aristocrat, AWB and Multiplex actions. His Honour also appeared in *Ashby v Slipper* in which his Honour appeared on behalf of Mr Ashby, both at first instance and on appeal.

Noel Hutley observed that his Honour has been the leading barrister for investor class actions in Australia for years and was a 'pioneer' in this field.

The Commonwealth Attorney-General George Brandis observed that his Honour's qualities of fairness, compassion, judgment, diligence and efficiency bear out the very best quality of Australian judges.

His Honour observed:

> Far from seeing law as an instrument of oppression to maintain or legitimatise injustices, I commenced and – I'm pleased to say – ended my career as a practitioner without any cynicism as to the practical operation of the system. It has imperfections, but I have observed how dedicated practitioners can prevent and alleviate wrongs and also how the legal system can be an effective instrument used, in a principled way, to further social justice. Moreover, apart from intellectual satisfaction and social utility, it has been, simply, great fun.

In addition to his Honour's usual duties as a judge of the court, his Honour has been appointed to serve on the Class Action Users Group Committee of the Federal Court.

Supreme Court

The Hon Justice T G R Parker

On 6 April 2017 the Chief Justice TF Bathurst presided in the Banco Court of the Supreme Court of New South Wales at the swearing in of the Honourable Justice Thomas Guy Radcliffe Parker as a judge to sit in the Equity Division of the court. President of the Sydney Bar Mr NC Hutley SC attended and spoke on behalf of the New South Wales Bar. Ms Wright of the NSW Law Society attended on behalf of the solicitors profession.

His Honour was educated at the Cranbrook School where he completed the Higher School Certificate in 1980. In the following year his Honour attended the University of Sydney studying both Computer Science and a Law degree from which he graduated in 1985. Briefly in 1986 he attended the College of Law and became a judge's associate to the Honourable Mr Justice Fox of the Federal Court of Australia.

In September of 1987 his Honour was admitted as a solicitor of the Supreme Court of New South Wales. Almost immediately after this, his Honour enrolled in a Master of Laws at the London School of Economics when Lord Wedderburn was still teaching company law cheek by jowl with Lincoln's Inn. For a brief time, his Honour was an employed solicitor at Clifford Chance in the City of London. As all roads led back to Sydney in March of 1989, his Honour commenced in the litigation department of Allen Allen and Hemsley and continued there as the sun was setting on the heady days of commercial litigation.

His Honour read with MA Pembroke, as his Honour then was, and commenced practising at the New South Wales Bar in the February of 1991.

His Honour practised primarily in commercial law, insurance and professional indemnity. Over the years his Honour's court craft was described as most pleasant, urbane and respectful but utterly tenacious. Illustrations of this tenacity and his Honour's quiet and benign reserve are [the Macedonian Church case] *His Eminence Petar the Diocesan Bishop of the Macedonian Orthodox Diocese of Australia and New Zealand v Kotevich* and *Commonwealth of Australia v Cockatoo Dockyard Pty Ltd.* Both cases required the patience of Job of any leading counsel – and

both cases ran so long that they have passed into legend. They hold a status much like the classic Jarndyce briefs.

His Honour was a member of the Seventh floor of Wentworth Chambers for many years and then relatively recently transferred to the severe functionality of New Chambers on a floor of a building designed by Lord Foster. It is known that in his Honour's most recent chambers there were no artworks to speak of. Rather, all attention was focussed on the breathtaking view through the Heads and far out over the Tasman Sea. This was the only decoration worth mentioning.

It is also noted that his Honour appeared variously as junior with distinguished members of the inner Bar – the Hon. D F Jackson QC, the Hon T E F Hughes AO QC and the Honourable Dyson Heydon QC. Parker J regaled the Banco Court with some anecdotes of a long career at the Bar and amusing and legendary anecdotes of High Courts of the past showing Communist tendencies. In the great tradition of advocacy, even in the ugliest stoushes his Honour never personalised any contest in question and was ever patient and never dismissive of an opponent.

By 2005, his Honour took silk and had spent some time then leading juniors to great effect. In over 30 years at the Sydney Bar his Honour was always known as quietly respectful, learned in legal principle and enthusiastic about science. To temper these qualities his Honour is also known to have a dry wit.

Remembering his years at the Bar, his Honour noted his tendency to be on the losing side of a case, to be somewhat knocked about, and his acute awareness of that at times. Perseverance and that necessary quality of fearlessness in an advocate were live in his words as he recounted a hard and long road to that day. He also paid tribute to his father who had taught him much about the stresses and strains of litigation.

During the course of his Honour's speech, he paid tribute to his family especially his wife and his children.

He recalled the privilege and enjoyment of practising as a barrister in this jurisdiction. His Honour was gracious in acknowledging the breadth of support of practitioners and solicitors over the years, such words proving that his court will be a most civilised and just place in which to appear and to be heard.

By Kevin Tang

Supreme Court

The Hon Justice Julia Lonergan was sworn-in as a judge in the Common Law Division of the Supreme Court of New South Wales on Tuesday, 21 March 2017. Attorney General Mark Speakman SC spoke on behalf of the bar and Ms Pauline Wright, president of the Law Society of NSW, spoke on behalf of the solicitors' branch of the profession.

Her Honour was educated at St Patrick's Primary, Parramatta and Loreto College, Kirribilli. She graduated from Macquarie University with a Bachelor of Arts and then a Bachelor of Laws from the University of Sydney. She was admitted to practise as a solicitor of the Supreme Court in 1983 and began work in her parents' firm, TP and J Lonergan in Parramatta, before spending several years at the GIO Australia and Suncorp-Metway.

Her Honour was called to the New South Wales Bar in 1997. In the ensuing 20 years she built up a thriving practice in medical negligence, personal injury and professional negligence, appearing for both plaintiffs and defendants. In the matter of *Simpson v Diamond*, her Honour was junior to Leonard Levy SC, now his Honour Judge Levy of the District Court, appearing for the plaintiff. The damages awarded, $14.2 million, were a record in medical negligence and personal injury cases. The attorney noted:

> This case was novel not only because of the record sum awarded but because it pioneered the use of international expert witnesses in these matters. It was also a landmark case because it proceeded to completion rather than settlement. Your Honour's technical knowledge and refined skill were critical and, indeed, your Honour's work and that of Levy DCJ induced what has been described variously as panic and an outcry and then the *Health Care Liability Act 2001* and the *Civil Liability Act 2002*.

Her Honour has presented many papers at medico-legal conferences and given generously her time and expertise. She has mentored many young female barristers, been an advocacy coach in the Bar Practice Course, served on Bar Council and been chairperson of Professional Conduct and Equal Opportunity committees.

Her Honour took silk in 2012. In 2013-14 her Honour was senior counsel assisting the Special Commission of Inquiry into the Police Investigation of Certain Sexual Abuse Allegations in the Catholic Diocese of Maitland-Newcastle.

Her Honour's interests outside the law are diverse. The attorney general said:

> Without reservation all those who shared some thoughtful remarks about your Honour in the lead up today were utterly delighted about your appointment as a judge of this Court. Your colleagues and your friends warmly describe you as a devoted mum, a most loved and loyal friend and an enthusiast of the arts. It has been said that your tastes in music are eclectic and growing in refinement and that you have never been known to turn down a concert whether it

> rock and roll or opera or some genre in between. I believe your Honour is an enthusiast of all things Irish, including that most esteemed of books, Ulysses. I am advised that for your Honour Bloomsday verges on a holy day of obligation.

The president of the Law Society expressed the high regard the legal profession has for her Honour, as well as its absolute confidence in her judicial qualities. Ms Wright said:

> The unflinching ethical standards and integrity you have brought to your practice of the law as an advocate will inform your life on the bench and whether it was the sheer force of hard work, your unmatched ability to scythe through the litigation thicket to get to the heart of a matter or your preparedness to make difficult decisions, your fellows and instructing solicitors alike have spoken of a barrister of exemplary ability with whom it was a privilege to work.
>
> …
>
> Although your Honour will be sorely missed by your fellow barristers and instructing solicitors there is a prevailing confidence that you will be an excellent judge, a diligent and careful hand on the evidence, actively but respectfully working against timewasting and prolixity. It is said those who appear before your Honour will quickly learn to get to the point but, equally, those who appear before you can always be confident yours will be a warm court, a friendly court and a just one.

Justice Lonergan spoke in reply. She thanked the many people who had guided her at every step of her career in the law. She spoke of the support from her parents, her siblings and her peers at the New South Wales Bar. She said:

> My good fortune in life is extended to my professional life. I will not say the juggle of personal and professional obligations is easy. That would be perjury. However, it is made much more manageable by the friendship of my colleagues at the Bar. If I thanked everyone who has been a fine friend and excellent combatant, the list would be very, very, very long. They know who they are. I am grateful to them as they have made the Bar one of the great places to be. From the robust, blokey intelligence of Jack Shand Chambers, to the welcoming bosom of 2 Wentworth, to the decency and containment of level 8 Wentworth, to the culture and inclusiveness of 12 Selbourne Wentworth, to the egalitarian comradeship of Maurice Byers, I have enjoyed every chambers of which I have been a member.

District Court

On 24 May 2017 David Russell SC was sworn in as a judge of the District Court of New South Wales. Arthur Moses SC spoke on behalf of the New South Wales Bar.

Before being appointed his Honour worked as a barrister for over 40 years. His Honour practised across many areas and conducted over 50 jury trials. His Honour is best known for insolvency and common law work, most notably dust diseases cases. His Honour is also the co-author of Gooley, Zammit, Dicker & Russell's *Corporations and Associations Law: Principles and Issues*, which is now into its sixth edition.

His Honour has lectured for 20 years on insolvency for the Legal Practitioners Admission Board. His Honour was also a lecturer and tutor for the Bar Practice Course and a member of the New South Wales Bar's Professional Conduct Committee from 2002 to 2010.

Arthur Moses SC observed that his Honour is:

> first and foremost, an advocate who has enjoyed the respect of both the bar and the bench… [who is] from the old school, quiet and unassuming with a focus on persuasion rather than theatrics.

His Honour was appointed senior counsel in 2002.

Local Court

Joy Boulos was sworn in as a Magistrate of the Local Court of New South Wales on 29 May 2017. Her Honour worked at Legal Aid NSW for 23 years, commencing in the civil litigation unit and specialising in consumer protection law, victims' compensation, housing, tenancy and human rights. For the last eight years her Honour was a senior managing solicitor, overseeing complex criminal matters.

David John Price was sworn in as a magistrate of the Local Court of New South Wales on 22 May 2017. Before his Honour was appointed, he practised as a barrister appearing primarily in commercial and common law matters.

NSW Industrial Relations Commission

Jane Seymour was sworn in as a Commissioner of the NSW Industrial Relations Commission on 15 May 2017. Her Honour was an associate to Justice Beazley (as her Honour then was) in the Federal Court of Australia, following which her Honour worked as a solicitor, including as partner of Australian Business Lawyers, and later, Gadens Lawyers. Her Honour also worked with the then Sex Discrimination Commissioner, Elizabeth Broderick, on the review of the treatment of women in the Australian Defence Force. In 2011, her Honour was called to the Bar and practised in a wide range of matters and continued to develop an extensive workplace investigation and mediation practice.

Bill Grant

Bill Grant OAM, a member of the New South Wales Bar Association, retired as CEO of the NSW Legal Aid Commission in December 2016 after a combined eleven years at the head of Legal Aid NSW. He died on 22 January 2017 while mowing the lawn of his new retirement home in northern NSW. Bill had been a senior officer of the NSW Attorney General's Department, at Legal Aid, and secretary-general of the Law Council of Australia. In each of these positions he was a good friend to the bar, in particular with amendments to the Legal Profession Act, in endeavouring to obtain reasonable fees for counsel in legal aid matters and the bar's role in the national legal profession. At his funeral on 2 February in a church packed with Bill's friends and colleagues, including the chief justice and many members of the judiciary and of the bar, Philip Selth , the recently retired as executive director of the Bar Association, spoke of Bill.

Michelle and Alison have spoken about Bill as husband and father; they have asked that I say a few words about Bill the public servant. I cannot say I am 'happy' to do so, but I am proud to say that Bill was my friend.

In June 2006 William Grant was awarded the Medal in the Order of Australia 'For service to the community and to the law through the New South Wales Legal Aid Commission'. That is probably one of the few times Bill was called 'William' in public.

This is not an occasion for a detailed recitation of Bill's illustrious curriculum vitae. But in summary, Bill commenced work in the Crown Solicitor's Office on 4 June 1973 as a legal clerk in the Conveyancing Branch. Upon completing the final year of his LLB degree from the University of Sydney in 1974, he was appointed to the position of legal officer, Conveyancing Branch on 1 January 1975. He was admitted as a solicitor of the Supreme Court of NSW on 26 July 1976. In the Crown Solicitor's Office Bill worked in the Prosecutions, Special litigation and Constitutional branches. Over a meal and a glass of wine Bill occasionally reminisced about those days, including him running matters in the Supreme Court under the Disorderly Houses Act and working on the Juanita Nielsen inquest.

In December 2003 Bill was asked by the minister for health to act as the commissioner of the Health Care Complaints Commission until a new commissioner was appointed. At the time the commission was under a lot of pressure as a result of the release of the Report of a Parliamentary Inquiry into procedures during investigations and prosecutions undertaken by the commission. Bill had been given a difficult political and management problem to clean up. He did so well with that bundle of problems that he was given another collection to sort out at Legal Aid, of which he became acting managing director in April 1999 - and CEO in November 2001.

Bill was a committed lawyer who never readily gave in. He had a strong passion for justice. Passion is a word that regularly comes up when talking about Bill's accomplishments. Bill used to work in the Goodsell Building in Phillip Street. It had a small underground car park. It was always stacked and Bill never appreciated being parked in. Staff often had to move another car during the day to get their own car out. One day in moving a car the accelerator 'got stuck' and he damaged two cars. The building manager for some reason reported the incident to the police, who subsequently charged Bill with negligent driving. Bill felt it was unfair as no-one was injured and it was an accident. He studied the relevant traffic laws and successfully challenged the charge on the basis that the carpark was private property not subject to the traffic laws.

Bill was a very strong black letter lawyer but always able to imagine how laws, systems and processes could be improved for the benefit of users and the broader community. One important matter Bill led over 25 years ago was the NSW response to the 1991 report of the Royal Commission into Aboriginal Deaths in Custody. There were some important outcomes from that response, including establishing the Aboriginal Justice Advisory Committee and making significant changes to provide more and better pre-sentencing diversion programs and post sentencing options. The way Bill went about it was indicative of his approach. Bill met directly with many Aboriginal people and their organisations to hear firsthand experiences, taking the time to properly listen and to respectfully engage. A senior public servant who worked with Bill then notes that this was 'a wonderful example of appropriate cultural awareness long before that was even recognised as a term and practice'. That officer, Bill and I had lunch a few months ago. Bill's frustration that the Indigenous incarceration rate remains unacceptably high was on full display.

Although Bill held passionate views on social justice and related matters,

Bill Grant

it was, however, unusual for him to publicly show his frustration. Perhaps on this occasion it was in part because The Malaya Restaurant was his second office. For the past twenty years Bill and I regularly had lunch at that restaurant and its predecessors. I gave up bothering to look at the menu. Bill just ordered - he didn't need to look at the menu! We always ordered a bottle of sparkling water, the main purpose of which was so we could try and get the inevitable curry stains off our business shirts before our PAs and wives noticed. Michelle tells me Bill need not have bothered even trying!

Today the term 'public servant' is at times used by the ignorant pejoratively. But Bill was proud that he was a public servant - someone who passionately, enthusiastically and with the utmost integrity delivers a service to the community, particularly the less fortunate. Not only did Bill believe in access to justice for all, but he did all he could in a range of positions to increase that access. Bill didn't play favourites - or games with the Ministers he served. He was no 'Sir Humphrey'. He was a very traditional public servant, dealing with both sides of politics in a straightforward, non-partisan manner.

Bill was fascinated by politics of the day. He scanned all of the daily newspapers and tuned in to media reports. If there was a leadership spill on, or something controversial taking place in parliament, Bill's door would be closed as he followed the situation unfolding. But he never played party politics.

One of the attorneys general with whom Bill worked told me last week he felt that his contact with Bill on multiple occasions 'reflected his commitment to outcomes for people who were vulnerable. He genuinely cared. The way he dealt with Labor and Liberal ministers always conjured an image of his next career being more than a passingly adequate tightrope walker and a really good juggler!' Bill's nomination for the OAM was strongly backed by the attorney general at the time. Yet another attorney general told me that while he was AG, Legal Aid in effect ran on auto-pilot - that is, it was so well managed by Bill that the minister could devote his attention to matters elsewhere.

Bill and Michelle moved to Canberra in 2007 where he served to 2011 as the secretary-general of the Law Council of Australia, the legal profession's peak body. The president of the Law Council noted a few days ago that Bill's 'natural warmth and impeccable work ethic meant that he was loved and respected within the Law Council and across the legal profession'.

Without Bill's work on the Commonwealth/state national legal profession reform taskforce, out of which torturously, and belatedly, emerged the Uniform Law that now regulates the legal profession in NSW and Victoria - it is possible the profession would now be governed by Canberra. He worked tirelessly on the national profession in an absolutely thankless role. He was very disappointed that so far only NSW and Victoria have signed up to the uniform law.

Each year the Law Council has a new president; each needs the strong and loyal support of the CEO. Bill gave that support in spades. One president recalls how Bill and Michelle took him out one evening when he was on his own in Canberra. 'Bill was a top bloke and very kind to me. When I first started as president we went out for some drinks at a new hotel (very trendy) in Canberra and we were having a drink that they would set alight and you drink it. A flaming scotch or something called a Blue Blazer. Bill was very keen on that drink and we had a few. The next day the place burned down and we both felt guilty.' Last week the current president spoke of having recently caught up with Bill as she was preparing to take on her new role as president of the Law Council. She noted that Bill 'was as warm and encouraging of me then as he always was', and that she was greatly buoyed by their exchange.

The quarterly meetings of Law Council directors have been compared with mandatory meetings of a dysfunctional family seeking to ensure each is not left out of the will of the mad uncle. Well, that is a slight exaggeration - but the meetings could at times be heated - or boring - and overlong. Bill would sit next to the president giving sage advice, never seeking attention. But if Bill was asked a question, we all listened. Usually Bill had before the meeting effected a reconciliation or compromise over contentious matters. He was trusted by all. Occasionally some at the meeting would send Bill SMS messages along the lines of 'Are we there yet?', 'Can we please go home now Daddy?' Back would swiftly come a reply, not always suitable for publication. Bill never gave any indication that he was not totally engrossed in the agenda. The best we ever got was a slight smile. His was a dry wit rather than a raucous laugh.

I tried Google to see if there was a Scottish Imp - but all I found was the Hillman car. But Bill did at times resemble a 'mischievous devil', albeit that Bill was not small – although in recent months he was proud of losing a bit of weight.

When Bill finished up at the Law Council, the Legal Aid Commission was again in need of a strong, innovative and passionate leader. Both the NSW Law Society and Bar Association spoke wistfully of Bill returning to his old patch. But the timing wasn't good; the usual recruitment and appointment processes made it very likely that Bill would be snapped up by some other agency before he could be considered by the government for appointment to Legal

Bill Grant

Aid. So the CEOs of the Law Society and the bar spoke with the attorney general about how this was a great opportunity to have Bill back at Legal Aid. I think the AG was well ahead of us, for a few days later Bill rang and told me that Cabinet had agreed to his appointment.

Bill was absolutely committed to legal aid and ensured as much as he could that the underprivileged people - and the lawyers acting for them - got fair funding. Bill's legacy at Legal Aid included making services for victims of domestic violence a core part of the Legal Aid NSW, expanding civil law services, and bringing legal services to remote, rural and regional NSW.

As at the LCA, the staff respected and admired Bill and enjoyed working with him. I emphasise with him rather than for him. He was passionate about the health and wellbeing of his staff. In particular, Bill would not tolerate bullying of any staff. At times he had to be 'talked down' from his initial 'charge them' position. But he listened. He was a leader focussed on leadership and management skills. He threw out the concept of the longest serving lawyer being the successor to the manager's role.

One of Bill's Legal Aid staff recently wrote down a few thoughts they had of Bill, which I unashamedly plagiarise to share with you, Bill's family and friends.

> There was an aura around Bill. I remember watching a former Director nervously prepare for meetings with him. Papers in order, personal grooming done and fully briefed. Nothing would be put forward if there were holes or doubt – because Bill didn't tolerate that. When Bill came back from Law Council we were told by people who knew Bill that he most valued strategic thinking. And they were right. When a difficulty was presented to him, he would always approach it from the most strategic angle. 'Keep the powder dry' and 'Pick your battles' were two of his favoured lines.

He believed in his people and what we could achieve at Legal Aid. But he also had high expectations which led to a culture of achievement. Sitting in on meetings about a recent project he said: 'Well of course we will be delivering services first. And I expect our services will be of a much higher standard than what is offered by other legal services around Australia. People will always turn to us as the leaders'.

He spoke in a similar way about collaboration across the legal sector in NSW, with the court administrations, profession, community legal centres and others providing support services.

When in 2015 the new National Partnership Agreement on Legal Assistance set objectives for legal services requiring Legal Aid to collaborate with other legal services, governments and the private legal profession to provide joined-up services to address people's legal and related problems, Bill was heard proudly proclaiming that Legal Aid NSW was years ahead of other states on this score. 'We are ahead of the game' was one of his favoured lines whenever he compared Legal Aid NSW with other agencies – and he would have been immensely disappointed if it had not been.

It is little wonder that for the last two years Bill had Legal Aid's executive team and those around him in a frenzy. Often when people approach retirement they start to slow down – not Bill. He was determined to have Legal Aid handed over in the best shape it could be. Workshops requiring 'blue sky thinking' took place, many hours were spent by his executive team offline plotting where the organisation needed to be and how it would get there. As one staff member has noted: 'Such was the activity that by the time Bill left the building there was almost palpable relief – we all needed a holiday – and many commented it was like Dad leaving the house!'

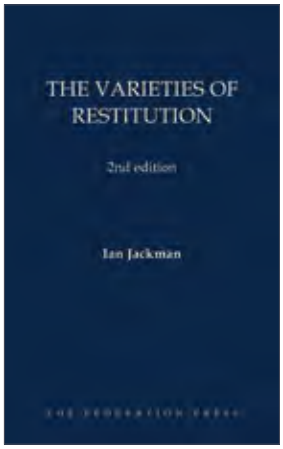
I have not before thought of Bill as some kind of Australian Elvis Presley. Bill having a 'selfie' taken with his finance staff on his last day at Legal Aid doesn't quite get there. 'Elvis has left the building' is a phrase that was often used by public address announcers at the conclusion of Elvis Presley concerts in order to disperse audiences who lingered in hopes of an encore.

We cannot have an encore. But when Bill leaves the building today he leaves behind many, many friends who admired him, respected him, and who enjoyed his company. He was a true public servant who gave so much trying to improve the lot of others less fortunate. He will be remembered well beyond the time of most of us. He deserves to be.

2 February 2017.

The Varieties of Restitution (2nd ed)

By Ian Jackman SC | The Federation Press | 2017



Almost two decades have passed since the publication of the first edition of this fine book. During that time the landscape of the law of restitution in Australia has substantially changed. The publication of a second edition has been long awaited.

The principal argument of the book is unchanged. It is that, contrary to the position adopted in England, the law of restitution cannot be explained by reference to the unifying principle of reversing 'unjust enrichment at the plaintiff's expense'. The author then goes on to argue that there are three 'varieties' of restitution involving different conceptions of injustice. The first involves the recovery of money or another incontrovertible benefit which has been paid by a plaintiff 'non-voluntarily' (for example, by mistake, duress, involving a total failure of consideration or by necessity). The second variety involves a plaintiff recovering money for benefits in kind provided pursuant to a genuine, but typically implicit, non-contractual promise by the defendant to pay for the benefits. The last category concerns restitution for wrongs. Recovery in this category is said to be justified by the need to protect the integrity of certain facilitative institutions of private law, such as property or fiduciary relationships.

In the first edition, the author rightly described his principal argument as 'not a currently fashionable position.' Whilst it remains heretical in England, it reflects current orthodoxy in Australia. This edition draws upon numerous decisions of the High Court of Australia in the past decade that have rejected the English doctrine by which a claim in 'unjust enrichment' can be made by direct invocation of the principle that the defendant has been 'unjustly enriched at the claimant's expense'. It provides a defence of those Australian decisions and a strong, and at times fierce, critique of the current English approach, particularly its academic proponents. The critique is principally found in Chapters 1 and 2, the latter of which is a considerably expanded section concerning the history of the law of restitution.

One of the most significant criticisms of the English restitution academy advanced in the book is that in an attempt to do away with past 'legal fictions' it has given birth to many others.

One of the most significant criticisms of the English restitution academy advanced in the book is that in an attempt to do away with past 'legal fictions' it has given birth to many others. Mr Jackman highlights that in the case of recovery of a mistaken payment – commonly regarded as the central case of the law of restitution – there is no need for the plaintiff to prove loss in order to recover the payment. A plaintiff who has fully passed on the expense of the payment (say, to the plaintiff's customers) can still recover from the defendant. Mr Jackman argues, with considerable force, that as a matter of ordinary English a defendant in such a case has not received a benefit 'at the plaintiff's expense'. Similarly, in cases awarding restitution for wrongs where the defendant obtains a benefit from using the plaintiff's property but the plaintiff does not suffer any detriment. Or, more generally, in cases where a *quantum meruit* is awarded where services are requested and performed but no benefit or 'enrichment' is obtained by the defendant at all (for example, in cases of wasted preparatory work).

However, the contribution provided by the present edition does not lie merely in providing a critique of a unifying theory of unjust enrichment. To a practising lawyer there are some rather obvious weaknesses in that theory. One weakness in that theory is that, at least for the present, the High Court of Australia has rejected it. Another weakness is the inability of the theory to assist in resolving practical legal problems. One could describe the whole of the common law of torts as compensating 'good people' for 'wrongs' done to them by 'bad people'. But that criterion, expressed at only a slightly higher level of abstraction than the unifying theory of unjust enrichment, would not assist in resolving any practical legal problem. Likewise, the contention that the law of restitution is concerned with unjust enrichment at the plaintiff's expense provides little assistance to practising lawyers. It is perhaps unsurprising that the main proponents of the English approach have been academics.

Rather, a substantial part of the value of the book lies in the author's discussion in Chapters 3 to 8 about why restitution is and should be awarded in materially different categories of case.

The discussion concerning the recovery of mistaken payments is of a high standard, although the analysis concerning awards of interest on restitutionary claims is somewhat brief.

Ian Jackman SC, 'The Varieties of Restitution (2nd ed).'

Chapter 6, which deals with the voluntary provisions of benefits in kind, is particularly useful in identifying how claims for a *quantum meruit* for work done can be understood as reflecting genuine, albeit implied, promises between parties. It is also the most radical and thought-provoking chapter of the book. Deane J's reasons in *Pavey and Matthews Pty Ltd v Paul* (1987) 162 CLR 221, which have generally been accepted in Australia, are criticised and Dawson J's reasons in that case, which have generally been forgotten, endorsed. The many cases that have recognised a *quantum meruit* claim by an innocent contractual party after the valid termination of a contract are also said to be wrong in principle.

The final two chapters of the book address what is sometimes called 'proprietary restitution' (that is, proprietary claims and remedies for restitution) and defences to restitutionary claims. The former chapter deals principally with tracing in equity, with less detailed discussion concerning so-called tracing at common law and proprietary claims to recover mistaken payments.

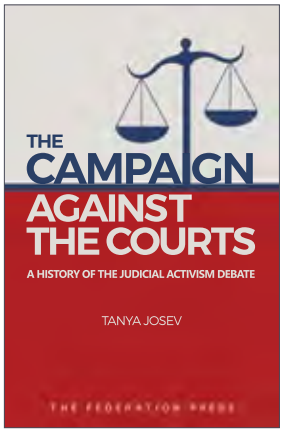
Many readers, particularly those who have been taught by the Law Faculty of the University of Oxford, will not agree with the author's arguments. However, it is an insightful and intelligent work that is essential reading for those interested in the law of restitution.

The book is well written and easy to read. At just over 220 pages, there are necessarily areas where the analysis is more limited. However, the book does not pretend to be a text book on the law of restitution. Rather it is an extended argument on the structure and theoretical basis of one of the more controversial areas of private law. Many readers, particularly those who have been taught by the Law Faculty of the University of Oxford, will not agree with the author's arguments. However, it is an insightful and intelligent work that is essential reading for those interested in the law of restitution. It is to be hoped that the next edition does not take another two decades.

Reviewed by Tom Prince

The Campaign Against The Courts: A History of Judicial Activism

By Tanya Josev | The Federation Press | 2017



I have to admit that the prospect of reading, let alone reviewing, *The Campaign against the Courts – A History of the Judicial Activism Debate* by Tanya Josev did not fill me with excitement and could not tear me away from supervising my children's viewing of Australian Ninja Warrior!

Once I started reading, however, I discovered not a 'great story [of] sex, race and power' as David Marr's review on the back cover promised, but a great story of the development of the term 'judicial activism' from its first use in the United States in the middle of the last century to its adoption in Australia in the early 1990s and continuing right up to the recent appointment of Justice Edelman to the High Court.

A work experience student recently asked me what the politics are of the various judges of the Supreme Court. I was surprised by this question, not least since it was one to which I had given little thought. Where those judges are required to follow precedent, they generally do so; and where there is an issue of discretion or an issue of law not yet determined by authority, a judge's decision may say something about his or her attitude in a particular area of law, but I had not perceived any underlying broad political approaches.

I added that it seemed to me that things might be different in the High Court, where the judges may decline to follow precedent and where they may be called upon in applying the Constitution to strike down legislation. In that context political leanings might be more apparent and it is this, as it seems to me, that is most likely to prompt accusations of 'judicial activism'.

…the appointment of Justice Edelman was described in The Australian as a 'conservative political decision' likely to ensure the High Court has a 'backbone that resists judicial activism', while at the same time The Telegraph saw him as a judicial activist and his appointment as evidence that the Coalition 'just keeps failing to make a conservative stamp on our institutions, unlike Labor, which entrenches leftists any chance it gets'.

Although I was aware of the term 'judicial activism', I would not have been able to give it a precise meaning. Having read this hugely entertaining and informative book, I could still not do so (through no fault of the author), but I am better informed and I do now know why it is really not possible to do so. Indeed, it seems to me that although a definition could of course be ascribed to the term, the reality is that it is used to mean many different things, depending upon the particular commentator and the particular context, but none of which are intended as complimentary.

Josev describes how the term emerged in the United States in the middle of the last century as a recognition of the perceived countermajoritarian difficulty of unelected and unaccountable judges being able to thwart the will of the majority by striking down legislation duly enacted by the people's representatives. It remained dormant as a term in Australia, however, until the early 1990s following the decisions in *Mabo* (1992) and later *Wik* (1996).

As Josev notes, the criticism of those decisions on the basis that they demonstrated judicial activism was driven not by any analysis of the reasoning applied but rather simply by the commentator disagreeing with the result. Similar observations can be made about the criticisms of the High Court's development of the implied rights doctrine in cases such as *ACT v Commonwealth, Nationwide News Pty Ltd v Wills* and *Leeth v Commonwealth* (all 1992).

Jumping forward in time, reactions to recent appointments to the High Court indicate how the term has been deployed over the 25 or so years of its use in Australia. Thus the appointment of Justice Edelman was described in *The Australian* as a 'conservative political decision' likely to ensure the High Court has a 'backbone that resists judicial activism', while at the same time *The Telegraph* saw him as a judicial activist and his appointment as evidence that the Coalition 'just keeps failing to make a conservative stamp on our institutions, unlike Labor, which entrenches leftists any chance it gets'.

It can be seen then that judicial activist is a term that has been applied in particular by the right wing press to criticise particular decisions where conservative legislation has been struck down (e.g. *Williams v Commonwealth* (2012 and 2014) and *Plaintiff M70/2011 v Minister of Immigration* (2011)). Without any

Tanya Josev, 'The Campaign Against The Courts: A History of Judicial Activism.'

analysis of the judicial reasoning involved, however, it is difficult to see how the term when applied only to particular results can have any content or real meaning.

Other meanings that have been ascribed to the term judicial activism are similarly uninformative and unhelpful. According to some commentators, activist judges are those who make the law rather than apply the law, but judges are required every day to apply their discretion in many areas or to decide cases where there is no binding precedent. To attempt to determine whether that is making, deciding or applying the law is a pointless semantic debate.

To similar effect, the perjoriative use of the term 'elitist' when applied to the judiciary is no more than a recognition of their function and the countermajoritarian difficulty.

Others have used the term to suggest that some judges are driven to achieve a particular result without regard to previous authority. The common law, however, has always recognised the power of a court to depart from a previous decision if it is satisfied that it was wrong or, at least in the case of the High Court, should not be followed. Thus decisions as to gender and parenthood can be revisited to take into account changing social conditions and scientific developments, such as gender reassignment, gamete donors and adoption; and a doctrine that says that a woman cannot be raped by her husband can be abandoned.

Divergences have emerged between common law jurisdictions in relation to issues such as advocates' immunity and murder by joint enterprise, but it is difficult to see that any insight is gained from describing one jurisdiction as activist and the other as legalistic.

In her epilogue, Josev identifies eight separate meanings for judicial activism that have been used, each of which can be the subject of similar criticisms. Indeed the absence of any accepted or even commonly used definition demonstrates the real problem with its use. As such, judicial activism is a moveable term of abuse that is unhelpful and uninformative; it should be avoided in any legal or academic debate; and it is best left for use, if at all, in the media. Whatever position one takes, however, this excellent book provides ample ammunition for the reader to enter into the debate well-informed and ready for battle!

By Anthony Cheshire

Bullfry and the wasteland

By Lee Aitken

'April is the cruellest month'. It is always then that the first doubts of the new practice year assailed him – 'July is a desert!' said Bullfry ruefully to himself, as he contemplated an empty diary, and the skull gave him its batrachian, mirthless smile.

The Bar Common Room, after continual decline in attendances will be closed.

He looked dolefully (unbelievingly) at the 'statistics' as recently recorded by the Bar Association. One barrister in three was more than sixty; a little under two thirds were north of fifty. And, perhaps most sinister of all, the raw number of practitioners had only increased by some 200 over some fifteen years. So, the cohort of ageing, dyspeptic advocates had steadily increased in size while, so it would seem, at the bottom, the bar as an institution was not attracting much, if any, new talent.

As he wandered the Street he was conscious of this ageing herd around him – law and life had numbed their elastic powers. But what did the current membership numbers presage? If eighty-odd youngsters joined the bar each year, surely there should be a constant growth, and a year-on expansion in the number of much younger counsel? Far from it – assuming that most newcomers were solicitors of recent vintage in their early thirties, there was obviously, and forebodingly, a constant, roiling mass of young barristers, male and female, joining the bar each year, and then departing, unwept and unlamented, after a couple of years of moderate practice to some more congenial, or profitable, pursuit.

He went down in the lift to the library but the doors clanged open prematurely and he found himself greeting Victor as ever. In front of him, the glass walls of the Wasteland glinted – but where had Mary Gaudron gone? Of old, she had waggled a minatory finger at Bullfry against a mosaic backdrop, tessellated to the terms of sections 75 and 76 of the Constitution.

Was 'the Wasteland' of the old common room an architectural metaphor for the state of the bar itself? To wit, an empty space, rarely occupied except for some notional 'educative' gathering, or the odd-Fifteen Bobber, or book launch, when a few slabs had to be trundled in for the trestles! Otherwise, an empty husk lying abandoned, unused, unoccupied, and with no very obvious purpose, at the very heart of Phillip Street. For what purpose, exactly, was the old Bar common room now used? Perhaps if the clerk would print out *InBrief* he might find the answer. Maybe it might even help him locate Mary.

Writing in 1985 in *Bar News* under the rubric, 'What the bar needs' AM Gleeson QC had a grand ambition for it as a place to spur a 'revival of corporate spirit'. He had said,

'To identify our enemies and declare them anathema would be emotionally gratifying, but politically unprofitable. A more positive solution may be to concentrate upon a revival of our corporate spirit. A new carpet in the bar Common Room (tastefully furnished in the style of former President McGregor, indulgently elaborated by Meagher QC, and now in a state of aesthetic collapse) might draw more members to a central meeting place. There is reason to believe that funds for such lavish expenditure will soon be available'.

Was 'the Wasteland' of the old common room an architectural metaphor for the state of the bar itself?

For reasons now historical but never fully disclosed to the readership of *Bar News* (since it contains no detailed discussion of the event at all), the Sydney Bar in its wisdom had dispensed with a popular meeting venue in the early years of the new century. The editor of *Bar News* merely said at the time, 'the physical fragmentation of the bar continues to increase, certainly within the Sydney CBD. The Bar Common Room, after continual decline in attendances will be closed'. Perhaps, too, the licensing requirement to disclose the emolument of relevant office holders had its impact.

What a contrast with the Paris of the South. Only the week before Bullfry had attended a long, boisterous lunch with

Bullfry and the wasteland

an ageing Victorian QC at the Essoign Club, which was situated discreetly behind frosted doors in the bowels of the Melbourne Bar in Owen Dixon West – on that Friday, the place had been packed. In operation since 1961, and separate from the bar itself for licensing purposes, the Club had continued to prove a most popular and congenial location to foregather for members of the Victorian Bar. According to its webpage, 'The Essoign is open daily (Monday to Friday) from 7.00 am for breakfast, morning tea, lunch afternoon tea, snacks and drinks till late …'! Alcohol could be purchased throughout the day from 11:30 am at a 15% discount to bottle shop prices. 'In the early evening, The Essoign is a friendly bar facility for those looking for a drink at the end of a long day'. On Friday night, there is a Happy Hour.

Was that closure fifteen years ago of the old NSW Bar Common Room simply a symptom of other fundamental 'cultural' differences between the two rival *metropoleis*? Did Victoria simply do a large number of 'cultural' things – including providing a common, frequented, meeting place for members of the same profession - better? In Melbourne you could fear a genuine, Parisian, riot – armed sans-culottes, denizens of Footscray and other banlieues, would descend after lunch on the City and attack policemen and their poor horses; there was a real Underworld, with career criminals, not some ersatz 'milieu' involving a misconstrued ethnic group with its own 'Crime Squad' or occasional, retired and cashiered, members of the constabulary; there, a sporting event attracted 100,000 spectators, all brought felicitously to a large stadium by public transport – bars, large and small, then stayed open 'til the small hours.

Down South, Counsels Chambers owned most of the rooms from which the bar practised and space was made available for all neophytes. In the Emerald City, in keeping with its general overweening interest in all things to do with property acquisition, a room in Wentworth and Selborne on a desirable floor could change hands for the price of a small house. The grand plan to provide accommodation for the entire Sydney Bar under one roof *a la* Melbourne by accumulating the necessary land had foundered because, among other reasons, it would have necessitated a dilution of the very 'goodwill' which produced the astronomical figures payable for rooms on certain bespoke floors.

Ageing, retired jurists now supplemented exiguous defined benefit schemes by acting as mediators at large – most matters had to go, perforce, to mediation in any event, so trial work was decreasing.

Perhaps, also, that desperate tension so clearly articulated by Jackson QC at a Bar Dinner years ago between the bar as a trade union, which looked to support its members through thick and thin, and develop their practices as a matter of course, as opposed to a government-mandated regulator, and stipendiary steward, was simply too large to be resolved. Apart from titivation around the social edges, *what concrete steps,* wondered Bullfry, *had the bar taken to increase the work available to younger, newer barristers in all the time he had been there?* And yet, the apparat running the show now seemed to require, expensively, a cast of thousands - or was it three, at market rates, as some junior suggested - monitoring CPDs, DVDs - any sort of acronym you liked – all a far cry from 30 years before, when Captain Cook ran the entire operation with only the doubtful assistance of Wheelahan as the Association's honorary secretary! To be fair, the Bar Association's chief office bearers then were men like 'The Smiler', Roddy, and 'Fat' Roger - *Vixere fortes ante Agamemnona multi* is, sadly, true for each generation.

And the decline in work for the journeyman junior threatened to accelerate. Ageing, retired jurists now supplemented exiguous defined benefit schemes by acting as mediators at large – most matters had to go, perforce, to mediation in any event, so trial work was decreasing. Solicitors were advertising their own high competency (and, indeed, superiority over the junior Bar) in criminal causes. Trial dates for anything longer than a day or two had dried up. One could go on and on. No wonder so many were seeking the comfort of the consolidated fund – *sera parsimonia est in fundo* was always in Bullfry's mind as he contemplated his Zurich scheme – 'thrift comes way too late when you are at the bottom of the barrel'.

The question is, thought Bullfry, recalling the insight of that famous Slavic agitator: 'What is to be done?' A small voice replied, 'What have *you* done? Ask not Bullfry, ask not'.

Tempus Fugit

By Advocata

There are rare peaceful pockets of practice. When you have wriggled out from the suffocating time pressure to focus on a single matter long enough for the issues to seem clearer and the odd embryonic answer to emerge. I found one of my friends in that state recently. He was sitting in a newly pristine room reading the only document on his desk. With his 21st birthday present fountain pen in hand and his face set in resolute concentration; he was commanding the task. The tea cup and saucer that his great aunt would have been proud of enhanced the statesman-like scene. He didn't even register me at the door. Shamed into silent retreat, I made all kinds of pledges to myself about focus and professionalism and generally straightening up to fly right. I shoved my towel and goggles into a cupboard as an immediate start.

The high income/house price ratio, free tertiary education, a smaller competitive pool, pre-CGT chamber purchases, fringe benefits free frolics and southern highlands holiday homes off the back of a cancellation fee are also regrettably gone with the wind.

My friend later revealed that he became almost hypnotically contented that afternoon by the rhythmic process of reading a paragraph, comprehending the proposition and then placing a small neat tick in the margin. He said that his idyll disappeared about two thirds into the document when he recalled that he was reviewing his opponents' submissions. This caused what he described as 'excavating folders of documents, about 100 emails and a conference call with Chicago around midnight'.

There are barristers amongst us who practised at a time when that response was not possible. I once asked my former clerk what people did in crisis before email and he said 'it was either a phone or a fax and if that didn't work - it didn't happen'. Unmoved by my incongruous stare he added 'things were stepped up by computers and mobiles but the world changed after email'. In more detail than I can recall even this morning's events, he described a kind of fantasia to me: documents unable to be reliably produced or distributed after hours; photocopying taking days and smelling great; barristers who were out of chambers being uncontactable other than by a home visit (discouraged); people calling chambers from phones outside the court; and transcripts that were collected from a box on the corner of Phillip and Hunter Street after 6pm. In the words of a reader on my floor 'no wonder they were able to put those jaunty little pink ribbons around the briefs'.

In my smaller moments I resent people who enjoyed their professional prime before email. The high income/house price ratio, free tertiary education, a smaller competitive pool, pre-CGT chamber purchases, fringe benefits free frolics and southern highlands holiday homes off the back of a cancellation fee are also regrettably gone with the wind. Yet they all pale in comparison to the freedom from immediate and direct solicitor communication.

One of my contemporaries decries the 'grinding repetition' of reacting all day to emails and postponing serious thought until after conventional work hours. Others I know turn off their email and ask reception to take a message for half the day to achieve tangible product before lunch. 'Sometimes that involves misrepresentations' one says 'but it's an ends orientated approach'. Increasingly people seem to be working from home to fulfil their professional commitments rather than their personal ones. 'I feel less anxious if I stay at home and put an 'out of office' message on for the day' says my contemporary. Otherwise I am either engaging with people or ignoring them'.

One senior junior told me that before he restructured his practice to focus on a highly specialised area of public law he felt like he was 'living out survivor'.

Some solicitors remain beguilingly confused about the time-lag between them sending an email and it being received, read, considered and formed a view about. A senior silk went as far as describing email as 'the passive aggressive personality's weapon of choice'. His prime example was emails which commence with 'I have just left you a message to call me ....'. 'Basically' he said, 'the moment the solicitor presses 'send' the issue that was their problem becomes my problem'. 'Not just passive aggressive' says another, 'just plain passive as well'. 'What does 'FYI' or 'see below' mean?' he continued. 'Am I to read it and react in some way or not? Most importantly, are they expecting me to charge for it'. A solicitor friend tells me that increasingly barristers' fee agreements include that they will charge for printing large volumes of material. 'That will be attachments' says my friend 'and some of those turn out to be emails that involve further attachments'.

It may well be that email, and the documentary evidence it has spawned, has led to more just decisions as most cases are less dependent upon 'oath on oath' cross examination. Barristers' complaints that briefs have grown vast do not wet the

eyes. It's hard to see how fewer printed documents can be a bad thing and the freedom from chambers that technology has brought assists the bar to be diverse. Perhaps the longing for the happy golden days of yore is borne of the inherent unpredictability of practice that email took nuclear.

One senior junior told me that before he restructured his practice to focus on a highly specialised area of public law he felt like he was 'living out survivor'. He exuded the joy of sufficient time to prepare a case about issues you have previously considered for a client you have become familiar with. A newly minted silk identified one of the reasons for making her application as a reaction against 'lurching in an adrenaline filled haze between procedural deadlines which were set without any reference to me'. Another of my colleagues eschews 'to do' lists on the basis that what he has to do evolves so much each day, that it is 'impossible to list, let alone prioritise, what I have to do'. 'The most infuriating thing' he says 'is that if you smoothed out the busy periods with the quiet it would be a relatively genteel existence'.

'I once tried to calculate how much I sold my youth for' joked a senior silk. Which surprised me because I had understood from the age difference between him and his current wife that he was still enjoying that stage of life.

I eye with envy the small group of barristers who do head off to catch the same ferry every night with not even a newspaper tucked under their arm. There must be a plethora of reasons for this degree of prepossession. Disposition, skill, luck combined with seniority and market power come to mind. Whatever the cause, most people at the bar that I know don't achieve it. As tempting as it is to pronounce that you can't even consider an email until next Wednesday, few juniors blurt that out. Once we accept a brief, with rare exceptions, the prevailing expectation is that we will be available to meet whatever arises irrespective of our other commitments. In the words of a now Federal Court judge 'multiple concurrent deadline syndrome' waits always for us.

His Honour turned to me and gruffed 'do have anything you wish to say'. At the tip of my tongue was 'you haven't given me judgment in that strike out application for a year; how could it possibly take so long?'. Instead I said, 'may it please the Court'.

Time spent's direct connection to professional remuneration illuminates the daily compromises we each make. 'I once tried to calculate how much I sold my youth for' joked a senior silk. Which surprised me because I had understood from the age difference between him and his current wife that he was still enjoying that stage of life. More soberingly, my tutor told me when I was about 2 weeks late with an advice that I was devilling for him that 'often the only difference between a good barrister and a bad barrister is time'. 'It's a circle of life. You have plenty of time, you are responsive, you do a great job and you get another brief. Too many impressed people and you are hard to catch, possibly short tempered and late. Which leads to you having more time'. 'The best work I ever produced was as a reader' claims my contemporary. 'Every now and then I dredge up one of those advices and am embarrassed by how many cases I read and how little I charged for it'. The public lament of a retiring floor member about only earning when he personally worked, not having enjoyed a margin and ending up with no good will to sell was described by his colleague as 'our very own *A la recherche du temps perdu*'. 'Or an advertisement for taking an appointment' said another.

Last week a judge growled at my opponent 'this is taking your client a long time, why is it taking so long?'. An avalanche of potential responses ran through my mind: they have other things to do, they can't face litigation, they don't want to pay lawyers, their children have needs, their dog died. 'I don't have specific instructions your Honour' my polished opponent said. 'It's taking a little longer than they expected'. 'Very well' said the judge. His Honour turned to me and gruffed 'Do you have anything you wish to say?' At the tip of my tongue was 'you haven't given me judgment in that strike out application for a year; how could it possibly take so long?'. Instead I said, 'May it please the court'.

THE FURIES

In mythology the Furies were three deities – in the form of ancient and ferocious crones – who gave advice to mortals. In this new column three wise counsel advise on all the things you never learned in the Bar Practice Course – or were too afraid to ask.

I have recently been in a number of matters where a judge has set strict limits on the length of submissions – three pages, even two pages. My problem is I have great difficulty in keeping my submissions to this length, particularly when the issues are complicated – and they're always complicated. Do you have any tips?

Dear Loquacious Lawyer,

Your aim should be concision, and not brevity. To convey the essence of an issue with precision and clarity is to demonstrate your deep understanding of it.

Take $E=mc^2$. In that simple equation, Einstein conveyed his theory of special relativity that mass and energy are interchangeable by reference to a single constant[1].

On the other hand, and at some two characters longer than Einstein's famous equation, is 'covfefe'. Granted, the word conveys much; however, none of it was intended by its author.

It is possible that your discovery or strike out application is more complex than the theory of special relativity, but we doubt it. If you discipline your thinking and writing to convey, with precision and clarity, the essence of the issue, you will save yourself and your judge time and effort. If that is your practice, you will come to embrace strict page limits on submissions. After all, judges do not set page limits thinking that all counsel can write concisely. But they do save themselves reading copious pages of writing by those that cannot. Do not let that be you!

People always say you have to develop a gravitas in court. I've seen some senior practitioners and they do have an impressive solemnity about them. How do I develop this myself? Is it something you learn, or are you born that way?

Dear Aspiring Advocate,

Take a moment to conjure, in your mind, the image of a barrister with *gravitas*. Think of the voice. Think of the bearing. Think of the height and age of the speaker. Think of the receptive judges hanging on every word. Now, tell us, was the image you conjured one of a dwarf Eskimo in her mid 20s? I thought not.

The problem with the word 'gravitas' (even qualified, as you have done, by speaking of 'impressive solemnity') is to convey a physicality and depth of register of voice that some barristers will have difficulty, if ever, attaining.

The word 'presence' is far better. You can have 'presence' provided you have knowledge, insight and direction on a matter and you are confident that your contribution will assist the court and your client. To have 'presence' is to assert, secure in your own case preparation, your rightful place at the bar table. It is to say, 'I will be heard!' because what you say is worth listening to. It is to say, 'I know the facts, the law and my client's case just as well, if not better, than any other person in this court room!'

If, on every matter, you can assert your 'presence' based on proper preparation, then those opponents who rely only on their 'gravitas' or 'impressive solemnity' will be shown to be no more than performers enacting a costly pantomime.

Endnotes

1 Commonly referred to as the speed of light travelling through a vacuum.