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**THE SUPREME COURT
OF NEW SOUTH WALES
BANCO COURT**

**SPIGELMAN CJ
AND THE JUDGES OF
THE SUPREME COURT**

Friday 30 May 2008

**FAREWELL CEREMONY FOR
THE HONOURABLE JUSTICE MASON AC
UPON THE OCCASION OF HIS RETIREMENT AS A JUDGE
OF THE SUPREME COURT OF NEW SOUTH WALES**

- 1 **SPIGELMAN CJ:** Today marks the culmination of 23 years of public-spirited service to the legal system of this State that has rarely been surpassed. With a degree of personal sacrifice, about which your Honour has never been known to comment, let alone complain, you turned your back on a lucrative career at the commercial bar to become the full-time Chairman of the Law Reform Commission in the middle of 1985.
- 2 From the Law Reform Commission you were appointed in early 1987 as Solicitor-General of this State, where you served for a decade to universal acclaim and, in the light of the contemporary attitude of the High Court to State submissions on constitutional matters, with considerable fortitude. Bloodied but not bowed, your Honour was appointed President of the Court of Appeal on 4 February 1997 and it is the culmination of your service in that post that we commemorate today.
- 3 The long term significance of your term of office will be found in the intellectual leadership you have displayed for the judiciary of this State and the development of the law. Your Honour has delivered judgments of the highest quality and depth of learning over the entire jurisdiction of this Court – torts, contracts, trusts, fiduciary duties, insurance, defamation, environmental law, conflicts, restitution, estoppel, evidence, procedure, criminal law, as well as the full range of statutes which have required

exegesis of the principles of statutory interpretation. By reason of your experience as Solicitor-General you understood the interface between government and the law and the weft and weave of current issues in constitutional law.

- 4 As one who has sat with you often, I can testify to the open mindedness, diligence and courtesy with which you approached each and every hearing and the sense of joy you always brought to the investigation of legal principle, although, over the years, there seemed to be more and more statutes and authority to which the word joy would not be an appropriate description of your Honour's reaction.

- 5 The quality of your judgments, both in terms of exposition of facts and depth of understanding of the law, are widely recognised throughout the State, indeed, throughout Australia. Many of your judgments will stand the test of time though, perhaps regrettably, you will frequently suffer the obscurity of an intermediate appellate judge whose reasoning is accepted, and often enough replicated, in an unsuccessful appeal to the High Court, whose judgment will in the future stand alone as authority for the proposition first articulated with force and clarity by your Honour. This was, for example, the case with your Honour's judgment on litigation funding.ⁱ I also have in mind a case when your Honour sat at first instance, in which your Honour came to a conclusion on a particular basis, rejected by the Court of Appeal, but upheld by the High Court without express reference to your Honour's reasons.ⁱⁱ

- 6 Your Honour delivered a number of important dissenting judgments on matters about which reasonable minds could and did differ and about which your Honour's reasons stand as a full exposition of the minority view which, by reason of the quality of your judgment and the continuance of disputation on issues at the borders of the legal discourse, such as wrongful birth,ⁱⁱⁱ and the award of exemplary damages in equity,^{iv} will

guarantee your Honour a life in academic legal footnotes for many years to come, and, possibly, vindication by a future High Court.

- 7 Beyond cases which are of sufficient difficulty or significance to attract the attention of the High Court, stands a formidable body of judgments by your Honour which have clarified the law in virtually every field of legal discourse and which will guide practitioners and judges in matters of significance in the administration of justice in this State for many years to come. I can only identify a handful of the scores of such judgments encompassing: recovery for psychiatric injury;^v the finality of commercial arbitral awards;^{vi} the concept of notional estate in the *Family Provisions Act*;^{vii} the equitable doctrine of contribution;^{viii} duties owed by employers in labour hire arrangements;^{ix} the ownership of poker machine licences;^x the existence of a contractual duty of good faith;^{xi} abuse of process in criminal proceedings;^{xii} on comity between Australian intermediate appellate courts;^{xiii} the scope of statutory remedies.^{xiv} I could go on for much longer if time permitted.
- 8 Of equal significance is the body of judicial decisions which may not be of broader significance but each of which was of considerable importance to the parties. Whether in civil or criminal appeals and, on some occasions, sitting at first instance, your Honour approached every case with the same high level of dedication and commitment.
- 9 You brought all your formidable intellectual skills to bear on the frequently complex range of specific facts involved in this core of the appellate jurisdiction. These are not the cases which make it to the law reports or excite academic interest. Nevertheless, they constitute the day-in day-out service that the judiciary provides for the fair and effective operation of our economy and society. They require personal empathy, an understanding of individual motives and societal forces, a capacity to bring practicality to bear on legal learning and an ability to identify the relevant legal principles

and apply them to the circumstances of each case. All of which you consummately displayed.

- 10 Your conduct has been characterised by the seriousness with which you approached your tasks, both as a leader of the Court and as a judge. You have addressed with diligence, erudition and sensitivity, on an annual basis, the difficult task of explaining to judges of the District Court precisely how and why the Court of Appeal has exercised its appellate jurisdiction with respect to their judgments.
- 11 You set high standards for the relations between judges and each other, particularly for judges such as yourself towards the top of the judicial hierarchy who have more than the usual range of opportunities to treat others in a manner in which they would not wish to be treated themselves. We have all been chastened by your careful analysis of the importance of civility on the part of appellate courts when explaining why it is that an appeal should be allowed, so that adverse conclusions are expressed without any sense of discourtesy to the judge below and, perhaps even more importantly, without diminishing the status and respect of that court in the public eye. You were always scrupulous in this respect yourself.
- 12 You have always understood the importance of certainty in the law and the role of an intermediate appellate court in observing prior and higher authority, whilst accepting the opportunity, when it arises, to develop the law in accordance with the common law method. You brought to this task a set of ethical principles which found their origin in your religious beliefs and the strength of your faith.
- 13 I hesitate to attribute to you the appellation of that much misused term “reformer”, which has the connotation that there is something wrong. *You* are an improver. You always proceeded on the basis that things can be done better.

- 14 You would, I believe, find comfort in the pithy dictum of an American judge, the polymath Richard Posner, who said that: “only in law is ‘innovative’ a pejorative”^{xv} and in his consequential observation: “American law is too vague, too complicated, too expensive; and it is these things in part because judges are too fond of sterile verbalisms and outmoded distinctions.”^{xvi} That could never be said of your Honour.
- 15 You have always had to hand an unnervingly accurate moral compass to guide your decisions and conduct, both as a judge and in your active role over many years in the Anglican Church.
- 16 It was this moral compass that led you to engage in the movement to encourage the ordination of women in your Church. That moral compass was also, I believe, the foundation of your intellectual interest in the law of restitution, a subject on which you are the co-author of the basic Australian text. In neither case was the strength of your principles capable of being diverted with the answer that that is not the way it has been done before.
- 17 You are perfectly, indeed uniquely, placed to investigate and explain to us all how it has come to pass that Sydney has become a world centre, indeed one of the bastions, of both evangelical Anglican theology and evangelical equity scholarship. Is there a connection?
- 18 To every aspect of your professional life, whether it be the course of administration, the conduct of hearings, the writing of judgments, the interaction with your colleagues, or the topics and content of the numerous addresses you made to public and legal audiences, you manifested a remarkable combination of an intellect of the highest order, an exceptional equanimity of temperament, personal civility bordering on grace and moral strength that is exceedingly rare.
- 19 This remarkable combination of personal characteristics endeared you to everyone with whom you came into contact in your professional life,

including every member of this Court. Your performance of the administrative and pastoral functions of the leader of the Court of Appeal has always been exemplary. Your multiple kindnesses, often at personal expense, to all of the members of the Court, their staff and court employees will never be forgotten. You continued the practice of some, but not all, of your predecessors, of courtesy to practitioners and consultation with all judges of appeal. You took an interest in the activities, concerns, achievements and the comings and goings of the staff of the Judges of Appeal, which was one of many manifestations of your profound concern for other people.

- 20 From the time of my appointment as Chief Justice, the tenth anniversary of which was last Sunday, to this day I relied on your experience, advice and support. I am and will always remain personally profoundly grateful to you. Furthermore, I know I speak on behalf of every judge of this Court and every judge who had the pleasure of serving on this Court during your period as President, when I express our most heartfelt of thanks for your leadership and collegiality in all of our interactions with you as a President, as a colleague and as a friend.
- 21 Your quiet self-confidence, which often appeared self-effacing without any sense of false humility, led you to abjure any need to display your considerable ability or to seek celebration for it. No doubt this occasion, and perhaps these remarks, may be a little uncomfortable for you. However, it is our need not yours to celebrate the extraordinary breadth of your achievement. We, and I, will miss you greatly.
- 22 **MS A KATZMANN, PRESIDENT, BAR ASSOCIATION OF NEW SOUTH WALES:** When rumours of your Honour's impending retirement reached the bar and before gossiping about your replacement started disbelief was quickly followed by dismay. When your Honour told your colleagues on the bench what you were proposing to do a pervasive sense of gloom enveloped them. So it is with mixed feelings that I speak this morning on behalf of the barristers of New South Wales to pay tribute to a long and

distinguished career in the service of the law and the people of New South Wales to wish your Honour well on your retirement from the bench and to send you off in the customary way.

- 23 At your swearing-in with characteristic modesty your Honour cautioned that the air at ceremonial sittings of this Court can become “thick and sweet with flattery so that it may be best not to inhale”. Someone may therefore need to alert me when your Honour starts to turn the same colour as Justice Young. Despite a relatively humble background your Honour was always destined for great things. From your first year at university your friends marked you out for appointment to the bench at the highest level. Why, as the Prime Minister might put it? First, you were a brilliant student but what was particularly noticeable was that you were judicial in your manner. You truly had a judicial temperament and in that regard at least you have not changed. You would argue without losing your temper and you would listen to the arguments of others before reaching a balanced opinion which was quite elusive to others of the same age. You invariably managed to tread the wise middle course. Indeed, it is your Honour’s wisdom and your measured approach to things that perhaps best characterises your life and work with one exception, golf, about which I will say something later.
- 24 Your Honour flirted with the solicitors branch of the profession, working for a short time at Minter Simpson, but the bar was your calling. You spent nine years at the junior bar practising largely in equity, commercial and public law before taking silk. You read with Theo Simos, later Justice Simos, on the tenth floor of Wentworth Chambers and there you remained until 1985 when you took up the position of full time Chairman of the New South Wales Law Reform Commission. It was in February 1987 when your Honour resigned to take up your appointment as the State’s Solicitor General but you continued to serve the Commission on a part-time basis afterwards.

- 25 Your Honour was a great mentor to junior barristers. Once you provided some useful advice to a young woman whom you had generously allowed to use your chambers for six weeks while you were overseas. As your Honour departed alluding to the barrister's need to continuously robe and disrobe your Honour uttered the reassuring words, "Well, if you don't make it at the bar you will have had a lot of practice as a stripper". Fortunately, this young woman went on to enjoy a stellar career at the bar but, as we all know, nothing is assured at the junior bar.
- 26 After nearly ten years as Solicitor General, including a brief legislated absence to enable you to argue against an attempt to restrain the Bishop of Goulburn from ordaining female priests, your Honour took up your present appointment. Someone should have warned the present Attorney that your Honour suffers from the ten year itch. You noted at your swearing-in ceremony that you were looking forward to working as part of a team to tackle the onerous workload of the Court of Appeal. In this respect your Honour has been an unqualified success. The Court's annual reviews show that the Court has performed well against time standards for pending case loads. Importantly, for these attributes encourage productivity, everyone from registry staff to associates, to fellow judges, praises your Honour's leadership, accessibility and willingness to assist, even at the most inconvenient of times.
- 27 Your Honour's judgments reflect your formidable intellect, your compassion and your application. Moreover, under your Honour's leadership the collegiate life of the Court has blossomed. I did say that your Honour had been an unqualified success. There is, however, one sceptic. He shall remain nameless but what he said is worth repeating. It was this: "Some say that the judge is a good administrator but I doubt it, he is too polite".
- 28 Whilst beavering away at your day job remarkably your Honour always managed to find the time for other things, for reading, for writing, for speaking, for the church, for the family and many other things beside.

Your Honour's academic writings include your co-authorship of the text, "The Australian Law of Restitution" and for many years the Probate and Succession Practice and many papers and lectures on such topics as succession, the rule of law, legal reasoning, equity, the somewhat esoteric subject of judicial humour and what one commentator has described as the interface between the law, religion and morality.

- 29 Your Honour also has an interest in legal history. You were a foundation member of the Council of the Francis Forbes Society for Australian and Legal History and currently serve as the organisation's senior vice-president. In 2005 you accepted appointment as a non-resident member of the Fiji Supreme Court and in 2005 you were appointed a member of the appellate tribunal of the Anglican Church. It is a mark of the esteem in which your Honour is held by the bar that you were invited to speak at the bench and bar dinner in 2000 and to give the prestigious Maurice Byers Lecture in 2004. In 2003 your Honour received Australia's top civil award, the Companion of the Order of Australia, for your contribution to the law and legal scholarship to the judicial system in New South Wales, to the Anglican Church and to the community. The University of Sydney recognised your multiple achievements by awarding you an Honorary Doctorate of Laws in 2005.
- 30 Notwithstanding all of this, as I mentioned earlier your Honour finds the time to play golf, a sport which your Honour took up relatively late but with all the zeal of a convert. In 2002 you captained the bench and bar versus solicitors golf tournament to its usual inglorious defeat, although I am reliably informed that there is no causal connection between your Honour's stewardship and the outcome. Perhaps this was merely a case where the risk did not come home. However, on one memorable occasion when playing against other barristers and judges in the Ken Hall Classic, named after your Honour's esteemed former clerk, your Honour did make a material contribution to a win entitling you and your partner, Dennis Wheelahan, "the odd couple", each to six months custody of the trophy that bears both your names. Your Honour is very proud of your golfing

achievements. Six months to the day you had someone call on Wheelahan who had had the trophy first to assert your rights. When a record of another of your Honour's victories appeared in the sports section of a newspaper you made sure the article was posted in a place where it was easily seen by anyone who came into your chambers.

- 31 Last year a portrait of your Honour's predecessor, Justice Michael Kirby, painted in the style of Goya, was unveiled in the President's Court. There is a blank wall immediately across from it crying out to be filled. Your Honour is the obvious subject. However, a more modern artistic style is appropriate I think. Given your Honour's many and varied activities perhaps something in the style of the Cubists would be suitable.
- 32 Your Honour is a prodigious worker and you were not averse to mucking down with the puisne judges when the need arose. One of those instances was mentioned by the Chief Justice. It was the case where your Honour's reasons were not followed in the Court of Appeal which upheld a notice of contention but where your Honour's views were preferred in the High Court. Usually your Honour's views were shared by the other members of the Court in any particular case. Not so on one memorable occasion when your Honour stood up for flexibility, dare I say modernity, in the remedies that equity could offer. On that occasion in your Honour's powerful dissent in *Harris v Digital Pulse Pty Limited* your Honour sanctioned an award of exemplary damages in an equity suit, unprecedented in this country, describing it as "legitimate progeny sired by judicial method from the stock of the common law of Australia" which, as your Honour pointed out, included the equitable line yet to some, steeped in the old traditions, drawing on a remedy developed in tort law to redress an equitable wrong was a heresy, perhaps just as shocking as the ordination of women priests.
- 33 My favourite judgment of your Honour's, however, is not any of those that have been mentioned. It is a judgment in a common law suit. The case concerned a claim in contract and tort brought by a quantity surveyor

against four joint venturers who were engaged in the development of land situated in the western suburbs of Sydney. Justice Meagher delivered the leading judgment. His Honour described the parties in the following way: “The appellant in this case is a quantity surveyor against whom his Honour, Judge Rolfe, awarded a verdict of some \$665,025 in favour of the four respondents who together constituted a joint venture engaged in the development of certain lands said to be situated at Bossley Park, wherever that is”. Your Honour’s judgment, as usual, was eloquent. However, it lacked your Honour’s customary restraint. It began:

“I have had the benefit of reading in draft the reasons of Justice Meagher. I also have the benefit of having access to a street directory. Accordingly, I do not share his Honour’s customary doubts about the location of well known Sydney suburbs lying to the west of Darling Point which sit cheek by jowl with his Honour’s customary lack of doubts about most other matters. A useful resource for those who need to locate Bossley Park is www.travelmate.dot.com.au. By clicking on Mapmaker one can find easy ways of getting from, say, Darling Point to that suburb.”

The judgment also contains the details of the link to that map.

- 34 “Otherwise”, your Honour continued, “I agree with Justice Meagher in the dismissal of this appeal substantially for the reasons he gives”.
- 35 Your Honour has been in preparation for this day for some time. At the 2000 bench and bar dinner your Honour adverted to the Court’s internal pre-retirement classes. You told us that the topics on offer included subjects as diverse as the impact of Latin on the interpretative theories of Derrida concerning good faith, car spotting, insurance of art collections, Thomas Becket’s influence on causation theory and mesothelioma cases, why God waited until the start of the third millennium before revealing his truth exclusively to Sydney Anglicans, whether the death of all men would increase the prospects of female ordination in the Diocese of Sydney and how to get more cars on the Balmain Peninsula, wherever that is.

36 Your Honour has made an enormous contribution to the law and to the State as an advocate, an academic, a writer, a law reformer and a judge. Your Honour's special contribution, however, I venture to suggest, lies in your personal qualities, notably your unfailing courtesy and your even temper. Your Honour is universally regarded as a good man, a man of compassion and understanding, a man with regard for each individual. Only the other day I happened to look at some remarks of Sir Robert McGarry which seem apposite, especially as I understand that your Honour is keen to follow in Sir Robert's footsteps by producing your own Antipodean version of his Miscellany at Law. Sir Robert used to tell his students that the most important person in the court room is the litigant who is going to lose. Later on he explained:

"Naturally, he will usually not know this until the case is at an end but when the end comes will he go away feeling that he has had a fair run and a full hearing? One of the important duties of the courts is to send away defeated litigants who feel no justifiable sense of injustice in the judicial process. Justice in full takes time but often it is time well spent."

37 By this and many other measures your Honour has been a good judge. You have given so much of your life to others. It is about time you started to look out for yourself. On behalf of the Bar of New South Wales I wish you every happiness in this next journey and for my own part as a graduate of the University of New South Wales I am pleased that you have chosen to spend some time there.

38 **MR H MACKEN, ACTING PRESIDENT, LAW SOCIETY OF NEW SOUTH WALES:** It is indeed a great privilege and a pleasure to add my remarks to the growing valedictions that have gone before. It is a little known fact that my great aunt, Marjorie Macken, married your Honour's uncle, Harold Mason, at a time that pre-dates the great depression so I speak today not so much the unworthy servant of 22,000 solicitors but rather as a long lost brother. Brilliance is a family trait. Evidence of your Honour's intellectual brilliance has been highlighted by a former tippy who swore that your rather electrically charged hairstyle was the result of your

brain constantly emitting high voltage currents. In fact, he wondered if in the throes of deep thought your Honour would indeed electrocute yourself every time you scratched your head, a head that could charge a mobile phone, now that's useful.

- 39 The task of preparing for this speech today was not so much anticipating that the preceding speakers would poach the highlights of your Honour's illustrious career, which of course they did, but more about determining what aspects of your career I should focus upon given the abundance of anecdotal and published material both by your Honour and about your Honour. Born in Scotland, your Honour grew up in Concord West with your parents, Ted and Margaret, and your younger sister, Louise. Your Honour attended the local primary school and then won a scholarship to the Kings School where you subsequently became dux of that school. From all accounts that scholarship was hard won, as your Honour was called back to complete the interview for Kings because you hadn't properly met all the board members. The story goes that you were missing a sock when you hurriedly presented yourself yet again. As you have recounted on several occasions, you will always be extremely grateful to the men who waited for a little boy. This generosity of time has become a trademark of your Honour's service ever since.
- 40 I am in the dark as to just where or when your Honour developed a passion for the law as neither your late father, Ted, a merchant seaman, nor your mother, Margaret, would appear to have paved the way. Whether it was your Honour's intellectual drive, a calling to service or simply a desire for classy company, whatever the reason the world is a far better place for your having chosen to do law. You graduated from the University of Sydney with a Bachelor of Arts degree and a Bachelor of Laws with first class honours. You then completed a Master of Laws at the University of London. You were admitted as a solicitor in 1970. Your Honour's time as a solicitor was sadly short-lived as you were called to the bar in 1972. In the late seventies when your Honour was in private practice you invited your current associate, Meg Orr, to fill in as a secretary on a three month

trial; twenty-nine years later this remarkable woman is still reputed to be on trial and perhaps could be described as long suffering rather than long serving although time in your company could never be deemed suffering?

41 Describing your Honour as a real people person Meg has obviously relished your wonderful sense of humour, your joy in mentoring others and your demonstrable kindness and care. She remarked that never in her twenty-nine years had she witnessed a litigant upset as your Honour always listened attentively and handled them so well that they usually ended up thanking you when they lost. On one occasion a self-represented litigant who had sued a council over a development issue and lost her appeal at the Full Bench in the Land and Environment Court brought her files in milk crates to the Court of Appeal and insisted that she was going 'all the way to the High Court'. Rather than take the easy option of just asking her to leave your Honour took the time to gently explain that her arguments were unlikely to fall within the grounds of appeal required for special leave. It turns out on this occasion you were correct.

42 Further insights into your Honour's character have been provided by your first tipstaff as President of the New South Wales Court of Appeal, Lachlan Wolfers. Upon his farewell Lachlan included a note of thanks to your Honour and a list of all the cases he believed had been wrongly decided. He says:

"It was with great delight that I received over the ensuing years at somewhat regular intervals copies of High Court judgments in which a few of your judgments were overturned, each time marked with a simple 'with compliments' slip and a note saying that I might find the enclosed interesting reading. As time passes I suspect the number of cases where I recall this happened will increase, not in a dissimilar way to how your golfing prowess improves after the nineteenth tee"

A very unkind remark considering your recent form at Killara.

43 On a more serious note your Honour's influence on Lachlan's professional career has been immense. He told us, "First and foremost you taught me

to love the law. Secondly, you taught me that happiness is not drawn from material possessions and how success may be achieved through hard work, dedication to one's chosen field and most of all respect for others." This latter sentiment was the focus of your 2007 paper to the JCA conference entitled "Throwing Stones, a Cost Benefit Analysis of Judges being offensive to each other".

44 Philip Kimpton, who unfortunately didn't heed your Honour's caution and became an international lawyer, was your Honour's tipstaff in 2002. He highlighted to us your enjoyment of the quirky bits of legal trivia, the older the better, and your delight in finding antiquated words to insert in judgments such as "portmanteau" used in your decision in *Victims Compensation Fund v Brown* in 2002. I looked it up and couldn't find it anywhere but apparently it's there.

45 This particular case perhaps made it on a Lachlan Wolfer's subsequent hit list.

46 Every person in my office contacted with regard to today's ceremony spoke about you with the utmost professional respect and admiration as a friend, a mentor and as an inspiration. One of the hallmarks of your Honour's career has been your steadfast service and commitment to your staff, the profession and people. A devoted husband to Anne and father to David and Prya your family has always been your highest priority. As a consequence your Honour built a career around maintaining regular hours, forsaking life as a QC at the bar for the chairmanship of the New South Wales Law Reform Commission prior to your time on the bench. Your Honour would always make it home for the family dinner even if that meant leaving midway through a meeting regardless of the bewildered faces you left behind. It seems, however, that as a bit of a night owl your Honour never really adjusted to Anne's penchant for being an early riser, a trait that became particularly apparent when in the course of one of your Honour's many official acting duties you were obliged to attend a 4 am dawn service. Your Honour got there but I'm told it was not a good look.

47 From an early age your Honour was a believer and strongly guided by Christian morals and ideals, a calling that has underpinned your whole approach to life and your way of living. Attending Sunday school at Holy Trinity in Concord West your Honour went on to lead the parish youth fellowship and like Henry Venn, the eighteenth century founder of the influential evangelical Clapham sect within the Anglican Church, your Honour found particular comfort in bible study groups. As a member of the Sydney Synod from 1975 to 2001, as has been mentioned, your Honour was very vocal, particularly championing the entitlement of women to be ordained as priests and you would be no doubt delighted with the ordination of Archdeacon K Goldsworthy this month, the first woman in Australia to become a bishop.

48 The awarding of the Companion of the Order of Australia in 2003 is a mark of the man that you are. At the time Bishop Glenn Davies of the Sydney Diocese expressed delight with your commendation and was reported as saying your Honour was an outstanding Christian who made a great contribution to the Anglican Church, nice words from Bishop Glenn Davies. Those remarks have been echoed by your Honour's tippy of 1999, Penny Hood, who has described you as a man of integrity and courage. She says:

“We hosted lunch meetings for the movement of the ordination of women in chambers and while he received a lot of opposition within the denomination for his stance his persistence was admirable and is a testament to his strength of conviction and his beliefs.”

49 Penny's following accolades encapsulate many of the virtues we've acknowledged here today. She's described your Honour as a dedicated, diligent, funny, patient, humble, courageous, warm, intelligent family minded Christian man. Your Honour has maintained close links with the circle of friends you made during your university days including Supreme Court Judges George Palmer and Peter Hall, recently retired College of

Law principal lecturer Les Handler and the co-author of Handler and Mason Succession Law and Practice in New South Wales, and solicitor Brian Hamer, all of whom have had the highest praise and regard for your Honour both as a friend and a colleague.

50 I know that your mother, Margaret, is extremely proud of your Honour's achievements and has kept all your commissions, well, apart from those that you gave away to your tipstaff. While your children, David and Prya, have not followed your Honour's legal inclinations you should be looking forward to sumptuous feasts or at least practice banquets in retirement now that Prya has become an apprentice chef although perhaps not. I use the word 'retirement' advisedly as by all accounts your Honour will be perhaps busier in retirement than on the bench. I understand you've been appointed a visiting professor at the University of New South Wales and you'll be doing some teaching and finishing for the Australian Miscellany of Law in conjunction with former Federal Court Judge Leslie Katz. Your Honour's work as an appellant judge in this Court has been erudite, perceptive, intellectually rigorous and critical to the enhancing of the public perception of justice in New South Wales. It's also been a profound sacrifice on your part. A man who is gregarious and sociable with a desire to engage with others it may have been something of a lonely and isolated existence.

51 Your calling to the ranks of academia and the imparting of knowledge to those around you will provide a tremendous outlet for your charm, grace, intellect and your highly developed social sensitivities. It is clearly a loss for the legal profession but there is no doubt that there is a profound gain for those who are blessed enough to come in contact with you in your future pursuits. You are one of the most wonderful people who have graced these rooms, you will be sorely missed. We owe our deep-seated thanks from the solicitors of New South Wales and we wish you all the very best for your future callings. On behalf of the Law Society of New South Wales I wish to convey my best wishes to your Honour for a

fulfilling, rewarding and joyous career change fully sustained by your faith, family and friends.

- 52 **MASON P:** Thank you, Chief Justice, Ms Katzmann and Mr Macken for your most kind remarks. Only my mother will have failed to detect the exaggerations. I am honoured by the presence of so many friends inside and outside the law who have walked with me through the past eleven years of my career as a judge, many of you for much longer. It is a special pleasure to acknowledge the Presidents of the Courts of Appeal of Queensland, Victoria and Western Australia. I thank you for your support and friendship as we have toiled in our appointed roles as the enforcers of the High Court's changing orthodoxies. You have had the opportunity last night of meeting my most worthy successor, James Allsop.
- 53 The pressures of intermediate appellate litigation in State courts have increased markedly over the decade or so of my term of office. Statutory intricacies have complicated standard processes such as the assessment of damages. They are provoking a spate of judicial review proceedings that seek to overcome caps and restrictions. The sentencing of offenders is now much more than the so-called instinctive synthesis it once was. Many appeals are disposed of only to be prolonged by sometimes complex costs disputes flowing from unaccepted settlement offers. Self-represented litigants, including those whom the Americans call "frequent filers", press constantly for the re-agitation of their usually doomed causes.
- 54 Last year the New South Wales Court of Appeal delivered 377 judgments as well as disposing of a large number of leave applications. The Court of Criminal Appeal delivered 373 judgments. The Judges of Appeal are assisted occasionally by judges from the trial divisions in civil matters and usually sit with two members of the Common Law Division in criminal matters. Nevertheless, this is remarkable productivity from a small group of very hard working Judges of Appeal, many of whom have already outlasted my judicial longevity.

55 My successive roles as a solicitor, a barrister at the private and then the public Bar, in law reform and as an appellate judge in both secular and church courts have given me wonderful opportunities to observe both the constancy and change of the law. As many of you know, I have written a good deal on the topic of judicial method. Even more than restitution it is the closest to an intellectual passion for me. All judges have passions, including black letter judges, not that I would use that label for myself. It is in this context of judicial method that I wish to take this last opportunity to voice some concerns about the unduly inward focus of the Australian legal system in the early twenty-first century.

56 On the occasion of his swearing-in as Chief Justice in 1987, Sir Anthony Mason said:

“Our courts have an obligation to shape principles of law that are suited to the conditions and circumstances of Australian society and lead to decisions that are just and fair.” [Please note the plural “courts.”]

He continued:

“In stating the common law for Australia we [and here he was referring to the High Court itself] now place closer attention to the common law as is reflected in the judicial decisions and academic writings of other countries”.

57 In 2007, when exercising its constitutional functions of correcting error and declaring the common law, the High Court signalled a departure from these principles.

58 The topic does not matter but the profound shift in the rules of judicial engagement does in my opinion. New and now binding rules of precedent that were ushered in on this occasion declare that the earlier decision of any intermediate appellate court in Australia is now generally binding on all others. So, too, are the “seriously considered dicta” of a majority of the High Court in any case, regardless of its age. These rules and the High Court’s response to this Court of Appeal’s erroneous though genuine

attempt to develop legal principle go well beyond giving effect to the principle of a unitary common law of Australia. They have been read throughout the country as the assertion of a High Court monopoly in the essential developmental aspect of the common law.

59 In the same appeal the High Court resolved an issue of controversial legal principle with the haughty declaration that it did not propose to examine a recently published critique on point emanating from a current English Law Lord or to examine other legal writing which “might offer support” for the legal proposition suggested by the Court of Appeal that the High Court proceeded to reject in categorical terms. In combination, these discouraging rules of process for inferior courts and this adopted methodology for the High Court itself will, in my opinion, have the effect of shutting off much of the oxygen of fresh ideas that would otherwise compete for acceptance in the free market of Australian jurisprudence. In my respectful opinion, decision-making by these blinkered methods will be stunted unnecessarily, whether it proceeds in the particular to the affirmation of older rules of law or to their principled development. If lower courts are excluded from venturing contributions that may push the odd envelope, then the law will be poorer for it. In short, a plea for intermediate courts of appeal to be kept in the loop.

60 I wish publicly to thank Chief Justice Gleeson and Chief Justice Spigelman with whom I have been most privileged to serve on this Court. I thank all of my fellow members of the Supreme Court and the judges of other State courts for their co-operation in the administration of justice in this State. To my colleagues on the Court of Appeal I shall miss the stimulation of your intellectual intercourse, your personal support, your differing senses of fun and above all your friendship that will endure today’s separation. Jim, Margaret, Roger, the two Davids, Murray, Ruth, John, Joe, Virginia and the two Peters, thank you very much.

61 A court is much more than it judges. Without the assistance of our associates, tipstaves, registrars, registry and administrative staff and court

officers we judges would be quite incapable of administering justice on any terms. I wish to record my deep appreciation for the work of my tipstaves and researchers, especially those currently in office, Danielle Gatehouse and Myra Nikolich, who have done so much to help me in the press of these final months in office. Above all, I thank my secretary, associate and friend, Meg Orr, for her twenty-nine years of unstinting service to me in my various legal endeavours, for her own services to the administration of justice in this State and for her personal support in wider, often painful processes to secure or administer justice within the Anglican Church.

- 62 My family is the most important thing in my life. My mother and my late father made considerable sacrifices to bring me to a new land and to provide me with a good education. My children, David and Prya, give me great satisfaction and joy as I watch them maturing as independent adults and struggling to cope with their difficult parents. Above all, I wish to thank my dear wife, Anne, for the constant warmth and excitement she brings to my life, for enabling my career to flourish often at the expense of her own, and for her deep senses of compassion and practical concern for others.
- 63 Today I step out of public office and into what I know will be a stimulating new phase of my life. My reasons for retiring as a judge at exactly this stage of my life are complex. Like much involving causation in the law they are incapable of exhaustive explication. But I know that the time is now right when I feel the energy to do other things and before what would be for me a judicial sub-prime onset. I almost became a teacher rather than a lawyer and I am relishing the idea of expounding the true impact of the Judicature Act to minds that are eager and open.
- 64 There is much that goes on behind the scenes in this building that I will particularly miss including communal lunches with colleagues, a Judges' Bible study group led by a distinguished theologian and the judges' yoga class. But for everything there is a season. I am happy to be moving on. Thank you again for the honour you have done me today.

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- i *Fostif Pty Ltd v Campbells Cash and Carry Pty Ltd* [2005] NSWCA 83; (2005) 63 NSWLR 203.
 - ii *Paliflex Pty Ltd v Chief Commissioner of State Revenue (NSW)* [2003] HCA 65; (2003) 219 CLR 325.
 - iii *Harrington v Stephens* [2004] NSWCA 93; (2004) 59 NSWLR 694.
 - iv *Harris v Digital Pulse Pty Ltd* [2003] NSWCA 10; (2003) 56 NSWLR 298.
 - v *Kavanagh v Akhtar* (1998) 45 NSWLR 588; *Morgan v Tame* [2000] NSWCA 121; (2000) 49 NSWLR 21.
 - vi *Raguz v Sullivan* [2000] NSWCA 240; (2000) 50 NSWLR 236.
 - vii *Kavalee v Burbidge* (1998) 43 NSWLR 422.
 - viii *Cockburn v GIO Finance Ltd (No 2)* [2001] NSWCA 177; (2001) 51 NSWLR 624.
 - ix *TNT Australia Pty Ltd v Christie* [2003] NSWCA 47; (2003) 65 NSWLR 1.
 - x *Jabetin Pty Ltd v Liquor Administration Board* [2005] NSWCA 92; (2005) 63 NSWLR 602.
 - xi *CGU Workers Compensation (NSW) Ltd v Garcia* [2007] NSWCA 193; [2007] 14 ANZ Ins Cas 61-746.
 - xii *Adler v Director of Public Prosecutions (Cth)* [2004] NSWCCA 352; (2004) 149 A Crim R 378.
 - xiii *Tillman v Attorney General (NSW)* [2007] NSWCA 327.
 - xiv *Akron Securities v Iliffe* (1997) 41 NSWLR 353.
 - xv See *United States v McKinney* 919 F 2d 405 (7th Cir 1990) at 421 per Posner J.
 - xvi *Ibid* p423.

2008

RECURRING ISSUES
IN THE
NEW SOUTH WALES COURT OF APPEAL

DISTRICT COURT JUDGES' CONFERENCE

25 MARCH 2008

(NEW MATERIAL INDICATED BY [REDACTED])

JUSTICE KEITH MASON AC
PRESIDENT, COURT OF APPEAL

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AGENCY

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Sweeney v Boylan Nominees Pty Ltd (2006) 226 CLR 161 (no vicarious liability for negligence of independent contractor)

Nationwide News Pty Ltd v Naidu & Anor [2007] NSWCA 377; (2007) Aust Torts Rep 81-928 (agent's knowledge, when attributed to principal [40])

CAUSATION [Now subject to **Civil Liability Act** Part 1A, Div 3]

General

Betts v Wittingslowe (1945) 71 CLR 637 at 649 (“... the breach of duty coupled with an accident of the kind that might thereby be caused is enough to justify an inference in the absence of any sufficient reason to the contrary that in fact the accident did occur owing to the act or omission amounting to the breach of [statutory] duty ...“.)

Chappel v Hart (1998) 195 CLR 232 at 239, 247-8, 257, 273 (shifting evidentiary onus - breach)

Naxakis v Western General Hospital (1999) 197 CLR 269 at 279, 296, 312

Allianz Australia Insurance Ltd v GSF Australia Pty Ltd [2005] HCA 26; (2005) 221 CLR 568 (inanimate objects don't generally cause accidents ([35])

Laybutt v Glover Gibbs [2005] HCA 56; (2005) 79 ALJR 1808
(P must show that reasonable care would have avoided or reduced extent of injury)

Travel Compensation Fund v Tambree [2005] HCA 69; (2005) 224 CLR 627
(causation decisions commonly involve normative considerations, but care needed in discerning relevant policy)

Bendix Mintex Pty Ltd v Barnes (1997) 42 NSWLR 307

State of NSW v Broune [2000] NSWCA 3 (unlit stairway - adult education class at high school – open to infer probable link to jarring as last step missed)

Muller v Lalic [2000] NSWCA 50 (chain of causation not necessarily broken by act of plaintiff or third party which constitutes more immediate cause (**Medlin v SGIC**))

AMP v RTA [2001] NSWCA 186, ATR ¶¶81-619 (suicide as result of depression stemming from adverse reaction to cross-examination – general discussion about causation)

TC v State of NSW [2001] NSWCA 380 (negligence by omission – causation – onus of proof – shift of evidentiary onus)

Concrite Pty Ltd v Rogerson [2002] NSWCA 310 (multiple causes contributing to injuries – evidentiary and persuasive onus contrasted)

Kingsgrove RSL v Spasevski [2002] NSWCA 342 (proof of causation – employer's duty of care in relation to criminal assaults)

Mahony v Watson [2003] NSWCA 259 (causation issues where successive accidents – impact of vulnerability stemming from earlier accident)

Southern Area Health Service v Brown [2003] NSWCA 369 (criminal conduct of nurse towards psychiatric patient – failure to take care to guard against foreseen risk within scope of duty of care)

Nambucca Shire Council v Connor [2004] NSWCA 13 (duty to warn – causation subjective – whether plaintiff must invariably give evidence of what would have been done)

Forbes v Selleys Pty Ltd [2004] NSWCA 149 (possible cause not probable cause – onus and causation discussed – evidentiary burden of proof in some cases – **Betts v Whittingslowe**)

Mazzaferro & Riverstone Pty Ltd v Vozzo [2004] NSWCA 271 (when evidence of arithmetical probability can sustain causation finding on balance of probabilities)

Commonwealth of Australia v Elliott [2004] NSWCA 360 (risk must come home – injury within area of foreseeable risk)

Rufo v Hosking [2004] NSWCA 391 (**Fairchild** approach not available in Australia – loss of less than 50% chance in medical malpractice cases)

Lasermax Engineering Pty Limited v QBE Insurance (Australia) Ltd & 2 Ors [2005] NSWCA 66 (causation in insurance – proximate not remote)

Graham v Remo Constructions [2005] NSWCA 225 (**Betts v Whittingslow** discussed)

Abigroup Contractors Pty Limited v Sydney Catchment Authority (No 3) [2006] NSWCA 282; (2006) 67 NSWLR 341 (trade practices claims)

TAB Limited v Beaman [2006] NSWCA 345 (armed robbery at TAB agency)

Sarkis v Summitt Broadway Pty Ltd t/as Sydney City Mitsubishi [2006] NSWCA 358; [2006] Aust Torts Rep 81-868 (suicide – whether chain of causation broken)

Scientific disputes

McDonald v Girkaid [2004] NSWCA 297

Warning signs

Hoyts Pty Ltd v Burns [2003] HCA 61; (2003) 77 ALJR 1934

Roads and Traffic Authority (NSW) v Dederer [2007] HCA 42; 81 ALJR 1773 (bridge on public road – RTA – design on signs prohibiting diving – “obviousness”)

Pledge v RTA [2004] HCA 13; (2004) 78 ALJR 572 at [18], [34], [44]

University of Wollongong v Mitchell [2003] NSWCA 91

CIVIL LIABILITY ACT 2002

Causation (s5D)

Graham v Hall & 1 Or [2006] NSWCA 208; (2006) 67 NSWLR 135 (JP's attestation of forged signature – no immunity under s135 Justices Act 1902 – whether attestation “maliciously and without reasonable and probable cause” within meaning of s135 – apportionment of liability.

“Claim”

State of NSW v Mastronardi [2003] NSWCA 72 (amendment of statement of claim after commencement of Act – definition of “claim” – new head of damages)

Contributory negligence

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Dangerous recreational activity (s5K)

Fallas v Moulas [2005] NSWCA 32; (2006) 65 NSWLR 418 (meaning of “significant” - whether P's activities to be segmented – “obvious risk” – accidental discharge of handgun during kangaroo “spotlighting”)

Falvo v Australian Oztag Sports Association & Anor [2006] NSWCA 17; [2006] Aust Torts Rep 81-831 (s5K to be read as a whole – meaning explained – oztag not a d.r.a.)

Domestic assistance (s15(3))

RTA v McGregor [2005] NSWCA 388 (**Geoghan v D'Aubert** [2002] NSWCA 260 (MAA s72(2) followed)

Factors to be considered (s5B)

Waverley Council v Ferreira [2005] NSWCA 418 (relationship between s5B and **Shirt** – propensity of boys to be mischievous)

Intoxication (s49)

Vale v Eggins [2006] NSWCA 348; [2006] Aust Torts Rep 81-869

“Obvious risk”, meaning of

See also **NEGLIGENCE, General – Obvious risks**

C G Maloney Pty Ltd v Hutton-Potts & Anor [2006] NSWCA 136 (whether “obvious risk” and its consequences at general law have been altered by the **Civil Liability Act** – recently polished floor in hotel)

Section 13 (economic loss) (see also Motor Accidents Act, s126)

Macarther Districts Motor Cycle Sportsman Inc v Ardizzone [2004] NSWCA 145 (s13: per Hodgson JA “the events” in s13(2) must correspond to future economic situation of plaintiff resulting from injury, not those corresponding to his future situation but for the injury) – doubted in **Penrith v Parks**

Penrith City Council v Parks [2004] NSWCA 201 (s13 discussed: buffer award not precluded)

Nominal Defendant v Lane [2004] NSWCA 405 (buffer award available, but only in proper cases – upward and downward adjustments available)

Section 15 (non-economic loss)

Woolworths Ltd v Lawler [2004] NSWCA 209 (s15: “solely because of the injury to which the damages relate”)

Owners – SP156 v Gray [2004] NSWCA 304 (s15: damages for non-economic loss)

Section 45 (roads authorities)

See **HIGHWAYS AND FOOTPATHS**

Transitional matters

Origin Energy LPG Ltd & Ors v Bestcare Foods Ltd & Anor [2007] NSWCA 321 (Regulation excluding application of Part 4 *Civil Liability Act 2002*, if liability arose before 26 July 2004, is valid)

CONTRACT

Accord and satisfaction

El-Mir v Risk [2005] NSWCA 215

Certainty

Ormwave Pty Limited & Anor v Smith [2007] NSWCA 210 (parties, not court, decide importance of terms)

Construction and formation

Brambles Holdings Ltd v Bathurst City Council [2001] NSWCA 61, 53 NSWLR 153 at [24]-[27] (relevance of pre- and post- contractual conduct to contract formation and meaning)

Magill v National Australia Bank [2001] NSWCA 221 at [50]-[51] (post contractual dealings irrelevant to meaning of contract as distinct from issue whether contract formed)

Optus Vision Pty Ltd v Australian Rugby Football League Ltd [2004] NSWCA 61 (construction of commercial documents)

Peppers Hotel Management Pty Ltd v Hotel Capital Partners Ltd [2004] NSWCA 114 (principles of construction of commercial agreements discussed at [65]ff, [121]ff)

Wyllie v Tarrison Pty Ltd [2007] NSWCA 184 (commercial agreement)

Ormwave Pty Limited & Anor v Smith [2007] NSWCA 210 (precise identity of offer and acceptance not always essential)

Gardiner v Agricultural And Rural Finance Pty Ltd [2007] NSWCA 235 (review by CJ of principles at [7] ff)

Waterways Authority of New South Wales v Coal & Allied (Operations) Pty Limited [2007] NSWCA 276 (commercial lease)

Kooee Communications Pty Ltd & Anor v Primus Telecommunications Pty Ltd [2008] NSWCA 5 ("commercial reality" does not justify rewriting clear words – when extrinsic evidence admissible)

Custom, term implied by

Uszok v Henley Properties (NSW) Pty Ltd [2007] NSWCA 31 at [22]-[23]

Damages

Brewarrina SC v Beckhaus Civil Pty Ltd [2005] NSWCA 248 (damages for building rectification costs)

Scott Carver Pty Ltd v SAS Trustees [2005] NSWCA 462 (ditto – *Bellgrove* discussed)

Bak v Glenleigh Homes Pty Ltd [2006] NSWCA 10 (mitigation – application of *Malec*)

Castle Constructions Pty Limited v Fekala Pty Limited & Ors [2006] NSWCA 133; (2006) 65 NSWLR 648 (causation – remoteness – loss of bargain damages – contract for sale of land)

Stuart Pty Limited v Condor Commercial Insulation Pty Limited [2006] NSWCA 334 (second limb of *Hadley v Baxendale*)

Penrith Whitewater Stadium Ltd & Anor v Lesvos Pty Ltd & Anor [2007] NSWCA 176; [2007] NSW ConvR 56-189 (part performance does not lead to damages of contract unenforceable under s54A of Conveyancing Act) (slr)

Westpoint Management Ltd v Chocolate Factory Apartments Ltd; Chocolate Factory Apartments v Westpoint Finance & Ors [2007] NSWCA 253 (building contract – when damages to be assessed according to rectification measure)

Employment (employee's implied obligation of good faith)

Del Casale & Ors v Artedomus (Aust) Pty Limited [2007] NSWCA 172; 73 IPR 326

Indemnity clause (construction)

Andar Transport Pty Ltd v Brambles (2004) 217 CLR 424

F & D Normoyle v Transfield [2005] NSWCA 193

BI (Contracting) Pty Limited v AW Boulderstone Holdings Pty Limited [2007] NSWCA 173

Intention to contract

Thompson v White [2006] NSWCA 350; [2007] NSW ConvR 56-171

Objective theory: Objective circumstances determine existence and terms of contract

Ermogenous v Greek Orthodox Community of SA Inc [2002] HCA 8, 76 ALJR 465 at [25] (intention to be bound determined objectively)

Pobjie Agencies v Vinidex Tubemakers [2000] NSWCA 115 (objective evidence governs unless proof that all parties intended subjectively not to enter into contract (cf **Air Great Lakes Pty Ltd v KS Easter Pty Ltd** (1985) 2 NSWLR 309) – contract may be inferred from conduct)

Brambles Holdings Ltd (supra)

Randwick City Council v Nancor Trading Co Pty Ltd [2002] NSWCA 108 (intention to be bound to be determined objectively)

Ryder v Frohlich [2004] NSWCA 472

Party, identifying

Dennis Pethybridge v Stedikas Holdings Pty Ltd [2007] NSWCA 154 (was it the company or its principal? – registered business name)

Post-contractual communications (when relevant)

Magill v National Australia Bank Ltd [2001] NSWCA 221 at [51]

Abigroup Contractors Pty Ltd v ABB Service Pty Ltd [2004] NSWCA 181 at [63]

Dennis Pethybridge v Stedikas Holdings Pty Ltd [2007] NSWCA 154 (whether permissible to identify parties: see at [59])

Rectification

Ryledar Pty Ltd & Anor v Euphoric Pty Ltd [2007] NSWCA 65

Repudiation and abandonment

Ryder v Frohlich (supra) (test of conduct constituting repudiation – extent of communication for election to termination – abandonment)

Sanpine Pty Ltd v Koombahtoo Local Aboriginal Land Council & Ors [2006] NSWCA 291 (tests for repudiatory conduct: see [100]ff)

Duffy Bros Fruit Market (Campbelltown) Pty Ltd v Gumland Property Holdings Pty Ltd; Gumland Property Holdings Pty Ltd v Pisciueneri & Anor [2007] NSWCA 7; [2007] ANZ ConvR 153 (repudiatory conduct not decided by reference to subjective intention – principles discussed at [195])

Signed agreement

Equuscorp Pty Ltd v Glengallen Investments [2004] HCA 55; (2004) 218 CLR 471 (*L'Estrange v Graucob* is good law – party bound by signed contract unless *non est factum* or rectification)

Statute of Frauds (Conveyancing Act 1919, s54A)

Penrith Whitewater Stadium Ltd & Anor v Lesvos Pty Ltd & Anor [2007] NSWCA 176; [2007] NSW ConvR 56-189 (no damages for breach of unsigned agreement for lease even if part performance had occurred) (special leave refused 14 December 2007)

COSTS

Bullock/Sanderson orders (generally unsuccessful D must have contributed to P's decision to sue Ds in alternative)

Gould v Vaggelas (1985) 157 CLR 215 at 229

RTA v Snape [1999] NSWCA 47

Almeida v Universal Dye Works Pty Ltd & Ors (No.2)
[2001] NSWCA 156 at [32]ff

Patrick Stevedores No 1 Pty Ltd v Kilkelly [2004] NSWCA 237 (separate proceedings in relation to separate accidents)

Guides Australia Inc v McMartin [2006] NSWCA 20; [2006] Aust Torts Rep 81-828

Toll Pty Ltd v Dakic [2006] NSWCA 58 at [139]

Nominal Defendant v Swift; Wollondilly Shire Council v Swift [2007] NSWCA 56

Coombes v Roads and Traffic Authority & Ors (No 2) [2007] NSWCA 70

PricewaterhouseCoopers Legal v Perpetual Trustees Victoria Limited & 3 Ors [2007] NSWCA 271; [2008] NSW ConvR 56-197

Calderbank, Evidence Act, s131(2)(h)

SMEC Testing Services Pty Ltd v Campbelltown City Council [2000] NSWCA 323 (all circumstances must be considered – **Calderbank** offer relevant but not determinative)

Rolls Royce Industrial Power (Pacific) Ltd v James Hardie & Co [2001] NSWCA 461 (filing of cross claim after Calderbank Letter, costs of contribution if successful on X-claim)

Cook v Hawes [2002] NSWCA 120 (even if offer contravenes Pt 39A r25(2) it may be relevant as to costs under general law)

CBA Investments Ltd v Northern Star Ltd (No 2) [2002] NSWCA 146 (all circumstances to be considered – reasonableness of offeree's conduct relevant)

Jones v Bradley (No 2) [2003] NSWCA 258 (**SMEC** principle endorsed)

Leichhardt MC v Green [2004] NSWCA 341 (**Calderbank** and Rules regime compared – whether offer by defendant for judgment in its favour with no order as to costs can be a genuine offer of compromise)

Russell v Edwards (No 2) [2006] NSWCA 52 (no automatic entitlement to indemnity costs in **Calderbank** situations)

The Anderson Group Pty Ltd v Tynan Motors Pty Ltd [No 2] [2006] NSWCA 120; (2006) 67 NSWLR 706 (real and genuine element of compromise required)

Elite Protective Personnel Pty Ltd & Anor v Salmon [2007] NSWCA 322

Compensatory

Allplastics Engineering v Dornoch Ltd [2006] NSWCA 33 (s148B does not permit costs discretion to be used to punish)

Costs in Criminal Cases Act 1967

Mordaunt v Director of Public Prosecutions & Anor [2007] NSWCA 121; (2007) 171 ACrimR 510 (principles discussed)

Cross-claims

Furber v Stacey [2005] NSWCA 242 (cross-claimant fails because plaintiff's claim against cross-claimant fails – whether plaintiff should pay cross-defendant's costs)

Follow event

Hooker v Gilling (No 2) [2007] NSWCA 214 (when court may depart from general rule that costs follow event - what is "success"?)

Indemnity costs compared to solicitor and client costs

Bowras v Grandelis [2005] NSWCA 463 (DCR Pt 39A r25(4))

Indemnity costs, when ordered

See also *Calderbank* (supra)

Arian v Nguyen [2001] NSWCA 5

LMI Australia Pty Ltd v Boulderstone [2003] NSWCA 74 (departure only when conduct plainly unreasonable – *Nobrega* test approved)

Leichhardt MC v Green [2004] NSWCA 341

Waste Recycling Service v Meafou [2004] NSWCA 462 (offer must be made to party in question before indemnity costs can be awarded against it)

Sydney City Council v Geflick & Ors [2006] NSWCA 280

San v Rumble (No 2) [2007] NSWCA 259; (2007) 48 MVR 492 (when appropriate to award in relation to motor accident when CARS assessment challenged – impact of MACA)

Elite Protective Personnel Pty Ltd & Anor v Salmon [2007] NSWCA 322 (whether *Calderbank* offer inclusive of costs can be the basis of an award for indemnity costs)

Indemnity principle (party must truly have incurred costs)

Wentworth v Rogers; Wentworth & Russo v Rogers [2006] NSWCA 145; (2006) 66 NSWLR 474 (where party not liable to pay solicitor until successful recovery of costs)

Interlocutory proceedings

His Eminence Metropolitan Petar, Diocesan Bishop of the Macedonian Orthodox Church of Australia and New Zealand & Anor v The

Macedonian Orthodox Community Church St Petka Incorporated & Anor (No 2) [2007] NSWCA 142 (principles governing costs of interlocutory proceedings)

Leave to withdraw settlement offer (when granted)

Gordon v Berowra Holdings Pty Ltd [2004] NSWCA 27, [2006] HCA 32

Legal Professional Act cap

Boylan Nominees Pty Ltd v Williams Refrigeration Australia Pty Ltd [2006] NSWCA 100; (2006) 65 NSWLR 717 (verdict for defendant is not a (nil) amount recovered – cross claim for contribution not capped – whether s198D costs cap applies to costs incurred by a cross-defendant or applies when defendant is successful)

Port Stephens Council v Theodorakakis (No 2) [2006] NSWCA 143; (2006) 67 NSWLR 299 (when excluding order will be made)

Limitation defence

Aussie Ideas Pty Ltd v Tunwind Pty Ltd; Hoddinott v Tunwind Pty Ltd [2006] NSWCA 286 (successful limitation defence not a proper basis for depriving costs)

Personal injury claims

Penrith City Council v Parks (No 2) [2004] NSWCA 381 (order for solicitor/client costs not inconsistent with Part 11 Div 5B – settlement offers)

Proportionality

Skalkers v T & S Recoveries Pty Ltd [2004] NSWCA 281 (proportionality relevant to deciding if costs reasonably and properly incurred)

Rehearing after arbitration

Bon Appetit Family Restaurant Pty Ltd v Synnerdahl [2002] NSWCA 368 (discussion of statutory fiction in s18(1) of **Arbitration (Civil Actions) Act 1983** – ***MacDougall v Curlevski*** (1996) 40 NSWLR 430 not to be extended to situation where defendant rightly judged plaintiff going to fail in arbitration and elected to call no further evidence)

Howard v Telstra Corporation [2003] NSWCA 188 (witness held back from being called at arbitration because thought unnecessary to call additional witness – no settlement offer – ***MacDougall v Curlevski*** and ***Morgan v Johnson*** dist)

Successful party, when deprived of costs or ordered to pay opponent's costs

Arian v Nguyen (supra)

G R Vaughan (Holdings) Pty Ltd v Vogt [2006] NSWCA 263

Third party

FPM Constructions v Council of City of Blue Mountains [2005] NSWCA 340 (personal order against director and shareholder – more than support for litigation required)

Unaccepted costs offers

See also **Calderbank**

Morgan v Johnson (1998) 44 NSWLR 578 (Pt 39A's costs allocations to be applied or cogent reasons given): see also **Mahony v Watson** [2003] NSWCA 259

Melville v Tadros [1999] NSWCA 162 (limited relevance of litigant being unrepresented)

Uniting Church of Australia (NSW Synod) v Legge [2002] NSWCA 307, 55 NSWLR 293 ("unreasonable" conditions)

Vale v Eggins (No 2) [2007] NSWCA 12 (significant change in case after offer made)

DAMAGES [see now **Civil Liability Act 2002**]

Aggravated [no longer available for negligence since **Civil Liability Act**: see s21]

Grey v Motor Accidents Commission (1998) 196 CLR 1 at 4 (aggravated and exemplary damages distinguished)

Hunter Area Health Service v Marchlewski (2000) 51 NSWLR 268 (aggravated damages are compensatory; (*obiter*) no aggravated damages for negligence)

Tan v Benkovic (2000) 51 NSWLR 292 at [35] (claim for aggravated damages should be pleaded/ particularised: aggravated damages not to overlap compensatory damages)

State of NSW v Dely [2007] NSWCA 303; [2007] Aust Torts Rep 81-920 (wrongful arrest, false imprisonment – conduct did not justify aggravated damages)

Compensation to relatives

De Sales v Ingrilli [2002] HCA 52, 77 ALJR 99 (benefit from deceased husband – deductions – remarriage prospects)

RTA v Cremona [2001] NSWCA 338, 35 MVR 190 (general principles re damages assessment – widow's lost superannuation entitlements, contingencies - percentage of dependency table, private school fees, cost of child care)

Axiak v Pezzano [2002] NSWCA 65 (loss of income – future loss – dependency rate – boarding school fees – child minding fees)

Walden v Black [2006] NSWCA 170 (principles discussed – likelihood of inheritance of home – comparison of situation of widow with that of widower and child)

Suresh v Jacon Industries Pty Ltd [2007] NSWCA 317 (husband fatally injured in work accident – assessment of damages)

Consequential loss – intentional torts

Palmer Bruyn & Parker Pty Ltd v Parsons (2001) 76 ALJR 163

TCN Channel Nine Pty Ltd v Anning (2002) 54 NSWLR 333

Contingencies (see **Vicissitudes**, below)

Economic loss

See **ECONOMIC LOSS DAMAGES IN PERSONAL INJURIES**

Evidentiary onus on defendant to disprove post-accident damages caused by tort (*Watts v Rake*)

Shorey v PT Ltd (2003) 77 ALJR 1104 at [46]-[47], [87]

Winston v Roach [2003] NSWCA 310 at [69]

Matchan v Lyons [2003] NSWCA 384 at [25]

Exemplary [no longer available for negligence since **Civil Liability Act**: see s21]

Grey v Motor Accidents Commission (supra)

New South Wales v Ibbett [2006] HCA 57; 229 CLR 638 (police wrongful arrest – trespass to land – Crown’s vicarious liability – need to avoid “double punishment” or overlap with aggravated damages)

Tan v Benkovic (supra) (need to be contumelious disregard of Plt’s rights)

Adams v Kennedy (2000) 49 NSWLR 78 (police officers - false arrest) – (Special leave refused 4.5.2001, on basis that State did not dispute its vicarious liability)

TCN Channel Nine Pty Ltd v Anning (2002) 54 NSWLR 333 (discrete sum should be awarded – no pre-judgment interest)

Port Stephens SC v Tellamist Pty Ltd [2004] NSWCA 353

State of NSW v Bryant [2005] NSWCA 393 (State’s vicarious liability for police extends to exemplary damages)

State of NSW v Delly [2007] NSWCA 303; [2007] Aust Torts Rep 81-920 (wrongful arrest – exemplary damages)

TCN Channel Nine Pty Ltd v Ilvari Pty Ltd [2008] NSWCA 9 (trespass to property – principle of no double counting – proper approach to award of exemplary damages)

Functional overlay/psychosomatism

CSR Ltd v Maddalena [2006] HCA 1; (2006) 80 ALJR 458 at [197]ff

Fund management costs

Shellharbour City Council v Rhiannon Rigby & Anor [2006] NSWCA 308; [2006] Aust Torts Rep 81-864

Griffiths v Kerkemeyer [see now **Civil Liability Act** s15]

CSR Limited v Eddy [2005] HCA 64; 222 ALR 1 (care of P’s child not included)

RTA v Lolomania [2001] NSWCA 268; 34 MVR 294

Geaghan v D’Aubert [2002] NSWCA 260 at [57]-[66]

Matchan v Lyons [2003] NSWCA 384; 40 MVR 466 (no compensation for care given as part of fair give and take of family life)

Illawarra AHS v Cameron [2005] NSWCA 159 (give and take principle)

Teuma & Anor v CP & PK Judd Pty Ltd [2007] NSWCA 166 (concept of “ordinary give and take” of marital relationship – **RTA v Lolomania** and **Matchan v Lyons** not followed)

Housing improvement damages for injured person

McNeilly v Imbree [2007] NSWCA 156; (2007) 47 MVR 536

Inferences against party whose actions have made accurate determination problematic

Tyco Australia Pty Ltd v Optus Networks Pty Ltd [2004] NSWCA 333 at [96], [246]

Interest on past losses

RTA v Cremona [2001] NSWCA 338, 35 MVR 190 at [146]ff

Life expectancy

Zhang v Golden Eagle [2006] NSWCA 25; (2006) 45 MVR 365 (Australian Bureau of Statistics “prospective tables preferred)

Pre-existing condition

Commonwealth of Australia v Elliott [2004] NSWCA 360 (pre-existing condition - causation – reconciliation of *Watts v Rake* and *Malec v Hutton*)

Seltsam Pty Limited v Ghaleb [2005] NSWCA 208 (pre-existing condition - causation – reconciliation of *Watts v Rake* and *Malec v Hutton*)

Qantas Airways Ltd v Lisica [2007] NSWCA 371; (2007) Aust Torts Rep 81-929 (plaintiff with psychiatric disorder partly caused by workplace injuries and partly by marriage breakdown)

Superannuation benefits (loss of)

Ghunaim v Bart [2004] NSWCA 28 (discussion about when actuarial evidence required)

Zhang v Golden Eagle [2006] NSWCA 25; (2006) 45 MVR 365

See now **Civil Liability Act**, s15A

Unrelated supervening event (impact on damages)

DNM Mining Pty Ltd v Barwick [2004] NSWCA 137

K'Mart Australia Ltd v McCann [2004] NSWCA 283 (*Baker v Willoughby*, *Jobling v Associated Dairies* discussed)

Vicissitudes (see **ECONOMIC LOSS DAMAGES IN PERSONAL INJURIES**, below)

DOUBLE SATISFACTION

General rule against double compensation

Thompson v Australian Capital Television Pty Ltd (1996) 186 CLR 574 at 608 (Gummow J)

Baxter v Obacelo Pty Ltd (2001) 205 CLR 635 (where P settled claim against D1 and then pursues D2)

Franklins Self Serve Pty Ltd v Wyber (1999) 48 NSWLR 249

Mancini v Thompson [2002] NSWCA 38 (concession that no workers compensation entitlement does not relieve court of need to determine deduction (if any) from verdict in respect of compensation paid and payable)

Rooty Hill Medical Centre v Gunther [2002] NSWCA 60 (absent agreement, (expert) evidence required re value of **WC Act** weekly benefits)

WC Act, s151Z

See Workers Compensation Act 1987 (infra)

ECONOMIC LOSS DAMAGES IN PERSONAL INJURIES [Now subject to Civil Liability Act Part 2, Div 2]

Do the best you can principle

State of NSW v Moss [2000] NSWCA 133, 54 NSWLR 536

Matchan v Lyons [2003] NSWCA 384 at [41]-[42] (judge must still explain this is being done)

McCracken v Melbourne Storm Rugby League Football Club Limited & 2 Ors [2007] NSWCA 353; (2007) Aust Torts Rep 81-925 (plaintiff must prove injury was productive of economic loss – whether substantial increase in property earnings after injury the result of own skill and efforts)

Evidence of comparable earnings (whether essential)

State of NSW v Moss (supra) (Heydon JA: difficulty of assessment and absence of evidence of comparable earnings not necessarily fatal for plaintiff)

Global or “cushion” awards

Arrowsmith v Haines CA 21.8.90

McDougall v Cullen CA 29.3.95

Armitage v Haines [1999] NSWCA 141 at [39]

Hunter Area Health Service v Marchlewski (2000) 51 NSWLR 268 at 277[54]

Penrith CC v Parks [2004] NSWCA 201 (buffer award not excluded by s13)

Briscoe-Hough v AVS [2005] NSWCA 51 (buffer award not excluded by s13)

Leichhardt MC v Montgomery [2005] NSWCA 432

Husband/wife partnerships for income splitting

Husher v Husher (1999) 197 CLR 138 (important that H had legal capacity to terminate partnership at will)

Conley v Minahan [1999] NSWCA 432

Loss of earning capacity: general

Norris v Blake (1997) 41 NSWLR 49 at 63-73

Waste Recycling Service v Meafou [2004] NSWCA 462

Retirement age

Bridge Printery Pty Ltd v Mestre [1999] NSWCA 342 (no fixed rule of 65: caution in accepting hypothetical evidence of injured P)

Rooke v Tagaloa [2000] NSWCA 228

Superannuation

Waste Recycling Service v Meafou [2004] NSWCA 462

Vicissitudes

State of NSW v Moss (supra)

RTA v Cremona (supra) at [139]ff

Chung v Anderson [2004] NSWCA 321 (15% should not be departed from without notice to parties)

Commonwealth of Australia v Elliott [2004] NSWCA 360 (discussion at [86] of contingencies affecting different components of damages unequally)

FAI Allianz Insurance Ltd v Lang [2004] NSWCA 413 (NSW practice discussed at [18]ff)

ESTOPPEL

Conventional estoppel

Whitehouse v B H Steel Ltd [2004] NSWCA 428

Estoppel by encouragement

Sullivan v Sullivan & Ors [2006] NSWCA 312 (survey by Handley JA)

Interlocutory rulings

Nominal Defendant v Manning (2000) 50 NSWLR 139 (but repeated applications may be abuse of process - see ***National Parks & Wildlife Service v Pierson*** [2002] NSWCA 273, 55 NSWLR 315. ***Manning*** does not give entitlement to multiple applications - see cases under **LIMITATION OF ACTIONS, Multiple applications**)

Issue estoppel

Tiufino v Warland (2000) 50 NSWLR 104 (breach issue determined in earlier property case binding in later personal injury case)

Commonwealth of Australia v Cockatoo Dockyard Pty Ltd [2006] NSWCA 322

Representation should be clear and unambiguous, but not necessarily as precise as a contract

Australian Crime Commission v Gray [2003] NSWCA 318

Galaxidis v Galaxidis [2004] NSWCA 111

EVIDENCE

Admissions

See **JUDICIAL METHOD**

Brown v Dunn

See **JUDICIAL METHOD, Fairness**

State Rail Authority of New South Wales & Anor v Brown [2006] NSWCA 220; (2006) 66 NSWLR 540 (***Browne v Dunn*** discussed – real issue is fairness of trial – issue can be joined in ways other than cross-examination)

Expert witness

Makita (Australia) Pty Ltd v Sprowles [2001] NSWCA 305, 52 NSWLR 705 (expert must provide criteria enabling evaluation – basal facts must be proved although they need not correspond with complete precision)

Rhoden v Wingate [2002] NSWCA 165, 36 MVR 499 (procedures in dealing with objections to expert reports)

Maudsley v Proprietors SP 39794 [2002] NSWCA 224, 24 NSWCCR 101 (***Makita*** applied – court not bound to accept opinion evidence as conclusive)

Faucett v St George Bank Ltd [2003] NSWCA 43 (opinions must be based on specialised knowledge - s79 **Evidence Act** – evidence as to ultimate issue – security expert)

Lake Macquarie CC v Holt [2004] NSWCA 305 at [18] (limited value of expert evidence re footpath repair standards)

Forge v ASIC [2004] NSWCA 448 (expert evidence going to ultimate issue is admissible: see [261]ff)

ASIC v Rich [2005] NSWCA 152 (admissibility and weight distinguished: assumed facts)

Foreign law

Optus Networks Pty Ltd v Gilsan (International) Ltd [2006] NSWCA 171 (judicial notice of foreign statutes and texts)

General course of business may prove particular act

Tambree v Travel Compensation Fund [2004] NSWCA 24

Jones v Dunkel

See **JUDICIAL METHOD**

Judicial notice

Crown Glass & Aluminium Pty Ltd v Ibrahim [2005] NSWCA 195 (cash industry for tradesmen – procedural fairness re matter taken into account)

Legal professional privilege

General Manager, WorkCover Authority of NSW v Law Society of NSW [2006] NSWCA 84; (2006) 65 NSWLR 502 (legal advice privilege – principles reviewed)

Valantine v Technical and Further Education Commission & Anor [2007] NSWCA 208; (2007) 166 IR 459 (privilege available in proceedings under GREAT Act)

HIGHWAYS AND FOOTPATHS

Brodie v Singleton SC; Ghantous v Hawkesbury SC [2001] HCA 29, (2001) 206 CLR 512

Leichhardt Municipal Council v Montgomery [2007] HCA 6 (independent contractor – Council’s duty is not non-delegable – subsequent proceedings in CA: [2007] NSWCA 361)

Roads and Traffic Authority (NSW) v Dederer [2007] HCA 42; 81 ALJR 1773 (bridge on public road – RTA – design on signs prohibiting diving – “obviousness”)

Waverley MC v Wagner [2002] NSWCA 10, 119 LGERA 167 (loose paver – lack of evidence as to who carried out work – case failed for want of proof): see also **Lake Macquarie CC v Bottomley** (1999) 103 LGERA 77)

RTA v McGuinness [2002] NSWCA 210, ATR ¶81-688 (protruding edge (½” or 13mm) of manhole cover – cover clearly visible against background bitumen of pavement)

Lombardi v Holroyd City Council [2002] NSWCA 252 (plainly visible step of 25 mm in a footpath not a high or unacceptable risk)

Burwood Council v Byrnes [2002] NSWCA 343 (paver on footpath – sunk by 20mm – duty of care is to be take reasonable care to prevent or eliminate dangers to pedestrians taking reasonable care for their own safety (**Brodie v Singleton SC; Ghantous v Hawkesbury SC** [2001] HCA 29, (2001) 206 CLR 512) – height differential obvious)

Richmond Valley Council v Standing [2002] NSWCA 359, (2002) ATR ¶81-679 (irregular paved concrete surface – duty of care explained – no concealment or absence of lighting – limited role of expert evidence)

Hastings Council v Giese [2003] NSWCA 178

Kogarah Council v Maas [2003] NSWCA 334

Lockhart Shire Council v King [2004] NSWCA 169

Temora SC v Stein [2004] NSWCA 236 (obviousness of risk goes to breach, not duty)

Lake Macquarie CC v Holt [2004] NSWCA 305 (jogger: limited value of expert evidence re footpath repair standards)

Liverpool CC v Millett [2004] NSWCA 340 (Council’s duty – blind crest – absence of centre line marking – relevance of assumption that drivers will exercise reasonable care – inadvertence)

Sutherland SC v Henshaw [2004] NSWCA 386 (extensive discussion and some difference of opinion as to scope of **Brodie**)

Newcastle City Council v McShane [2004] NSWCA 425 (obviousness of risk goes to breach, not duty of care – **Temora** followed)

Brymount Pty Ltd v Cummins [2004] NSWCA 438 (laneway in obvious poor state of repair – failure to repair not unreasonable)

Roads And Traffic Authority v Ryan; Blue Mountains City Council v Ryan [2005] NSWCA 34; (2005) 62 NSWLR 609 (evidence needed if council claims financial constraints)

Chotiputhsilpa v Waterhouse & Ors [2005] NSWCA 295 (RTA duty of care re. signage on Anzac Bridge)

Ainger v Coffs Harbour City Council [2005] NSWCA 424 (Council's duty non-delegable)

Leichhardt MC v Montgomery [2005] NSWCA 432 (duty is non-delegable, following **RTA v Fletcher** and **Scroop**)

Edson v Roads & Traffic Authority [2006] NSWCA 68; (2006) 65 NSWLR 453 (RTA's duty of care – people crossing freeway – allurements – obviousness of risk not conclusive)

Porter v Lachlan Shire Council [2006] NSWCA 126 (s45 – “road works”)

North Sydney Council v Roman [2007] NSWCA 27; (2007) 150 LGERA 419 (immunity under s45 **Civil Liability Act** – knowledge must be found in mind of officer having delegated a statutory authority to carry out necessary repairs)

Sheather v Country Energy [2007] NSWCA 179; [2007] Aust Torts Rep 81-901 (differing views expressed about content of duty)

Leichhardt Municipal Council v Montgomery [2007] NSWCA 361 (road authority's duty of care to pedestrians is not a non-delegable duty)

JUDICIAL METHOD

Admissions (general)

Dovuro Pty Ltd v Wilkins [2003] HCA 51; (2003) 215 CLR 317 (value affected by familiarity with legal standard – saying sorry not always an admission)

Guest v The Nominal Defendant [2006] NSWCA 77 (driver's failure to stop may be admission against Nominal Defendant)

Gordon v Ross [2006] NSWCA 157 (payment by insurer)

See also **Civil Liability Act**, Part 10 (s67ff)

Admissions may have great probative value: can undermine case of apparently credible witness

Voulis v Kozary (1975) 180 CLR 177 at 193

Bourke v MacNeil [2000] NSWCA 144 at [238] (medical histories)

Carian v Elton (2000) 31 MVR 421; [2000] NSWCA 175 at [15]

Amendments permitted if justice requires it

Walsh v Prest [2004] NSWCA 94 (errors and mistakes in litigation will be corrected if it is in interests of justice – principle in **Cropper v Smith**, **Queensland v J L Holdings** discussed)

Bias

Slavin v Owners Corporation Strata Plan 16857 [2006] NSWCA 71 (preliminary views on credibility)

John Fairfax Publications Pty Ltd v Maurice Kriss [2007] NSWCA 79 (disqualification of judge - test for apparent or ostensible bias)

Choice between two improbable scenarios

Guest v The Nominal Defendant [2006] NSWCA 77

Common sense v requirement for expert evidence

Laybutt v Glover Gibbs [2005] HCA 56; (2005) 79 ALJR 1808

Stoker v Adecco Gemvale [2004] NSWCA 449

Hevi Lift (PNG) Ltd v Etherington [2005] NSWCA 42

Conversation long ago: difficulty of proving deceptiveness

McMurtrie v Commonwealth of Australia [2006] NSWCA 148

Damages assessment: DC judge should usually assess damages for personal injuries even if finding for defendant

Nevin v B & R Enclosures [2004] NSWCA 339

Delay in delivery of judgment

Hadid v Redpath [2001] NSWCA 416 at [29]ff

Mastronardi v State Of New South Wales [2007] NSWCA 54

Evidence to be weighed by reference of capacity of party to produce it

Laybutt v Glover Gibbs [2005] HCA 56; (2005) 79 ALJR 1808 at [37]

Expert witnesses

Barbosa v Di Meglio [1999] NSWCA 307 (“argumentative” experts should be judged on the strength of their arguments)

Makita (Australia) Pty Ltd v Sprowles [2001] NSWCA 305, 52 NSWLR 705

Wiki v Atlantis Relocations (NSW) Pty Ltd [2004] NSWCA 174, 60 NSWLR 127 (generally inappropriate to resolve disputes between experts on basis that one is “impressive” – wrong to have regard to general reputation without disclosure)

Day v Perisher Blue Pty Ltd [2005] NSWCA 110 (concern about solicitors coaching witnesses)

See also **EVIDENCE**

Fairness (including *Brown v Dunn*)

Scalise v Bezzina [2003] NSWCA 362 (sufficient for plaintiff if issue joined in pleadings, opening or evidence in chief – not necessary to put case to defendant’s witnesses if they do not answer it)

Southern Area Health Service v Brown [2003] NSWCA 369

Davis v Council of City of Wagga Wagga [2004] NSWCA 34 (failure to confront plaintiff with case based upon material inconsistencies in medical reports)

Copmanhurst Shire Council v Watt [2005] NSWCA 245 (armoury of responses to breach discussed at [45]-[46])

State Rail Authority Of New South Wales & Anor v Brown [2006] NSWCA 220: see [22]; (2006) 66 NSWLR 540

Huseyin v Container Terminals Australia Ltd [2006] NSWCA 382; (2006) 46 MVR 1 (finding of lies not open if no cross-examination for this purpose)

Jones v Dunkel

Independent Timber Importers v Mercantile Mutual Insurance [2002] NSWCA 304 (inference only to be drawn if plaintiff’s evidence has probative significance – see also *Schellenberg v Tunnel Holdings Pty Ltd* (2000) 200 CLR 121 at 142-3)

Cadwallader v Bajco Pty Ltd [2002] NSWCA 328 (discussion of *J v D* by Heydon JA at [95]-[101])

Manly Council v Byrne [2004] NSWCA 123 (discussion at [44]ff)

White Constructions (ACT) v White [2005] NSWCA 173 (significance where allegations of fraudulent or improper conduct: see at [282])

Jovic v Lamont [2007] NSWCA 47 at [57]

BI (Contracting) Pty Limited v AW Boulderstone Holdings Pty Limited [2007] NSWCA 173

Ibrahim v Pham [2007] NSWCA 215 (inference only available if missing witness would be expected to be called by one party rather than the other)

Judges telephoning counsel

The Anderson Group Pty Ltd v Tynan Motors Pty Ltd [2006] NSWCA 22; (2006) 65 NSWLR 400

“Just, quick and cheap”

Glover Gibbs v Langbutt [2004] NSWCA 45 (trial judge's role in preventing lengthy trial running off rails)

Walshe v Prest [2004] NSWCA 94

Observing what happens in court (procedural fairness)

Government Insurance Office of NSW v Bailey (1992) 27 NSWLR 304

Kassem v Crossley [2000] NSWCA 276

Open justice

John Fairfax Publications Pty Ltd v District Court [2004] NSWCA 324; 61 NSWLR 344

R v Kwok [2005] NSWCCA 245; 64 NSWLR 335 (implied power of District Court to direct non-publication of witness' identity)

Personal injuries damages: judge should not discourage evidence of event where liability admitted

Wiki v Atlantis Relocations (NSW) Pty Ltd [2004] NSWCA 174, 60 NSWLR 127

Presumption of continuance

- always depends on facts
- wrong to require “unequivocal evidence” to displace it.

Swinburne v NSW Insurance Ministerial Corporation CA 27.10.1997

Carian v Elton (supra)

State of New South Wales v Higgins [2005] NSWCA 244 (may operate retrospectively)

Reasons (altering)

Todorovic v Moussa (2001) 53 NSWLR 463, [2001] NSWCA 419 at [41]ff (material alteration after judgment is not permissible - critical finding re credibility added)

Reasons (exposing)

Waterways Authority v Fitzgibbon [2005] HCA 57; 79 ALJR 1816 at [130] (judge must state real reasons – failure to do so may reveal error in process of fact-finding)

Beale v GIO (1997) 48 NSWLR 430

Maynard v Dabinett [1999] NSWCA 296 at [15]-[18] (Giles JA)

Bar-Mordecai v Rotman [2000] NSWCA 123 at 211-212 (no need to discuss every hopeless point)

Moylan v Nutrasweet Company [2000] NSWCA 337 at [63]ff (need for coherent, reasoned rebuttal of genuine expert evidence)

Hadid v Redpath [2001] NSWCA 416 (explanation of preference between key witnesses necessary)

Mistral International Pty Ltd v Polstead Pty Ltd [2002] NSWCA 321 at [79] (reasons for rejection of expert evidence)

Wiki v Atlantis Relocations (NSW) Pty Ltd [2004] NSWCA 174, 60 NSWLR 127 (disputes between experts must be resolved with reasons if capable of being resolved rationally – demeanour based reasoning usually inappropriate)

De Groot v Nominal Defendant [2005] NSWCA 61 (conflict between experts not properly resolved on demeanour basis: see at [28])

Hume v Walton [2005] NSWCA 148 (duty to record findings based on evidence, not just evidence: at [69])

Ainger v Coffs Harbour City Council [2005] NSWCA 424 (authorities surveyed – judge must squarely address the theory of plaintiff's case if it is to be rejected)

Mastronardi v State Of New South Wales [2007] NSWCA 54 (factual errors coupled with delay)

Sourlos v Luv A Coffee Lismore Pty Limited & Anor [2007] NSWCA 203 (reasons for finally disposing of a trial must contain facts found and judge's entire reasoning process – insufficient to incorporate counsel's submissions by reference: see [30])

Young v Cesta-Incani & Anor [2007] NSWCA 229; **(2007) 49 MVR 31** (duty to give reasons for preferring one expert witness over another)

Antonio Magnou v Australian Wool Testing Authority Ltd [2007] NSWCA 357 (rejection of evidence not referred to and reasons for rejection not given)

Standard of proof

Palmer v Dolman [2005] NSWCA 361 (standard where fraud sought to be inferred from circumstantial evidence – onus only to be applied at final stage of reasoning)

Trial by ambush

Nowlan v Marson Transport Pty Ltd (2001) 53 NSWLR 116, [2001] NSWCA 346 at [21]ff

Glover v Australian Ultra Concrete Floors Pty Ltd [2003] NSWCA 80 (even if unnecessary to plead fraud, fairness may require clear confrontation of plaintiff – “cards on table” approach discussed)

LEGAL PRACTITIONERS

Capping of costs

See **COSTS**

Costs orders against (s198M)

Lemoto v Able Technical Pty Ltd [2005] NSWCA 153, 63 NSWLR 300

Eurobadalla SC v Wells [2006] NSWCA 5

LIMITATION OF ACTIONS

Applications for extension

(i) General principles

Brisbane South Regional Health Authority v Taylor (1997) 186 CLR 541

Jones v Royal Hospital for Women CA 24.7.98 (principles summarised)

Milperra Marketing Pty Ltd & Ors v Bayliss [2001] NSWCA 315 (evidence of no prejudice cannot be dismissed by general principles of presumptive prejudice (arising from 20 year old records) and speculation as to difficulty)

Nowlan v Marson Transport Pty Ltd (2001) 53 NSWLR 116, [2001] NSWCA 346 (no trial by ambush – capacity of doctors to express causation opinion re past matters)

Yu v Speirs [2001] NSWCA 373 (not just and reasonable to extend time in light of no prima facie case – level of evidence to show viable cause of action)

Itek Graphix Pty Ltd v Elliott (2001) 54 NSWLR 207, [2001] NSWCA 442 (extensive review by Ipp AJA at [45]ff of cases under s52(4) **MA Act** and s151D(2) **WC Act** – discussion of rationales for limitation statutes – deliberate decision to let period expire a powerful adverse factor)

Parsons v Doukas (2001) 52 NSWLR 162 (restating **Holt v Wynter** – absence of prejudice not conclusive)

Love v Muratore [2002] NSWCA 15 (P must show a real case to advance, but application not appropriate venue for difficult conclusion on foreseeability)

Falconer v Laird [2003] NSWCA 114 (no rescission of deemed dismissal to extend time – whole period of delay to be considered)

Air Link Pty Ltd v Paterson (No 2) [2003] NSWCA 251 (Pt 17 r4 – application to amend outside limitation period – substantive time bar – federal cause of action)

State Rail Authority v Grant [2003] NSWCA 255 (relevance of defendant's conduct in causing or helping to cause plaintiff's delay)

D'Aquino Bros Pty Ltd v Glanville [2003] NSWCA 276 (“*real possibility of significant prejudice*” sufficient to cause application to be refused: at [22], citing **Commonwealth v Diston** [2003] NSWCA 51)

Colchester GR Pty Ltd v Case [2003] NSWCA 383 (initial decision not to sue based on outside pressure)

Smith v Morton [2004] NSWCA 84 (fair trial – prejudice – greater weight to later prejudice, especially if after limitation period) [not followed and doubted on latter point in context of s60G: see **Fletcher v Besser** (infra)]

State of New South Wales v Young [2004] NSWCA 204 (extension limited to breaches unaffected by prejudice to defendant)

Aiella v Marrickville Council [2005] NSWCA 194 (change in state of law – uncertain plaintiff waits)

Rutter v State of New South Wales [2005] NSWCA 231 (Plaintiff need only prove facts showing reasonable prospect of having sufficient evidence such as to give reasonable prospect of success (**Yu v Speirs** (supra)) – cause of action not complete until measurable loss or damage)

Robertson v The Zinc Corporation [2005] NSWCA 372 (prejudice – fair trial need not be perfect)

Lay v Employers Mutual Ltd [2005] NSWCA 450 (when a cause of action is negligence is complete [19])

Aussie Ideas Pty Ltd v Tunwind Pty Ltd; Hoddinott v Tunwind Pty Ltd [2006] NSWCA 286 (equitable claims, statute applied by analogy – costs not to be withheld simply because successful limitation defence)

State of New South Wales v Harlum [2007] NSWCA 120 (disability in form of major depressive illness impeding capacity to attend to claim)

Greater Lithgow City Council v Wolfenden [2007] NSWCA 180 (amendments to allow statute barred cause of action may be allowed under s64 in cases not covered by s65. **McGee v Yeomans** [1977] NSWLR 273 followed)

Greenwood v Papademetri [2007] NSWCA 221 (joining a party to proceedings after expiration period – correcting a mistake in the name of the party)

Nationwide News Pty Ltd v Naidu & Anor [2007] NSWCA 377; (2007) Aust Torts Rep 81-928 (actual prejudice must be significant and relevant: see [200] ff)

(ii) **Multiple applications**

Gladesville RSL Club Ltd v Bartsch (1998) 44 NSWLR 674 (previously extended period is “relevant limitation period” for s60I)

Edmondson Memorial Club v Bartsch [1999] NSWCA 348 (order may be varied or rescinded)

Nominal Defendant v Manning (2000) 50 NSWLR 139, (2000) 31 MVR 524 (**Manning** does not mean that second judge is bound to allow rehearing: repeated applications may be abuse of process: **Planet Build (NSW) Pty Ltd v Lassgol Pty Ltd** [2001] NSWCA 48; **Grant v Rafferty** [2001] NSWCA 244; **Telstra Corp Ltd v Rea** [2002] NSWCA 49 at [22]; **NPWS v Pierson** (2002) 55 NSWLR 315)

(iii) **Limitation Act 1969, ss60G, 60I [causes of action accruing before 1990]**

- Examine P’s actual awareness: did P know or ought he/she to have known
- Don’t weigh prejudice
- Plaintiff has onus
- Fair trial is the key
- Actual and general (presumptive) prejudice)

Dow Corning Australia Pty Ltd v Paton CA 24.4.1998

Australian Croatian Cultural Association v Benkovic [1999] NSWCA 210

Commonwealth of Australia v Nelson [2001] NSWCA 443 (whether P was aware or ought to have been aware of “nature and extent of injury” – PTSD – whether “just and reasonable” to extend time)

South Western Sydney Area Health Service v Gabriel & Anor [2001] NSWCA 477

Telstra Corporation Ltd v Rea [2002] NSWCA 49 (s60I is concerned with what actual P knew or ought to have known)

Hoult v Gilbert [2002] NSWCA 121 (s60I(1) gateway must be satisfied in respect of each proposed defendant)

State of NSW v Knight [2002] NSWCA 185 (nature and extent of injury to be assessed as at date application is heard – “nature” and “extent” are distinct concepts)

Cranbrook School v Stanley [2002] NSWCA 290 (failure to consider s60G an error of law)

State Rail Authority v Grant [2003] NSWCA 255 (relevance of defendant’s conduct in contributing to plaintiff’s delay)

Fletcher v Besser [2004] NSWCA 132 (wrong to give greater weight to prejudice occurring later or after expiry of limitation period – fair trial is a relative concept in extension cases)

Eijkman v Magann [2005] NSWCA 358 (psychiatric injury – sexual abuse – P always knew his life was ruined – formal diagnosis not the discovery of new condition)

Commonwealth of Australia v Smith [2005] NSWCA 478 (knowledge of mental injury means knowledge that it constitutes a recognisable psychiatric illness – whether P ought to have known)

JX v GX & Ors [2006] NSWCA 167 (psychiatric injury – sexual abuse – awareness of nature and extent)

Commonwealth Of Australia v Shaw [2006] NSWCA 209; (2006) 66 NSWLR 325 (psychological injuries arising from collision between Melbourne and Voyager in 1964 – whether applicant knew he suffered a personal injury or was unaware of the connection between personal injury and defendant’s act or omission – when he ought to have become aware – whether just and reasonable to extend time)

Commonwealth of Australia v Smith [2007] NSWCA 168 (Voyager disaster – psychiatric injury – principles summarised)

Hornby v The Nominal Defendant [2007] NSWCA 222 (comparative weight of prejudice before and after expiry of limitation period – no significant prejudice to opponent)

(iv) **Limitation Act 1969, s60C** (cause of action accruing on or after 1 September 1990)

Sydney City Council v Zegarac (1998) 43 NSWLR 195 (apply criteria set out in s60E(1) - relevance of prejudice discussed - plaintiff’s evidentiary and persuasive onus)

Schering-Plough Pty Ltd v Page [2002] NSWCA 4 (inadequate reasons fatal - s60E particulars – extension set aside)

(v) **Motor Accidents Act 1988, s52(4)**

(see also **MOTOR ACCIDENTS ACT 1988, Late Claims**)

Astill v Newman [1999] NSWCA 43 (1999) 28 MVR 561 (persuasive onus)

Holt v Wynter (2000) 49 NSWLR 128

Seib v Morton [2000] NSWCA 139, (2000) 31 MVR 488

Huckel v Norris [2001] NSWCA 301 (restating **Holt v Wynter**)

Itek Graphix (supra)

Parsons v Doukas (2001) 52 NSWLR 162

Attikullah v Sefton (2001) 53 NSWLR 574 (leave may be granted *nunc pro tunc*)

Loiko v NZI Insurance Australia Ltd [2002] NSWCA 23, 35 MVR 460 (effect of s52(1A))

Reeves v Reeves [2002] NSWCA 181, 36 MVR 488 (for s52(4B) purposes include potential reduction for contributory negligence – onus on defendant)

Laidlaw v Touma [2002] NSWCA 190, 35 MVR 388

Blackburn v Allianz Australia Insurance Ltd [2004] NSWCA 385, 61 NSWLR 632 (“forensic diligence” discussed – relevance of plaintiff’s infancy - “full and satisfactory explanation”)

Creevy v Barrois [2005] NSWCA 264 (impact of extension on cross-claim)

(vi) **Motor Accidents Compensation Act 1999, s109(3)**

Smith v Grant [2006] NSWCA 244; (2006) 67 NSWLR 735 (dilatatory conduct of applicant’s solicitor – full and satisfactory explanation that fulfils the requirements of s66 – test is whether a reasonable person in the position of the claimant would have been justified in experiencing same delay – reliance upon conduct and advice of solicitors, although negligent, could provide satisfactory explanation for delay – consistent with **Khoury v Linfox Australia Pty Ltd** [2006] NSWCA 51; (2006) 45 MVR 425)

Sauer v Allianz Australia Insurance Limited [2006] NSWCA 364; (2006) 47 MVR 220 (principles discussed – prejudice)

(vii) **Workers Compensation Act 1987, s151D**

Malone v NSW National Parks and Wildlife Service [2001] NSWCA 345 (no trial by ambush)

Uniting Church in Australia Property Trust v Lea [2002] NSWCA 55 (loss of material witness caused material prejudice rendering trial unfair – rationales for limitation bars – onus of persuasion remains on applicant)

Whisprun Pty Ltd v Sams [2002] NSWCA 394 (leave may be granted *nunc pro tunc*) (see also **Mealing v Chand** [2003] NSWCA 205)

Trpenoski v BHP Flat Products [2003] NSWCA 176 (notice of motion for leave to commence proceedings is not commencement within cl 9(1) of Part 18C of Schedule 6)

State of NSW v Connor [2003] NSWCA 200 (there is still an election under s151D even if statement of claim filed pursuant to leave *nunc pro tunc*)

Coal and Allied Operations Pty Ltd v Stringer [2003] NSWCA 271

BHP Steel (AIS) Pty Ltd v Necati [2004] NSWCA 117 (correctness of direct application of *Itek Graphix* to s151D reserved at [4])

Almario v Allianz [2005] NSWCA 19, 62 NSWLR 148 (effect of s151D(2))

Damages for solicitor's negligence

See **PROFESSIONAL NEGLIGENCE**

Economic loss claims (when cause of action arises)

Commonwealth v Cornwell [2007] HCA 16 at [5]-[6]; (2007) 229 CLR 519

Scarcella v Lettice (2000) 51 NSWLR 302 at 306

Segal v Fleming [2002] NSWCA 262 (defendant bears onus of proving claim barred – chance of loss not the same as loss of chance – damage must be “measurable”)

Christie v Purves & Ors [2007] NSWCA 182; [2007] Aust Torts Rep 81-899

Limitation Act, solicitor overlooking

See **PROFESSIONAL NEGLIGENCE, Limitation Act**

MEDICAL NEGLIGENCE

Damages and causation

See also **CAUSATION** (supra)

John Gunson "Turbulent Causal Waters: The High Court, Causation and Medical Negligence" (2001) **Tort Law Review** 53

Chappel v Hart (1998) 195 CLR 232 at 239, 247-8, 257, 278 (reasoning from breach to causation)

Rosenberg v Percival (2001) 205 CLR 434 (doubts re **Chappel v Hart** being treated as loss of chance case)

Shead v Hooley [2000] NSWCA 362 (likely prognosis pre-operation to be taken into account)

Elbourne v Gibbs [2006] NSWCA 127 (warning as to material risks – whether breach caused injury – factors to be weighed)

Duty of care

Panagiotopoulos v Rajendram [2007] NSWCA 265 (psychiatric injury – duty of care by medical practitioner to husband of patient)

Failure to warn (*Rogers v Whittaker*)

Chappel v Hart (1998) 195 CLR 232 at 246, 272-3 (caution in accepting P's hypothetical reconstruction)

Rosenberg v Percival (2001) 205 CLR 434 (**Rogers v Whittaker** reaffirmed - Duty to warn of material risk inherent in proposed treatment - materiality

- *would P have undergone procedure if warned?*
 - Subjective test but probabilities critical
 - a) likelihood of happening
 - b) seriousness of outcome
 - c) pressure to relieve existing condition: Gleeson CJ at [14]

O'Brien v Wheeler CA 23.5.98

Bourke v MacNeil [2000] NSWCA 144

Johnson v Biggs [2000] NSWCA 338 at [45], [87]

Alirezai v Smith [2001] NSWCA 60 (risk of failure and of detrimental outcome)

Harvey v PD [2004] NSWCA 97, 59 NSWLR 639 (joint patient consultation – HIV)

Loss of chance in medical negligence cases

Rufo v Hosking [2004] NSWCA 391, 61 NSWLR 678

Medical histories contrary to plaintiff's current claims

Bourke (supra)

Psychiatric patient, duty to

Hunter Area Health Service & Anor v Presland [2005] NSWCA 33, (2005)
NSWLR 22

MOTOR ACCIDENTS ACT 1988 / MOTOR ACCIDENTS COMPENSATION ACT 1999

“Claim” not to be commenced before assessors’ certificates (s70, 108)

Leo N Dunn & Sons Pty Ltd v McPhillamy [2000] NSWCA 343 (“claim” in s40 directed at accident occurring at one fixed point of time)

Emad Trolley Pty Ltd v Shigar [2003] NSWCA 231, 57 NSWLR 636 (requirement mandatory – “claim” even if concurrently a breach of employer’s duty of care)

Owen v State of New South Wales [2004] NSWCA 165 (“claim” must occur at one fixed point in time – onus lies on defendant if defence raised – injury caused by 2 hours jolting not caught). See also **Khaya v Container Terminals Australia Ltd** [2005] NSWCA 433

Hayek v Trujillo [2007] NSWCA 139; **(2007) 49 MVR 12** (merely because insurer lost right to challenge a late claim did not excuse P ignoring s108)

Certificates under s61 (effect, conclusivity and setting aside)

Murdoch v Davis [2005] NSWCA 466

Pham v Shui [2006] NSWCA 373; (2006) 47 MVR 231

Contributory negligence (s138)

Mackenzie v Nominal Defendant [2005] NSWCA 180 (rider and pillion passenger both very intoxicated)

Ranger v Turner [2007] NSWCA 162

Costs

San v Rumble (No 2) [2007] NSWCA 259; (2007) 48 MVR 492 (MACA ss148(1), 151, 153(1))

Domestic assistance (s72)

Morgan v Gibson NSWCA 6.6.97 (criteria is “need” not “need, less benefit to others”)

Geaghan v D’Aubert [2002] NSWCA 260, 36 MVR 542 (both limbs of s72(2) must be satisfied – care of animals not included)

Matchan v Lyons [2003] NSWCA 384 (existing liability to pay for domestic services not necessary – no compensation for care given as part of fair give and take of family life)

FAI Allianz Insurance Ltd v Lang [2004] NSWCA 413 (**Morgan v Gibson** applied – distinction between s72 and common law discussed at [27]ff – care given as part of fair give and take of family life not included, although there may be compensation for the contingency that care may not be given in this way in the future)

Franklins Ltd v Burns [2005] NSWCA 54 (reference to “fair give and take” principle at [84]ff)

“Driver” (s3(1))

AMP General Insurance Ltd v Maguire [2004] NSWCA 64 (mechanic in charge of vehicle requests person outside vehicle to start motor – mechanic still driver when out of control vehicle injures)

Due search and inquiry (s28(1))

Nominal Defendant v Swift; Wollondilly Shire Council v Swift [2007] NSWCA 56

Duty to give details before suing (s50A(d))

Atikulla v Sefton [2001] NSWCA 385, 53 NSWLR 574, 35 MVR 136 (scope of s50A- proceedings may be dismissed in part if breach)

Manderson v Ellis [2002] NSWCA 289, 37 MVR 214 (failure to provide full details as required by s50A means that plaintiff not entitled to commence proceedings)

Economic loss (ss134, 136?)

Hodgson v Crane [2002] NSWCA 276, 36 MVR 551 (once s134’s cap is passed, no idea of proportionality with economic loss)

(as to s136, see **CIVIL LIABILITY ACT**, s13 (above))

Fraudulent claim and statutory remedy to recover financial benefit (s66)

Toubia v Schwenke [2002] NSWCA 34, 54 NSWLR 46 (principles discussed)

Future economic loss (s126) [see also Civil Liability Act, s13]

Nominal Defendant v Lane [2004] NSWCA (cushion or buffer award available)

“Injury”

Allianz v GSF Australia [2005] HCA 26; (2005) 221 CLR 568 (defective unloading mechanism – not “injury with MAA)

Nominal Defendant v GLG Australia Pty Ltd [2006] HCA 11; (2006) 80 ALJR 688 (forklift system caused vibrations causing box to fall from container – not “injury” within MAA)

Gunter v State Transit Authority of NSW [2004] NSWCA 330, 61 NSWLR 414 (Act applies even if injury partly caused by negligent act other than use of motor vehicle)

Toll Pty Ltd v Dakic [2006] NSWCA 58 (back injury while removing heavy trailer ramp – whether a “defect” in vehicle – **Zurich** discussed – whether the heavy ramp or unsafe work system caused the injury)

Inasmuch Community Inc v Bright & Anor [2006] NSWCA 99; (2006) 45 MVR 234 (meaning of “injury” and “collision” – rear door of truck blows open and strikes P – satisfaction of temporal and causal requirements of the Act)

Walfertan Processors Pty Ltd v Dever [2006] NSWCA 289; (2006) 47 MVR 140

Brambles Australia Ltd (t/as Brambles Industrial Services) v Sandy & Anor [2006] NSWCA 357; (2006) 47 MVR 207 (truck overbalanced when tipping load – work system fault – no “injury”)

Huseyin v Container Terminals Australia Ltd [2006] NSWCA 382; (2006) 46 MVR 1

Interest on damages (s73(4))

Tran v GIO (2001) 51 NSWLR 733

Late claims (s43A: “full and satisfactory explanation”)

Russo v Aiello [2003] HCA 53; (2003) 215 CLR 643 (onus on applicant under s43A(7) – however, plaintiff’s failure to advance material justifies *Jones v Dunkel* inference – focus is upon justifying delay, not excusing it – prejudice to insurer (or lack thereof) irrelevant – scheme does not confer discretion to extend time or excuse delay)

Mancini v Thompson [2002] NSWCA 38 (prejudice not a relevant factor [unless of course s52(4) also engaged] – “full” explanation discussed)

Diez v Truong [2002] NSWCA 265, (2002) 37 MVA 158 (principles if claimant is young child or brain-damaged)

Manderson v Ellis [2002] NSWCA 289, 37 MVR 214 (relevance of solicitor’s negligence)

Buller v Black [2003] NSWCA 45, (2003) 56 NSWLR 425 (“full and satisfactory” discussed – standard is reasonableness not perfection – no discretion involved)

Figliuzzi v Yonan [2005] NSWCA 290

Smith v Grant [2006] NSWCA 244; (2006) 67 NSWLR 735

Late claims (s73)

Hayek v Trujillo [2007] NSWCA 139; (2007) 49 MVR 12 (insurer loses right to challenge if fails to notify under s73(3)(a))

Limitation provision

See **LIMITATION OF ACTIONS**

Mitigation (s39)

Mahony v Watson [2003] NSWCA 259 (reasonableness is touchstone)

“Net weekly earnings” (s125)

Kaplantzi v Pascoe [2003] NSWCA 386 (narrow construction inappropriate)

Non-economic loss (s133(3))

Hodgson v Crane [2002] NSWCA 276, 55 NSWLR 199 (proportionality approach abandoned under ss131-134)

Longhurst v Hunt [2004] NSWCA 91 (unless degree of permanent impairment is made **solely** with respect to psychiatric or psychological injury, such injury cannot be taken into account in assessment of degree of permanent impairment necessary to overcome 10% threshold)

Notice to Nominal Defendant before suing (MACA, s36(3))

Wythes v McCaffrey [2004] NSWCA 367

Part 6 (scope)

RTA v Ryan [2005] NSWCA 34 (discussion of situation before and after 1995 amendments)

Permanent impairment

Brown v Lewis [2006] NSWCA 87, (2006) 65 NSWLR 587 (limited relevance of permanent impairment findings to economic loss)

“Public street”

Ryan v Nominal Defendant [2005] NSWCA 59

Settlement opportunity before suing (s52(1A))

See also **WORKERS COMPENSATION ACT**, s151C

Loiko v NZI Insurance Australia Ltd [2002] NSWCA 23, 35 MVR 460

NEGLIGENCE (GENERAL)

Bailment

Terry Hogan Prestige Cars Pty Ltd v Opera Investments Pty Ltd [2006] NSWCA 139

Breach

Neindorf v Junkovic [2005] HCA 75; (2005) 80 ALJR 341 (inquiry about what is reasonable and practicable not to be undertaken in hindsight (at [94], [98])

Clarke v Coleambally Ski Club Inc [2004] NSWCA 376 (relevance of obviousness)

Ohlstein bht Ohlstein & 3 Ors v E & T Lloyd t/as Otford Farm Trail Rides [2006] NSWCA 226; [2006] Aust Torts Rep 81-866 (industry practice relevant but not conclusive)

Pesl v Ray Smith Tractors & Anor [2007] NSWCA 74; [2007] Aust Torts Rep 81-883 (inquiries into breach must be prospective: see [76] – **Vairy v Wyong Shire Council** (2005) 223 CLR 422 cited)

Brighton le Sands Amateur Fishermen's Association Ltd v Vasilios Koromvokis [2007] NSWCA 331 (primary judge asked himself the wrong question – the steps that a defendant should have taken to avoid a foreseeable risk of injury must be considered prospectively, not retrospectively)

Breach of statutory duty (see TORT)

Budgetary restraints impacting on breach

State of New South Wales v Williamson [2005] NSWCAA 352

Carrier's duty of care to intoxicated passenger

State Rail Authority v Schodel [2001] NSWCA 394

Cause of action, when accrues

Lay v Employers Mutual Ltd [2005] NSWCA 450 (see at [19])

Children

See **Schools and Children**

Contributory negligence [see now Civil Liability Act, ss5R-5T]

Czatyрко v Edith Cowan University [2005] HCA 14; (2005) 79 ALJR 839 (employees different: see [12]-[13])

Thompson v Woolworths [2005] HCA 19, (2005) 221 CLR 234 at 247[40] (ditto)

Nominal Defendant v Rowland-Smith [2003] NSWCA 65 (“agony of the moment” reaction)

Ghunaim v Bart [2004] NSWCA 28 (when employee's inadvertence is c.n.)

Pelley v Maitland Benevolent Society [2004] NSWCA 323 (failure to provide safe system of work – mere inattention is not contributory negligence)

Consolidated Broken Hill Ltd v Edwards [2005] NSWCA 380 (2005) Aust Torts Rep 81-815 (at [65])

Waverley Council v Ferreira [2005] NSWCA 418 (s5R discussed – application to child)

Salmon v Meacham [2006] NSWCA 89 (apportionment – culpability of parties – degree of departure from standard of care of reasonable man – causative potency of parties' negligent conduct)

Pham v Shui [2006] NSWCA 373; (2006) 47 MVR 231 (cyclist riding on footpath in breach of Australian Road Rules)

Dos Santos v C Morris Painting & Decorating & Anor [2006] NSWCA 54; (2006) 45 MVR 162 (review of principles by McColl JA at [64] ff)

Ackland v Commonwealth of Australia [2007] NSWCA 250; [2007] Aust Torts Rep 81-916 (psychiatric injury – events predated application of s10(1) *Law Reform (Miscellaneous Provisions) Amendment Act 1965*)

Elite Protective Personnel Pty Ltd & Anor v Salmon [2007] NSWCA 322 (not contributory negligence – failure to leave nightclub when asked – elbow broken whilst being ejected – whether available for intentional tort)

Criminal conduct of third parties, when duty to protect against

Modbury Triangle Shopping Centre Pty Ltd v Anzil (2000) 205 CLR 254

State of New South Wales v Bujdoso [2005] HCA 76; 80 ALJR 236 (State's duty of care to child sexual assault prisoners)

Oxlade v Gosbridge Pty Ltd CA 18.12.98 (no general duty unless hotelier knows or ought to know of facts requiring intervention - difficult causation issues)

Guildford Rugby League Football Club v Coad [2001] NSWCA 139, ATR ¶81-623 (hotelier's failure to evict brawlers or to provide security guards – causation)

Ashrafi Persian Trading Co Pty Ltd t/a Roslyn Gardens Motor Inn & Anor v Ashrafinia [2001] NSWCA 243 (sleeper in motel bashed by person reaching through narrow gap - duty only arises in exceptional cases)

Proprietors of Strata Plan 172226 v Drakulic [2002] NSWCA 381 55 NSWLR 659 (assault on common property – scope of ***Modbury*** doctrine)

Faucett v St George Bank [2003] NSWCA 43 (bank's duty to employee – system of cash delivery)

Southern Area Health Service v Brown [2003] NSWCA 369 (psychiatric patient – relationship with psychiatric nurse – sexual assault)

Cook v R & M Reurich Holdings Pty Ltd [2004] NSWCA 268 (visitor requested to help in emergency – foreseeable that assistance might be given)

TAB Ltd v Atlis [2004] NSWCA 322 (occupier of TAB premises – failure to control rowdy drunken behaviour – difference between error of judgment and negligence)

Parissis v Bourke [2004] NSWCA 373 (occupier's duty – guest at party attempts to light barbecue by throwing methylated spirits) (slr)

State of NSW v Zerafa [2005] NSWCA 187 (prison assault)

English v Rogers [2005] NSWCA 327, ATR 81-800 (armed robbery – hostage – cleaning contractor – causation)

Coca Cola Amatil v Pareezer [2006] NSWCA 45; [2006] Aust Torts Rep 81-834 (independent contractor shot while delivering Coke – breach, causation issues)

Zreika v State of New South Wales [2006] NSWCA 272 (prison assault)

TAB Limited v Beaman [2006] NSWCA 345 (armed robbery at TAB agency – employee hurt – causation)

Gittani Stone Pty Limited v Pavkovic [2007] NSWCA 355; (2007) Aust Torts Rep 81-924 (situation called for employer to do more than it did – non-delegable duty owed by employers may extend to protecting employees from the criminal behaviour of third parties)

Duty of care [now subject to **Civil Liability Act** ss5B, 5C and Part 7 (self-defence and recovery by criminals)]

Dovuro Pty Ltd v Wilkins [2003] HCA 51; (2003) 215 CLR 317 (manufacturer – economic loss)

State of New South Wales v Bujdoso [2005] HCA 76; (2005) 80 ALJR 236 (State's duty of care to child sexual assault prisoners)

Reynolds v Katoomba RSL [2001] NSWCA 234, ATR ¶81-624 (no duty to gamblers) (special leave refused)

Desmond v Cullen [2001] NSWCA 238, 34 MVR 186 (hotel licensee's duty to patron – causation)

McDonald v State of NSW [2001] NSWCA 303, ATR ¶81-620 (duty owed by State to public officers)

Trustees of RC Church v Kondrajan [2001] NSWCA 308 (teachers generally - school playground games)

South Tweed Heads Rugby League Football Club Ltd v Cole [2002] NSWCA 205, 55 NSWLR 113 (club – patron served alcohol – subsequent motor vehicle accident)

Kolodziejczyk v Grandview Pty Ltd [2002] NSWCA 267, ATR ¶81-673 (specialist roofing subcontractor was owed no duty of care by house renovator in relation to fall from untied ladder)

Faucett v St George Bank Ltd [2003] NSWCA 43 (bank's duty to employee – safe system for delivery of cash)

Cran v State of New South Wales [2004] NSWCA, 62 NSWLR 95 (police and DPP owe no duty to prisoner whose incarceration was prolonged by delay in invoking fast-tracked procedures for drug detection)

State of New South Wales v Godfrey [2004] NSWCA 113 (escaping prisoners)

Hunter AHS v Presland [2005] NSWCA 33, 63 NSWLR 22 (hospital and psychiatric patient)

State of NSW v Watzinger [2005] NSWCA 329 (prisoners working)

Consolidated Broken Hill Ltd v Edwards [2005] NSWCA 380, (2005) Aust Torts Rep 81-815 (obviousness goes to breach, not duty, for occupier)

Booksan Pty Ltd v Wehbe [2006] NSWCA 3; [2006] Aust Torts Rep 81-830 (content of duty – role of obviousness)

Ambulance Service of NSW v Worley [2006] NSWCA 102 (duty of care of paramedic in administration of adrenalin intravenously if patient not on point of death – interpretation and understanding of protocol)

Seltsam Pty Ltd v McNeill [2006] NSWCA 158; (2006) 4 DDCR 1 (asbestos manufacturer – casual worker – no duty because no reasonable foreseeability of risk of injury to class of persons in 1961)

Graham v Hall [2006] NSWCA 208; (2006) 67 NSWLR 135 (person purporting to witness forged document)

State of New South Wales v Klein [2006] NSWCA 295; [2006] Aust Torts Rep 81-862 (fatal but lawful police shooting – no duty owed to relatives of deceased for psychiatric injury)

Sutherland Shire Council v Becker [2006] NSWCA 344; (2006) 150 LGERA 184 (public authority – statutory powers relating to subdivision)

Rickard Constructions Pty Ltd v Rickard Hails Moretti Pty Ltd [2006] NSWCA 356 (building supervisor usually owes duty to owner, not contractor)

Randwick City Council v T & H Fatouros Pty Ltd [2007] NSWCA 177; [2007] Aust Torts Rep 81-898 (even though Council's conduct may have contributed to respondent's loss, there was no duty of care owed to prevent respondent sustaining economic loss when stairs caused personal injury – failure to prove vulnerability in the **Woolcock Street Investments** sense)

Amaca Pty Ltd (under NSW External Administration) v A B & P Constructions Pty Ltd [2007] NSWCA 220; [2007] Aust Torts Rep 81-910 (manufacturer's duty of care to consumers – content and scope)

Sydney Water Corporation v Abramovic & Anor [2007] NSWCA 248; [2007] Aust Torts Rep 24881-913 (no duty owed by a statutory authority to the employee of its independent contractor – no direction given as to manner in which they were to carry out their work and no overall coordination and organisation)

Panagiotopoulos v Rajendram [2007] NSWCA 265 (psychiatric injury – duty of care by medical practitioner to husband of patient)

Commonwealth of Australia v Griffiths & Anor [2007] NSWCA 370 (scope of witness immunity that negates duty of care)

Employer's duty of care to employees

Andar Transport Pty Ltd v Brambles Ltd [2004] HCA 28; (2004) 317 CLR 424 at [34]ff, [43]ff

Czatyрко v Edith Cowan University [2005] HCA 14, 79 ALJR 839 (general statement at [12] – contributory negligence requires more than “mere inadvertence, inattention or misjudgment”)

Koehler v Cerebos [2005] HCA 15, 79 ALJR 845 (duty of reasonable care to avoid psychiatric injury – relevance of contractual obligations – foreseeability of risk of psychiatric injury necessary, but not decisive)

Laybutt v Glover Gibbs Pty Ltd [2005] HCA 56; (2005) 79 ALJR 1808 (D does not have to have foreseen precise manner in which injury occurred – employer's duty to give instructions in some cases – evidence of practicality of proposed alternative course or safeguard essential unless within common knowledge – relevance of request for instructions or worker's complaint about unsafe system)

State of NSW v Seedsman [2000] NSWCA 119, 217 ALR 583 (duty to employee – “shock” not required)

Connors v Simplot Pty Ltd [2001] NSWCA 205

Boral Transport Pty Ltd v Whitehead [2001] NSWCA 395 (general discussion at [42]ff, including duty to skilled employee)

Van Der Sluice v Display Craft Pty Ltd [2002] NSWCA 204 (fall from ladder while installing Christmas decorations – experienced independent contractor – risk obvious – see general statement by Heydon JA at [74])

State of NSW v Paige [2002] NSWCA 235, 60 NSWLR 371 (disciplinary proceedings – stress)

Twynam Pastoral Company Pty Ltd v Bennett [2002] NSWCA 319

Faucett v St George Bank Ltd [2003] NSWCA 43 (bank's duty extends to reasonable care to prevent robberies)

TNT Australia Pty Ltd v Christie [2003] NSWCA 47, (2003) 56 NSWLR 1 (employer's non delegable duty – labour hire business – provision/repair of safe tools)

- **TNT** distinguished on facts because not day in day out relationship equivalent to employment (**Samsung Electronics v Macaura** [2005] NSWCA 386)

Texcrete Pty Ltd v Khavin [2003] NSWCA 337 (employer's duty remains one of reasonable care – relevance of employee's experience)

Ghunaim v Bart [2004] NSWCA 28 (discussion of distinction between employee's inattention and carelessness at [61]-[65])

Australian Traineeship System v Wafta [2004] NSWCA 230 (risk that employee would attempt to lift heavy weight not reasonably foreseeable)

Pelley v Maitland Benevolent Society [2004] NSWCA 323 (failure to provide safe system of work – mere inattention is not contributory negligence)

Emoleum (Aust) Pty Ltd v Bond [2004] NSWCA 352 (non-delegable duties of labour hire company and company coordinating road resealing work)

Stoker v Adecco Gemvale [2004] NSWCA 449 (no duty to interrogate new employees about special vulnerability – breach if employer aware)

Gomes v Metroform Pty Ltd [2005] NSWCA 171 (work under time pressure)

AFS Catering Pty Ltd v Stonehill [2005] NSWCA 183 (employer's duty proactive)

Atkinson v Gameco (NSW) Pty Ltd [2005] NSWCA 338 (non-delegable duty of care strict only in qualified sense – casual act of negligence occurring overseas – duty when employer sends employee to premises controlled by another)

TAB Limited v Beaman [2006] NSWCA 345 (armed robbery at TAB agency – causation)

J Blackwood & Son Steel & Metals Pty Ltd v Nichols & Anor [2007] NSWCA 157; (2007) 165 IR 76 (liability of principal for employee of contractor – **Stevens v Brodribb Sawmilling Co Pty Ltd** (1986) 160 CLR 16 and **TNT Australia Pty Ltd v Christie** [2003] NSWCA 47; (2003) 56 NSWLR 1 distinguished)

Nationwide News Pty Ltd v Naidu & Anor [2007] NSWCA 377; (2007) Aust Torts Rep 81-928 (duty to prevent bullying)

State of New South Wales v Rogerson [2007] NSWCA 346; (2007) Aust Torts Rep 81-926 (discrimination and victimisation because of family relationship – no duty of care to prevent psychiatric injury)

Foreseeability

State of New South Wales v Godfrey [2004] NSWCA 113 (**Wyong** test remains binding: see at [9])

Highways and footpaths

See **HIGHWAYS AND FOOTPATHS**

Independent contractor or employee?

See also **TORT, Vicarious liability**

Paddison v Ultimate Image Pty Ltd [2004] NSWCA 410

Boylan Nominee Pty Ltd v Sweeney [2005] NSWCA 8 (**Hollis v Vabu Pty Ltd** (2001) 207 CLR 21 discussed – all factors to be considered – “representation” and “control” not conclusive – McHugh J’s suggested vicarious liability based on notion that conduct of independent contractor was “directly authorised” rejected)

Pack-Trainers Pty Ltd v Moore [2005] NSWCA 43

National Transport Insurance v Chalker [2005] NSWCA 62 (owner of prime mover)

Australian Air Express Pty Ltd v Longford [2005] NSWCA 96

Intoxication

See now **Civil Liability Act**, Part 6 (s47ff)

Joint liability

Balesfire Pty Limited t/a The Gutter Shop v Jamie Adams and Others; Jamie Adams v Balesfire Pty Limited t/a The Gutter Shop and Ors [2006] NSWCA 112 (Construction safety. More than one person owing duty of care – head contractor and subcontractor may be jointly liable)

Landlord

See **OCCUPIER'S LIABILITY**

Mitigation of loss

PricewaterhouseCoopers Legal v Perpetual Trustees Victoria Limited & 3 Ors [2007] NSWCA 271; [2008] NSW ConvR 56-197

Motor accidents

Derrick v Cheung [2001] HCA 48; 181 ALR 301 (possibility of different outcome is not the issue)

Commissioner of Main Roads v Jones [2005] HCA 27; 79 ALJR 1104 (wild horse on roadway)

Manley v Alexander [2005] HCA 79; 80 ALJR 413 (driving at night – factors to be taken into account)

Kelly v Carroll [2002] NSWCA 9 (discussion by Heydon JA about driver's duty to look out for errors by other drivers and pedestrians)

South Tweed Heads Rugby League Football Club Ltd v Cole [2002] NSWCA 205, 55 NSWLR 113 (driving in dark – unable to pull up safely – no principle of automatic negligence)

Knight v Maclean [2002] NSWCA 314 (per Heydon JA at [68]: “It is not the law that a driver complying with the minimum requirements of the law of negligence must drive in such a way as to anticipate everything that a pedestrian might do at all stages of every journey, or to be in a position to reduce speed to levels which will avoid any risk of a collision at all stages of any journey”)

Ma v Keane [2003] NSWCA 50 (driver's duty to pedestrian who runs out)

South Sydney Council v Walsh [2003] NSWCA 102 (lighting for pedestrians)

Tobin v Worland [2005] NSWCA 188 (infant pedestrian)

Dos Santos v Morris Painting [2006] NSWCA 54; (2006) 45 MVR 162 (failure to indicate when changing lanes – whether cyclist driving on inside lane guilty of contributory negligence)

Coombes v Roads and Traffic Authority & Ors [2006] NSWCA 229; (2006) 46 MVR 215 (detour on highway – traffic control plan – responsibility for design and/or implementation as between RTA and Council)

McNeilly v Imbree [2007] NSWCA 156; (2007) 47 MVR 536 (standard of care owed by inexperienced driver to driving instructor)

Kollas v Scurrah [2008] NSWCA 17 (slow moving oversize vehicle on highway – whether absence of flashing lights negligence)

Non-delegable duty

See **TORT**

Obvious risks

Thompson v Woolworths [2005] HCA 19; (2005) 221 CLR 234 at [37]

Vairy v Wyong SC [2005] HCA 62, (2005) 223 CLR 422

Clarke v Coleambally Ski Club Inc [2004] NSWCA 376

Paddison v Ultimate Image [2004] NSWCA 410 (use of ladder by plasterer)

Edson v Roads & Traffic Authority [2006] NSWCA 68, (2006) 65 NSWLR 453

Consolidated Broken Hill Ltd v Edwards [2005] NSWCA 380 (**Vairy** explained, McHugh J not followed). See also **Timberland** [2005] NSWCA 419 and **Langham** [2005] NSWCA 461.

Shellharbour City Council v Rhiannon Rigby & Anor [2006] NSWCA 308; [2006] Aust Torts Rep 81-864 (occupier's duty not extinguished or restricted by obviousness of risk – BMX track)

Occupier

See also **OCCUPIER'S LIABILITY**

Personal responsibility and inadvertence

A V Jennings Ltd v Thomas [2004] NSWCA 309 (discussion by Bryson JA about trends)

Professional negligence

See **PROFESSIONAL NEGLIGENCE**

Public authorities [see now **Civil Liability Act**, Part 5 (s40ff)]

Graham Barclay Oysters Pty Ltd v Ryan [2002] HCA 54; (2002) 211 CLR 540

Timbs v Shoalhaven City Council [2004] NSWCA 81 (council – duty of care – deceased killed by falling tree – whether inspector professed expertise to advise re tree safety)

Dungog Shire Council v Babbage [2004] NSWCA 160 (fallen tree on road – whether “sickly” and whether council should have detected and removed it)

Port Stephens SC v Booth [2005] NSWCA 323 (council approving development and issuing s149 certificate – statutory “good faith” immunity)

Retail vendor

McPherson's Ltd v Eaton & Ors [2005] NSWCA 435, (2006) 65 NSWLR 187

Schools and children

Roman Catholic Church Trustees v Hadba [2005] 221 CLR 161

Trustees of RC Church v Kondrajian [2001] NSWCA 308 (teachers generally – school playground games)

Bujnowicz v Trustees Roman Catholic Church [2005] NSWCA 457 (pothole in football field)

Martin v The Trustees of the Roman Catholic Church of the Archdiocese of Sydney [2006] NSWCA 132 (school excursion – girl slipped and fell from structure in obstacle course - whether reasonable precautions exercised. P not told and did not know what to do in event of slipping.)

Ohlstein bht Ohlstein & 3 Ors v E & T Lloyd t/as Offord Farm Trail Rides [2006] NSWCA 226; [2006] Aust Torts Rep 81-866 (horse trail ride – beginner – expert evidence as to risk assessment – relevance of industry practice)

St Mark's Orthodox Coptic College v Abraham [2007] NSWCA 185 (when a parent may assume a duty of care – bringing up children cannot be risk-free)

Sport

McCracken v Melbourne Storm Rugby League Football Club Limited & 2 Ors [2007] NSWCA 353; (2007) Aust Torts Rep 81-925 (spear tackle)

Standard of care [See now **Civil Liability Act** ss50, 5P re professionals]

Dovuro Pty Ltd v Wilkins (2003) 215 CLR 317

Vairy v Wyong SC [2005] HCA 62; (2005) 223 CLR 422 (**Shirt** “calculus” – breach to be determined prospectively, unlike causation – appellate decisions on breach not to be viewed as precedents)

Van der Sluice v Display Craft Pty Ltd [2002] NSWCA 204 (foreseeability of injury insufficient – sometimes doing nothing is a reasonable response (at [83])

University of Wollongong v Mitchell [2003] NSWCA 94 (obvious risks – signs – **Shirt** calculus – entitlement to assume that most entrants will take reasonable care for own safety) (indirectly affirmed by HC in **Hoyts Pty Ltd v Burns** [2003] HCA 61; (2003) 77 ALJR 1934)

Francis v Lewis [2003] NSWCA 152 (obviousness – costing in **Shirt** calculus does not always require evidence: at [47] – relevance of no accidents ([57])

Taouk v Waste Recycling & Processing Service of NSW [2003] NSWCA 273 (standard is reasonableness – sometimes doing nothing may satisfy it)

Local Spiritual Assembly of the Bahai's of Parramatta Ltd v Haghighat [2004] NSWCA 21, (2004) Aust Torts Rep ¶81-729 (not every action that increases risk of injury is unreasonable and negligent – unreasonableness must still be shown) (slr)

Macarther Districts Motor Cycle Sportsman Inc v Ardizzone [2004] NSWCA 145 (motorcycle race – 12 year old boy)

State of New South Wales v Finnan [2004] NSWCA 314 (supervising schoolteacher – playground activities)

Parissis v Bourke [2004] NSWCA 373 (community standards – absent occupier's duty to young adults at party – alcohol)

Hobona Pty Limited & Anor v Richard Gremmo [2006] NSWCA 261 (Injury caused by glass in fenced off area of tavern. To require the supply of plastic glasses imposes an unreasonable standard of care in all circumstances.)

Unincorporated association

Hrybnyuk v Mazur [2004] NSWCA 374 (when duty arises against member or committee)

Vicarious liability

Sandstone DMC Pty Limited & Anor v Trajkovski & Anor [2006] NSWCA 205 (nightclub owner and licensee – security officer was acting within the scope of his employment – **NSW v Lepore** (2003) 212 CLR 511 applied)

Sprod bnf v Public Relations Oriented Security Pty Limited [2007] NSWCA 319; [2007] Aust Torts Rep 81-921 (assault was in furtherance of employer's interests – unlawful and criminal acts by employees – principles discussed)

Voluntary assumption of risk [now subject to **Civil Liability Act**, Part 1A Div 4]

Hadland v Council Of The City of Blacktown (unreported 21 May 1997)

Canterbury Municipal Council v Taylor [2002] NSWCA 24 at [144]-[147] (principles re defence)

South Tweed Heads Rugby Football Club Ltd v Cole [2002] NSWCA 205, 55 NSWLR 113

Moore v Woodforth [2003] NSWCA 9; ATR ¶81-686

McNeilly v Imbree [2007] NSWCA 156; (2007) 47 MVR 536

Monie v Commonwealth of Australia [2007] NSWCA 230

Warnings

Roads and Traffic Authority (NSW) v Dederer [2007] HCA 42; 81 ALJR 1773 (bridge on public road – RTA – design on signs prohibiting diving – “obviousness”)

Seltsam Pty Ltd v McNeill [2006] NSWCA 158; (2006) 4 DDCR 1 (relevance and weight of P's evidence as to how warning would have affected his conduct)

See also **CAUSATION**

OCCUPIER'S LIABILITY

Causation

Franklins Ltd v Hunter CA 1.5.98

Oxlade v Gosbridge Pty Ltd CA 18.12.98 at pp9-10 (circumstances in which it is permissible to reason from breach to causation)

Guildford Rugby League Football Club v Coad [2001] NSWCA 139, ATR ¶81-263

Marrickville Municipal Council v Moustafa [2001] NSWCA 372

State Rail Authority of NSW v Schadel [2001] NSWCA 394 (intoxicated person walking into train)

Commercial premises

Hoyts Pty Ltd v Burns [2003] HCA 61; (2003) 77 ALJR 1934

Franklins Selfserve Pty Ltd v Bozinovska CA 14.10.98 (supermarkets - duty to take reasonable care has regard to assumption that entrants will exercise some care for own safety - causation where absence of hypothetical warning sign)

David Jones v Bates [2001] NSWCA 233 (duty is reasonable care, not whether safety could be improved)

SRA v Madden [2001] NSWCA 252, ATR ¶81-629 (child injured on escalator at station)

Buttita v Strathfield Municipal Council [2001] NSWCA 365 ("Golf courses are not nurseries" – some dangers speak for themselves)

North Sydney Council v Plater [2002] NSWCA 225 (parking station – stairs complied with ordinances when built – nose of stairs worn but not unreasonably so, according to expert evidence – no evidence of earlier falls – no stairs are perfectly safe)

Owners Strata Plan 30889 v Perrine [2002] NSWCA 324 (absence of handrails or defined nosing on stairs not negligent in circumstances)

University of Wollongong v Mitchell [2003] NSWCA 94 (retractable seats - obvious risks – signage - causation)

Francis v Lewis [2003] NSWCA 152 (external staircase – building codes – inherent dangers of stairs – *Shirt* calculus)

A V Jennings Ltd v Thomas [2004] NSWCA 309 ("It remains the law that allowance must be made for inadvertence and that an occupier owes a duty of care even to careless entrants")

Broughton v Competitive Foods Australia Pty Ltd [2005] NSWCA 168 (duty owed by occupier when terminating licensee's licence to enter – security guard – no duty of positive action)

Timberland Property Holdings Pty Lt v Bundy [2005] NSWCA 419 (establishing causation where evidence slight – oil patch on car park)

Hilas v Todbern Pty Ltd (trading as Hurstville Supercentre) [2007] NSWCA 315 (fall on internal concrete stairway)

Evidence

Makita (Australia) Pty Ltd v Sprowles [2001] NSWCA 305, 52 NSWLR 705 (expert evidence re slipperiness of stairs)

Generally

Judge Sidis, "Ramping up occupiers' liability" in (2001) 4 Butterworths Direct Link No 8

Jones v Bartlett (2000) 205 CLR 166

Thompson v Woolworths (Queensland) Pty Ltd (2005) 221 CLR 234.

Wilkinson v Law Courts [2001] NSWCA 196 (occupier of public building – steps without handrails – duty does not require occupier to make premises as safe as reasonable care can make them)

Marrickville MC v Moustafa [2001] NSWCA 372 (interrelationship of duty, breach, damages causation – object buried in park later used to cause explosion)

A V Jennings Ltd v Thomas [2004] NSWCA 309 (occupier in control of workplace – allowance still made for inadvertence)

Ridis v SP 10308 [2005] NSWCA 246 (owners corporation of SP – injury on common property – review of cases on occupiers liability for non-commercial premises)

Booksan Pty Ltd v Wehbe [2006] NSWCA 3; [2006] Aust Torts Rep 81-830 (duty not excluded because P not taking responsibility for own safety)

Highways and footpaths

Bartolo v Owners SP 10535 [2005] NSWCA 256 (occupiers liability and highway authority liability not to be elided) (see also ***Turnbull v Alm*** [2004] NSWCA 173 at [43])

See **HIGHWAYS AND FOOTPATHS**

Hotel, restaurant – duty in relation to conduct of patrons

Guildford Rugby League Football & Recreational Club v Coad [2001] NSWCA 139, ¶ATR 81-263

South Tweed Heads Rugby League Football Club v Cole [2002] NSWCA 205, 55 NSWLR 113 (generally no duty to protect patrons from harming themselves by becoming intoxicated)

Angus v Stevenson [2002] NSWCA 296

Hobona Pty Limited & Anor v Richard Gremmo [2006] NSWCA 261 (failure to use plastic glasses not a breach)

Wagstaff v Haslam & Anor [2007] NSWCA 28 (causation – knowledge)

Spedding v Nobles; Spedding v McNally [2007] NSWCA 29

Collingwood Hotel Pty Ltd v O'Reilly; Night Knowledge Security Pty Ltd v O'Reilly [2007] NSWCA 155 (duty of occupier and licensee of hotel to exercise reasonable care for safety of patrons)

Landlord's duty to tenant's visitors

Jones v Bartlett (2000) 205 CLR 166

Assaf v Kostrevski CA 30.9.98 (visitor suffers electric shock while attempting to rig extension light in laundry with defective ceiling light)

Ahluwalia v Robinson [2003] NSWCA 175

Ridis v SP 10308 [2005] NSWCA 246

Sakoua & Anor v Williams [2005] NSWCA 405, 64 NSWLR 588

New South Wales Department of Housing v Hume bhnf Donna Hume & Anor [2007] NSWCA 69; [2007] Aust Torts Rep 81-879 (landlord's duty to tenant's visitor – porch no more than one meter high – whether stairs should have had hand-rails where no statutory obligation – whether prior "incidents" disclosed dangerous defect)

Estate of the Late JJ Virgona by its Executors v De Lautour [2007] NSWCA 282; [2007] Aust Torts Rep 81-918 (principles discussed – no breach – condition of roof area did not render premises unfit for purpose for which they were let)

Limited duty to protect against criminal acts of third parties

See **NEGLIGENCE (GENERAL)**

"Occupier"

State of New South Wales v Broune [2000] NSWCA 3 (there may be shared occupation)

Neighbourhood Association DP 295386 v Hannah Forgeron [2005] NSWCA 150 (test for breach of duty of care was that of occupier – application of proper test)

Parks and public places

Vairy v Wyong SC; Mulligan v Coffs Harbour CC [2005] HCA 62; (2005) 223 CLR 422 (diving accidents – dangerous to use obviousness as determinant of liability – warning signs)

State of New South Wales v Steed [2001] NSWCA 178 (school grounds – lawful entrant – dangerous activities contrasted at [47]ff)

Wilkinson v Law Court Ltd [2001] NSWCA 196 (see [32]: stairs)

Waverley Council v Lodge [2001] NSWCA 439 (Council's control of rock pool cannot be assumed – when failure to erect warning signs re obvious risks is negligent)

Marrickville MC v Moustafa (supra)

Waverley Municipal Council v Swain [2003] NSWCA 61 (beaches)

Campbelltown CC v Frew [2003] NSWCA 154 (Council swimming pool – slippery steps – low risk of injury – nosing – dangerous climbing)

Bathurst CC v Cheesman [2004] NSWCA 308 (slightly raised paver on footpath in private area owned by Council – obligation of pedestrians to take care for own safety)

Clarke v Coleambally Ski Club Inc [2004] NSWCA 376 (small recreational club with licence to use public land to public entrants - not unreasonable for club to rely on visitors to take reasonable care for themselves)

Wilkins v Council of the City of Broken Hill [2005] NSWCA 468 (public swimming pool – diving – failure to enforce prohibition – P lost on causation because of attitude towards authority)

Falvo v Australian Oztag Sports Association & Anor [2006] NSWCA 17; [2006] Aust Torts Rep 81-831 (playing fields for amateur sports)

Shellharbour City Council v Rhiannon Rigby & Anor [2006] NSWCA 308; [2006] Aust Torts Rep 81-864 (statutory authority as occupier of BMX track – content of duty – relevance of obviousness of risk – duty to young inexperienced drivers)

Pedestrians, Council's duty towards

See **HIGHWAYS AND FOOTPATHS**

Residential premises

Neindorf v Junkovic [2005] HCA 75; 80 ALJR 341

Stannous v Graham (1994) Aust Torts Rep ¶81-293

Ordukaya v Hicks [2000] NSWCA 180

Australian Postal Corporation v Gallard [2000] NSWCA 316

Drotem Pty Ltd v Manning [2000] NSWCA 320 (distinction between public commercial premises and residential premises discussed)

Baker v Gilbert [2003] NSWCA 113 (at [38]: no rule of law that householders may ignore a defect that reasonable care would have brought to their attention)

Parissis v Bourke [2004] NSWCA 373 (absent householder's duty to 18 y.o. son's party guests – alcohol – attempt to light barbecue with methylated spirits – social host responsibility)

Specialist contractors

Papatonakis (1985) 156 CLR 7

Davis v Nolras Pty Ltd [2005] NSWCA 379

Stairways

New South Wales Department of Housing v Hume bhnf Donna Hume & Anor [2007] NSWCA 69; [2007] Aust Torts Rep 81-879 (various stairway cases discussed)

Trespasser

Coffs Harbour City Council v Backman [2001] NSWCA 202, (2001) ATR ¶81-614

Consolidated Broken Hill Ltd v Edwards [2005] NSWCA 380 (duty of care to trespassers allowed to pass over railway bridge – discussion of “obviousness” post ***Vairy v Wyong SC***)

Warnings (relevance)

Vairy v Wyong SC [2005] HCA 62; (2005) 223 CLR 422 (esp at [7])

Nambucca SC v Connor [2004] NSWCA 13 (relevance of plaintiff’s evidence ([20])

A V Jennings Ltd v Thomas [2004] NSWCA 309

Cruise Group Pty Ltd v Fullard [2005] NSWCA 161 at [17]: reasonable response may be to put up no signs)

PROCEDURE (DISTRICT COURT)

Admissions – leave to withdraw

Maile v Rafiq [2005] NSWCA 410 (CTP Insurer admitted liability – genuine ground for contesting negligence later emerged – whether interests of justice required withdrawal of admission)

Ambush theory of litigation condemned

Nowlan v Marson Transport Pty Ltd (2001) 53 NSWLR 116

Glover v Australian Ultra Concrete Floors Pty Limited [2003] NSWCA 80

Amendment of statute-barred claim

Air Link Pty Ltd v Paterson (No 2) [2003] NSWCA 251 (see **LIMITATION OF ACTIONS**)

Application to restore proceedings struck out or stayed for default

National Parks & Wildlife Service v Pierson [2002] NSWCA 273, 55 NSWLR 315 (second action abuse of process if default not cured)

Application for rehearing of arbitration (Pt 51A)

Walshe v Prest [2004] NSWCA 94 (time does not run if Registrar fails to endorse date of sentencing award)

Arbitration award

Walshe v Prest [2004] NSWCA 94 (Registrar's duty to endorse date of sending of award – time does not run if breached)

Costs: Pt 39A r31(4)

Chiha v McKinnon [2004] NSWCA 273 (rule only applies where **plaintiff** fails to improve position after arbitration)

Default judgments, setting aside

AVS Australian Venue Security Services Pty Ltd v Criminale [2006] NSWCA 368 (s159 “irregularity”)

Discharging jury (s79A)

Germain v Cordina Chicken Farms Pty Ltd [2002] NSWCA 56 (principles stated – need to consider if redirection sufficient)

Dismissal for want of prosecution

Micallef v ICI Australia Operations Pty Ltd [2001] NSWCA 274

Falconer v Laird [2003] NSWCA 114 (no rescission of deemed dismissal under Pt 12 r4C if unfair to extend time)

Bamforth v Betcke [2003] NSWCA 116 (dismissal orders under Pt 18 r3 – when open to be set aside under Pt 1 r7A(5))

Torrac Nominees Pty Ltd v Karabay [2007] NSWCA 96 (preliminary dismissal order made before UCPR – no motion for reinstatement pending when UCPR commenced – no power to extend time)

Equitable Jurisdiction of District Court under s134(1)(h)

Commercial Bank of Australia v Hadfield [2001] NSWCA 440, 53 NSWLR 614 (mortgagor's claim for "damages" for wrongful exercise of power of sale fell within s134(1)(h) – discussion about DC's equitable jurisdiction)

Kolavo v Pitsikas [2003] NSWCA 59 (jurisdiction to declare negligent solicitor liable to indemnify plaintiff for costs payable to third party when they are assessed)

Overmyer Industrial Brokers v Campbells Cash & Carry Pty Ltd [2003] NSWCA 305 (injunctions by way of ancillary equitable relief)

Evidence and procedure

Perisher Blue Pty Ltd v Vidakovic [2006] NSWCA 234; [2006] Aust Torts Rep 81-858 (absence of findings of crucial primary facts and important pieces of evidence left out of reasons were substantial errors of fact finding)

Expert reports

Yacoub v Pilkington (Australia) Ltd [2007] NSWCA 290 (expert report served but not tendered – other party seeks to tender – expert not available for cross examination)

"Incompetent" party (DCR Pt 45 r5(3))

Murphy v Doman [2003] NSWCA 249 (discussion of test of "incompetence" in content of rule about need for tutor)

Judgment entered "irregularly"

Smith v Budandan Enterprises [2002] NSWCA 322, 55 NSWLR 367 (no need for misconduct – waiver)

Kendell v Carnegie & Ors [2006] NSWCA 302; (2006) 68 NSWLR 193 (consent judgment – claim of mistake)

AVS Australian Venue Security Services Pty Ltd v Criminale [2006] NSWCA 368 (default judgment – setting aside not automatic upon pointing to non-compliance with Rules – principles of "inherent" jurisdiction not to be invoked)

Jurisdiction under s44(1)(a) DC Act

Ross Forsyth v Deputy Commissioner of Taxation [2004] NSWCA 474 (fixed as at 1997)

Lay advocate, when granted leave

Damjanovic v Maley [2002] NSWCA 230, 55 NSWLR 149 (principles governing exercise of discretion under s43(1)(b) of District Court Act)

No case submissions

Hunt v Watkins (2000) 49 NSWLR 508

Pleadings

Kirby v Sanderson Motors Pty Ltd [2002] NSWCA 44, 54 NSWLR 135 (material facts plus causes of action to be identified (Pt 5 r6A))

Preliminary dismissal order

Bamforth v Betcke [2003] NSWCA 116 (delay in application to set aside needing explanation: see at [34])

Zhao v Posa [2004] NSWCA 184 (Rule 7A confined to orders on court's own motion – if party applies for irreversible order, notice required)

Design & Survey Neon Pty Ltd v Davies [2004] NSWCA 274 (grounds for setting aside: see [73] – extending time for application to set aside – discretion)

Andresakis and Skouteris t/as Andresakis & Associates v Alexis Holdings Pty Ltd [2006] NSWCA 294

Referee decisions (review)

Ryde City Council v Tourtouras [2007] NSWCA 218 (review of referee's report by DC judge – principles)

Security for costs

Philips Electronics Australia Ltd v Matthews [2002] NSWCA 157, 54 NSWLR 598 (Pt 40 categories are not exclusive for natural persons – independent operation of s156)

Separate questions

Tyrrell v The Owners Corporation Strata Scheme 40022 [2007] NSWCA 8 (not to be used if facts assumed and not agreed)

Slip rule (UCPR r36.17)

Newmont Yandal Operations Pty Limited v The J Aron Corporation & The Goldman Sachs Group Inc & 3 Ors [2007] NSWCA 195

Transfer of proceedings to Supreme Court

KBRV Resort Operations Pty Ltd v Chilcott (2001) 51 NSWLR 516

PROFESSIONAL NEGLIGENCE

See also **MEDICAL NEGLIGENCE**

Damages not to be assessed as if breach of warranty

Thomas v Adam [2000] NSWCA 127 (solicitor)

Tan v Benkovic (2000) 51 NSWLR 292 (doctor)

Legal advice, content of duty of care

Heydon v NRMA (2000) 51 NSWLR 1

Kolavo v Pitsikas [2003] NSWCA 59 (role of expert evidence)

Ibrahim v Pham [2007] NSWCA 215 (solicitor retained to advise on mortgage – whether duty to advise on investment risk)

Limitation Act, damages for solicitor's negligence

Phillips v Bisley CA 18.3.97

Orford v Qi Yang He [2002] NSWCA 152, 36 MVR 464

Argyropoulos v Langton [2002] NSWCA 183, 36 MVR 432 (solicitor – failure to commence proceedings in time – failure to seek leave to extend time – damages)

Wilson v Rigg [2002] NSWCA 246, 36 MVR 451 (solicitor – failure to commence motor accident claim in time – extension application refused due allegedly to negligence – measure of damages)

Radosavljevic v Radin [2003] NSWCA 217

Dunn v Firth [2003] NSWCA 280

Wilkinson v Daley [2004] NSWCA 331 (real value of loss to be assessed – prospect of verdict in lost action being unsatisfied to be taken into account)

Leitch v Reynolds [2005] NSWCA 259

Negligent advice

Leda Pty Limited v Weerden & Anor [2007] NSWCA 174; (2007) 63 ACSR 636 (accountant – tax advice)

Solicitor-negligence in conveyancing transaction

Thomas v Adam [2000] NSWCA 127

Standard of care

See now **Civil Liability Act** ss50, 5P

PSYCHIATRIC INJURY [see now **Civil Liability Act** Part 3 (s27ff)]

Aggravated damages inappropriate in claim based on pure psychiatric injury (“nervous shock”)

Hunter Area Health Service v Marchlewski (2000) 51 NSWLR 268

Causation

Pioneer Construction Material Pty Ltd v Millsom [2002] NSWCA 258 (effect of absence of counselling for employee, following trauma – expert evidence necessary)

DSM-IV

Commonwealth v Smith [2005] NSWCA 478 (Handley JA: not all emotional problems are an injury – not everything in DSM-IV is a psychiatric injury)

Duty of care

Tame v New South Wales; Annetts v Australian Stations Pty Ltd (2002) 211 CLR 317; [2002] HCA 35 (reasonable foreseeability, not sudden shock as ultimate yardstick – no liability unless injury would have been caused to person of “normal fortitude”, unless defendant knew of unusual susceptibility)

FAI Insurance Co Ltd v Lucre (2000) 50 NSWLR 261 (no immediate victim exclusion, but “mere bystanders” still different unless within LR(MP) Act 1944)

State of New South Wales v Seedsman [2000] NSWCA 119, 217 ALR 583 (duty to employee - “shock” not required)

Gifford v Strang Patrick Stevedoring Pty Ltd (2001) 51 NSWLR 606 (**WC Act 1987**, s151P merely limits damages and does not displace other limits on recovery – actual perception of accident or aftermath – normal grieving response excluded)

New South Wales v Paige [2002] NSWCA 235, 60 NSWLR 371, ATR ¶81-676 (no duty of care to conduct disciplinary proceedings so as to avoid psychiatric harm)

Patrick Stevedores (No 1) Pty Ltd v Vaughan [2002] NSWCA 275 (industrial dispute causing psychiatric injury – reasonable foreseeability of injury)

Rundle v SRA [2002] NSWCA 354 ATR ¶81-678 (rail authority – plaintiff leaning outside carriage to spray graffiti – ***Modbury Triangle Shopping Centre Pty Ltd v Anzil*** principle)

State of New South Wales v Napier [2002] NSWCA 402 (employee – prison complex – ***Modbury Triangle Shopping Centre Pty Ltd v Anzil***)

O’Leary v Oolong Aboriginal Corp [2004] NSWCA 7 (employer – distinction between stress and psychiatric injury – foreseeability – “normal fortitude” relevant, not determinative)

Cubbon v RTA [2004] NSWCA 326 (plaintiff’s mother and sister killed in car accident and plaintiff not present at scene of accident or aftermath – sufficient proximity post ***Tame***)

Fear of contracting disease must be a recognisable psychiatric injury before damages recoverable

CSR Ltd v Thompson (2003) 59 NSWLR 77

Fiduciary duty, breach of, when damages for psychological injury recoverable

Cassis v Kalfus (No 2) [2004] NSWCA 315

Intentional infliction and foreseeability

Nationwide News Pty Ltd v Naidu & Anor [2007] NSWCA 377; (2007) Aust Torts Rep 81-928

Motor Accidents Compensation Act 1997, s141 (s77 of MAA)

Hoinville-Wiggins v Connelly [1999] NSWCA 263 (non-relative needs to be "present at the scene" at time of accident)

Physical injury leading to psychiatric injury

Kavanagh v Akhtar (1998) 45 NSWLR 588 (general rules of duty and foreseeability apply)

Stress and psychiatric injury contrasted

O'Leary v Oolong Aboriginal Corp [2004] NSWCA 7

Worker's Compensation Act 1987, ss151 G – H

Gifford v Strang Patrick Stevedoring Pty Ltd [2007] NSWCA 50 (sections do not apply to nervous shock claims by children of worker)

Worker's Compensation Act 1987, s151 P

Gifford v Strang Patrick Stevedoring Pty Ltd (2001) 51 NSWLR 606

TORT (GENERAL)

Assault and battery

Darby v DPP [2004] NSWCA 431 (sniffer dog – elements of torts discussed)

Breach of statutory duty

Bhambra v Roet [2003] NSWCA 393 (Reg 73)

McDonald v Girkaid [2004] NSWCA 297

Multiplex Constructions (NSW) Pty Ltd v Lopez [2004] NSWCA 319 (reg 73 of Constructions Safety Regulations)

Paddison v Ultimate Image Pty Ltd [2004] NSWCA 410

Millingham v Wilkie [2005] NSWCA 45 (employer in breach solely by reason of plaintiff employee's negligence, no cause of action for damages – **Buckman** and **Andar** discussed)

F & D Normoyle Pty Ltd v Transfield Pty Ltd [2005] NSWCA 193 (reg 73 – “carries out construction work” – “access” – “passageway”)

Armstrong v Hastings Valley Motorcycle Club Ltd [2005] NSWCA 207 (when statutory duty is a “mere licensing provision”)

Lenz v Trustees of the Catholic Church [2005] NSWCA 446 (regs 73 and 74 – upon whom does obligation fall – cases reviewed)

Booksan v Wehbe [2006] NSWCA 3 at [156]; [2006] Aust Torts Rep 81-830 (contributory negligence a defence after **Civil Liability Act: Transfield Pty Ltd** [2005] NSWCA 193 at [39] followed)

Balesfire Pty Limited t/a The Gutter Shop v Jamie Adams and Others; Jamie Adams v Balesfire Pty Limited t/a The Gutter Shop and Ors [2006] NSWCA 112 (Regs 73, 74 – head contractor and subcontractor can be jointly liable – **Buckman** discussed)

Contribution between tortfeasors

Amaca Pty Ltd v New South Wales [2003] HCA 44; (2003 77 ALJR 1509 (must determine if party is a tortfeasor who would if sued be liable, before addressing contribution/indemnity issue)

RTA v Ryan [2005] NSWCA 34 (where liability capped – **Unsworth** principle)

Forstaff Blacktown v Brimac [2005] NSWCA 423 (accident predates 2001 amendments to **WCA Act**, proceedings commenced after 27.11.01)

Contributory negligence

Pelley v Maitland Benevolent Society [2004] NSWCA 323 (contributory negligence where breach of employer's duty to provide safe system of work)

False arrest/ false imprisonment

Zaravinos v State of NSW [2004] NSWCA 320, 62 NSWLR 58

Krivoshev v RSPCA [2005] NSWCA 76 (when arrest appropriate for minor offences)

Thompson v Vincent [2005] NSWCA 219, ATR 81-799 (police officers – implied licence to enter – **Crimes Act** s352)

Nasr v State Of New South Wales [2007] NSWCA 101; (2007) 170 ACrimR 78 (law on time an arrested person can be detained reviewed at [70] ff)

State of NSW v Delly [2007] NSWCA 303; [2007] Aust Torts Rep 81-920 (duty to inform reasons for arrest and its exceptions – aggravated damages – exemplary damages)

Inducing breach of contract (justification)

Sydney Organising Committee for the Olympic Games v Zhu [2002] NSWCA 380

Intentional infliction of nervous shock

Nationwide News Pty Ltd v Naidu & Anor [2007] NSWCA 377; (2007) Aust Torts Rep 81-928

Joint and concurrent tortfeasors

Baxter v Obacelo Pty Ltd (2001) 205 CLR 635

Malicious prosecution

A v State of NSW [2007] HCA 10 (elements of tort restated and explained – prosecutor does not have to believe in guilt)

Nuisance

Volman v Lobb [2005] NSWCA 348 (mud on footpath)

Melaleuca Estate v Port Stephens [2006] NSWCA 31; (2006) 143 LGERA 319 (unreasonable failure to abate – statutory good faith defence)

Sutherland Shire Council v Becker [2006] NSWCA 344; (2006) 150 LGERA 184 (loss of lateral support)

Greenwood v Papademetri [2007] NSWCA 221 (elements of public nuisance – builder on private land creates public nuisance – liability of owner and occupier)

Non delegable duty of care [see now **Civil Liability Act** Part 1A, Div 7]

Burnie Port Authority v General Jones Pty Ltd [1994] HCA 13; (1994) 179 CLR 520 at 550-1

Andar Pty Ltd v Brambles Ltd [2004] HCA 28; (2004) 217 CLR 424 at [34] (employer)

Leichhardt Municipal Council v Montgomery [2007] HCA 6 (road authority's duty is not non-delegable – rationale of existing categories) – nuisance is absorbed into negligence

Hoult v Gilbert [2002] NSWCA 121 (hospital)

TNT Australia v Christie [2003] NSWCA 47; (2003) 56 NSWLR 1 (employer and labour hire firm)

Rockdale Beef Pty Ltd v Carey [2003] NSWCA 132 (feedlot entrepreneur)

Multiplex Constructions (NSW) Pty Ltd v Lopez [2004] NSWCA 319

Emoleum v Bond [2004] NSWCA 352 (labour hire firm and coordinate of road sealing work)

Eurobodalla SC v Dufty [2004] NSWCA 450 (**Brodrigg** and recent cases discussed)

National Transport Insurance Ltd v Chalker [2005] NSWCA 62 (**Stevens v Brodrigg** discussed – owner of prime mover who did most jobs for same person – formal relationship not ignored)

Pack-Trainers Pty Ltd v Moore [2005] NSWCA (discussion of **Brodrigg** and recent trends imposing duties on entrepreneurs with coordinating role)

Samsung Electronics Australia v Macura [2005] NSWCA 386 (**TNT v Christie** dist)

M A Partitioning and Ceilings Pty Ltd v Kezic [2005] NSWCA 414 (**TNT v Christie** distinguished – employee of subcontractor)

Forstaff Blacktown Pty Limited v Brimac Pty Limited & Anor; Brimac Pty Ltd v Johnston & Anor [2005] NSWCA 423 (labour hire firm's duty to devise safe system)

Trespass to land

TCN Channel Nine Pty Ltd v Anning (2002) 54 NSWLR 333 (television crew – whether express or implied licence to enter – damages)

Thompson v Vincent [2005] NSWCA 219, ATR 81-799 (police officers – implied licence to enter – **Crimes Act** s352)

Pringle & Ors v Everingham [2006] NSWCA 195; (2006) 46 MVR 58 (incidents in hotel car park – police breath testing – implied licence – need to plead correctly)

Vicarious liability

Hollis v Vabu Pty Ltd [2001] HCA 44; (2001) 207 CLR 21

New South Wales v Lepore [2003] HCA 4, 77 ALJR 558

Leichhardt Municipal Council v Montgomery [2007] HCA 6 (limit of vicarious liability for independent contractors)

Gutman v McFall [2004] NSWCA 378 (principle in **Soblusky v Egan** 103 CLR 215 is confined to motor vehicles)

Mambare Pty Ltd t/as Valley Homes v Bell [2006] NSWCA 332; [2006] Aust Torts Rep 81-867 (discussion of limits of **Stevens v Brodrigg** – no duty of constant supervision of independent contractors)

Fox v Leighton Contractors Pty Ltd & Ors [2008] NSWCA 23 (head contractor's negligence in failure to ensure induction training for subcontractors – duty is not a non-delegable one)

Commonwealth of Australia v Griffiths & Anor [2007] NSWCA 370 (employee entitled to witness immunity negating duty of care – employer also protected from vicarious liability)

TRADE PRACTICES / FAIR TRADING ACTS

Causation

Abigroup Contractors Pty Limited v Sydney Catchment Authority (No 3)
[2006] NSWCA 282; (2006) 67 NSWLR 341

Damages for breach of ss52/42

Auyeung v Chan [1999] NSWCA 417 (misleading conduct - restaurant - downturn of business - causation - damages, how assessed)

Sydney Harbour Casino Properties Pty Ltd v Coluzzi [2002] NSWCA 74 (proving reliance and causation of loss where misleading prediction or expression of opinion – s51A - representation with respect to future matters – tortious measure of damages)

Havyn Pty Ltd v Webster [2005] NSWCA 182 (representation as to belief – causation – measure of damages – representee’s carelessness)

Abigroup Contractors Pty Limited v Sydney Catchment Authority (No 3)
[2006] NSWCA 282; (2006) 67 NSWLR 341

Passing on misleading information

Wong v Citibank Ltd [2004] NSWCA 396 (whether a mere conduit or adopter – when an employee may be liable)

VICTIMS COMPENSATION

Victims Compensation Fund v Brown [2003] HCA 54; (2003) 77 ALJR 1797 (“shock” as defined in cl 5 of Schedule 1 (now repealed) – “symptoms and disability” – “and” conjunctive)

Victims Compensation Fund Corporation v Ainsworth (2001) 51 NSWLR 466 (aggravation of existing condition – District Court’s jurisdiction (s39(3)(a)) and limited powers (s35(5)(b)))

Victims Compensation Fund Corporation v District Court [2002] NSWCA 355 (District Court has no advisory jurisdiction – hypothetical questions to be avoided)

Victims Compensation Fund Corporation v GM [2004] NSWCA 185, 60 NSWLR 310 (“injury” – victim of sexual assault – absence of psychiatric or other evidence)

WORKERS COMPENSATION ACT 1987 / WORKPLACE INJURY MANAGEMENT ACT 1998

Appeal Panel (duty to give reasons)

Campbelltown City Council v Vegan [2006] NSWCA 284; (2006) NSWLR 372 (failure is error of law on face of record)

“Employer”

Shaw v Bindaree Beef Pty Ltd [2007] NSWCA 125 (who is the employer for the purposes of the Acts – effect of **Apprenticeship and Training Act 2001**)

Section 11A (psychological injury wholly or predominantly caused by disciplinary action)

Department of Education & Training v Sinclair [2005] NSWCA 465

Section 40 (award for incapacity payments)

Singh v TAJ (Sydney) Pty Limited [2006] NSWCA 330; (2006) 4 DDCR 557

Section 151A (election)

Ostojic v Trazmet Pty Ltd [2005] NSWCA 145 (history of section and predecessors)

Humphreys v Mulco Tool & Engineering Pty Ltd [2006] NSWCA 355; (2006) 4 DDCR 389 (no election if P disentitled to commence proceedings because of s151C – valid election continues to operate as bar despite repeal of pre 2001 s151A)

Section 151C

Berowra Holdings Pty Ltd v Gordon [2006] HCA 32; (2006) 225 CLR 364

Sydney Ports Corporation v Collins [2003] NSWCA 28, (2003) 56 NSWLR 232 (objective approach required to determine if true denial – silence or equivocation insufficient)

Lampson (Australia) Pty Ltd v Mackay [2004] NSWCA 152 (failure to respond not a denial of liability)

Kennards Hire Pty Ltd v Koufu [2005] NSWCA 413 (“we will not be admitting breach of duty of care on behalf of the employer” a denial, in context)

Asplundh Tree Expert (Australia) Pty Ltd v Robertson [2005] NSWCA 471 (action commenced after 27.11.01 not protected merely because separate action (since discontinued) commenced before)

Wollongong Fabrications Pty Ltd v Ramsbottom [2006] NSWCA 279 (“notice of injury”)

Section 151AB

ICI Australia Operations Pty Ltd v WorkCover Authority [2004] NSWCA 55 (“employment to the nature of which the disease was due” (s151 AB))

Section 151G

Gifford v Strang Patrick Stevedoring Pty Ltd [2007] NSWCA 50 (neither s151G nor s151H apply to nervous shock claims by children of deceased worker)

Section 151H

Cargill Australia Ltd v Agius [2002] NSWCA 119, 54 NSWLR 282 (gratuitous domestic assistance damages are treated as economic loss damages under s151H)

Section 151L (mitigation of damages)

State of New South Wales v Fahy [2006] NSWCA 64; [2006] Aust Torts Rep 81-865

Section 151Z

Franklins Self Serve Pty Ltd v Wyber (supra)

Hampic Pty Ltd v Adams (1999) NSWCA 455, (2000) ATPR [1999] ¶41-737 (extends to actions for breach of statutory duty: **Leonard v Smith** (1992) 27 NSWLR 5 to be followed)

Leighton Contractors Pty Ltd v Smith [2000] NSWCA 55 (**Leonard v Smith** to be followed)

State of New South Wales v Kennelly [2001] NSWCA 71 (s151z(2) does not have reference to s5(1)(c) of LR(MP) Act or principles of contribution at common law or equity: operation of subsection discussed)

State of New South Wales v Kennelly (No 2) [2001] NSWCA 472

Lapcevic v Collier [2002] NSWCA 300 (**Leonard** and **Grljak** discussed and explained)

Clout Industrial Pty Ltd (in liq) v Baiada Poultry Pty Ltd [2004] NSWCA, 61 NSWLR 111 (**Leonard** and **Grljak** discussed and summarised (esp at [32] and [60]-[63]). **WC Act** amendments that commenced in November 2001 do not apply to proceedings commenced before then

Nominal Defendant v Hi-Light Industries [2004] NSWCA 423, 61 NSWLR 585 (Nominal Defendant not immune from recovery action under s151Z(1)(d))

QBE Workers Compensation (NSW) Ltd v Dolan [2004] NSWCA 458, 62 NSWLR 42 (right conferred by s151Z(1)(d) depends on true liability of third party tortfeasor to pay damages (**GIO v McDonald** (1991) 25 NSWLR 492) – this right exists independently of worker's right to sue for damages – consent judgment between employee and third party tortfeasor does not give rise to *res judicata* estoppel)

Gordian Runoff Pty Ltd v Heyday Group Pty Ltd [2005] NSWCA 29 (S151Z(2) explained – **Leonard** and **Grljak** approved)

Gordian Runoff Pty Ltd v Heyday Group Pty Ltd [2005] NSWCA 29 (employer and non-employer tortfeasor – apportionment of responsibility – liability between contractors as joint tortfeasors)

Timberland Properties v Bundy [2005] NSWCA 419 (P entitled to judgment against each tortfeasor even if amounts differ)

Forstaff Blacktown Pty Limited v Brimac Pty Limited & Anor; Brimac Pty Ltd v Johnston & Anor [2005] NSWCA 423 (amendments limiting damages recoverable from employer - injury before but proceedings brought against 3rd party after amendments – no basis for contribution)

Glynn v Challenge Recruitment Australia Pty Ltd [2006] NSWCA 203 (whether s151Z means proportionate liability to P - apportionment between joint tortfeasors **Gordian Runoff** “explained”)

Turner v George Weston Foods Ltd [2007] NSWCA 67; (2007) 4 DDCR 571 (correct date at which to assess damages which worker would have been entitled to if third party had been sued)

Allianz Australia Insurance Ltd v Newcastle Formwork Constructions Pty Ltd [2007] NSWCA 144 (excessive request for particulars – for principles see **Sims v Wran** (1984) 1 NSWLR 317 p321-2)

Teuma & Anor v CP & PK Judd Pty Ltd [2007] NSWCA 166 (indemnity – whether statute barred amount constitutes part of capped damages)

WIM Act Schedule 1, cl 2 (“deemed worker”)

Boylan Nominees Pty Ltd v Sweeney [2005] NSWCA 8 (requirements considered at [59] ff)

National Transport Insurance Ltd v Chalker [2005] NSWCA 62 (**Op Industries v MMI** distinguished and doubted)

Ebb v Fast Fix Steel Fixing Pty Ltd [2007] NSWCA 236; 2 AWR 3,536 (deemed employer provisions do not affect general law principles touching common law liability – statutory restraints on common law damages apply to deemed employment relationship – **Op Industries v MMI** reconsidered)

WIM Act (application to pre 1987 claims)

Attileh v SRA [2005] NSWCA 64, 62 NSWLR 439

“Work injury damages”, meaning of (s250)

Kimberly-Clark Australia Pty Ltd v Thompson [2006] NSWCA 264; (2006) 67 NSWLR 187 (does not extend to nervous shock suffered by spouse resulting from death of husband because cause of injury was death to employee)

Notice of injury (s254)

Star City Pty Ltd v Hudson [2007] NSWCA 188 (notice of second injury not required because it was result of first injury – **WIM Act**, s254)

Throwing Stones: A cost/benefit analysis of judges being offensive to each other

THROWING STONES: A cost/benefit analysis of judges being offensive to each other

Justice Keith Mason
JCA Conference
6 October 2007

We can give offence without intending it. But judges, of all people, ought to know the meaning of their words. Sometimes the sting is intended, especially in a reserved judgment. Sometimes it is personal.

This paper explores the motivation of studied harshness, when it is legitimate, and its impact upon the effective working of the judiciary. I am unaware of any previous writing on the topic in Australia.

A judge is entitled to speak freely during the hearing and is expected to make frank disclosure of the true reasons that support his or her proposed orders. Within an appellate court, circulating reasons in draft invites the concurrence or reasoned dissent of one's colleagues as well as their assistance in removing unintended infelicities. Sharp edges of language, fallacious reasoning and overlooked arguments may thus be detected before it is too late. But when a judge's reasons are published they speak to the world at large. With the internet they pass instantaneously across the city and across the globe without hope of retraction.

The more strident a rebuke in a judgment the more likely it is to be picked up by the legal public, reported by the media (usually out of context), and viewed as a slight on the reputation of the person rebuked. The substance of the decision may be ignored. The media coverage of Sackville J's recent **C7** judgment containing criticism of a lawyer associated with one of the winning parties is an example of what I am talking about.

When a judge adopts strong language to condemn a party's criminal or corrupt conduct, a witness's perjured testimony, or a legal practitioner's incompetence there are well-established rules about procedural fairness and standards of proof that the judge is first expected to apply. And there are avenues of recourse for those affected or the parties associated with them.

When a judge adopts sarcasm or worse to gibe a colleague in a collegiate court, the recipient will know in advance what is coming. The odd unseemly public spat between judges on appellate courts may lower the standing of those judges and their court, but at least the recipient(s) get fair warning and an opportunity not to turn the other cheek.

When a judge chooses to chastise the judge whose decision is under appeal, such criticism will invariably strike a target who was uncharged and unrepresented and who has no recourse. This will be the case whether or not the criticism was justified in its content or in its terms. Is this part of the inevitable cut and thrust of the judicial system? In what circumstances is strong language appropriate? Is it possible to develop standards or conventions as to when such criticism is in order and as to acceptable methods of expressing it?

My topic addresses the relationship between appellate and lower courts in the language of their public discourse. I am not concerned with what passes as judicial humour, except where it is sarcastic and directed at the court or judge below. From my perspective as President of an intermediate appellate court, I perceive that our senior judiciary has a problem that calls to be acknowledged and analysed. The chosen title ("Throwing Stones") acknowledges that I may be both the most and the least qualified to speak.

I am unaware of the extent of the problem as regards appeals from Local Courts to the District or County Court or in relation to appeals to single judges of the Supreme Court. In any event, the dynamics are different where courts of appeal or the High Court of Australia are involved. Studied criticism in a reserved and published judgment by a senior court bears an institutional sting, if only because of the intended likelihood of its republication.

Some readers will consider the problem to be inevitable in a system that highly values free speech and judicial independence and in which an appeal court has the duty to correct material errors. They may share the view of Field Marshall Montgomery who, when asked how he justified war, referred the questioner to Maeterlinck's **The Life of The Ant**. Montgomery's point was that war casualties are part of the natural stuff that happens.

Others will think it better that judges kept silent because they should never throw stones at each other!

In defence of this paper, I suggest that most Australian judges will know at once what I am talking about. The High Court and intermediate courts of appeal occasionally adopt personally offensive language when detecting and correcting error below.

In my opinion, the topic also deserves attention because offensive discourse undermines the mutual respect that should exist as between the different layers of the judicial hierarchy. It promotes an "us/them" mentality. It reinforces unhelpful perceptions that the higher court lacks understanding of the dynamics of life in the trenches. And it saps the institutional morale of the lower court, especially if reportage of a rebuke attributes fault to the court as a whole. Fear of a second personal attack may provoke inertia by stemming the flow of judgments by nervous judges. These consequences apply whether or not the content or language of the reproof was justified.

Like casualties of war, these harmful impacts are justifiable only to the extent that they are inevitable.

Successive Chief Justices of Australia have written about the corrosive impact of attacks by the media or the Executive branch upon the Judiciary. But we see only half of the problem if we exclude the impact of judges attacking each other. Our voracious media thrives on reporting conflict, error and dysfunctionality. Public accountability is an essential aspect of the appellate process, but doing so by means of abusive language has a cost that needs to be weighed by those responsible.

It is always open for a judge to decide a case by stating that the issues were X, that the submissions were Y, and that the decision is Z because the answers to X and Y were XA, XB etc, YA, YB etc. In an appellate court this exercise may entail disagreement with the reasons of the court below or the processes whereby its decision was reached. Sometimes a submission that the lower court misconducted itself in some way also falls to be addressed.

In 99 times out of 100 the submissions of counsel in an appeal choose language that does not attribute personal fault to the judge below. Advocates focus upon errors, not the actor who made them, the sin and not the sinner. An appellate judge must address all such issues without fear or favour, but also without affection or ill will. The choice to castigate the sinner is almost always the unprompted decision of the appeal judge.

Sometimes an appeal court encounters judicial misbehaviour that calls for firm denunciation. A few months ago, the Queensland Court of Appeal strongly criticised a judge's conduct towards an unrepresented litigant, describing it as impatient, rude and overbearing. This would have stung the judge deeply, but was part of the proper vindication of the appellant's rights that had been trampled on by the very conduct justly complained of. The Court of Appeal's judgment drew forth a public apology by the Chief Justice to the litigants concerned. Geoff Davies, a former judge of the Queensland Court of Appeal, has written that this incident shows why other jurisdictions should have a Judicial Commission like that in New South Wales to address these matters more systematically. [1] But he also stressed the obligation of an appeal court to speak firmly when firmly satisfied about miscarriages stemming from judicial misbehaviour. I agree.

Indeed I see nothing wrong with an appellate court noting that a significant error has occurred repeatedly in successive decisions by an identified judge who has ignored previous appellate reversals. A few years ago the New South Wales Court of Criminal Appeal recorded the many instances of studied disregard of sentencing standards and appellate reversals by a named judge of the District Court. The New South Wales Court of Appeal has done likewise with repeated infractions by a judicial officer of his duty to provide adequate reasons and to grapple with the real issues presented at a trial.

This admittedly extreme resort is fairer to the lower court as a whole than a broadside directed to it *en masse*. In situations like this, a calm recounting of the judicial record may be more effective than vituperative language.

I recognise that some courts (including the Victorian Court of Appeal) have a policy of not identifying the judge appealed from, at least in certain situations. In my view, this risks the appearance of judges protecting each other. It is also impracticable, in that the profession will always know who is involved if it matters. Furthermore, other judges on the court below are entitled to be excluded from the criticism.

A court's reasons must address the winning and losing parties and the main arguments advanced on their behalf during the hearing. A judgment may also speak to the profession, the academic community, those involved with the enforcement or making of the law, and the public generally. It is an acknowledged role of an appellate court to expound general principles for the guidance of the profession and others.

Nothing in this paper implies that appellate courts should hold back from their painful but necessary supervisory role (sometimes called their visitatorial jurisdiction). Since appellate decisions are forward-looking as well as backward-looking, there will be situations in which deterrent policies are properly in play.

Making the appellate judge feel good for getting something off the chest is not, however, a proper aspect of the judicial function. The obligation to act without fear or favour does not authorise the venting of personal spleen even where error is clearly established. In Roscoe Pound's words, "*the opinion of [a judge] should express his reason, not his feelings*". [2]

All of us speak from the heart at times, believing that it is necessary to do so in the particular circumstances. Each judge is free to choose the language and tone of his or her discourse. Sometimes we adopt rhetorical forms. Some of us are brusque by nature. Sometimes strong language is used unconsciously. At times, we persuade ourselves (some more than others) that the "time to speak" has arrived and that our voice deserves to be heard in a particular matter.

Not all of us have wisdom or sensitivity that matches our perceived capacities. All of us will make mistakes, sometimes in the very act of perceiving them in others. An appeal court's reasons will interest the judge under appeal. They are meant to do so. Lessons are to be learnt and mistakes avoided in the future. It will be expected that the judge's co-workers will read what is written as well. If there are blows to individual or collective self-esteem, they will not be kept secret in our system of open justice.

The court whose decision is challenged has no means of controlling the arguments presented on appeal or responding to their perceived inadequacies, let alone the perceived deficiencies of the appeal judgment. Alone of the world, the judge or judges who are overturned must accept reversal without public questioning, not even (or especially) in a later judgment. They can complain to colleagues, grumble to their spouse or kick the cat. But a public response is for others to make.

Most judges adopt the policy of never speaking privately about their own decisions to those above or below them in the judicial hierarchy. For them, the answer must be as Pontius Pilate's (*Quod Scripsi Scripsi*). Those who breach this convention may unconsciously rub salt into a wound, sometimes their own. And if it is the senior judge who initiates the discussion, he or she may provoke a frank response that may be as unwelcome as it is unhelpful.

Australian law, unlike that in India, [3] does not give a judge standing to move the higher court to correct or expunge its own unjustified error.

I do not suggest that we follow the Indian precedents that recognise an inherent jurisdiction to permit application for the expungement of objectionable remarks from the court record. But there is a most useful statement about the principles I am advocating in a 1990 decision of the Indian Supreme Court: [4]

Judicial restraint and discipline are as necessary to the orderly administration of justice as they are to the effectiveness of the army. The duty of restraint, this humility of function should be [the] constant theme of our judges. This quality in decision making is as much necessary for judges to command respect as to protect the independence of the judiciary. Judicial restraint in this regard might better be called judicial respect, that is, respect by the judiciary. Respect to those who come before the court as well to other co-ordinate branches of the state, the executive, and legislature. There must be mutual respect. When these qualities fail or when litigants and public believe that the judge has failed in these qualities, it will be neither good for the judge nor for the judicial process.

These considerations mean that an appeal judge should weigh most carefully the cost/benefit of choosing to go beyond what is necessary for deciding the appeal and attacking the judge or judges appealed from, or their court generally. The appeal judge wields a mighty weapon if he or she chooses to add a personal rebuke. The temptation to do so will be strongest in a context involving clear error, but the kick is always a free kick.

Appellate courts are necessarily subject to little or no external restraint. They alone are the collective guardians of their own discourse. In reality, one member of the court cannot stop another from saying what he or she chooses. Of course, we do not have to concur in reasons with which we disagree and we are free to dissent from them in our own terms.

The double entendre of my chosen title ("Throwing Stones") acknowledges that the problem of strong language is not confined to the way the High Court of Australia sometimes addresses intermediate courts of appeal. From my perspective in New South Wales I am aware of considerable (and sometimes justified) resentment from other courts in New South Wales about the language of the reasons sometimes emanating from the Court of Appeal. I base myself on ten year's attendance at the annual conference of District Court Judges in this State, and upon welcomed, though sometimes painful, feedback from the President of the Industrial Relations Commission and the Chief Judge of the District Court. I have written or joined in judgments offending the standards that I now propound and this is a cause for regret.

In recent years when attending the District Court Judges' Conference I have been questioned about the tone of criticism found in certain "*judgments of the Court of Appeal*". I point out that mine is a busy Court without infinite opportunity to check and recheck the language of its judgments. I explain the educative role of the Court of Appeal. I indicate that no one is perfect (intending thereby to include judges of the Court of Appeal as much as judges of the District Court). I also explain that occasional excessive language is the price paid for free speech values. I tell the Conference that no appellate judge assumes responsibility for a colleague's reasoning unless joining with that reasoning with unqualified assent: this at least attempts to answer the blanket criticism of the Court of Appeal. I also tell the District Court Judges that stronger language is sometimes chosen deliberately because of perception of a recurring problem.

That is about as far as I can go by way of explanation and justification to my judicial colleagues in the District Court. The rest lies with the individual and collective self-discipline of the Court of Appeal. At my request, the District Court judges provided me with a bundle of cases of concern. The material was considered at a meeting of the Judges of Appeal. In some instances, we perceived our brethren from the District Court to be overly sensitive. In others, we recognised room for our own improvement.

There has for some time been significant concern within the New South Wales Court of Appeal about the cases (numerically small, but costly to litigants and the State) in which a new trial is ordered because the trial judge has not wrestled adequately with the issues and/or exposed his or her reasoning to an acceptable degree. While I hasten to absolve the great majority of District Court judges from this comment, there is sometimes a perception that the problem of absence of reasons stems from more than simple oversight.

Everyone has his or her own *betes noires*. But there are recurring situations that appear to trigger offensive language from time to time. I am not at this stage justifying or condemning the language. For the present, I merely flag the situations that tempt some appellate judges to "let rip".

Appeal judges appear to get angry when they perceive recurring yet avoidable problems, instances of high-handed bullying and wasted costs. The temperature may rise even higher if the identified error concerns a field of intellectual interest to the appellate judge concerned or if the judge below is thought to have wilfully disregarded binding precedent.

The High Court may get touchy about intrusions upon areas in which it perceives itself to have a monopoly in developing the general law. It is also solicitous for the plight of trial judges who have been unjustly reversed by an intermediate court of appeal.

Scenarios that call for a strong, but not necessarily offensive, response include repeated infractions of established principles of judicial method, disregard of binding authority, and mistakes involving well-known legal principles. Even here, caution is strongly advised. Errors may be the product of the way the case below was conducted. Slips and omissions in the language of reasons of busy judges do not always betoken substantive errors.

Indeed, the very talk of “error” may be inapt and therefore offensive. An appellate court that decides a case is entitled to pull rank by preferring one interpretation of a statute over another, or adopting one field of academic discourse in preference for another in a contentious area. But considerably more is required to be shown before it may justly brand the opposite view as erroneous. One recalls Jackson J’s aphorism about the Supreme Court of the United States:[5] *“We are not final because we are infallible, but we are infallible because we are final”*.

An appellate court can expect to be asked by at least one of the parties to find error in the decision below. If error there is, the court must identify it (at least so far as this is necessary) and expose it by demonstrating superior reasoning process. So far so good. But when, if at all, is it, necessary or productive to go further? I have in mind reasons that:

- grade an error as “serious”, “very wrong” or “fallacious”
- state or imply that the error was the product of gross ignorance about a basic legal principle without first addressing and rejecting the possibility of poor expression in the reasons of a busy judge
- seize upon an obvious slip in one portion of a judgment without acknowledging a correct statement of principle elsewhere in the reasons
- state or imply that overlooking of precedent was wilful, without squarely addressing the basis for such a conclusion
- include comments *ad hominem* directed at the judge or the judge’s scholarly associates
- state or imply that the overruled judge was on a wilful frolic contrary to the judicial oath to do *“justice according to law”*
- castigate the lower judge in circumstances where a split decision in the appellate court reveals some of the rebuker’s colleagues to have found absence of error in the court below. Might consistency not mean that the rebuker should add his or her colleagues to the list of the benighted if silence is not the preferred option?

It could be useful for a forum such as the JCA to start a project for identifying further categories of offensive discourse that should be avoided according to best practice.

Any judge who itches to get stuck into another errant judge or who writes in anger should pause and consider the advice of Benjamin Cardozo: [6]

Write an opinion, and read it a few years later when it is dissected in the briefs of counsel. You will learn for the first time the limitations of the power of speech, or, if not those of speech in general, at all events your own. All sorts of gaps and obstacles and impediments will obtrude themselves before your gaze, as pitilessly manifest as the hazards on a golf course. Sometimes you will know that the fault is truly yours, in which event you can only smite your breast, and pray for deliverance thereafter.

It would be quite wrong for anyone to infer that this paper is connected with my decision to retire from the Bench in the new year. I have been thinking about these matters for a considerable time. I do admit, however, that the imminence of judicial retirement affords me some liberty to speak my mind. In doing so, I would hope that I have not caused offence to any judicial colleague. If I have, he or she is welcome to reply with stones thrown in my direction.

END NOTES

1. **The Australian** 14/9/2007.
2. Roscoe Pound, “Cacoethes Dissentiendi: The Heated Judicial Dissent” 39 **Amer B Assn J** 794 (1953) at p797.
3. For a review of the cases see **Re ‘K’, a Judicial Officer** [2001] 4 LRC 622, [2001] 2 LRI 411.
4. **Mathur v Gupta** [1990] 2 SCR 110 at 117.
5. **Brown v Allen, Warden** 344 US 443 (1953) at 540.
6. Cardozo B, *Law and Literature*. Published in (1939) 39 **Columbia Law Review** 119 at 122.

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Law Graduation Address – Macquarie University

LAW GRADUATION ADDRESS – MACQUARIE UNIVERSITY

WEDNESDAY 18 APRIL 2007

Justice Keith Mason AC

Every five years or so my graduating law class holds a reunion dinner. These events mark the passing of the years and the passing of our enthusiasms. At the early reunions, all the talk was about entry into legal practice, our encounters with the partners in the law firm, our early briefs at the Bar. A decade later, professional legal work was still the main topic of conversation, with much boasting about our climb up the greasy pole marked “wealth and/or status”. The solicitors talked about appointment as an associate partner; the barristers talked of acquisition of chambers; the academics about early publications in law journals.

By the early 1990s, the talk had swung away from law as the principal focus and more towards children, homes, gardening and overseas holidays. And there were gaps in our numbers: some had died, some disappeared, some were in gaol. Several had moved into other professions. One solicitor had become a grief counsellor. Others were fantasising about what life would have been like in an alternative universe such as (for me) professional golf.

At the most recent event, retirement plans were openly discussed. In Horace's words, “*Eheu fugaces, Postume, Postume, labuntur anni*” (*Alas Postumus, Postumus, the fleeting years are slipping by*). That's Horace of ancient Rome, not Horace Rumpole – although Rumpole must surely have muttered this passage sometime in his career.

What we – the graduating class of Sydney Law School of 1970 - have kept over the years are shared memories of an exciting and informative period of our youth. Often our discussion has returned to particular teachers whom we admired for their lecturing skills, capacity to inspire, humour and humanity. I am sure that the graduates assembled here today already share a body of mainly positive memories. These memories will endure, perhaps maturing with age.

Of course, talk of “shared” memories of a graduating class is something of an overstatement. Inevitably, each graduate takes away different perspectives. Experience in both life and the law teaches that witnesses to a common event perceive and remember things differently.

Henry Bournes Higgins was a leader of the Australian Federation movement and a Justice of the High Court of Australia between 1906 and 1929. Late in life he thought back to his preparatory schooldays in Dublin at the Wesleyan Connexional School. He was prompted by reading of a character called Henry Higgins in a play recently written by a famous school contemporary, George Bernard Shaw. Higgins the judge wrote to remind Shaw the dramatist of their shared experiences. He enquired whether Shaw's schooldtime memories had prompted him to name the hero of his play Henry Higgins. To be certain that Shaw's recollection was jolted, Higgins mentioned a mutual friend called Kingsbury.

As you know, Shaw's play was Pygmalion. But Higgins the judge misnamed it Pygmalion and Galatea. This prompted a more than usually mischievous reply from the acerbic dramatist:

“Dear Mr Higgins, [he wrote]

I remember Kingsbury quite well; but I don't remember you. In 1865 when you left, I was only 9 years old. If we were really at the old Wesleyan Connexional School (now Wesley College and co-educational) together, it can have been for a short overlap only. I certainly did not call the hero of Pygmalion (not Pygmalion and Galatea, which is a play of the late W S Gilbert) after you ...

There was a boy who came and went in my time whose name may have been Higgins, though I am not quite sure of it. But he was weakminded or rather infantile, and used to stand up and sing during roll call when the

fellows next to him told him that Dr Crook expected him to do it. He stayed only a very short time, and should never have been sent there. A most goodnatureed creature, who may have turned out well after all. Your dates exclude the possibility of identifying you with him.

Wesley College has sometimes claimed my interest as an old alumnus; but I have not a good word to say for it. It could not even teach Latin; and it never seriously tried to teach anything else. A more futile boy prison could not be imagined. I was a dayboy: what a boarder's life was like I shudder to conjecture."

I hope that you have had better learning experiences at this institution; and that you will retain closer ties with your alma mater than George Bernard Shaw did for his old school.

The School of Law here – and its graduates – are held in high esteem by the legal profession. From the outset, the faculty has pursued independent paths, blending core legal studies with innovative analyses of the societal impact of particular subjects and a critical assessment of the role of law itself.

The Centre for Environmental Law is particularly well-known for its interdisciplinary and collaborative approaches to a vast and vital topic. The Centre's research staff and teaching methods model the wide embrace of the subject by blending law, science and public policy and viewing the topic globally.

It must be a fitting source of pride that the recently appointed Chief Judge of the Land & Environment Court is a graduate of this still young establishment.

Environmental law is now mainstream. But I want to say a few words about the contribution that it has made to the law generally. In doing so, I trust you will forgive some further personal reminiscences.

When I was at law school in the 1960s a classical illustration of the extra-territorial legislative power of the English Parliament was its supposed capacity to make it a crime for a Frenchman to smoke on the streets of Paris. This example would not be used nowadays because we perceive that a single gauloise cigarette smoked in Montmartre may be like the flapping of a single butterfly's wings in the Amazon jungle in its potential environmental impact. Concern for the global environment has caused the constitutional theorists to think up alternative examples of the outer limits of legislative power of a national Parliament.

I was the Solicitor General for this State between 1987 and 1997. In this role, I had the pick of the appellate litigation conducted on behalf of the State and its agencies.

At the start of my decade in office the greater part of the work involved old fashioned constitutional law, especially federal demarcation disputes. By the end of the decade at least a third of my work involved matters environmental, many of them of the highest sensitivity. The change in emphasis reflected a massive upsurge of governmental concern about such matters. It also reflected a trend to use litigation against the State and its agencies as a form of participatory democracy and a means of setting agendas for action. Environmental issues also tended to set agency against agency, and one of my roles was to advise and/or mediate in such disputes.

Adjunct Professor Patricia Ryan, a law school classmate of mine from Sydney, has described the 1970s as the decade of environmental awakening. The Australian Conservation Foundation was instituted in 1965 and a number of environmental bodies began to emerge in the following decades. Significant events in this State were the **Environmental Planning and Assessment Act 1979** and the establishment of the Land & Environment Court. These signalled switches from town planning law to environmental law, from mainly bureaucratic control to mainly judicial control, and from a piecemeal bandaid approach to a more holistic one. Concern for the amenity of a neighbourhood became transformed into concern for the whole environment as perceived by all five of the senses. Nation states came to realise that they could exert or be forced to respond to international pressure to lift their game and to show concern for others, including the generations of the future.

These trends provoked constitutional disputation as the federal Parliament began to pay attention to land use issues that were traditionally the concern of the States; and as State Parliaments sought to control the impact on the local environment of conduct taking place elsewhere. An example of the latter

phenomenon was **Brownlie v State Pollution Control Commission** in which a Queensland farmer was successfully prosecuted for releasing the insecticide endosulfan that washed into the Barwon River on the State border killing fish on the New South Wales side of the middle line of the river.

Australia's environmental consciousness was stirred with legal landmarks that included the Whitlam government's intervention in the International Court of Justice to challenge French nuclear testing in the Pacific, the **Murphyores** case of 1976 involving banning of export of sand mined from Fraser Island, the **Tasmanian Dam** case in 1983 and the **Bropho** decision in 1990.

Bropho's case involved the question whether a Western Australian statute prohibiting the destruction of aboriginal sites and objects bound the Crown. The High Court significantly lowered the threshold for determining whether an enactment bound the Crown and its agencies. This marked a shift in the approach to statutory interpretation in which it became much easier to infer (if Parliament had left the matter in doubt) that civil and criminal enactments protective of the environment applied to the governmental bodies as much as the citizenry. Section 124 of the **Environmental Planning & Assessment Act** gave standing to "any person" to apply to enforce these laws that now bound the Crown. There was no shortage of people willing to keep government accountable in the courts. Some plaintiffs were vexatious, many were impecunious and therefore immune from an effective costs sanction, but the bottom line was that their access to justice allowed rule of law accountability to be maintained.

The State government soon discovered that laws prohibiting pollution or the destruction of natural habitat were more likely to be invoked against its own regulatory authorities than against private miscreants. I found myself doing more than prosecuting polluters. I began to represent the State or its agencies as defendants in the Land & Environment Court or the Supreme Court. On one occasion the Forestry Commission was effectively charged with killing koalas in breach of the **National Parkes and Wildlife Act 1974** through its licensing of tree-felling.

At other times my role was to argue that significant activities that government wanted to happen in a hurry (like establishing a waste disposal depot, or the opening of a coal mine or Fox Studios at the Showground) ought not to be impeded by the slow toils of environmental litigation launched by men of straw or community groups with minimal assets. To this day it is environmental law that produces most judicial review proceedings in the Supreme Court of New South Wales and many significant issues of statutory interpretation. Important questions concerning access to justice and governmental accountability have also been thrashed out in the minutiae of FOI applications touching environmental matters and fights over the rules about payment of costs in "public interest" litigation.

These were some of the trends that changed the nature of the practice of the Second Law Officer almost overnight. Sometimes my role was to arbitrate privately in disputes between governmental agencies (such as the Department of Planning, the Mining Department and the Forestry Commission) that were each given powers to supervise each other, but in a context where a member of the public could go to the Land & Environment Court complaining if the regulator rested on its oars.

The most interesting case encountered in my entire career at the Bar, for its mix of black letter law and social policy, involved a prosecution for pollution in which the prosecuting agency sought access to records that the defendant had been required to keep as a condition of a licence. **Environmental Protection Authority v Caltex Refining Co Pty Ltd** saw a sharply divided High Court hold that the privilege against self-incrimination did not apply to corporations or their records.

You will not be surprised to learn that I was not always on the side of the angels. But the adversary system needs a proper contradictor to bring out the best in issues. And of course it is fallacious to think that environmental issues arise in a vacuum or that government gets into stoushes with greenies for the fun of it. No one wants a waste disposal facility in their backyard, but everyone wants an efficient system for disposing of their own waste. There is inevitably a role for government in organising, regulating and legislating for the responsible promotion of development. But government and industry operate in an increasingly well informed market in which there are many perspectives as to where the public interest lies in matters environmental. Public opinion here and abroad is demanding that government take an increasingly global and long-term approach to environmental sustainability. This will inevitably impact upon legal processes and the political forces that mould them.

What is fascinating about environmental issues is that they are in one sense too vast for even the most powerful government in the world to handle in isolation. Yet at the same time they are of personal concern to each individual worried about what happens in his or her backyard or what will befall his or her children and grandchildren.

May I close with another reminiscence that illustrates this interplay of the macro and micro in environmental law. In the mid 1990s I was representing those anxious to promote a sewage outfall for the Coffs Harbour district. The State government and the local council believed they had all necessary powers to force the matter through. Some citizens took a different view about where the public interest lay. The governmental promoters of the project struck a snag in that the outlet pipe had to cross a short expanse of land dedicated as a public reserve. It was called "Look-At-Me-Now Headland". The whole project was stalled when this impediment was raised in the Land and Environment Court by a small ginger group who retained Tim Robertson, now Tim Robertson SC a leader of the environmental bar. From my perspective as a government lawyer the case raised big issues of statutory construction. But I first learnt that Tim was involved when my wife mentioned at the dinner table that she had sent a donation to the group of greenies that was promoting the litigation and instructing him.

I congratulate the graduates for your efforts and achievements. You are entitled to be proud of yourselves, just as your family and friends who are gathered here are also entitled to be proud of you. The teaching and administrative staff of the Law Faculty also deserve praise for their dedication, inspiration and perseverance.

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What Has Equity To Do With Restitution? Does It Matter?

WHAT HAS EQUITY TO DO WITH RESTITUTION? DOES IT MATTER?
Justice Keith Mason, Chancery Bar Association, Inner Temple
27 November 2006

Equity and restitution relate at many points. Working out the intersections has driven both to greater self-awareness, but much remains to be done.

Each edition of Goff and Jones' *Law of Restitution* commences:

"Restitution is the law relating to all claims, quasi-contractual or otherwise, which are founded upon the principle of unjust enrichment. Restitutionary claims are to be found in equity as well as at law."

This is seen as a hostile takeover offer by the exponents of classical equity whose organising tool is the work of the Court of Chancery before 1875. By contrast, Goff and Jones' definition appeals to coherence within the law of obligations. The late Peter Birks took that appeal very seriously, producing and revising versions of a sharply mapped out universe which in its ultimate form had little or no room for fault-based liability or rights that depended on the exercise of judicial discretion. [1]

If the Equity traditionalists have cared too little for rationality, it can equally be said that Birks dealt too roughly with the enduring claims of Equity as a system of practical justice which, among other things, shapes the very contours of Restitution.

On my understanding, the unjust enrichment concept is an organising principle that assists in sorting, teaching and developing the detailed case law in a principled manner. [2] A five point template usefully presents the issues by posing the following questions:

1. Was the defendant enriched?
2. Was it at the plaintiff's expense?
3. Was it unjust, according to the categories developed in the caselaw?
4. Do any restitutionary or other defences apply?
5. What remedies are available and appropriate?

There are, however, parts of historical restitution that cannot be addressed entirely by reference to this template. These include, in my opinion, cases concerned with entitlement to lost or misappropriated money, such as *Lipkin Gorman (a firm) v Karpnale*[3] and claims for remuneration where it is just that the defendant pay at market rates regardless of the enduring value of the benefit received. Remedies that strip gains flowing from wrongdoing are restitutionary, but, for them, enrichment at the plaintiff's expense has a different, looser meaning than in cases such as recovery of money paid under mistake. Equitable relief that strips profits from defaulting fiduciaries is partly illuminated by reference to the unjust enrichment principle, but deterrent and prophylactic principles are also in play. These topics form part of the broader law of restitution even though some scholars are unhappy to see them within a law of unjust enrichment.

In preferring the slightly broader land of restitution I expose myself to the reproof just directed at the Equity traditionalists. But there are in truth analogical as well as historical links that bind the outriders I have mentioned to the central categories within each land, such as mistake, duress and failure of consideration. So the situation has much more coherence than that railed against in Mr Hackney's review of *Snell's Equity* and Professor Birks' review of Meagher, Gummow and Lehane's *Equity Doctrines and Remedies* each to be found in the *Law Quarterly Review*. [4]

At least a generation before the time of Lord Mansfield, it was established that indebitatus assumpsit lay at common law to recover money paid under mistake, in consequence of duress to goods and upon a consideration that failed. In these core categories, claimants at common law pleaded a promise, but there was never any semblance of an express contract, hence the label quasi-contract. If (as usually happened) these claims were litigated at common law, lawyers used the count for money had and received.

In the eighteenth century, as now, journeymen practitioners were satisfied if a precedent was found to justify using a particular process. They searched the digests and the practice books and stopped if they found a case in point. Blissfully untroubled about committing fusion fallacies, the folk at the coalface are unlikely to have cared that the count for money had and received was also available to enforce obligations cognisable as trusts or to strip profits. And if they realised that Chancery had a concurrent jurisdiction to relieve against mistake, fraud, accident and failure of basis, they seemed happier to go to Lord Mansfield's Court of Kings Bench where the pleading and procedure were easier.

But Mansfield was not a journeymen judge and it was in the famous case of *Moses v Macferlan*, [5] decided in 1760, that he ventured a synthesis of the existing cases. Speaking of the count for money had and received, he said: [6]

"This kind of equitable action, to recover back money, which ought not in justice to be kept, is very beneficial, and therefore much encouraged. It lies only for money which, *ex aequo et bono*, the defendant ought to refund."

After stating some negative propositions, he continued:

"[The action] lies for money paid by mistake; or upon a consideration which happens to fail; or for money got through imposition, (express, or implied;) or extortion; or oppression; or an undue advantage taken of the plaintiff's situation, contrary to laws made for the protection of persons under those circumstances.... In one word, the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money."

Six years later, Lord Mansfield spoke of money had and received as "a liberal action, founded upon large principles of equity, where the defendant can not conscientiously hold the money. The defence is any equity that will rebut the action." [7]

One thing is crystal clear. Lord Mansfield was speaking about a common law action. Indeed, we should keep in mind that he was dealing with a form of action that had to be explained to a jury. Presumably the jurors needed to be told that the pleaded "assumpsit" was fictitious in the quasi-contract cases. And were they not also entitled to some guidance about how to arrive at a just verdict? According to Sir John Baker: [8]

"It was, after all, the twelve good men and true rather than the twelve judges who had the last word on whether or not a fiction would take effect, and in what circumstances."

But what exactly was Lord Mansfield getting at with these references to equity that have come down to us in the law reports printed in a lower case "e"? Was Mansfield possibly importing just a touch of Chancery law, especially with his embrace of the ideas of oppression and of taking undue advantage?

As William Murray, Mansfield had practised extensively in Chancery when at the Bar. Being a well-read Scotsman steeped in civilian law and trained in Lincolns Inn, he was certainly capable of creative lateral thinking about English common law.

For most of the nineteenth and well into the twentieth century, judges distanced themselves from Mansfield's expansive dicta. This was a period in which judicial reasoning became more formalised. Common money claims continued to be brought in the core areas, but the judges decided that there would be no more loose talk about *ex aequo et bono*, ties of natural justice or equity. For example, in 1849, when counsel (in a direct take from *Moses v Macferlan*) submitted that the action for money had and received was an equitable action, in which the plaintiff's right to recover depended on the circumstances of the case, Pollock CB interrupted him, stating:

"The old notion about the action for money had and received being an equitable action is exploded in modern practice-it is a perfectly legal action, and no good can result from calling it an equitable one."

To which Parke B chimed in: "None." [9]

The fiction of implied contract was to be the justification for this body of law, even though some, like Cotton LJ in *Re Rhodes* in 1890, would describe it as "erroneous and very unfortunate". [10]

There were fortunately only two or three cases in which the court's views about the conceptual basis of the action for money had and received caused the law to take what we would now see as a false turning. One was *Baylis v Bishop of London* in 1913 [11], where the defence of change of position was rejected. Another was *Sinclair v Brougham* in 1914. [12] There the House of Lords declared that, for the purpose of any novel claim in money had and received, the averred contract had to be genuine, with the consequence that an action to recover money paid to a building society under an ultra vires contract was rejected.

The proprietary remedy that their Lordships awarded in lieu left commentators baffled as to its basis. For some, the answer was found in another diverting fiction, that of the antecedent fiduciary relationship, although it is quite impossible to tease this out of the arms length banker-customer relationship in *Sinclair v Brougham*. On a highly disputed reading of the later Court of Appeal decision in *Re Diplock's Estate* [13], such a relationship was for a time said to be essential before there could be any proprietary relief in equity, including what used to be seen as the remedy of equitable tracing. This view of *Re Diplock's Estate* has been challenged by several commentators [14] and it cannot in my opinion survive the modern reappraisal of the principles of tracing or the line of "theft cases" that I refer to below.

Of present relevance, *Baylis* and *Sinclair* contain references to Lord Mansfield's equity. In *Baylis*, [15] Farwell LJ said that it was clear that Mansfield was not referring to an equity in the sense in which it was used in the Court of Chancery. And Hamilton LJ (the later Lord Sumner) said [16] that:

"... we are not now free in the twentieth century to administer that vague jurisprudence which is sometimes attractively styled 'justice as between man and man.'"

In *Sinclair v Brougham*, Lord Sumner explained in a lengthy passage that Lord Mansfield had been referring to the procedural advantages of the common money count, not anything of substance drawn from Chancery. [17]

This meant that the existing categories of quasi-contract would not be explained, let alone extended, by reference to palm tree equity or even Chancellor's equity. A couple of years later, Scrutton LJ described the history of money had and received as one of "well-meaning sloppiness of thought". [18] Scrutton was accusing Mansfield and his followers of ignorance, while warning others not to repeat such categorical errors. In *Re Jones Ltd v Waring and Gillow Ltd*, [19] Scrutton LJ again reminded the profession that the passage from *Moses* was "no longer a satisfactory guide".

Moses v Macferlan is discussed in the recently published *Landmark Cases in the Law of Restitution* [20]. Mr Swain, the author of the relevant chapter, traces the fate of both natural equity and Chancellor's equity in the nineteenth and early twentieth century reappraisal of Lord Mansfield's dicta. As to Equity with a capital "E", his conclusion is that: [21]

"As the implied contract analysis gained ground in England, the link with Equity was lost. It would never recover."

Writing in the *Law Quarterly Review* in 1924, HG Hanbury could state that [22] "in *Moses v Macferlan*, ... Lord Mansfield definitely crossed the all too narrow bridge which leads from the sound soil of implied contract to the shifting quicksands of natural equity - and equity in the mouth of a common lawyer is apt to mean equity in its ethical and somewhat nebulous sense."

Today we know that implied contract was not "sound soil" for quasi-contract. Both *Baylis* and *Sinclair* are now discredited precedents. *Baylis* was overturned by the House of Lords in *Lipkin Gorman* in 1991. And both aspects of *Sinclair v Brougham* were exploded by the Lords in *Westdeutsche Landesbank Girozentrale v Islington London Borough Council* in 1996. [23] In his chapter in *Landmark Cases in the Law of Restitution*, Eoin O'Dell describes *Sinclair v Brougham* as "mad, bad and dangerous to know". [24]

It would be a fallacy to infer in point of logic that the overturning of *Baylis* and *Sinclair* was intended to revive Lord Mansfield's "equity" in any of its manifestations. Indeed, we know that when judges ushered implied contract out the door they introduced the concept of unjust enrichment to take its place. Since 1954 in Canada, [25] 1987 in Australia [26] and 1991 in England, [27] our final appellate courts have employed unjust enrichment as the conceptual framework for a wide variety of old and new restitutionary claims including actions for money paid under void or unenforceable contracts, payments under mistake of fact or law, payments on a consideration that fails, contribution and recoupment claims, restitutionary claims against the Revenue and non-contractual subrogation. [28]

Lord Wright is widely credited with having brought the idea of unjust enrichment to England in the 1940s, drawing on the principle expounded in the 1936 *Restatement of the Law of Restitution, Quasi Contracts and Constructive Trusts*. I think scholars now agree that the concept was first used in English jurisprudence in an 1802 tract by Sir William Evans. It was an "Essay on the Action for Money Had and Received", in the form of an extended dissertation on *Moses v Macferlan*. [29] Evans cited a civil law maxim that in translation states that it is naturally just that one man should not be enriched to the detriment of another.

In 1997, Gummow J, a justice of the High Court of Australia and co-author of the early editions of Meagher, Gummow and Lehane, *Equity, Doctrines and Remedies*, signalled in *Hill v Van Erp* [30] at 226-227 his unhappiness with the exorbitant claims of those who sought to pack down the whole of restitution into a tight unjust enrichment box. His Honour returned to the topic in the 2001 *Roxborough* case. There he cited with approval Justice Paul Finn's statement about unjust enrichment being capable of concealing rather than revealing why the law arrives at its outcomes. [31]

Gummow J added arguments based on the disinterment of Lord Mansfield's Equity in its Chancery sense. He cited a body of American Supreme Court authority, including the opinion of Cardozo J, that viewed Mansfield's equity references as deliberate, substantive and sustainable according to the standards of Mansfield's time. [32]

This also was the view of Sir William Holdsworth.[33]

Further in Lord Mansfield's defence, we should remember that eighteenth century Chancery law was still in its early child-bearing stage. Anyone's references to "equity" in 1760 are not to be tested according to the exacting standards of a 21st-century Equity treatise.

Professor Sir John Baker's researches show that the action for money had and received was often used in the eighteenth and nineteenth centuries to enforce trust obligations. He points out that this common money count "enabled the third party beneficiary to enforce something like a trust of money, independently of contract, and without recourse to the action of account. Apart from anything else, this created an interesting jurisdictional division: trusts of land remained firmly within the jurisdiction of the Chancery, not least because of the more suitable remedies available there, whereas an equitable interest in money was allowed to a limited extent within the ambit of the common law because money could be recovered in the form of damages." [34]

A similar point was made in *Westdeutsche* at first instance. Hobhouse J (as he then was) observed in relation to the nineteenth century decisions on money had and received. [35]

"The reasoning of the common law judges expressly had regard to what was conscionable and by inference reflected the analogy between the common law 'use' and the fiduciary concept recognised by equity. There was also a complete convergence of the principles applied by the common law and Chancery courts."

In the classical third edition of their *Precedents of Pleadings*, published in 1868, Bullen and Leake cite [36] a number of mid-nineteenth century cases showing that a trustee who admitted he held money on behalf of a beneficiary or an executor who admitted that a legacy was due could be sued at common law in the action for money had and received.

These are examples of equity and common law addressing the same situation and, through different procedures, remedies and/or causes of action offering outcomes that are similar in effect. The ancient and modern history of Restitution is full of this, which largely explains why it has become the battleground for recent debates about the fusion of law and equity. Apart from the examples already

given, think of what has happened as regards Equity's concurrent jurisdiction to relieve against mistake, accident and failure of consideration, the principles of contribution and recoupment; [37] and relief against penalties. [38] Consider also the profound rethinking about the processes of tracing and following money that has occurred in recent times due to the scholarship of Professor Lionel Smith and Lord Millett. It is no longer productive to speak of tracing at common law and tracing in equity as if the processes were different.

The two systems have borrowed openly from each other. Each has been prepared at times to modify its own doctrines so as to remove conflict, and to let one jurisdiction wither on the vine as the other became the dominant survivor. This has occurred before, after, and independently of the *Judiciary Act*. Some of Chancery's borrowings are listed under the rubric of Equity following the Law or are parked in Equity's "concurrent jurisdiction". Some have just quietly happened in a system of fused administration and common procedures. Sometimes the borrowings are masked by the use of different labels to describe doctrines and remedies that are identical in effect or that ought to be so in any rational and coherent legal system. (Sometimes, however, common labels mask genuine differences that are justified on more than historical lines and ought therefore to be maintained.) [39]

Does it matter who is right or wrong historically about Mansfield's "equity"?

Lord Hoffman recently observed that: [40]

"Once a judgment has been published, its interpretation belongs to posterity and its author and those who agreed with him at the time have no better claim to be able to declare its meaning than anyone else."

Accordingly, judges have had legitimate scope for reappraisal of Lord Mansfield's admittedly opaque language. Furthermore, whatever Mansfield had in mind is not necessarily controlling, especially in light of the volume of water that has flowed under the bridge since 1760, including water of the commingled streams of law and equity.

It would of course be foolish to think that debates about history have nothing to do with the present or the future.

Those who came to bury Mansfield's equity and those who would seek to disinter it were and are each making points about their own understanding of the scope of both Equity and Restitution.

The hostile comments about *Moses v Macferlan* were asserting the hardening of Equity into a body of more fixed rules than it had in the eighteenth century. [41] The early twentieth century judges may also have viewed the Judicature reforms as requiring law and equity to be kept distinctive in their substantive doctrines rather than as facilitating continuing principled fusion in those areas as well. Mansfield's soft and inclusive "equity" challenged both goals. Expelling or chastising heretics (even long dead ones) is a common way of drawing lines for the guidance of the flock that remains.

Conversely, while Gummow J in *Roxborough* appears to accept that money had and received is a common law action that applies hard-nosed rules (my words, not his) in traditional areas, he nevertheless advocates that "in deciding cases... which question the boundaries of the established categories, recourse should be had to the general considerations referred to in *Moses v Macferlan*." His Honour added that: "if those general considerations resonate with equitable notions, then in a system in which equity prevails that cannot be a source of surprise." [42]

When His Honour referred to *Pavey's* case [43], above n. 2 having removed *Moses v Macferlan* from the pikestaff of implied contract, he added, much more controversially, that "this has left Lord Mansfield's 'insightful observations' free to have their effect". [44] The traditional cause of action involved in *Roxborough's* case meant that this challenging idea did not have to be applied in that case. It will nevertheless be interesting to watch if and how this renewed interest in Lord Mansfield's "equity" gathers support, in my country, if not in yours.

My historical ramblings suggest that it is often unproductive to show whether Law or Equity first conceived of a particular doctrine that is now firmly entrenched and nowadays accessible by a well-known remedy. There are many areas of the general law in which we can now hopefully apply Maitland's forecast that: [45]

"The day will come when lawyers will cease to inquire whether a given rule be a rule of equity or a rule of the common law: suffice that it is a well-established rule administered by the High Court of Justice."

There are, however, some areas where our highest courts have yet to decide whether one or both systems still operate in common fields and whether they should be permitted to do so on different terms. One of them concerns misdirected funds that pass to persons who are not bona fide purchasers without notice. This is the question whether liability under the recipient limb of *Barnes v Addy* [46] requires proof of some form of notice or whether it is strict, subject to the restitutionary defences. In this country the latter position has been advocated by Professor Birks [47] and supported extra-judicially by Lord Nicholls [48] and Lord Walker. [49] In my country, it is about to be considered by the High Court of Australia in an appeal from a decision in which I participated. [50] You will therefore understand why I say nothing about this fascinating issue which otherwise falls within the topic of my lecture.

I do, however, want to say a few words about the role of unconscionable conduct in restitution and about the remedial constructive trust. The debates on these not unrelated topics lie at the heart of the modern intersection of equity and restitution. At this point in history the law in your country and in mine on these matters could scarcely be further apart.

The Australian law on unconscionable conduct has picked up the old learning about "catching bargains", developing it so that it applies well beyond closed categories of plaintiffs like the drunkard or the gullible young person. This branch of fruitful equity extends to anyone who is under a special disability or disadvantage in a transaction, where the other party's state of knowledge makes it unconscionable to take advantage of the situation. The plaintiff's state of disadvantage may be the product of emotional, educational or financial difficulties occurring in the particular situation. [51] Lawful but illegitimate pressure, like a threat to terminate a contract, or to prosecute (i.e. so called economic duress) is also within the scope of this doctrine under Australian law, as recently declared by the New South Wales Court of Appeal in *Australia & New Zealand Banking Group v Karam*. [52] The doctrine is not excluded from commercial dealings, although few such cases succeed on their facts. As I indicate below, this unconscionability doctrine also informs the Australian law on the remedial constructive trust.

Those familiar with Peter Birks' writings would not be surprised to learn that he saw things in more black and white terms. This intrusion into restitution of the Chancellor's foot was anathema to him. Birks suggested in 1996 that a category of law relating to unconscionable behaviour was useless, and, therefore the lawyer who deals in 'unconscionable behaviour' is "rather like the ornithologist who is content with 'small brown bird'". [53]

Lord Nicholls acknowledged in *Royal Brunei Airlines v Tan* that: [54]

"Unconscionable is a word of immediate appeal to an equity lawyer. Equity is rooted historically in the concept of the Lord Chancellor, as the keeper of the Royal Conscience, concerning himself with conduct which was contrary to good conscience. It must be recognised, however, that unconscionable is not a word in everyday use by non-lawyers."

The necessarily somewhat open-ended equitable doctrine as it is applied in Australia is capable of generating litigation. It has also produced split appellate decisions on the facts, not that these consequences are unique to this branch of Equity. And, bearing in mind that I am speaking to the Chancery Bar Association, it must be acknowledged that not everyone will think that litigation in the pursuit of justice is a bad thing.

With isolated exceptions that are well documented in Hedley and Halliwell's *Law of Restitution*, [55] these principles are not invoked in England and Wales, on my researches. I detect that they are regarded as inapplicable almost by definition in what are labelled "commercial" or "industrial" situations. *Foskett v McKeown*[56] and the judgment of Nourse LJ in *Re Polly Peck (No 2)* [57] also shows that your law appears to have several areas marked "Property-Keep Out", that by definition exclude any role for restitutionary doctrines and certain equitable ones as well. The influence of the two Peters (Birks and Millett) seems much in evidence in this context.

These differences about the role of unconscionable conduct as a free-standing ground for intervention (what I would call an unjust factor, when applied in the taxonomy of restitution) may also reflect differing attitudes between our two countries about the value of certainty in commercial transactions;

and (in Australia) the influence of trade practices and contracts review legislation that has permeated into the culture of our general law.

English scepticism about the unconscionability concept was well justified by reference to the way that the idea ran riot in Australia in the 1980s and early 1990s. Every pleading in matters contractual or commercial contained a portmanteau allegation of unconscionability. In the rare cases where this idea was pressed at trial, judges sometimes used the term "unconscionable" in a conclusory sense and without clearly enunciating the legal or equitable doctrines specifically in play. As Professor Michael Bryan has observed, unconscionability in Australia has sometimes needed saving from its friends quite as much as from its enemies. [58] But a strong corrective was administered by the High Court in 2003 in a significant passage in *Tanwar Enterprises Pty Ltd v Cauchi* that is too lengthy to include in this text.[59] The Court pointed out that unconscionable conduct was neither a sufficient nor a necessary condition for equitable intervention. Practitioners' eyes were directed down at the cases and not up to the skies. Interestingly enough, identical warnings about the use of the unjust enrichment concept had been issued a decade or so earlier.

There is a distinction between the "well developed principles, both specific and flexible in character" endorsed in *Tanwar* [60] that govern the equitable doctrines of unconscionable conduct and the clearly dis-endorsed "subjective evaluation of what is fair or unconscionable" referred to in the 1992 *David Securities* case. [61]

I turn finally to the remedial constructive trust.

The constructive trust has many uses that have nothing to do with restitution. Indeed, as Lord Millett has frequently pointed out, the concept is often invoked in contexts that involve no semblance of a trust at all, for example in the areas of tracing en route to a personal remedy such as account or money had and received and in *Barnes v Addy* situations that, on the facts, can only lead to personal remedies because the defendant did not retain any traceable benefit deriving from the plaintiff. Sometimes, as his Lordship put it in *Paragon Finance v Thakerar*, the constructive trust is "nothing more than a formula for equitable relief". [62] In other words, and this is me speaking not Lord Millett, the concept is often a fiction, Equity's counterpart to the implied contract of unreformed quasi-contract.

I want to focus on the use of the constructive trust (and its junior brother, the equitable lien) as a discretionary proprietary remedy that is made available, if necessary and appropriate, as a response to an established case of unjust enrichment such as payment by mistake, improper pressure, upon a failure of basis, breach of fiduciary duty, and (just to see if I have kept your attention) unconscionable behaviour. If awarded, the remedy may confer priority over unsecured creditors in an insolvency. But that is not its only role and it is, with respect to some of the reasoning in *Re Polly Peck (No 2)*, [63] wrong to argue that because there may be circumstances in which it may be unjust to interfere with distribution *pari passu* in insolvency, then the remedy should never be made available. Well-known cases such as *Cook v Deeks*, [64] *Attorney-General for Hong Kong v Reid* [65] and *Louth v Diprose* [66] show that the remedy can be used against a solvent defendant, but as the appropriate means of stripping the defendant entirely of his or her ill-gotten gains.

Sir Peter Millett gave a lecture to this Association in June 1996 in which he stated that: [67]

"The remedial constructive trust has taken root in the United States and Canada: it is unlikely to do so in England and Australia. The distinction between personal and proprietary rights is fundamental to the law of insolvency."

I respectfully agree with the latter proposition, while observing (pace *Polly Peck*) that insolvency law recognises that trusts and secured interests exist, leaving it to law and equity to declare when circumstances have given rise to claims that, according to the terms of the insolvency statute, take priority over unsecured creditors.

Sir Peter Millett's first proposition implied that antipodean law was hostile to the remedial constructive trust. The silence in the reasoning of the Court of Appeal in the 1998 *Polly Peck* decision (which surveyed the Canadian and United States law) suggests that that Court proceeded on a similar basis. While several of the Australian High Court cases to which I refer below were decided quite recently, the signs were nevertheless already there in 1998 that Australia too would embrace the remedial constructive trust. [68] Incidentally, the Court of Appeal in New Zealand would also take this step in 1998 in the *Fortex Group* case. [69]

When, in 1988 the High Court of Australia held that money paid under mistake of law was recoverable as money had and received, the Court added by way of considered dictum that: [70]

“The common law right of action may arise in circumstances which also give rise to a resulting trust of specific property or which would lead a modern court of equity to grant relief by way of constructive trust.”

This perhaps is a clue to how the Court might react to a situation like *Chase Manhattan Bank v Israel-British Bank*, [71] the decision involving a mistaken second payment that continues to split both equity and restitutionary scholars down the middle. The dictum may, however, do little to resolve the debate about whether the trust recognised in that case was a resulting or constructive one. All of their Lordships in *Westdeutsche* recognised that an institutional resulting trust was a very blunt instrument to wave at an insolvent defendant. This suggests reasons for favouring the discretionary remedial constructive trust, if it is an available candidate. But the debate about *Chase Manhattan* is in this country driven to accommodate the decision in *Polly Peck*, which is generally though not universally viewed as having rejected the remedial constructive trust here for all purposes. [72] I also detect in both this jurisdiction and in Australia that the labelling debates about the two types of trust involve lingering glances backward to the otherwise discredited proposition about the need for a pre-existing fiduciary relationship before a court may award equitable proprietary relief in any circumstances.

Since 1988, the High Court of Australia has sanctioned a proprietary remedy by way of remedial constructive trust or equitable lien in several restitutionary situations, especially those capable of parallel characterisation as either a failure of basis or unconscionable conduct. [73]

The proprietary remedies are available in both domestic and commercial situations where a venture in which parties embark is frustrated. Following the lead of the Privy Council in *Attorney General for Hong Kong v Reid*, [74] Australian courts have imposed remedial constructive trusts in a range of circumstances where there was no shadow of a relevant antecedent fiduciary relationship as well as against defaulting fiduciaries and their associates. [75]

This jurisdiction is avowedly discretionary. Factors including delay, the plaintiff's willingness to do equity and consideration of the rights of third parties are kept in view. In *Bathurst City Council v PWC Properties Pty Ltd* (1998), (1998), [76] the High Court made it plain that “before the court imposes a constructive trust as a remedy, it should first decided whether, having regard to the issues in the litigation, there are other means to quell the controversy”. [77] See also *Roxborough* above n. 28 at 534 [46] The Court adopts a minimalist approach, looking to see if an equitable lien might suffice rather than a full-blown trust. [78]

In stating that there is no point in worrying about a proprietary remedy against a solvent defendant, unless of course impounding the whole property is necessary to strip away the entirety of an ill-gotten gain, the Court has signalled that the very matter that troubled your Court of Appeal in *Polly Peck* may be the entre to relief in a proper case. There is an as yet slender body of caselaw examining the weight to be given to the claims of unsecured creditors not to be outranked in an insolvency. [79] I foresee the unconscionability principle being invoked as a justification and controlling mechanism for this form of relief. Not every plaintiff in restitution can be said to have taken the risk of the defendant's insolvency. It would seem to me that a court could well find it unjust for a defendant (and therefore its unsecured creditors as well) to oppose an equitable lien to secure the right to restitution of an unjust enrichment occurring earlier in time than the unsecured debts. [80] And, as occurred in *Chase Manhattan*, where a mistaken double payment has so swollen the pool available for unsecured creditors that it would be inequitable for them to pocket a share in the benefit there seems to be no reason to withhold an equitable lien. These are only examples and I stress that the equities in the particular case will always need to be closely examined.

There has been a spate of Australian cases illustrating the so-called “theft principle”. Bryson J, a judge who is proud to be seen as a New South Wales Equity traditionalist could declare in 1991 that “the attribution of a constructive trust to stolen money is well established”. [81] In *Westdeutsche*, Lord Browne-Wilkinson was untroubled by the idea of a constructive trust arising in relation to stolen moneys or as against a fraudulent infant, neither of which situation betokens an antecedent fiduciary relationship. [82]

The Australian line of theft cases is reviewed in a very recent article in the *Australian Law Journal*. [83] It tracks back to the early High Court decision of *Black v Freedman & Co Ltd*. [84] On my researches, *Black's* case has been twice referred to with approval by appellate judges in this country. It was cited

by Lord Templeman in *Lipkin Gorman* [85] and also in the 1989 Court of Appeal decision of *Metall und Rohstoff AG v Donaldson Luffkin & Jennrette Inc.*

In *Metall und Rohstoff*, a Court of Appeal comprising Slade, Stocker and Bingham LJJ stated themselves satisfied that there was a good arguable case that circumstances may arise justifying the imposition of a remedial constructive trust, a remedy described by their Lordships as “a constructive trust de novo as a foundation for the grant of equitable remedy by way of account or otherwise”. [86] The door to a remedial constructive trust was left open by Lord Mustill in *Re Goldcorp Exchange Ltd* in 1995 [1995] 1 AC 74 at 104 and by Lord Browne-Wilkinson in *Westdeutsche* in 1996. [88] But, as I have already indicated, it was pushed firmly shut in this country in 1998 in *Re Polly Peck International (No 2)*. [89]

What Lord Mansfield would have made of all this we cannot tell and it does not matter. But I like to think that he would be amused by the thought of this Scottish-born citizen of a country as yet undiscovered when he decided *Moses v Macferlan* presuming to speak about the relationship of law and equity in terms that even he would have viewed as heretical. Since Mansfield was a member of Lincolns Inn, perhaps he would not have been surprised to hear these things being said within the Inner Temple.

END NOTES

1. P Birks, *Unjust Enrichment*, Oxford: Oxford University Press, 2003
2. See *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221 at 256-257
3. [1991] 2 AC 548
4. J Hackney Publication Review of *Snell's Equity* (2001) 117 LQR 150-154; P Birks Publication Review of *Meagher, Gummow and Lehane's Equity Doctrines and Remedies* (2004) 120 LQR 344-348
5. (1760) 2 Burr 1005; 97 ER 676
6. *Moses*, above n. 5 at 681 [1012]
7. *Sadler v Evans* (1766) 4 Burr 1984 at 1986; 98 ER 34 at 35
8. Sir John Baker “The History of Quasi-Contract in English Law” in (eds.) WR Cornish, R Nolan, J O’Sullivan and G Virgo, *Restitution Past, Present and Future: Essays in Honour of Gareth Jones*, Oxford: Hart Publishing, 1998, 37-56 at 54
9. *Miller v Atlee* (1849) 13 Jur 431
10. (1890) 44 Ch D 94 at 105
11. [1913] 1 Ch 127
12. [1914] AC 398
13. [1948] Ch 465 (CA)
14. Including AJ Oakley “Proprietary Claims and their Priority in Insolvency” [1995] 54 *Cam LJ* 377 at 383-384
15. *Baylis*, above n. 11 at 137
16. *Baylis*, above n. 11 at 140
17. *Sinclair*, above n. 12 at 454-455
18. *Holt v Markham* [1923] 1 KB 504 at 513
19. [1925] 2 KB 612 at 637
20. C Mitchell and P Mitchell, *Landmark Cases in the Law of Restitution*, Oxford & Portland: Hart Publishing, 2006
21. W Swain “*Moses v Macferlan* (1760)” above n. 20 *Landmark Cases in the Law of Restitution* at 19-37
22. HG Hanbury “Recovery of Money” (1924) 40 LQR 31-42 at 35
23. [1996] AC 669
24. E O’Dell “*Sinclair v Brougham* (1914)” above n. 20 *Landmark Cases in the Law of Restitution*, 213-246 at 245
25. *Degelman v Guaranty Trust* (1954) 3 DLR 785
26. *Pavey & Matthews*, above n. 2
27. *Lipkin Gorman*, above n. 3
28. See *Pavey & Matthews*, above n. 2; *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353; *Lipkin Gorman*, above n. 3; *Burke v LFOT Pty Ltd* (2002) 209 CLR 282; *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349; *Westdeutsche*, above n. 23; *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516 at [20], [25]; *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70; *Banque Financière de la Cité v Parc (Battersea) Ltd & Ors* [1999] 1 AC 221
29. Sir William Evans “An Essay on the Action for Money Had and Received” in W Evans, *Essays: On the Action for Money Had and Received, on the Law of Insurances and on the Law of Bills of Exchange and Promissory Notes*, Liverpool: Merrit & Wright, 1802, reprinted in [1998] RLR, 1-33
30. (1997) 188 CLR 159 at 226-227

31. *Roxborough*, above n. 28 at 543-545, citing P Finn "Equitable Doctrine and Discretion in Remedies" in (eds.) WR Cornish *et al*, *Restitution Past, Present and Future*, 251-274 at 252
32. *Roxborough*, above n. 28 at 548-550
33. Sir William Holdsworth, *A History of English Law* (vol 1), London & Methuen: Sweet and Maxwell, 1903 at 467
34. Sir John Baker "The History of Quasi-Contract in English Law" in (eds.) WR Cornish *et al*, *Restitution Past, Present and Future*, 37-56 at 48-49
35. *Westdeutsche*, above n. 23 at 923. The first sentence was quoted with approval by Gummow J in *Roxborough v Rothmans of Pall Mall Australia Ltd* at 551 [89] see above n. 28. See also Lord Hobhouse in *Royal Bank of Scotland v Etridge (No 2)* [2002] 2 AC 773 at 826
36. E Bullen and SM Leake, *Precedents of Pleadings in Actions in the King's Bench Division of the High Court of Justice*, London: Stevens, 1868 at 46-47
37. *Albion Insurance Co Ltd v Government Insurance Office (NSW)* (1969) 121 CLR 342 at 349-352
38. *AMEV-UDC Finance Limited v Austin & Anor* (1986) 162 CLR 170 at 191
39. K Mason "Fusion: Fallacy, Future or Finished" in (eds.) S Degeling and J Edelman, *Equity in Commercial Law*, Sydney: Lawbook Co, 2005, 41-76
40. *Deutsche Morgan Grenfell Group Plc v Her Majesty's Commissioners of Inland Revenue* [2006] UKHL 49 at [14]
41. See PS Atiyah, *The Rise and Fall of Freedom of Contract*, Oxford: Oxford University Press, 1979 at 388-397 ("The rise of formalism and the decline of equity.")
42. *Roxborough*, above n. 28 at 553 [95]
43. *Pavey & Matthews*, above n. 2
44. *Roxborough*, above n. 28 at 551 [90]
45. FW Maitland, *Equity: A Course of Lectures*, edited by AH Chaytor and WJ Whittaker, revised by J Brunyate, Cambridge: Cambridge University Press, 1949 at 20
46. (1874) 9 Ch App 244
47. P Birks "Misdirected Funds: Restitution from the Recipient" [1989] *LMCLQ* 296
48. In his article "Knowing Receipt: The Need for a New Benchmark" in (eds.) WR Cornish *et al*, *Restitution Past, Present and Future*, 231-245
49. In his John Lehane Memorial Lecture 2004 "Dishonesty and Unconscionable Conduct in Commercial Life: Some Reflections on Accessory Liability and Knowing Receipt" (2005) 27(2) *Syd LR* 187
50. *Say-Dee Pty Ltd v Farah Constructions Pty Ltd* [2005] NSWCA 309
51. The leading cases are *Commercial Bank of Australia Limited v Amadio* (1983) 151 CLR 447; *Louth v Diprose* (1992) 175 CLR 621; *Bridgewater v Leahy* (1998) 194 CLR 457
52. (2005) 64 NSWLR 149
53. P Birks, "Equity in the Modern Law: An Exercise in Taxonomy" (1996) 26 *Univ WALR* 1 at 16
54. [1995] 2 AC 378 at 392
55. S Hedley and M Halliwell, *The Law of Restitution*, London: Butterworths, 2002. The cases include *Boustany v Pigott* (1993) 68 P & CR 298 (PC) and *Gillett v Holt* [2001] Ch 210 at 225
56. [2001] 1 AC 102
57. [1998] 3 All ER 812
58. M Bryan "Unjust Enrichment and Unconscionability in Australia: A False Dichotomy" in (eds.) JW Neyers, M McInnes and SGA Pitel, *Understanding Unjust Enrichment*, Oxford & Portland: Hart Publishing, 2004, 47-78 at 76
59. (2003) 217 CLR 315 at 324 at [20]-[26]
60. *Tanwar Enterprises*, above n. 59 at 324 [20]
61. *David Securities*, above n. 28 at 379 [46]
62. [1999] 1 All ER 400 at 409
63. *Re Polly Peck*, above n. 57
64. [1916] 1 AC 554
65. [1994] AC 324 (PC)
66. (1992) 175 CLR 621
67. Sir Peter Millett "Restitution and Constructive Trusts" (1998) 114 *LQR* 399-418 at 399
68. See below
69. *Fortex Group Ltd (In Receivership and Liquidation) v MacIntosh* [1998] 3 NZLR 171
70. *Australia and New Zealand Banking Group Limited v Westpac Banking Corporation* (1988) 164 CLR 662 at 673 [11]. See also *Neste Oy v Lloyds Bank Plc* [1983] 2 Lloyd's Rep 658 at 665-6 per Bingham J
71. [1981] Ch 105
72. For an alternative, though strained interpretation see R Grantham and C Rickett, *Enrichment and Restitution in New Zealand*, Oxford & Portland: Hart Publishing, 2000 at 418
73. *Muschinski v Dodds* (1985) 160 CLR 583; *Baumgartner v Baumgartner* (1987) 164 CLR 137; *Roxborough* above n. 28 at 534 [46]
74. *Attorney-General for Hong Kong*, above n. 65
75. See e.g. *Hancock Family Memorial Foundation Limited v Porteous* (2000) 22 WAR 198; 156 FLR

- 249; *Robins v Incentive Dynamics Pty Ltd (in liq)* (2003) 175 FLR 286
76. (1998) 195 CLR 566
77. *Bathurst City Council*, above n. 76 at 585 [42]. See also *Roxborough* above n. 28 at 534 [46]
78. *Giumelli v Giumelli* (1999) 196 CLR 1011
79. See e.g. *Parsons v McBain* (2001) 109 FCR 120; [2001] FCA 376
80. See *Re Jonton Pty Ltd* [1992] 2 Qd R 105
81. *Australian Postal Corporation v Lutak* (1991) 21 NSWLR 584 at 589
82. See *Westdeutsche*, above n. 23 at 716
83. J Tarrant "Theft Principle in Private Law" (2006) 80 *ALJ* 531
84. (1910) 12 CLR 105
85. *Lipkin Gorman*, above n. 3 at 565-566
86. [1990] 1 QB 391 at 479
87. [1995] 1 AC 74 at 104
88. *Westdeutsche*, above n. 23 at 716
89. *Re Polly Peck*, above n. 57

LEGISLATORS' INTENT: How judges discern it and what they do if they find it

LEGISLATORS' INTENT: How judges discern it and what they do if they find it

Justice Keith Mason, IALS, 2 November 2006

In *Roe v Russell* [1] Scrutton LJ lamented that he could not order costs to be paid by the draughtsmen of the Rent Restrictions Acts, and the members of the Legislature who passed them, whom he considered responsible for the obscurity of the legislation.

The sometimes jaundiced experience of judges needs, like statutes themselves, to be understood in context. Statutes are read and applied thousands of times a day across the country. Genuine problems of ambiguity in meaning or difficulty of application are really few and far between, and they come into sharp focus in adversary litigation. We judges should in fact marvel at how few difficulties arise in practice. We should also bear in mind that provisions we find either vexing or too clear for argument may, to other judges higher up the ladder, reveal our own short-sightedness.

Courts must resolve every dispute brought within their jurisdiction. Judges therefore take up the strain of finding meaning in the relevant text and applying that meaning to the situation presented. We do not have the option of telling litigants that "it is too hard" or "no answer to your problem is available" or "the matter is remitted to Parliament to have a second attempt at explaining itself". Statutes must always fit one with the other, because the bedrock principle that the law is a coherent unity means that "the legislature cannot speak with a forked tongue".[2]

Chief Justice Willmott wrote in 1767 that "words are only pictures of ideas on paper". [3] Sometimes the picture is unclear because the idea (or legislative policy) was also fuzzy. Sometimes the word-painter (or Parliamentary Counsel) had inadequate instructions or insufficient time to complete the portrait to fullest satisfaction. Judges need at least to remind themselves that legislative drafters often work to produce gold from dross within very short timeframes. From personal experience, they know that the discipline of writing a reserved judgment can itself expose problems requiring further attention. Alas for parliamentary counsel, there may not always be time for a further draft. And the attention span of those giving instructions may sometimes be limited. Sometimes too, distorting amendments are inserted in Committee, on the run, and by persons not completely au fait with the big picture.

In any event, it is vain to think that those involved in preparing legislation will foresee all problems, solve all foreseen problems, or never create fresh problems by their own tampering.

Once again, this should not surprise our judges. The common law has been wrestling to declare itself with clarity and coherence for centuries, with courts being assisted by counsel and the writings of legal scholars. Yet basic principles still lack or defy pellucid enunciation. *Donoghue v Stevenson* [4] proved more of a beginning than an end. There are whole areas in the law of obligations that lie uneasily one against the other, like the tectonic plates of the earth's crust, apparently stable in the centre, yet mobile at the points of overlap and liable to shift catastrophically from time to time. Diplock LJ once remarked that:[5]

"the law is nearly always most obscure in those fields in which the judges say: 'the principle is plain, but the difficulty lies in its application to particular facts'."

Anyone who has been involved in law reform will know that clear proposals often need radical surgery in light of the questions that accompany early drafts of the Bill intended to become an appendix to the final report.

The exigencies of the drafting task and the constancy of human imperfection guarantee that hard problems of statutory interpretation will always be with us. Parliamentary Counsel will never have to adopt the work practices of the rug weavers of Qum who deliberately insert a mistake into their handiwork because only Allah is perfect. Those who write judgments are similarly placed.

You may have observed that I have so far said nothing about the foresight, competency or motives of our legislators. I can assure you that my silence on this topic does not stem from Article 9 of the Bill of Rights which provides that "the freedom of speech and debates or proceedings in Parlyament ought not to be impeached or questioned in any court or place out of Parlyament". [6]

Pepper v Hart [7] reversed a well-established rule of statutory interpretation that can be traced back to the mid 18th-century and had only been modified in the late 19th-century to permit reference to White Papers and the like in the context of the mischief rule. [8] The Law Commissions in 1969 [9] and the Renton Committee in 1975 [10] had recommended against change. The Hansard exclusionary rule had been restated emphatically by the House of Lords in 1975 [11] and again in 1981.[12]

Pepper was a hard case in which the Revenue propounded an interpretation of a taxing statute that flew in the teeth of assurances, illustrated by examples, repeatedly given by the Financial Secretary to the Treasury when promoting the legislation through the Commons. Yet, if ever there were an idea whose hour had come by 1992, it was the legitimacy of referring to Hansard for at least some purposes in construing legislation. The law was already moving away from the "austere judicial literalism" [13] of Lord Simonds. The notion of a purposive construction was emerging, pushing the boundaries of the ancient mischief rule stemming from Heydon's Case. [14] Access to travaux preparatoires had become the acceptable method for construing international treaties and the growing body of municipal legislation giving them effect. Some judges were troubled (in the way their predecessors were not) by the discordance between a rule banning consideration of this material for any purpose and their own practice of taking the odd peek at Hansard for assistance. [15] And, by 1992 the House of Lords had declared itself able to revisit its earlier decisions, thereby reflecting the postmodern uncertainties of our current age.

As acknowledged in Pepper, there were already decisions (some of them predating confirmatory legislation) in Australia and New Zealand that gave effect to principles similar to those that were to be adopted by the Law Lords. The exclusionary rule has also been abandoned in Canada, [16] India [17] and Singapore, [18] some of the cases in those jurisdictions having preceded Pepper. American law is to similar effect, not without its critics, most notably Justice Antonin Scalia of whom more later. On my researches, only the Supreme Court of Ireland has rejected Pepper.

I do not suggest that any Pepper principle is applied uniformly in the different jurisdictions. Quite the contrary.

Professor Vogenauer's review of the English jurisprudence, published in the 2005 Oxford Journal of Legal Studies, [19] shows that the reasons given for the rule of exclusion tended to be pragmatic rather than principled until the 1970s. The source materials were neither dependable nor accessible until 1909, when Hansard became comprehensive and authoritative in this country. Online searching was only coming into vogue around the time Pepper was decided. Other pragmatic reasons, including the transactional costs of searching for needles in haystacks and the unlikelihood of finding them were weighed in Pepper and (over the dissent of Lord Mackay) found not to be determinative.

As happens in life, appeals to principle often come to the fore only when people start questioning an ancient practice. And, as also happens in life, defenders of the status quo may advance untenable grounds for holding the line. (Some of the arguments belatedly advanced against the enfranchisement or ordination of women have borne these two qualities.) Sometimes too, those exercising the newly-found liberty fail to avoid abuses stemming from their own misunderstanding of the reasons that ought to set the proper boundaries of the new dispensation. The debate about Pepper v Hart and the sometimes casual attitude to its stringencies in this country, as documented by Professor Vogenauer, illustrate these phenomena.

One argument of principle was raised and easily despatched in Pepper itself, but it was already unfashionable by 1992. This was the suggestion that Article 9 of the Bill of Rights might prohibit courts from consulting Hansard to construe legislation.

Before moving away from pragmatism, I should emphasise the reasons for caution about relying upon what is said and done in Parliament in aid of construction of statutes. The idea picks up the thinking in Bismarck's attributed aphorism that those who like law and sausages should never watch either being made. It is advanced most convincingly by those with direct experience in the cut and thrust of parliamentary law-making. Sir Nicholas Lyell QC, who was Attorney General at the time of Pepper v Hart and leading counsel for the Crown in the case itself, has pointed out that parliamentarians are not

and cannot be equipped to consider nuances of language used by promoters of a Bill in the course of debate. It is therefore most unlikely that they will consult the text of earlier legislation or indeed any extraneous material before voting for a Bill as it emerges sausage-like from the churn of proceedings in Parliament. [20] Professor Baker has reminded us that these considerations are multiplied when it is borne in mind that the members of one chamber of a bicameral legislature can hardly be expected to be on top of the speeches made in the other chamber. [21]

Now these matters should not be taken too far, lest judges apply different standards to Parliament than the members require of themselves. Modern legislatures have extremely tight schedules. Lots of material is taken as read, as it were. Attendance at Parliament is not compulsory. Party discipline is a reality. In these circumstances, it may be too precious and ultimately counter-democratic for judges to refuse in a proper case to infer that members did not assent to principles and policies advanced by the mover, incorporating them into their decision to vote for the Bill to pass.

Often it will be wrong to infer anything beyond courtesy from those listening silently or anything beyond preoccupation from those absent from the chamber during the critical debate. [22] But surely not always. Can I seek to make the point negatively, by asserting that no-one today would defend the pre-Pepper law on the basis that the Queen's assent is necessary to pass a law and by arguing that Her Majesty was not privy to the proceedings in Parliament. Yet this was a reason given for the exclusionary rule when first promulgated in 1769.

A clear statement in a second-reading speech or explanatory memorandum that is replicated in each House may cast genuine light on the text to which it is addressed. The same cannot as easily be said for speeches made in Committee as to a perceived state of affairs, including remarks about the meaning of a clause or the current state of the common law. I confess to real difficulty in making a bridge between such statements and the meaning of the finished legislative product, especially where the statement is used to head off an amendment proposed in Committee in only one House of the Parliament. The readiness of Courts in this country to use such material appears to be a real point of distinction between your jurisprudence and that with which I am more familiar.

From the outset, Pepper attracted critics who began to invoke fundamental, sometimes constitutional, principles to turn back the clock. Lord Steyn, in particular, voiced such concerns on and off the bench, [23] some of which appear to have persuaded the House of Lords to apply the Pepper with a good pinch of salt. Since Pepper is a common law principle of statutory interpretation in this country, the debates have taken place in the time-honoured ways. Sometimes they have involved attempts to "explain" Pepper by finding a different ratio decidendi to that which would have occurred to (dare I say have been intended by) the bench that decided the supposedly authoritative case. I shall pass over Francis Bennion's assertion that the Law Lords in Pepper misapplied the very principle they brought into being. [24] Professor Vogenauer suggests (with a question mark) [25] that there has been a retreat from Pepper, although he does not, I think, point to any case in which there was majority support for retreat, apart from the Spath Holme decision. [26] He summarises that case [p653] in the following terms:

"... [F]or the purpose of statutory interpretation, Pepper is confined to cases where the court is concerned with the meaning that is given to the words used in legislation. As a matter of principle, reference to Hansard is inadmissible if the policy and objects of an Act have to be ascertained for the purpose of identifying the scope of a discretionary power. This may only be done in exceptional cases where the minister gave a categorical assurance to Parliament that the discretionary power would not be used in a given situation."

If I may be permitted an aside, and it is not a new point, I would have thought that resort to Hansard to find legislative policy was more defensible than resort to it for finding the meaning of particular words. It would defy common sense to spurn the bridge of Hansard if one was left speculating whether Parliament was responding to the mischief identified in say a law reform commission report or a decided case. My own experience, for what it is worth, is that discovering the policy of an Act as an aid to a purposive construction is the only area where reference to Hansard has ever proved the slightest bit helpful. Perhaps the distinction between mischief on the one hand and policy or objects on the other is somewhat less categorical than suggested in the summary of Spath Holme I have quoted.

Others have criticised Pepper for betrayal of private law principles touching the interpretation of written contracts. [27] Their views are also overstated, in my respectful opinion. The law does at times receive

evidence going to the meaning of a text from things done or said during its creation. Thus, with contracts, help will occasionally (and I stress occasionally) be drawn from evidence as to the mischief or context revealed during the drafting stage from the discussion of the negotiating parties or even snippets of text considered and rejected for not embodying their common intent. With contracts as with statutes, the search is for the so-called objective meaning of the final product. But it is not possible to demonstrate a priori that such meaning can never be discerned from travaux préparatoires. Lord Nicholls has recently suggested that the law is moving in this area. [28] The parole evidence rule is riddled with so many exceptions and qualifications that Professor Fridman has suggested that the rule itself may be the potential cause of injustice. [29]

I cannot refrain from some comments about in *R v A (No 2)* [30] while recognising that several later cases appear to adopt a less controversial approach to the application of s3 of the Human Rights Act 1998. [31] The House of Lords was faced with a carefully crafted rape-shield law that had been enacted after the Human Rights Act. The law set up a clear and detailed regime restricting the right to cross-examine a complainant as regards previous sexual relations with the accused. Most of their Lordships acknowledged that the text was intractable if one applied the ordinary canons of statutory interpretation, including the rules about promoting the legislative purpose and leaning in favour of the accused. Nevertheless, the unfairness of the legislative restrictions, in the eyes of the Court, saw the judges substituting their own views of fairness and relevance for the closely crafted intentions of Parliament. They did so in 2001 by invoking Parliament's broadly expressed intention about Convention principles, stated in 1998, to trump Parliament's particular statement in 1999.

In Lord Steyn's words, "while the [rape-shield] statute pursued desirable goals, the methods adopted amounted to legislative overkill". [32] The 1999 Act was found to have made an excessive inroad upon the unqualified Convention right to a fair trial.

I wish to say nothing about the ultimate judgment call as to the link between common law relevance and Convention fairness. The House of Lords ultimately concluded that a broad brush reading down s41 of the Youth Justice and Criminal Evidence Act 1999 was a "possible" interpretation of the statute in light of the Convention. This country has chosen to arm its judges with the right to make that decision. The majority invoked s3 of the Human Rights Act which, as you know, provides that: [33]

"So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights."

I venture to suggest that *R v A (No 2)* shows the capacity of s3 to become the judicial equivalent of a Henry VIII clause in Convention matters.[34] To this observer, it does seem to have been a most strained view of the concept of interpreting or "reading" a statute to see that case being determined by reference to s3 rather than by a frank declaration of incompatibility.

The forensic outcome of A's case also suggests that it is not always be correct to view resort to s3 as the lesser intrusion, the remedy that gives greater deference to the so-called true intention of Parliament. [35] As I understand it, the reasons given by their Lordships in *R v A (No 2)* would have been immediately binding on the parties in the yet unfinished rape trial, not to mention its impact on the rights of the complainant, in a way different to the impact of a declaration of incompatibility. The latter remedy would have returned the statute to Parliament to do what it wished in response, whether or not that involved repeal, amendment in a more specific direction than the interpretation offered by their Lordships or no change at all to the status quo. Parliament would also have been free to make its call as to the transitional aspects of any response to the Court's ruling on the Convention issue. I have not overlooked the European Court of Human Rights in this gallop through the options open to the litigants and the Courts.

To adapt Lord Hoffmann in *R (Wilkinson) v Inland Revenue Commissioners*, [36] the outcome in A's Case may have come as a surprise to the members of the Parliament which enacted the 1999 rape-shield law. In his Lordship's words, "in that sense the construction may have been contrary to the 'intention of Parliament'".

In my respectful view, it is not easy to detect any sense in which the reasoning in *R v A (No 2)* accords with the traditional understanding of that guiding concept of statutory interpretation. The Law Lords' acknowledgment of the intractability of the later statute embodying the rape-shield provisions suggests, to this observer, that Dicey's bedrock principle about the supremacy of a later Parliament over its predecessor, in any battle of competing statutory wills, seems now to need qualification in the field of human rights in this country. In cases dealing with enactments passed after the Human Rights

Act there is, to my perception, an unresolved tension between two propositions stated a couple of paragraphs apart by Lord Bingham in *In re S*, when he said that s3 is "a powerful tool whose use is obligatory" and that s3 is the means whereby the Human Rights Act "seeks to preserve parliamentary sovereignty" [37] Are there not (I ask) some constitutional limits upon the manner in which Parliament can tell judges how to go about their core business of interpreting statutes, particularly recent ones? But these fascinating constitutional issues are far too large for me to dwell upon this evening.

In *R v A (No 2)*, Lord Steyn [38] invoked *Pepper v Hart* when placing reliance upon a statement by the Lord Chancellor that "in 99% of the cases that will arise, there will be no need for judicial declarations of incompatibility". The linkage between this prediction made in the third (and I emphasise third) reading speech on the Human Rights Act and the meaning of s3 of that Act is not at once apparent. Nor is it clear to me how this approach fits with Lord Steyn's estoppel-based interpretation of *Pepper* itself, given that the matter in issue was the scope of s3 of the Human Rights Act.

When I differed from Professor Vogenauer as to the extent of the retreat from *Pepper*, I had the benefit of material coming into existence after the time he wrote his article. [39] This said, my reading of the cases here suggests that judges seldom find any crock of gold in *Hansard*.

Lord Steyn's proposed alternative ratio of *Pepper*, [40] involving private law notions of estoppel and admissions by the Executive against interest, as well as what strikes me as the untenable corollary that an Act could have a different meaning depending on who invokes it, has been (in my respectful view) answered convincingly in the academic literature.[41] It has not, to my knowledge, been endorsed by other than Lord Hope in *R v A (No 2)* [42] and somewhat tentatively by Lord Hobhouse in *Wilson*. [43]

Lord Nicholls spoke against the "sidelining" of *Pepper* in *Jackson's Case* [44] and his remarks were recently endorsed by Lord Carswell. [45]

Several clouds of doubt appear to have lifted in the recent decision of *Harding v Wealands*. [46] There it was held that the damages-capping provisions of the New South Wales Motor Accidents Compensation Act 1999 did not apply to tort claims arising out of accidents in New South Wales that are litigated in this country. The local statute in question was the Private International Law (Miscellaneous Provisions) Act 1995. Their Lordships in *Harding* were not troubled by invoking *Pepper* in private litigation that had nothing to do with governmental rights. Significant too, was their readiness to examine a statement by the Lord Chancellor in the nature of a blanket assurance about how English courts would continue to deal with the assessment of damages with regard to foreign torts. The Chancellor was then the head of the judiciary, but he was on any view dealing with a complex aspect of the evolving common law.

The Lord Chancellor's statements in *Committee* deflected an amendment that would have put the matter beyond doubt. There was, however, no reference in the reasons for judgment in *Harding* as to what might have been said in the Commons where, on my researches, the Bill passed without any debate (admittedly later than the legislative proceedings in the House of Lords).

The reasoning in *Harding* and the specific endorsements of *Pepper* have well and truly brought the original case back into the sunshine, perhaps also into the glare of its opponents.

Some of *Pepper*'s fiercest critics have, in my view, overstated their case and therefore not assisted in the search for those variants of *Pepper* that are worth retaining in the judicial kitchen. I include three matters in this context. The first are statements from Francis Bennion, Lord Steyn, Dr Aileen Kavanagh and others to the effect that ministers' statements may, under *Pepper*, operate to bind the courts or serve as a "trump card" in litigation, allowing the Executive to legislate through ministerial assertion. [47] This is not a fair reading of the speeches in *Pepper*, as Professor Vogenauer and Lord Nicholls among others have pointed out. [48] It is Parliament's legislated intention alone that counts.

The law is very clear in Australia that a minister's understanding of the effect of a statute or the state of the common law cannot give the Bill he or she is promoting an effect inconsistent with its terms as construed by the court. [49] In *Re Bolton; Ex parte Beane*, [50] the High Court of Australia went further in refusing to give any weight to a minister's unambiguous second reading speech that contradicted the text. Mason CJ, Wilson and Dawson JJ stated: [51]

"The words of a Minister must not be substituted for the text of the law.... It is always possible that through oversight or inadvertence the clear intention of the Parliament fails

to be translated into the text of the law. However unfortunate it may be when that happens, the task of the Court remains clear. The function of the Court is to give effect to the will of Parliament as expressed in the law.”

These three justices were former Solicitors-General.

The words of a minister can be definitive in the sense of resolving a particular dispute as to the meaning of an ambiguous text, [52] but they are never “authoritative” in the sense sometimes advanced by the critics of Pepper. [53]

My second example of overreaction to Pepper is related to the first. Dr Kavanagh has recently taken up Lord Steyn’s proposition that Pepper v Hart offends the principle of the separation of powers, a doctrine she describes as forbidding members of the executive or the legislature to interpret the law as well as make it. She invokes Lord Wilberforce’s spectre of courts sinking to the level of being “a reflecting mirror of what some other interpretation agency might say”. [54] This, with respect, is fallacious on two counts, because it misstates the interpretative functions of both the agencies and of the courts.

It would be an intolerable state of affairs if all agencies of government were not constantly involved in interpreting the laws by which they and citizens are governed. And there is nothing at all wrong with MPs forming their own views about the meaning of Bills and Acts as they go about their work. Courts alone can construe legislation authoritatively and the separation of powers doctrine requires their rulings to be followed by everyone unless and until Parliament speaks again. There is a world of difference between listening to someone’s views and being bound to give them effect. A judge who takes account of evidence and listens to counsel does not abdicate the responsibility of judgment.

Pepper v Hart has nothing to do with the separation of powers, except in the entirely different sense that judges who are reluctant to give effect to ministerial statements (in general or in the particular) are emphasising the separation between the Executive and Parliament as regards law-making competence.

Thirdly and most curious of all are the concerns expressed about the impact of Pepper upon the practices of Parliament itself. The voicing of these matters by judges and academics lies uneasily with the separation of powers arguments coming from the same sources. [55] Now it is undoubtedly true that Pepper has led in this country to practices whereby members of Parliament ask the promoter of a Bill to give particular assurances, sometimes expressly referring to Pepper v Hart in case the minister has not got the message. [56] Sometimes these questions may have been planted (we call them “Dorothy Dixers” in Australia). And it is undoubtedly the case that ministerial statements are occasionally used in preference to further drafting, or (worse still) to preclude a clarifying amendment in Committee. I have experienced the former situation myself when I was Solicitor General for New South Wales, where Pepper is nothing like the industry it is in this country.

But surely judges can be trusted not to be duped or overborne. They are capable of ensuring that the loud voice of an unambiguous text is not drowned out by the tiny voice of its promoter. This is an area where Article 9 of the Bill of Rights and separation of powers principles ought themselves to have some sway. Judges should leave Parliament to enforce its own best practice. They should also recognise that Hansard records statements made in a forum where meaningful debate and attempts at persuasion still sometimes occur. Parliament is the place to discipline the ministerial assurance that is untrue, sloppy or mispredictive. Courts do not need to wander down this path and Pepper does not require it.

Slanted statements by legislators are an art-form in the United States, but judges there are not fooled, certainly not Scalia J. In the recent Guantanamo Bay case of Hamdan v Rumsfeld, [57] he railed against the use made by the majority of his colleagues on the Supreme Court who selectively quoted what the Americans call “floor statements” to support a contentious point of statutory interpretation. Scalia J warned against indulging in “the fantasy that Senate floor speeches are attended (like the Philippic of Demosthenes) by throngs of eager listeners, instead of being delivered (like Demosthenes’ practice sessions on the beach) alone into a vast emptiness.”

This leads me briefly to the philosophical debate about the intention of Parliament or the intention of the members whose votes are responsible for the passage of a Bill. [58] At one level, the matter is a non-issue for, as Lord Reid pointed out, [59] we are always looking for the meaning of the words

which Parliament has used in its solemn enactment. The motives or beliefs of those who vote for a measure, even their beliefs as to its meaning, may cast little or no light on the meaning of the text and may, in any event, prove extremely difficult to establish in point of fact.

Some, like Lord Steyn [60] and Scalia J attack the whole notion of the intent of the legislature as unprovable and spurious. Kirby J has described the concept as a "polite but unacceptable fiction". [61] Scalia J has observed that:

"We are governed by laws, not by the intentions of legislatures."

"Our task is not to enter the minds of the Members of Congress – who need have nothing in mind in order for their votes to be both lawful and effective – but rather to give fair and reasonable meaning to the text...."

Similar points about the minds of politicians were made by Lord Nicholls and Lord Hobhouse in *Wilson v First County Trust Ltd (No 2)*, but without I think denying the basal idea of Parliament's intention. Lord Nicholls said delicately that "[i]t should not be supposed that members necessarily agreed with the minister's reasoning or his conclusions". Lord Hobhouse was blunter in stating (with the concurrence of Lord Rodger) that it was a "fundamental error of principle to confuse what a minister or a parliamentarian may have said (or said he intended) with the will and intention of Parliament itself". [62]

Sometimes legislative intention is explained as an objective concept, an idea that is in turn difficult to pin down from a philosophical point of view. It has been critically examined in the writings of Daniel Greenberg, Parliamentary Counsel and the author of the much improved latest edition of *Craies on Legislation*. [63] I shall mask my ignorance by not venturing into these philosophical debates.

To me, it is significant and sufficient that our highest Courts explicitly recognise that Parliament can have an intention that may be hidden behind the opacity of its statutory language, or even demonstrably misstated in that language. We have all seen examples of this, just as we have seen wills that make perfect and obvious sense if the word "not" is read into a clause or if a legacy to a non-existent "daughter" is read as going to the testator's son. Every Interpretation Act sets out rules to be applied "unless the contrary intention appears".

In *Pepper*, the Law Lords worked on the premise that there is such a thing as the "intention of the legislature". They spoke in these very terms [64] and it is, I suppose, proper to have regard to their speeches to determine what they were intending to convey. Alas, there is little point in asking them personally because, as Lord Hoffmann remarked very recently in the *Deutsche Morgan* case: [65]

"Once a judgment has been published, its interpretation belongs to posterity and its author and those who agreed with him at the time have no better claim to declare its meaning than anyone else."

Beyond the semantics, the philosophical debates and the empirical points about difficulty of proof lies the important constitutional message that judges are endeavouring to convey when they use this language of intention. [66] Fairness, accessibility to law and the primary rules of statutory interpretation all direct us to the ordinary and grammatical sense of the enacted words read in context. We are also required nowadays to avoid absurdity and to construe enactments purposively. In your system this reference to purposive construction is found in the caselaw. For us in Australia it is a statutory rule of interpretation. In either case, "purpose" implies unexpressed intention in the sense of something anterior to and not discovered directly from the text itself.

Bennion is surely correct in describing the suggestion that there can be no true intention behind an Act of Parliament as "anti-democratic". [67] When judges invoke the intention concept they are in the same breath acknowledging the supremacy of statute over common law and the reality that legislators and those assisting them (being human) do not always express their meaning clearly when signing off on the legislative text. "Legislative intention" is thus more than a polite fiction. As Gleeson CJ put it, the concept expresses the constitutional relationship between the legislature and the judiciary. [68]

We fool ourselves if we think that, in every case, a single "true" meaning will emerge if we wrestle long

enough with the text. It follows that we should welcome all the help we can get in resolving genuine ambiguities that emerge, so long as we remember that the task remains that of determining what Parliament meant by the words it used, not what it was intending to say. [69] Judges must never assume a particular intention and then proceed to find it in Hansard or anywhere else. [70]

Hansard may occasionally provide useful and legitimate clues. But not often, for myriads of reasons many of which I have already touched upon. There are others. Sometimes the people involved in statute-making were themselves uncertain about where they were aiming. Sometimes they deliberately chose to confer a broad discretion, or to use woolly or fuzzy language [71] or language that was obviously always speaking. These latter methods of drafting are occasionally used with deliberate but undisclosed intent on the Executive's part. The Executive in Parliament may be content to let the courts work matters out by trial and error, even or especially if that leaves the judges taking the flack in particular classes of case. Lord Browne-Wilkinson was surely smiling when he wrote in *Pepper* that "Parliament never intends to enact an ambiguity". [72]

We would fool ourselves if we thought that even sharper rules of statutory interpretation could iron out ambiguity or avoid hard choices in statutory construction. If our prescient legislators may be taken to recognise this truth of nature, then it is to me inconceivable that Parliament would not want judges to look at all available material that might cast genuine light upon what it was seeking to convey. In several countries, including my own, Parliament has decided to spell out this mandate to the judges by enacting rules similar to those expounded in *Pepper*.

In 1946, Lord MacMillan, having detected the purpose of an Act, remarked that:

"The legislature has plainly missed fire." [73]

Lord Diplock's extra-judicial riposte in 1978 was that:

"if ... the Courts can identify the target of Parliamentary legislation their proper function is to see that it is hit: not merely to record that it has been missed." [74]

This latter sentiment better captures the true role of judges when interpreting legislation in a parliamentary democracy. [75]

The concept of the intention of Parliament expresses an important constitutional principle rooted in political reality and judicial prudence. Because of it, the principles in *Pepper v Hart*, properly understood and cautiously applied, should continue to guide our Courts.

END NOTES

1. *Roe v Russell* [1928] 2 KB 117 at 130
2. *Waugh v Kippen* 160 CLR 156 at 165
3. *Dodson v Grew* (1767) Wilm 272 at 278; 97 ER 106 at 108
4. *Donoghue v Stevenson* [1932] 1 AC 562
5. *Ilkiw v Samuels* [1963] 2 All ER 879 at 889; [1963] 1 WLR 991 at 1004
6. Bill of Rights 1688 (UK)
7. *Pepper (Inspector of Taxes) v Hart* [1993] 1 AC 593; [1993] 1 All ER 42
8. *Eastman Photographic Materials Co. Ltd v Comptroller-General of Patents, Designs and Trade Marks* [1898] AC 571
9. The Law Commission and the Scottish Law Commission, *The Interpretation of Statutes*, Law Com No 21 and Scot Law Com No 11 (1969) at 31-36
10. Renton Committee Report, *The Preparation of Legislation – Report of a Committee Appointed by the Lord President of the Council*, May 1975, Cmnd 6053, London HMSO at
11. *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591 at 598
12. *Fothergill v Monarch Airlines Ltd* [1981] AC 251 at 278 per Lord Diplock
13. The Right Hon Sir Nicholas Lyell QC MP "Pepper v Hart: The Government Perspective" (1994) 15 *Statute Law Review* 1-9
14. *Heydon's case* (1584) 3 Co Rep 7a; 76 ER 637 at 638. See generally *Pepper (Inspector of Taxes) v Hart* [1993] 1 AC 593 at 617 per Lord Griffiths
15. *Pepper (Inspector of Taxes) v Hart* [1993] 1 AC 593 at 618. Dixon CJ and Convention Debates.

Look up recent biography pre *Cole v Whitfield* 165 CLR 360 (s92 case)

16. See Sullivan, R and Driedger, E Sullivan and Driedger on the Construction of Statutes, (4th ed.) Butterworths, Markham, Ont. 2002 at 485ff
17. *KP Varghese v Income Tax Officer* AIR 1981 SC 1922
18. *Tan Boon Yang v Comptroller of Income Tax* [1993] 2 SLR 48. See also *The "Seaway"* [2005] 1 SLR 435
19. Vogenauer, S "A Retreat from *Pepper v Hart*? A Reply to Lord Steyn" (2005) 25(4) *Oxford Journal of Legal Studies* 629-674
20. The Right Hon Sir Nicholas Lyell QC MP "Pepper v Hart: The Government Perspective" (1994) 15 *Statute Law Review* 1-9
21. Baker, JH "Case and Comment: Statutory Interpretation of Parliamentary Intention" (1993) 52 *Cambridge Law Journal* 353-357
22. Kavanagh, A "Pepper v Hart and Matters of Constitutional Principle" (2005) 121 *Law Quarterly Review* 98 at p105
23. The Right Hon Lord Johan Steyn "Pepper v Hart: A Re-Examination" (2001) 21(1) *Oxford Journal of Legal Studies*, 59-72; The Right Hon Lord Johan Steyn "The Intractable Problem of the Interpretation of Legal Texts" (2003) 25(1) *Sydney Law Review* 5-19
24. Bennion, FAR *Statutory Interpretation* (4th ed.) Butterworths, London 2002 at 53
25. Vogenauer, S "A Retreat from *Pepper v Hart*? A Reply to Lord Steyn" (2005) 25(4) *Oxford Journal of Legal Studies* 629-674
26. *Ex parte Spath Holme Limited* [2001] 2 AC 349; [2001] 1 All ER 195
27. Baker, JH "Case and Comment: Statutory Interpretation of Parliamentary Intention" (1993) 52 *Cambridge Law Journal* 353-357
28. The Right Hon Lord Nicholls "My Kingdom for a Horse" (2005) 121 *Law Quarterly Review* 577-591. See also *Codelfa Construction Pty Ltd v State Rail Authority of NSW* [1982] HCA 24; (1982) 149 CLR 337
29. Fridman, GHL *The Law of Contract in Canada* (4th ed.) Carswell, Scarborough, Ont. 1999 at 481
30. *R v A (No 2)* [2002] 1 AC 45; [2001] UKHL 25
31. Kavanagh, A "The Elusive Divide Between Interpretation and Legislation under the Human Rights Act 1998" (2004) 24 *Oxford Journal of Legal Studies* 259
32. *R v A (No 2)* [2002] 1 AC 45 at [67], [43]
33. Human Rights Act 1998 (UK)
34. In Dr Kavanagh's more nuanced words, a "transformative interpretation" under s3 is "the same as those types of legislative amendment which change a statute by inserting a word or a phrase. So it seems that section 3 authorizes a form of judicial amendment of statutory material." Kavanagh, A "The Elusive Divide Between Interpretation and Legislation under the Human Rights Act 1998" (2004) 24 *Oxford Journal of Legal Studies* 259 at 283
35. Fredman, S "From Deference to Democracy: The Role of Equality Under the Human Rights Act 1998" (2006) 122 *Law Quarterly Review* 53-81 at 79
36. *R v Her Majesty's Commissioners of Inland Revenue (Respondents) ex parte Wilkinson (FC)* (Appellant) [2005] UKHL 30 at [18]
37. *In re S (Minors) (Care Order: Implementation of Care Plan)* [2002] 2 AC 291 at [37], [39]; [2002] UKHL 10; [2002] 2 AC 291 at [37], [39]
38. *R v A (No 2)* [2002] 1 AC 45 at 68 [44]
39. See also Sales, P "Pepper v Hart: A Footnote to Professor Vogenauer's Reply to Lord Steyn" (2006) 26 *Oxford Journal of Legal Studies* 585-592
40. *R v A (No 2)* [2002] 1 AC 45 at 68 [45]; *McDonnell v Congregation of Christian Brothers Trustees & Ors* [2004] 1 AC 1101 at [29]; [2003] UKHL 63
41. Kavanagh, A "Pepper v Hart and Matters of Constitutional Principle" (2005) 121 *Law Quarterly Review* 98 at 116-118; Vogenauer, S "A Retreat from *Pepper v Hart*? A Reply to Lord Steyn" (2005) 25(4) *Oxford Journal of Legal Studies* 629-674; Sales, P "Pepper v Hart: A Footnote to Professor Vogenauer's Reply to Lord Steyn" (2006) 26 *Oxford Journal of Legal Studies* 585-592
42. *R v A (No 2)* [2002] 1 AC 45 at [81]
43. *Wilson v First County Trust Ltd (No 2)* [2004] 1 AC 816 at 865 [140]; [2003] UKHL 40
44. *R (on the application of Jackson) v A-G* [2006] 1 AC 262 at [65]; [2005] UKHL 56
45. *Harding v Wealands* [2006] 4 All ER 1; [2006] UKHL 32; [2006] 3 WLR 83
46. *Harding v Wealands* [2006] 4 All ER 1 at 25 [81]; [2006] UKHL 32; [2006] 3 WLR 83
47. Bennion *Statutory Interpretation* (4th ed.) Butterworths, London 2002 at 547; The Right Hon Lord Steyn "Pepper v Hart: A Re-Examination" (2001) 21(1) *Oxford Journal of Legal Studies* 59-72 at 64-70; Kavanagh, A "Pepper v Hart and Matters of Constitutional Principle" (2005) 121 *Law Quarterly Review* 98 at 100-101
48. *Wilson v First County Trust Ltd (No 2)* [2004] 1 AC 816 [58]-[59]
49. See e.g. *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476 at 499 [55]; [2003] HCA 2 at [55]
50. *Re Bolton*; *Ex parte Beane* (1987) 162 CLR 51; [1987] HCA 12

51. *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 518; [1987] HCA 12
52. *Insurance Commission of Western Australia v Container Handlers Pty Ltd & Ors* 218 CLR 89 at 103 [33] per McHugh J; [2004] HCA 24 at [33]
53. Kavanagh, A "Pepper v Hart and Matters of Constitutional Principle" (2005) 121 Law Quarterly Review 98
54. Kavanagh, A "Pepper v Hart and Matters of Constitutional Principle" (2005) 121 Law Quarterly Review 98 at 102-103 will give you the chapter and verse.
55. See The Right Hon Lord Steyn "Pepper v Hart; A Re-Examination" (2001) 21(1) Oxford Journal of Legal Studies 59-72 at 69; Kavanagh, A "Pepper v Hart and Matters of Constitutional Principle" (2005) 121 Law Quarterly Review 98 at 106-107; *Pickin v British Railways Board* [1974] AC] 765
56. Based on a casual electronic stroll through 2006 Hansard in the House of Lords
57. *Hamdan v Rumsfeld* 415 F 3d 33 (DC Cir 2005); 126 S Ct 622 (29 June 2006)
58. See "The Principle of Legality and the Clear Statement Principle", Opening Address by the Honourable JJ Spigelman AC, Chief Justice Of New South Wales, to the New South Wales Bar Association Conference "Working With Statutes", Sydney, 18 March 2005 for a recent discussion.; Vogenauer S "What is the Proper Role of Legislative Intention in Judicial Interpretation?" (1997) 18(3) Statute Law Review 235-243
59. *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591 at 613
60. The Right Hon Lord Steyn "Pepper v Hart; A Re-Examination" (2001) 21(1) Oxford Journal of Legal Studies 59-72 at 64-66
61. *R v Hughes* (2000) 202 CLR 535; [2000] HCA 22
62. *Wilson v First County Trust Ltd (No 2)* [2004] 1 AC 816 at [66], [178], [139] respectively
63. Greenberg, D "The Nature of Legislative Intention and Its Implications for Legislative Drafting" 27 (1) Statute Law Review 15-28; See also Vogenauer S "What is the Proper Role of Legislative Intention in Judicial Interpretation?" (1997) 18(3) Statute Law Review 235-243
64. [Vogenauer p654n for refs]
65. *Deutsche Morgan Grenfell Group Plc v Inland Revenue & Anor* [2006] UKHL 49 at [14]
66. See generally *Singh v The Commonwealth* 222 CLR 322 at [19]; [2004] HCA 43 at [19] for a sustained defence of the concept by Gleeson CJ
67. Bennion, FAR Statutory Interpretation (4th ed.) Butterworths, London 2002 at 409
68. See also French J in *NAAV and Ors v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 123 FCR 298 at 411, describing the concept as a "legitimising and normative term"
69. *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591 at 645 per Lord Simon
70. *Richardson v Austin* (1911) 12 CLR 463 at 470 per Griffith CJ; [1911] HCA 28
71. ,[As to this see>>]
72. *Pepper (Inspector of Taxes) v Hart* [1993] 1 AC 593 at 634
73. *Inland Revenue Commissioners v Ayrshire Employers Mutual Insurance Association Ltd* [1946] 1 All ER 637 at 641 cited in *Kingston & Anor v Keprose Pty Ltd* (1987) 11 NSWLR 404 at 424
74. Lord Diplock "The Courts as Legislators" in *The Lawyer and Justice* (Sweet and Maxwell, London 1978) at 274 cited in *Kingston & Anor v Keprose Pty Ltd* (1987) 11 NSWLR 404 at 424
75. See *Kingston & Anor v Keprose Pty Ltd* (1987) 11 NSWLR 404 for chapter

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National Security Law Course

**OPENING REMARKS:
NATIONAL SECURITY LAW COURSE
Justice Keith Mason AC
13 September 2006
University of Sydney**

Terrorism is not new. Justice Michael Kirby recently observed that the British regarded George Washington and his confederates as terrorists who had risen in rebellion against the Crown[1]. What appears to be new about the spate of attacks that started on **9/11, 2001**, is the readiness of the modern terrorist to wage war on persons who have no involvement with government other than that they live within a nation state that has policies that the terrorists wish to change. The chosen means are indiscriminate acts of extreme violence intended to kill or maim at random, and designed to put the whole nation and its allies in fear. The long-term aims of the terrorist are presumably to cower the nation's government into changing its domestic or foreign policy. Sometimes they are no more concrete than to destabilise the nation's economy and morale.

Modern suicide bombers are a new breed of martyrs whose primary aim is to kill innocent third parties. If their own death is viewed in their own circles as a martyrdom to faith, it must be a cruel faith that places no value on the lives of others.

There is much that is ugly about secular nation states in the modern era. Western democracies are also capable of repression and injustice. But the democratic ideal to which we cling means that, for us, change must come through persuasion and the ballot box, not by force of arms.

Around the world, not just the western world, nations have responded to terrorism and the threat of terrorism by enacting laws that create new offences and extend the territorial scope of old offences; laws prohibiting new forms of incitement, and/or punishing membership of proscribed organisations; laws tightening border control and easing the expulsion of those who pose a threat; laws authorising new forms of covert surveillance; and laws involving control, detention and preventative detention that are not dependent upon the measured processes of the criminal law.

These new laws will be blunt and overinclusive in their impact. Yet, to exclude citizens and restrict the laws to outsiders (however defined) would miss the mark. Most of the terrorists responsible for recent attacks or threatened attacks have been citizens of the countries directly involved, and not just citizens by recent adoption. Furthermore, harsh laws that target foreign nationals may be struck down or read down under proportionality jurisprudence in those countries that use this judicial device. The recent decision of ***A v Secretary of State for the Home Department***[2] saw the House of Lords finding that certain measures aimed at foreign nationals were not "strictly required" by the exigencies of the situation for the very reason that similar measures were not aimed at the potentially equally dangerous class of citizens.

For police openly to adopt racial or religious profiling would also offend widely held values of non-discrimination. Interestingly enough, these values are themselves currently under question, particularly in the United States (if you can trust what is seen on **Fox News**).

The recent, deliberate restrictions of existing freedoms almost invariably require legislation. Attempts to tighten security by reliance upon the existing powers of the police or the Executive arm have generated their own legal and constitutional problems, as evidenced by challenges in the United States to Executive surveillance by wiretap and to the Guan tanamo Bay situation.

Curtailments of traditional freedoms expose the Executive Branch to judicial review from courts that are generally anxious to preserve the status quo. The common law is justly proud of its commitment to liberty and its requirement that any overriding legislation must be explicit in its intent. Courts everywhere are also required to test the validity of the new legislation against constitutional and Bill of Rights restrictions already in place in their countries. Thus it was that Indonesia's Constitutional Court, not even a year old, struck down an anti-terrorist enactment that had been made retrospective to get at the perpetrators of the Bali bombing outrage[3]. Even in Australia, where there is no Bill of Rights, constitutional principles stemming from the entrenched separation of federal judicial power impose as

yet uncertain limits upon the Executive's power to detain suspected terrorists or those who have yet to be found guilty of criminal offences. You will be studying these local constitutional issues, some of them deriving from the 1992 decision in ***Lim v Minister for Immigration, Local Government and Ethnic Affairs*** [4] in this course. There are also constitutional issues associated with the federal Parliament's vague duty to take State courts as it finds them.

The local threat of violent Islamic terrorism is not the only stimulus for these new laws. The form of some of the recent legislation stems as much from globalisation as from the particular threats unleashed by Al Qaeda and its satellites. Australia's trading partners expect cooperation in their fight against terrorism and require us to do our bit in what is justly seen as an international effort in face of a worldwide problem. And since international terrorism uses the innocent tools of international communication such as the internet, the mobile phone and the transfer of money across national lines, effective regulation calls forth new intrusions into these otherwise private and innocent means of intercourse.

Constitutional requirements, legitimate distrust of government and the democratic need for legal accountability mean that courts and lawyers become inevitable participants in this sad new world. Governments want the cachet of judicial or at least quasi-judicial involvement in the issuance of warrants. The validity of warrants and control orders themselves may be challenged on legal or factual grounds. Curtailment of liberty through immigration control, expulsion, detention and control orders inevitably attracts judicial review. Courts need to respond by adopting their processes, so long as this is consistent with the proper role of the judiciary and consonant with its core function. The little loved ***Kable's Case***[5] shows that there are still some things that courts cannot be required to do even if those things are dressed up in traditional curial garb.

And, of course, the prosecution of terrorist crimes requires the involvement of judges, jurors and legal practitioners. This in turn has produced the phenomenon of Executive vetting of key participants in the judicial process, something that creates its own set of legal and constitutional issues in a polity committed to the independence of the judiciary and (to a degree) to the separation of powers.

The **National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth)** states as its object:

to prevent the disclosure of information in federal criminal proceedings and civil proceedings where the disclosure is likely to prejudice national security, except to the extent that preventing the disclosure would seriously interfere with the administration of justice.

The key principle of the Act is that the Commonwealth Attorney General can certify that the disclosure of information during a case may prejudice national security. Consequently the Act provides for increased pre-trial information management procedures; notification by Counsel during hearings of any anticipated disclosure of sensitive information, and an application to the court for a ruling on the information; court closure to consider the application and hear argument from each side; the issuing of various certificates by the court in relation to the information – for example, non-disclosure certificates and witness exclusion certificates; and/or the court declining to give effect to the non-disclosure application and ordering that the information be disclosed without alteration or that the witness be called. The court may stop proceedings if it believes a party may not receive a fair hearing. Whatever the ruling, in making its rulings the court must give greatest weight to national security considerations in accord with the object of the Act.

This is all new territory for lawyers and judges.

The **Law and Justice Legislation Amendment (Video Link Evidence and Other Measures) Act 2005 (Cth)**, which applies to terrorism offence proceedings, enables certain evidence to be given by video link. This obviously facilitates access to witnesses who are abroad or who have fears for their safety. Equally clearly, it raises fairness issues, that are fortunately not entirely novel having regard to recent developments concerning evidence from victims of sexual assault and children[6].

One suspects that there will be calls from some quarters to revise our commitment to traditional rules of evidence relating to the overseas questioning of suspects by persons in authority, in light of the recent Victorian Court of Appeal decision in ***Thomas*** [7]. I imply no view either way about the appropriateness of any such legislative change, beyond remarking that it is hard to justify different rules simply on the basis of the country in which the disputed evidence is collected.

Incitement to terror can occur in circumstances where freedom of speech is traditionally given the highest protection. I refer to speech in a religious context and private communication through telephonic means and/or the internet. Yet these are the means that have been chosen to incite extreme acts of violence. Dr Ben Saul has recently observed that:

Contemporary terrorism by extremist, quasi-religious groups has been accompanied by the revival of particularly virulent propaganda, as well as by inflammatory and provocative rhetoric. Facilitated by cheap and portable digital technology, terrorist videos are distributed over the internet or through Arab media channels, sometimes finding their way (in sanitised form) into the western media. The raw, uncensored versions of some of these videos are extraordinarily bleak: filled not only with crude political messages and ideology, but also seething with hate and pathological cruelty[8].

You will be examining free speech issues in this course.

Because we in Australia have been used to profound domestic peace we tend to see law as an instrument of social and economic improvement. Yet law's primary function has always been to maintain order in the sense of personal security and the security of property. Occasionally, when there is an affray or a riot, as in Cronulla last year, we get a glimpse of what happens if law and order breaks down generally in a particular time and place. The fear that is generated may be more significant than the individual acts of violence.

Events such as 9/11, the Bali, Madrid and London bombings, and the attempted bombing of passenger aeroplanes, open the dark spectre of the misery and chaos that widespread random violence inflicts not just on the primary victims but also upon society itself.

The recent response to the threat of terrorism reminds us of the ancient notion of the King's or Queen's peace. Parliament and the Executive are endeavouring by these recent measures to assert and proclaim their universal control over society, in the interest of safety and security. In ***Cain v Doyle***, [9] Latham CJ referred to the "*fundamental idea of the criminal law ... that breaches of the law are offences against the King's peace*". From this ancient nation the Chief Justice derived the proposition that it would be inconsistent to hold that the Crown can itself be guilty of a criminal offence.

Sir Frederick Pollock's 1886 Oxford lectures on **The King's Peace** pointed out that the idea of particular punishment for those who violate it is a most ancient one. What I found interesting is Pollock's tracing of the steps whereby the King's peace was originally conferred at particular times and in particular places. It was only by the end of the thirteenth century that the king's peace had grown from an occasional privilege to a universal right. Thus, the expression "*the king's highway*" that survives to this day shows that the idea of peculiar legal sanctity clung about highways (and journeying) in popular imagination long after they had ceased to be more under the king's peace than any other English ground[10].

You are about to embark upon a fascinating short course of study in an area that, unlike much in the law, is both fascinating and topical. But if ever there were a subject that reminded us of the limitations of law it is this one. The public is entitled to demand that the Australian government do everything reasonably within its power to ensure peace and security. But no one is so foolish as to believe that law is the only answer to the problem posed by modern-day terrorism. In the final analysis, terrorism cannot be stopped by either war or law.

This does not mean that we ignore law any more than the unstopability of murder would be a reason for taking murder off the statute book. We as a nation need to confront terrorism by good intelligence-gathering and good policing as well as better drawn laws administered by judges and lawyers who are committed to do their part by adapting traditional procedures to meet new needs. Professor George Williams has written often about these matters in recent times. He acknowledges that the law can play an important role in the strategies that must be adopted to address terrorism as best we may.

Professor Williams is one of many who urge our lawmakers constantly to ask the question about the cost of these new laws both in terms of enforcement cost and in terms of their impact upon the democratic freedoms we are seeking to protect in fighting the so-called "war on terror". These are not just questions for our politicians. Lawyers are well placed to understand the extent to which new laws depart from the fundamentals of our inherited rights and freedoms and to assess the impact of these new laws.

I am sure that you will depart from this course better informed about the law touching our national security. Hopefully, you will be wiser as well, emerging better equipped to use that wisdom, not just in the interests of your several clients, but for the good of society as a whole as we work through these difficult times.

ENDNOTES

1. The Hon Justice Michael Kirby AC CME, 'National Security: Proportionality, Restraint and Commonsense', National Security Law Conference, Federal Court of Australia (Sydney, 12 March 2005) p2.
2. [2004] UKHL 56.
3. Tim Lindsey, Simon Butt, Ross Clarke, "Review is not a Release", *The Australian*, Tuesday 27 July, 2004: http://www.law.unimelb.edu.au/alc/wip/review_not_release.html
4. ***Chu Kheng Lim and Others v The Minister for Immigration, Local Government and Ethnic Affairs and Another*** (1992) 176 CLR 1.
5. ***Kable v Director of Public Prosecutions (NSW)*** (1996) 189 CLR 51.
6. See ***R v Ngo*** (2003) 57 NSWLR 55 and the rule in ***R v McHardie and Danielson*** [1988] 2 NSWLR 733 (at [739]).
7. ***R v Thomas*** [2006] VSCA 165 (18 August 2006).
8. Dr Ben Saul, "Speaking of Terror: Criminalising Incitement to Violence", (2005) 11(2) UNSWLJ Forum, p24. 9. (1946) 72 CLR 409 (at [418]).
10. Sir Frederick Pollock, ***Oxford Lectures and Other Discourses***, (New York, 1890) pp82-3.

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Law And Religion In Australia

LAW AND RELIGION IN AUSTRALIA

Justice Keith Mason National Forum on Australia's Christian Heritage
Monday 7 August 2006
Canberra

At the time of white settlement in this country, the idea that Christianity was not embedded in the law would have been regarded as a heresy both of a legal and a religious nature. For example, when in 1797 Kenyon CJ effectively instructed a jury to convict the publisher of Paine's *Age of Reason* for blasphemy, he told them that "the Christian religion is part of the law of the land". [1] The Church of England was established by law in England and, to a degree, also in this country. It enjoyed several privileges in the early decades after New South Wales was first colonised. This tended to upset other Christian groups more than church outsiders.

Many rules of the common law, including its crime of blasphemy, were traceable to the Ten Commandments. But it was the law of man and not Scripture that defined the offences in detail, established procedures for trial and determined appropriate punishments. Not every Old Testament crime was punishable under inherited English statute or common law. And sometimes the law imposed different remedies to those prescribed in the Old Testament, as for example in regard to adultery. Australians would always have been uncomfortable with the Biblical penalty of death for that sin.

Furthermore, murder, theft and false swearing are crimes everywhere, not just in the cultures of Jews, Christians and Muslims, the "people of the Book". This suggests, if proof were needed, that guidance about right and wrong derived from Holy Scripture may indicate, not just that something is good for humanity if it is willed by God, but also that God wills that which is by its nature good. Non-Christian and pre-Christian societies have in many instances come to a similar understanding about matters the law should address, perceiving signposts to truth in what Catholic theology calls natural law. There is, of course, nothing wrong with a Biblical source for rules of right conduct. It is just that most people nowadays expect to be given additional justifications in which the values and policies are spelled out.

Claims that Christianity is part of our law are often associated with statements about Australia being a Christian nation. The latter proposition may be true in terms of predominant religious orientation acknowledged in the Census. But the label tells us little about the nature or depth of religious conviction in this country, or its impact upon the public or private lives of our citizens. In any event, a claim to be a Christian nation should be an acknowledgement of a blessing received and not some badge of national merit. If we have a good system of law and a sound democracy, we should regard these benefits as products of divine grace not things the nation has achieved because many of its citizens have been Christians.

Some claims of biblical pedigree were quite false and only demonstrate our capacity for self-delusion.

Slavery was recognized by the English common law as part of the law of property until the late eighteenth century. Biblical defences of the institution were mounted well into the nineteenth century in the southern United States. In 1843 1200 Methodist clergy owned slaves in that country. It was a famous decision by Lord Chief Justice Mansfield in 1772 that proclaimed slavery within England to be incompatible with the common law. [2] Mansfield would have been branded a judicial activist for this bold conclusion had that sloppy term of abuse been in vogue at the time. It would require legislation by the Parliament in the early nineteenth century to ban the overseas slave trade within the British Empire. This only came about through the political efforts of the radical Clapham Sect lasting more than a decade. They were stoutly opposed by traders concerned about loss of profits and bishops concerned about social stability. [3] Slavery was not an issue in Australia because convicts provided the cheap labour necessary for our pre-industrial society.

The common law established that it was lawful for a husband to rape his wife and Biblical explanations were offered for this rule. This doctrine lasted until 1991 when it too was overturned through the proper exercise of the lawmaking powers of judges in Britain and Australia. [4] The biblical principle that husband and wife are "one flesh" also created a strange common law doctrine that prevented one spouse from suing the other in tort. The doctrine, which survived well into the twentieth century, was a perversion of any scriptural principle because it interpreted the "one flesh" metaphor literally and then concluded that one person could not sue himself. The ultimate beneficiaries of this odd rule were

insurers of motor vehicles who invoked spousal immunity to avoid having to pay up if a person injured his or her spouse through negligent driving. This so-called Christian legal principle was finally swept away in Australia by the **Family Law Act** of 1975.

Even sound Biblical authority for particular conduct being right or wrong does not mean that the law should necessarily intrude. Nor does it indicate what legal response is appropriate.

Different times may also produce different attitudes about the wrongness of particular conduct and the proper sanctions for curbing it. Approaches to child discipline based upon a literal interpretation of the Biblical Proverb about “*sparing the rod*”[5] are no longer acceptable. Indeed, an Australian parent who caused injury through beating a child would expect to be in trouble with the law.

Societal attitudes may swing from particular conduct being permitted and even morally obligatory, to it being frowned upon morally, then to it being prohibited by law. For example, attitudes to smoking cigarettes in restaurants and burning off leaves in the backyard have changed profoundly in the lifetimes of many people attending this Forum. In times past, each activity would have been strongly encouraged in particular contexts. The moral worm later turned, but when the sanction of public disapproval proved inadequate we resorted to the criminal law. Sometimes things move in the opposite direction: for example, consensual homosexual conduct involving adults is no longer criminal.

We take child sexual abuse much more seriously nowadays than in the past. This has thrown up a fascinating jurisprudential debate in sentencing law. Should a person convicted today of having committed such a crime 30 years ago be punished according to today’s sentencing tariff or the tariff when the offence was committed? [6] The question raises issues of consistency as well as exposing the tension between the deterrent and denunciatory functions of sentencing law and practice.

The Old Testament distinguishes clearly between crime and sin. Law and morality have always been separate spheres. They generally reinforce each other, but not always. “Not always,” for at least two reasons: because not every human law is just, and because even just laws may be self-defeating.

As to the first reason, Christianity teaches that, while we must respect those put in authority, some laws may be so unjust that a believer’s higher duty to God requires martyrdom unless and until the unjust law can be lawfully overturned.

As to the second reason, we must never forget that law is not an end in itself. Some types of law may lack a sufficiently high level of support to be appropriate for the mere majority to force through Parliament. Other laws may be counterproductive if only because they provoke disobedience rather than compliance. Some laws may simply be too costly to police and enforce. Some good ideas are too nuanced for law and lawyers. No laws are self - executing.

We cannot therefore always look to “the law” to achieve what is good or prevent what is bad. Law and government have limited roles in promoting public welfare and even more limited roles in promoting the Gospel, however we view it.

Sometimes sound laws produce unintended outcomes that are unjust. Sometimes legal rules are invoked inappropriately. Human limitations prevent us from seeing all the consequences of our actions, even those stemming from good intentions. Contracts can become tools of oppression. Statutory schemes designed to confer benefits to the needy can be rorted. Law has its limits and we do not necessarily overcome them by passing more detailed or onerous laws. Sometimes we should be questioning whether our readiness to resort to law is the problem, not the answer.

Law doubtless has an ethical dimension, but, in the words of Cardinal Clancy:[7]

[That ethical dimension] is limited by the law’s primary function of maintaining right order in society. While it is of great importance to preserve and respond to the moral dimension, it is even more important to recognize that civil law does not say the final word on morality. Unfortunately, a society that wishes to preserve traditional Christian morality while abandoning the Christian faith on which such morality is founded, more and more looks to the law to be a substitute foundation. Hence, a law to decriminalize a proscribed practice is interpreted by many as a law sanctioning that practice. “Legal” and “illegal” become “moral” and “immoral” respectively. When a society then finds that it cannot preserve a traditional morality without its proper foundation, it takes the easy way out and adopts the current practice – whatever it is – as the new morality, but still looks to the law for its sanction.

Law's greatest limitation is that it depends on human actors for its enforcement. Yet police can overstep the mark, witnesses can be dishonest, confused or biased, judges and juries can make mistakes in forming decisions. The highly improbable happens sometimes. Both the Bible and human experience teach us that terrible miscarriages of justice occur from time to time and that they are not always remedied in the lifetime of the actors. Over the last hundred years or so we have responded by adding extra layers of appeal and judicial review, royal commissions and every manner of inquiry. We have come to believe in Lord Atkins' famous aphorism that "*finality is a good thing but justice is a better*", [8] as if a choice between finality and justice is always clearly presented. Christians at least should know that justice and truth are attributes of God, and beyond the complete grasp of sinful humankind no matter how much we aspire towards them.

Australians have always been unhappy with the State assuming the role of moral guardian or religious nanny. Remnants of establishment of the Church of England were swept away by the mid nineteenth century. Since then, courts have bent over backwards to avoid becoming embroiled in religious doctrinal disputes. Indeed, judges have had to remind warring Christians of St Paul's injunction against "*go[ing] to law before the unjust*" (1 Corinthians 6:1-7 (KJV)). [9]

Hostility to any form of theocracy is definitely an aspect of our Australian legal heritage. I also like to think of it as part of our Christian heritage, because it reflects my understanding of scriptural principles about not using the institutions of the State to resolve religious disagreements. Australian law's unwillingness to get involved in theological disputes also stems from our pragmatic spirit and distrust of authority. It is part of the reason why we have not needed to erect a strong wall of constitutional separation between Church and State.

I believe that we are fortunate to have been spared the worst excesses of the legal culture wars we see taking place in North America. In my view, constitutional law is not the place to be having profound debates about sexuality, the nature of marriage, when it is right to have an abortion and who decides, the proper separation of Church and State, or the circumstances in which discrimination is a good or bad thing.

Please understand what I am saying. Individuals have many important rights, human rights, which neither the Government nor Parliament should transgress. The **Universal Declaration of Human Rights** includes rights such as:

- the rights of race, colour, sex, language, religion, political or other opinion (Article 2);
- the right to life, liberty and security of the person (Article 3); and
- the right not to be subjected to cruel, inhuman or degrading treatment or punishment (Article 5).

My point is that courts are not the best place to work out and define the **content** of these rights. If we hand this task over to our judges there are also costs and consequences that must be taken into account.

Topics such as sexuality, the nature of marriage, when it is right to discriminate and when it is not, abortion and the proper separation of Church and State are too important to be sidelined by channeling them into the debating chambers of our constitutional courts. Yet this is what happens if we pass high-sounding Bills of Rights or open-textured anti-discrimination statutes. I do not want decisions about such issues to be set in concrete by a cabal of seven legal scholars in the High Court, no matter how eminent. Legal precedents on constitutional issues become very hard to recall and American experience shows that the stacking of constitutional courts is not a desirable way to address the problem.

Judges are skilled and experienced in the matters of the law and (to a degree) in the way that law intersects with ethics, psychology, politics, public health, economics etc. But judges are not ethicists, psychologists etc and they have no special skills or present mandate to be making **society's** decisions for it. It is a delusion to think that a few motherhood words in a Constitution or a Bill of Rights can define, let alone resolve, the nuanced issues involved in a proper assessment of such profoundly divisive matters. It is also crazy to think that law's adversarial system is the best place to be thrashing them out. If laws are to be involved in these areas, they require prolonged debate, accurate cost assessment, sharp definition, and a good deal of trial and error. Changes may need to be phased in. Remedies and sanctions may need to be ratcheted up or down over time. Courts lack the means or the expertise of doing these things. Adversarial litigation is not the best place to be attempting to do so.

Only the profoundly naive think that giving judges the role of defining our most contentious and sensitive rights will reduce the heat of debate. Judges have their own passions, even those who loudly proclaim the value-neutrality of the law. One consequence of constitutionalising any issue (ie removing it from the sphere of development through the common law or by Parliament) is that the highest judiciary itself becomes politicised. Candidates for office are vetted for their political correctness in hot political areas, sometimes at the cost of concentrating on their capacity to perform core judicial functions. American experience also shows that politicians may like to talk tough on litmus issues, while hoping (with fingers crossed) that the courts will neuter or strike down the very legislation they have promoted in order to placate single-issue constituents.

Our founding fathers made a deliberate choice to leave State and Federal Parliaments generally free in the matters about which they might legislate. Certain powers were assigned to the Commonwealth Parliament, but few matters were excluded from the reach of all legislators. We have no constitutional Bill of Rights. Nevertheless basic freedoms are widely enjoyed by those fortunate enough to live in or get to our shores.

One of the few exceptions to the policy of having no constitutionally embedded rights was s116 of the federal Constitution which provides:

The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.

The provision was framed cautiously and has been interpreted narrowly. This is hardly surprising given that the Preamble to the same Constitution humbly relies on the blessing of Almighty God. [10] Section 116's prohibition does not extend to State laws, it does not preclude government aid to religious institutions and it does not prevent religious displays in the public arena. In theory, Australian Parliaments have considerable scope to legislate in matters religious if they choose. In fact, they have kept away, only intervening to facilitate church governance if there is very high consensus among the adherents of a particular church for this to occur. Our constitutionally laid back polity is free to debate prayers in Parliament and Christmas trees in public schools and public places, but the debate does not take place in the High Court of Australia.

The practical consequence of keeping religious issues out of our Parliaments and Courts has been that, unlike our colleagues in the United States, judges in this country have not been embroiled in the often evanescent culture wars of the day. This has been to the good of our society and most fortunate for those who hold judicial office in this country. Judges have enough to do in the core areas of the law.

Men and women of goodwill who share a common Christian heritage may disagree strongly about what is or should be the law. Christian judges do not always agree about the outcome of a particular case. Christians are on all sides of politics and may tend to disagree on what Biblical values are important as well as the ways and means of giving effect to them. For example, Christians hold widely divergent views about the appropriate levels of punishment of crime and about whether we should allow a fresh start for certain categories of offender.

In public discourse in this country, including legal discourse, there is increasing reluctance to acknowledge the source of genuine Biblical principles. Citing Scripture may be needlessly controversial or, as I have indicated, positively misleading. Sometimes a Scriptural badge of origin appears to detract from authenticity or at least persuasive appeal. Sometimes it is recognized that Biblical principles are not the monopoly of believers; or even that believers may be amongst the slowest to give them effect.

But at times believers have been silenced by a false argument, much in vogue nowadays. This is the idea that so-called secular policies have free passage into public discourse while faith-based policies must be suppressed on that account. How often have we heard it said that X should keep his religious ideas to himself or at least confine them to preaching to his own flock.

There is a false dichotomy at work here, because all policies have values, including secularly-derived policies. There is, of course, a more fundamental objection, in that free speech is both an important individual right and vital to the welfare of society. There should be no spurious barriers to entry into public debate. With this attempt of modern secular society to gag the religious voice it is hardly surprising that we find modern Christians restating classical free speech doctrines. [11] There is an

irony here, because in times past it was the Christian mainstream that was unfair to non-Christians in the area of free speech.

Those proclaiming that our laws are value-free or should at least be purged of faith-based values are either deluded or dangerous. National security, self-reliance, the unhindered pursuit of profit, the good of the environment, individual healthiness, protection of the vulnerable, tolerance and privacy are all values. Of course, some of them derive from Biblical principles and have been given effect through law because they are widely supported by voters or embedded in authoritative legal precedents. Of course, some policies in statute and common law will be hostile to gospel values, although one might expect disagreement in identifying them. Those concerned with the law as it should be (ie the public and politicians) and as it is (ie the judges) should be allowed to debate the strengths of relevant values without having to keep silent merely because certain values are labelled as faith-based.

Lawmakers (including our judges, who are responsible for law's application and the development of the common law) bring a diverse range of attitudes to their task. A substantial number of them are practising Christians who hold to an increasingly unfashionable view among Christians (especially evangelical Christians) that the daily vocations of the laity are themselves gospel ministries when pursued with integrity.

From time to time appellate courts have to grapple with legal claims that force judges to confront large issues without the direct guidance of statute or judicial precedent. Two notable examples in recent times were **Cattanach v Melchior**[12] and **Harriton v Stephens**. [13] **Cattanach** involved a parent's claim for damages for the cost of raising a healthy but unintended child born because a negligent doctor performed an inadequate sterilisation procedure. The High Court decided by four votes to three that damages were recoverable and were not to be offset by the benefits or blessings stemming to the parent from the birth of a healthy child.

Harriton involved a severely disabled child whose pregnant mother contracted rubella that was not detected through the negligence of her doctor. For the purpose of the case it was assumed that the mother would lawfully have terminated the pregnancy had the doctor diagnosed rubella. By six votes to one the High Court held that the child could not sue the doctor, in effect because she would not have come into existence were it not for the doctor's negligence. The Court held that it was impossible to estimate the damages suffered by the child because a judge has no means of comparing and placing a monetary value upon the difference between a severely disabled existence and non-existence altogether.

In each case the issues were agonised over by a trial judge, three judges in a State Court of Appeal and by all seven members of the High Court of Australia. A vast range of legal and other considerations were taken into account. Many of the judges were at pains to emphasise the law's agnosticism as to the value of life, death or profoundly disabled existence. But the questions to be decided, the legal obligation to spell out reasons, and the conscientious need to wrestle publicly with highly vexing questions ensured that the judgments are replete with a lot of metaphysical discussion. Some of it is thinly disguised under discussion of earlier legal precedents or sociological observations.

In **Cattanach's** case, the judges were inevitably drawn into discussing the relevance to the issue at hand of whether a healthy but unplanned child could be regarded by the law as both a "blessing" to the parents and a burden that could be laid at the feet of the negligent doctor. The judges also anxiously considered how the child in question might later react to the news that he was presented as a financial liability for the purposes of the litigation.

Cases such as these force judges to confront literally life and death issues. There were no direct legal precedents in Australian law and a wide range of conflicting overseas ones. Inevitably the judges drew upon personal experiences, values and belief systems. This was entirely proper in the circumstances where, unlike Parliament, the judges did not have the option of doing nothing on the topic. They had to decide where the loss fell and to explain why.

Often legal policies can be sourced to earlier precedents that appear at first blush to represent a neutral root of title. But on closer analysis they may turn out to be the product of the beliefs and values of judges from an earlier generation. At times, judges quote encyclopedias and learned works dealing with non-legal issues related to the case. At other times judges have, in Kirby J's words, "*attempted to objectify the foundation for their judgments*" by appealing to the supposed opinion of the fictional character known as the reasonable person. [14] This character is known in England as the man on the Clapham omnibus or the London Underground.

At other times, when faced with cases like this, judges quote great works of literature or Holy Scripture itself to justify, explain or express the profound values they are seeking to capture. To cite Kirby J again [15]

Lying deep in many of the judicial opinions are perceptions of moral or ethical factors, illustrated by the recourse to Biblical citations.

Michael Kirby himself has often done this, although in **Cattanach** he chided judges who seek to enforce what he called “*judicial interpretations of scripture*”. [16] He expressly had in his sights Meagher JA who said in an earlier case: [17]

Every child is a cause of happiness to its parents. Every parent looks on his child as David did on Absalom, or Oedipus on Antigone. In St John’s Gospel (16.21) it is said “A woman when she is in travail hath sorrow, because her hour has come: but as soon as she is delivered of the child, she remembereth no more the anguish, for joy that a man is born into the world.”

This was hyperbole, but the basic message was clear. In Mr Justice Meagher’s view, the law should endeavour to bring into account the positive side of having a healthy child in any assessment of the financial downside to parents with an unplanned extra mouth to feed.

Kirby J would have none of this reasoning. He said: [18]

The language of “blessings” ... is a distraction from the real subject matter of parental claims. Neither the invocation of Scripture nor the invention of a fictitious oracle on the Underground (not even its Australian equivalent) authorises a court of law to depart from the ordinary principles governing the recovery of damages for the tort of negligence. If such recovery is to be denied, its rejection must find some other and different reasons or another and different law-maker. If there is any area where the law has no business in intruding, it is in the enforcement of judicial interpretations of Scripture and in giving legal effect to judicial assertions about “blessings”...

In my respectful view, citation of the Bible is not an attempt to enforce interpretations of Scripture, any more than a judge who quotes Shakespeare to explain his or her thought processes is trying to enforce the dramatic themes of that playwright. If we want transparency in our lawmakers and judges, then we surely want them to be up front with the ideas moving them to decision-making. A judge’s personal ideas and religious beliefs count for nothing if they conflict with statute or binding precedent. If the judge cannot abide by the judicial oath to do right **according to law** then he or she should resign. But there are sometimes situations where there is no clear precedent, where the very question to be asked is uncertain and where the answers are highly contestable. The two cases I have been referring to were of this nature.

Hopefully we have not reached the stage that an idea relevant to public or legal discourse is off limits if it is sourced to the Bible or because it forms part of a larger corpus of philosophy or theology. I am pleased to report that, in the New South Wales Court of Appeal decision in **Harriton**, one Jewish judge cited the New Testament and one Christian judge cited the Old Testament. [19]

In modern times, the common law has turned its face against formalism and legal fictions. Judges are expected to explain and justify their actual thought processes and not to cloak them in a fog of legalese. This is a vital aspect of judicial accountability. Of course, it may expose the judge to criticism from legal brethren or outsiders. Such criticism goes with the turf and tenured judges have broad shoulders. The point I wish to emphasise is that the judge’s duty, both as a judge and a person, is to give an honest account of his or her true reasons. If they are unacceptable they may be corrected on appeal, ignored by judicial colleagues on the same appellate bench or overturned by Parliament (at least if the ruling does not involve a matter of constitutional law).

Our Australian legal system is replete with Biblical and Christian values. Its central role is to deliver justice and to settle disputes. It aspires to find out the truth, while recognizing that what is true is not always relevant to the particular legal dispute. The criminal law endeavours to suppress what the Book of Common Prayer describes as “*wickedness and vice*”, while realising that the divergent aims of penology are hard to reconcile and even harder to achieve across the board.

The human fallibility of judges will ensure that these mighty (dare I say it Godly) goals of justice, peace,

truth and goodness are not always attained. But the goals are important enough in themselves. Our legal heritage does not have to seek out dubious Biblical roots.

ENDNOTES

1. **Williams' Case** (1797) How St Tr 654 at 703.
2. **Somerset v Stewart** (1772) 1 Lofft, 98 ER 449.
3. See E M Howse, **Saints in Politics: The "Clapham Sect" and the Growth of Freedom** (1971).
4. **Reg v R** [1992] 1 AC 612, **The Queen v L** (1991) 174 CLR 379.
5. Proverbs 13:24.
6. See **MJR** (2002) 130 A Crim R 481.
7. Homily in 1989 Red Mass, Sydney.
8. **Ras Behari Lal v The King Emperor** (1934) 150 LT 3 at 5.
9. See my lecture, "Believers in Court: Sydney Anglican going to law", **The Cable Lecture 2005**.
10. See generally Tony Blackshield, "Religion and Australian constitutional law" in Peter Radan, Denise Meyerson and Rosalind F Croucher, **Law and Religion: God, the State and the Common Law**, Routledge, 2005.
11. See eg Bishop Robert Forsyth **Dangerous Protections, How Some Ways of Protecting Religious Freedom May Actually Diminish the Freedom of Religion**, Acton Lecture 2001.
12. (2003) 215 CLR 1.
13. [2006] HCA 15, 80 ALJR 791; 226 ALR 391.
14. **Cattanach** at 52 [135] per Kirby J.
15. **Cattanach** at 52[135].
16. At 58 [151].
17. **CES v Superclinics (Australia) Pty Ltd** (1995) 38 NSWLR 47 at 87.
18. *Ibid*.
19. **Harriton v Stephens** (2004) 59 NSWLR 694 at 700[17] (Spigelman CJ, referring to Matthew 19:19), 721[155] (Mason P, referring to Job 3:3).

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The Rule Of Law, Judicial Review And The Public-Private Divide

THE RULE OF LAW, JUDICIAL REVIEW AND THE PUBLIC-PRIVATE DIVIDE

Testing the boundaries of New Zealand's public law domain: Forum Address

Justice Keith Mason*
Wellington Town Hall, New Zealand
20 March 2006

The rule of law is the bedrock of civilised society. It rules the rulers, including those who exercise judicial power. A *“person invested with power must, if called upon, justify its exercise by reference to some principle or rule of law”*. [1]

The requirement to defend the legality of power, if called upon to do so, is vital to the liberal democratic countries that we are blessed to inhabit. It informs the principles of constitutionalism, the accountability of holders of public office, judicial review of administrative action and the individual's freedom from unwanted interference whether wielded by public or private interests. We see its importance if our gaze turns to countries where law and order has broken down or where a dictator or ruling oligarchy governs by whim.

The concept of the rule of law has an aspirational aspect as well. Indeed, there are times and places where it is more aspirational than real.

In the thirteenth century Bracton asserted that *“the law is the highest inheritance which the King has; for by law he and all his subjects are ruled”*. He coined the phrase about the King being under God and the law that Sir Edward Coke took up in the seventeenth century when he was trying to lay down his view of the law to an absolutist Monarch and when Parliament was flexing its muscles against the Crown. John Adams spoke of *“a government of laws and not of men”* in his 1780 draft of the Constitution of the Commonwealth of Massachusetts.

Albert Venn Dicey, whose writings flourished in the early twentieth century, saw the rule of law as meaning equality before the law, a concept he watered down by paraphrasing it as *“the equal subjection of all classes to the ordinary law of the land”*[2]. Dicey's slant on the rule of law arose from his individualist philosophy. He had the common lawyer's aversion for the statute book and he feared socialism. He saw government as essentially coercive power. This coercion had to be strictly limited if the individual was to prosper.

These writers made stirring claims for the concept of the rule of law. Yet, in a way, each man spoke of an ideal that fell far short of reality. Of course, an ideal such as the rule of law really matters. It can shape political debate. It may impose moral constraints. And it also informs legal discourse, though indirectly. What McHugh and Gummow JJ said recently of the Australian scene is, I am sure, equally true in New Zealand with your more flexible constitutional arrangements. Their Honours wrote that [3]:

... the observance by decision-makers of the limits within which they are constrained by the Constitution and by statutes and subsidiary laws validly made is an aspect of the rule of law under the Constitution. It may be said that the rule of law reflects values concerned in general terms with abuse of power by the executive and legislative branches of government. But it would be going much further to give those values an immediate normative operation in applying the Constitution.

Legal scholars are not alone in viewing the rule of law from their own perspective.

A politician's vision will focus on those aspects of the rule of law that further democratic principles. Indeed, a member of the government may bridle if a court prefers the fine print of a statute over the broad brush of the Parliamentary debates. The Executive is not likely to share the common lawyer's view that fundamental rights such as procedural fairness and fair trial require explicit overriding by

legislation before they can possibly be qualified.

Judges hold differing views about Ministerial statements and explanatory memoranda as guides to the meaning of statutes. Not all have gone quite as far as Scalia J who remarked that “*we are governed by laws, not by the intention of legislatures*” and that “*it is our task ... not to enter the minds of Members of Congress – who need have nothing in mind for their votes to be both lawful and effective – but rather to give fair and reasonable meaning to the text ...*”[4]. But all judges know from experience that questions of statutory construction may involve issues that those responsible for drafting and enacting legislation never contemplated.

Behind stuffy judicial attitudes to extrinsic guides to the meaning of statutes lie significant constitutional principles about law-making. The House of Lords has gone out of its way to demonstrate that reliance on ministerial statements may divert the court away from the expressed intention of Parliament as enacted in legislation. In ***Wilson v First County Trust Ltd (No 2)***, [5]. Lord Nicholls wryly observed that “*it should not be supposed that Members necessarily agreed with the Minister’s reasoning or his conclusions*”. Lord Hobhouse was even blunter in stating that [6]. “*it is a fundamental error of principle to confuse what a minister or a parliamentarian may have said (or said he intended) with the will and intention of Parliament itself*”. Their Lordships were making the high constitutional statements that, apart from themselves, only Parliament is recognised as a legitimate source of law-making power and that Parliament only expresses its legislative will through enacting statutes [7].

Judges naturally view the rule of law from the angle of their involvement with it, which focuses upon resolving individual disputes in an adversary context. Vaguely formulated policies that are not spelt out in legislation will be passed over if they are incompatible with the common law with its penchant for liberty and individualistic rights. Courts place great store on aspects of the rule of law in which they hold the ring, namely constitutional accountability, judicial review and the separation of the judicial power. A judge will see particular problems with privative clauses and with enactments that interfere with the existing jurisdiction and powers of courts.

Judges do, of course, diverge in their understanding of what fidelity to law entails. For example, attitudes ebb and flow over formalism, the proper use of precedents and the gravitational pull of statute law.

You do me an honour, as a Scottish-born Australian, to open a Conference devoted to testing the boundaries of New Zealand’s public law domain. I profess no expertise beyond that of the interested but disinterested observer who is fascinated by comparative law and who has looked at public law from the different angles of a lawyer in private practice, a law reformer, a law officer and latterly a judge.

My role as Solicitor General for New South Wales between 1987 and 1997 took me to the edge of many of the public-private boundaries you will be considering at this Conference. During my decade in that position, the Crown Solicitor’s Office lost much of its traditional monopoly representing the State Crown in all of its manifestations. That “Crown” also shrank as many governmental functions were outsourced or placed under the oversight of statutory corporations operating under charters obliging them to act commercially with little or no continuing Executive oversight.

I am sure that there were similar developments in New Zealand.

The very structure of public law has also been challenged during the last two decades. The prerogatives of the Crown have narrowed and their exercise has become justiciable in many aspects [8]. Much of the common law of judicial review has been reshaped and modified by legislation. Disputes about the awarding of government tenders may crop up in the disparate fields of judicial review and contract itself, but either way the new law must accommodate to the policies reflected in outsourcing, level playing fields, heightened accountability and freedom of information. The law of restitution has produced a spate of recent cases melding private and public law principles in the context of claims to recover unauthorised taxes and levies [9].

In the role as Solicitor General it was a great pleasure to meet my New Zealand counterpart, John McGrath, now Justice McGrath of your Supreme Court. John used to smirk when the Australian Solicitors General agonised over the restraints of our written Constitution and issues of federalism. New Zealand appeared to be a Solicitor General’s dream, at least before the Bill of Rights, the rediscovery of the Treaty of Waitangi and MMP. I remember your Attorney General, Geoffrey Palmer telling me at a Conference of Law Reform Agencies in the mid 1980s that New Zealand needed a Law Commission because it was too easy to change the law here and the process needed to be slowed down a bit. That was a true sentiment in those days, not so true now. A bit like Sir Geoffrey’s statement

that “judges [would] continue to have the same legal remedies as they now have, irrespective of whether the *Bill of Rights* is in issue”[10]. I shall return to **Baigent’s Case** a little later in these brief remarks.

Different law systems see rule of law issues differently both as to the framework of issues and the answers provided. In what follows, I seek to draw no invidious comparisons and I particularly crave your indulgence if I have mistaken the current situation under New Zealand law. I am only trying to point out some national differences that touch on several of the themes in this Conference’s program.

The debate currently raging in the United States about the capacity of the Executive, drawing on the role of the Head of State as Commander in Chief, to position itself beyond the scope of generally expressed legislation [11] appears foreign to our collective experience. For us, the presumption of interpretation that the Executive is not bound by statute is one that is fairly easily displaced [12].

We in Australasia also welcome citation of foreign caselaw as useful, non-binding, guidance in matters yet to be resolved by our highest courts. Yet there is a violent culture war on this topic raging in the United States, spurred by strong ideas of constitutional originalism and meaningless name-calling about judicial activism [13]. Scalia J leads the charge on this issue of foreign precedents [14]. While he claims to have cited more foreign authorities than any of his colleagues, he points out that they all predate the American Constitution.

There are significant differences between public law in New Zealand and Australia that have nothing to do with federalism. Your **Bill of Rights Act** places many important rights in sharper focus than the common law. It is pregnant with possibilities and will inevitably cause friction between the Judiciary and the Executive, all the more so because of its reinforcement of a constitutional separation of powers. Thomas J has described the Bill of Rights as a “launching pad for the judicial development of remedies which in other countries are retained for *constitutional* violations” [15]. We in Australia are yet to embrace a national Bill of Rights. This said, some of our leading judges seem intent to discover implied rights within the interstices of the constitutional separation of judicial power.

Your courts appear to have embraced [16] in its entirety, while ours maintain a distinction between jurisdictional and non-jurisdictional error of law for some purposes [17]. I suspect that your attitude to the scope of **Wednesbury** unreasonableness may be more flexible in some areas than in Australia [18], although, on my researches, senior judges in neither country (with the possible exception of Kirby J) have much enthusiasm for disproportionality as a free-standing doctrine [19]. Unlike New Zealand, Courts in Australia have turned their back on the view that so-called legitimate expectations can ground substantive outcomes [20]. And the idea that infringement of a Bill of Rights or even a Constitution could sound in damages as a free-standing cause of action has been firmly rebuffed in Australia. Your famous **Baigent** decision, reflecting the American **Bivens** doctrine, is not the law in my country [21].

There will be discussion today about **Dunne v Canwest TV Works Ltd**[22]. I understand why some observers regard this recent decision as a controversial extension of the **Datafin** principle [23], not to mention **Wednesbury**[24]. The whole topic is yet another where the public law of our two countries is presently divergent. Your Court of Appeal has embraced **Datafin** and the principle that a private organisation is amenable to judicial review on appropriate grounds if its powers have significant public consequences [25]. **Datafin** has had only qualified and mixed reception in Australian state courts [26] with respect to the public dealings of a private body. When the matter was raised in the High Court in the **Neat** case in 2003 only Kirby J endorsed **Datafin**[27]. He was in dissent and the majority construed the relevant legislation as empowering the company to act free of the constraints deriving from public law as if it were a natural person, ie commercially and selfishly. Given current events in Australia it is a significant irony that the company involved is AWB, the privatised former Australian Wheat Authority whose dealings in Iraq have caused widespread embarrassment [28].

The High Court of Australia has given a cool reception to Sir Robin Cooke’s idea that some fundamental common law rights may be beyond the reach of Parliament. This said, it has chosen the path of distinguishing rather than entirely negating Sir Robin’s bold proposals [29]. On my reading, your Court of Appeal has also tiptoed around the point in recent years, contenting itself with statements that the issue is academic, given the good sense of Parliament [30].

A major theme of this Conference relates to the boundaries between public and private law.

The recent decisions of your appellate courts in the **Pratt Contractors** litigation [31] represent, on one view, a firm choice of a private law ordering of public tender law. In Denning-like style, Lord Hoffmann foreshadowed the result in the opening paragraphs of his speech in the Privy Council. While setting the

scene, he referred frostily to “*judicialising*” the procedure for competitive tendering and he spoke of tenderers not wanting to be “*hobbled by quasi-judicial procedural rules*” [32]. As you know, the Court of Appeal and the Privy Council found that the rights of the tenderers were to be governed by the private law of contract. If a so-called process contract was involved at all, its terms were to be worked out according to the expressed intentions of the parties in such of the documentation as was clearly intended to be legally binding. If broad notions of “fairness” were to be imported, then this would be because the particular contract carried such an implication. I perceive that Australian law sees matters in a similar vein [33], although we are very much in flux about importing generalised principles of good faith or “fairness” into commercial contracts not involving insurance. A duty of fair dealing was generously conceded at first instance in *Pratt* [34]. I doubt that such a concession would have been made in my country. That will come as no surprise to Kiwi cricket lovers, although it is not always wise to judge a nation’s laws by reference to what happens in the last ball of a One Day International cricket match.

The recent cases do not drive public law from the tendering field. A disappointed tenderer who gets in quickly enough may invoke judicial review if able to point to some statutory mandate that was overlooked. But it is getting harder to do so as Parliament pushes statutory bodies out into the level fields of the market place, prescribing non-justiciable, contractual models for procurement. Judicial review also has the drawback that the best it can offer is to pull the house down and force the government party back to tender. If a rejected tenderer wants damages it must plead a case in contract or misfeasance in public office, a tort that requires proof of malice [35].

These trends in tendering law reflect legislative policies of privatising many functions that have in times past been viewed as core governmental functions. Yet the trend is not all one way. Your accidents compensation scheme can be viewed as the choice of a public (statutory) model over a private (tort based) model. Australian governments are unlikely to adopt it, fearing anything that puts them in the position of the insurer of last resort. But with us, there has been massive statutory intrusion into the field of personal injury damages in the last few years. In one area, the liability of public authorities, there has been a deliberate blending of public and private law models. Following English law stated in *Stovin v Wise* [36], it is now necessary for a plaintiff who claims damages based on breach of statutory duty by a public authority to establish *Wednesbury* unreasonableness for starters [37].

Concern for the rule of law must never lose sight of the practicalities of delivering its ideals, including the practical impacts of regulating the legal profession in particular ways and of doctrines such as legal professional privilege and public interest immunity.

The privatising of areas once firmly seen as the realm of public law has been accompanied by the outsourcing of government legal services. No longer does the Crown Solicitor’s Office have a monopoly except in core areas. This trend has been driven by Treasury’s quest for efficiencies and savings, by the sheer volume and complexity of some transactions, and by the effective marketing of the big law firms. It is also as old as the hills in that Government has always used the private Bar for much of its specialist legal work.

But there are downsides, and the issue should be kept in view at a Conference such as this. Information embedded in the corporate memory of the Crown law office needs to be shared across the Government. Yet a private law firm that acts only for one department or statutory corporation will inevitably push that body’s current passions against other branches of government. Long-term constitutional interests of government may also be overlooked because the private firm is on a steep learning curve or because an entrepreneurial managing partner is a little too eager to please the non-captive client. Legal opinions buried in the archives of the Crown Law Office may not always be shared around if a single department or statutory authority retains a law firm that is viewed as a competitor in the brave new world of tendering for what is regarded as legal “business” [38].

I once had a particularly interesting experience while Solicitor General. A statutory authority was being prosecuted for a work-place accident. The idea of Crown v Crown may strike some as anomalous, but many would see such accountability as an aspect of the rule of law. The defendant properly retained its own solicitors and barristers. It decided to take the point that the criminal sanctions in the statute did not bind the Crown or those within its shield. This was an arguable proposition, but one on which there had already been Crown law advice favourable to the prosecution position. Much more open to debate was whether the quango was itself within the shield of the Crown. As second law officer I telephoned senior counsel for the defendant and asked if it was to be his submission that his client authority represented the Crown. When (as I already knew) he said it was, I directed him on behalf of the Crown to abandon his first point.

This personal story brings me back to where I started. We are all committed to the principles of the rule of law. Yet, John Adams’ so-called “government of laws and not of men” is necessarily placed in the

hands of the men (and women) who constitute the legislative, executive and judicial arms of government. Also the men and women who practise law, thereby modelling the rule of law itself. We all like to defend our patch when threatened. Hopefully, we always strive to do so with the utmost fidelity to the rule of law, what Bracton described as "our highest inheritance".

* President, New South Wales Court of Appeal. I am grateful for the research assistance of Vivien Pollard and John Zerilli.

END NOTES

- [1] Philip A Joseph, "The Demise of **Ultra Vires** - Judicial Review in the New Zealand Courts" [2001] PL 354 at 358, citing **Entick v Carrington** (1765) 19 St Tr 1029.
- [2] A V Dicey, **Introduction to the Study of the Law of the Constitution** 10th ed, 1959 pp202-3.
- [3] **Re Minister for Immigration and Multicultural & Indigenous Affairs; Ex parte Lam** (2003) 214 CLR 1 at 23[72].
- [4] **Conroy v Aniskof** 507 US 511, 519 (1993), **Pennsylvania v Union Gas Co** 491 US 1, 30 (1989).
- [5] [2004] 1 AC 816 at 843[66].
- [6] At 864[139].
- [7] This theme is developed in greater detail in my paper "The View from the Other Side - Judicial Experiences of Legislation", Fourth Australasian Drafting Conference, 3 August 2005, http://intranet/lawlink/Supreme_Court/ll_sc.nsf/pages/SCO_mason_030805
- [8] **Burt v Governor-General** [1992] 3 NZLR 672; **Jarratt v Commissioner of Police for New South Wales** [2005] HCA 50, 79 ALJR 1581.
- [9] **Woolwich Equitable Building Society v Inland Revenue Commissioners** [1993] AC 70, **Roxborough v Rothmans of Pall Mall Australia Limited** (2001) 208 CLR 516, **Waikato Regional Airport Ltd v Attorney-General** [2004] 3 NZLR 1 (PC).
- [10] 510 NZPD 3450 (1990) cited in Rishworth G, "Civil Remedies for Breach of the Bill of Rights", Rishworth et al, **The New Zealand Bill of Rights** (2003) at 811.
- [11] See David Cole, "What Bush Wants to Hear" **New York Review of Books** 17 November 2005.
- [12] Cf **Bropho v Western Australia** (1990) 171 CLR 1.
- [13] See E W Thomas, "So-called Judicial Activism and the Ascendancy of Judicial Constraints" (2005) 21 NZULR 685.
- [14] See, eg **Atkins v Verginia** 536 US 304, 347-8 (2002).
- [15] **Dunlea v Attorney-General** [2000] 3 NZLR 136 at 155[60], quoting Paul Rishworth in Huscroft & Rishworth (eds), **Rights and Freedoms: New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993** (1995), p75. This was a dissenting judgment. The majority (Richardson P, Gault, Keith and Blanchard JJ) were at pains to emphasise the rarity of Bivens-type damages claims. This does not appear to cut across the potentiality of the Bill of Rights Act as a springboard, as noted by Thomas J.
- [16] **Anisimic Limited v Foreign Compensation Commission** [1969] AC 147.
- [17] **Peters v Davison** [1999] 2 NZLR 164. Cf **Craig v South Australia** (1995) 184 CLR 163, Uniting Church in **Australia Property Trust (NSW) v Industrial Relations Commission of New South Wales** (2004) 60 NSWLR 602.
- [18] See **Wellington City Council v Woolworths New Zealand Ltd** (No 2) [1996] 2 NZLR 537, **Discount Brands Ltd v Northcote Mainstreet Inc** [2004] 3 NZLR 619 at 631[50] and **Attorney-General (NSW) v Quin** (1990) 170 CLR 1.
- [19] **Isaac v Minister for Consumer Affairs** [1990] 2 NZLR 606 at 635-6; **Bruce v Cole** (1998) 45 NSWLR 163 at 185; **Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam** (2003) 214 CLR 1 at 23[72].
- [20] **Attorney-General v Quin; Re Minister for Immigration and Multicultural & Indigenous Affairs; Ex parte Lam** (2003) 214 CLR 1. Cf **Ngai Tahu Maori Trust Board v Director-General of Conservation** [1995] 3 NZLR 553, **NZ Maori Council v Attorney-General** [1996] 3 NZLR 140 at 184-185 (Thomas J).
- [21] See **Kruger v Commonwealth** (1997) 190 CLR 1 at 124, 146-7; **British American Tobacco Ltd v Western Australia** (2003) 217 CLR 30 at 52-3.
- [22] [2005] NZAR 577.
- [23] **R v Panel on Takeovers and Mergers; Ex parte Datafin Plc** [1987] QB 815.
- [24] See, eg Dean R Knight in (2005) 21 NZULR 711.
- [25] **Electoral Commission v Cameron** [1997] 2 NZLR 421, **Royal Australasian College of Surgeons v Phipps** [1999] 3 NZLR 1, **Wilson v White** [2005] 1 NZLR 189 at [21].
- [26] See Allars, "Public Administration in Private Hands" (2005) 12 AJ Admin L 126 at pp130-2.
- [27] See also **Forbes v New South Wales Trotting Club Ltd** (1979) 143 CLR 242 at 276 (Murphy J).
- [28] **Neat Domestic Trading Pty Ltd v AWB Limited** (2003) 216 CLR 277. Generally as to the limited reception of **Datafin** in Australia, see Aronson, Dyer & Groves **Judicial Review of Administrative Action** 3rd ed pp127-136.
- [29] **Durham Holdings Pty Ltd v New South Wales** (2001) 205 CLR 399.

[30] **Shaw v Commissioner of Inland Revenue** [1999] 3 NZLR 154 at 158.

[31] **Transit New Zealand v Pratt Contractors Ltd** [2002] 2 NZLR 313 (CA), **Pratt Contractors Ltd v Transit New Zealand** [2005] 2 NZLR 438.

[32] [2005] 2 NZLR at 438.

[33] See **Hughes Aircraft Systems International v Airservices Australia** (1997) 76 FCR 151; **St George Football Club Inc v Soccer NSW Ltd** [2005] NSWCA 481.

[34] See [2000] 2 NZLR at 332[75].

[35] **Garrett v Attorney-General** [1997] 2 NZLR 332; **Northern Territory v Mengel** (1995) 185 CLR 307.

[36] [1996] AC 923.

[37] See, eg **Civil Liability Act 2002 (NSW)** s43.

[38] See generally New South Wales Law Reform Commission, Report 86, **Circulation of Legal Advice to Government**, March 1998.

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Admission Of Lawyers

**THE SUPREME COURT
OF NEW SOUTH WALES
BANCO COURT**

**Mason P
Giles JA
Adams J**

Friday 17 February 2006

ADMISSION OF LAWYERS

MASON P: The formal part of these proceedings is over, but before the Court adjourns, I wish to congratulate and welcome the newly admitted lawyers.

You are to be congratulated individually for the effort that has seen you here today commence formal practice in this State. It has involved a period of lengthy study and practical training. You are entitled to be proud of your achievements, just as your family and friends who are gathered here are also entitled to be proud of you.

The Chief Justice is unable to sit this afternoon. The Court sitting is the Full Court of the Supreme Court of New South Wales. On my right is Giles JA; on my left, Adams J.

It is necessary and fitting that admission to practice occurs by virtue of an order made by the Supreme Court of New South Wales in proceedings such as this. Apart from its formal role, this proceeding is a symbolic representation of the function of the Supreme Court in setting and maintaining standards of legal practice. It reminds the newly admitted lawyers, and the older ones, and the wider communities with which you are involved, that legal practitioners have duties to the Court that are paramount.

Among the obligations you owe to the Court are: a duty of full disclosure of the relevant law; a duty of candour not to mislead the Court as to any of the facts or to knowingly permit your client to do so; a duty not to permit commencement or continuance of any baseless proceedings; a duty to exercise care before making an allegation of misconduct against any person and to test any instructions you might receive from your client in that regard; a duty not to assist in any form of improper conduct; and a duty to conduct cases efficiently and expeditiously.

The performance of these duties may, on some occasions, conflict with your client's interests or, indeed, his or her enthusiasms. Nevertheless, they are obligations of a professional character that you owe to the Court.

I mentioned wider communities and there are necessarily obligations and relationships involved towards those wider communities. First and foremost are the clients whom you will be called upon to serve with undivided loyalty and commitment. As well, there are the clients who perhaps may not have the funds of your regular clients for whom you

may be called upon to give access to justice by making your services available free of charge. There is the community of your fellow practitioners to whom you owe duties of honesty, courtesy and cooperation. There is the community of the public. Your duty to use your legal skills is one that involves applying them in a way which is consistent with your other obligations to serve the public good.

As you enter various niches in the legal profession, you will experience considerable pressure to conform to the cultures of the firm, the set of chambers, the government department, the faculty. This collective embrace is appropriate insofar as it educates, encourages and helps maintain proper professional standards. But never forget that, as individuals, you have the opportunity to project your values and your ideals into your chosen calling. Conversely, your personal well-being and the integrity of your life and belief system are vital to your ability to function as a legal practitioner. You are a person first and a lawyer second.

The law is a demanding and exacting profession, but do not let it squeeze out your relationships with communities beyond the law and with those near and dear to you. Your professional life is important, but it is only a part of your wider calling.

It was said of Samuel Johnson's biographer Boswell that his father was a very closed and bookish man. The father was a busy barrister who was appointed a Judge in Scotland in 1754 when Boswell was 14. Throughout his life Boswell had a particularly fond memory of a day spent fishing with his father when he had been a small boy. We would now refer to this as "quality time" in a parent-child relationship. For Boswell it must have been a rare event whose memory remained with him into adulthood. After the father's death, Boswell came upon his diary and was able to turn up the entry of the happy day spent fishing. Sadly the father's note read something like this, "*Unable to do any reading. Day wholly wasted fishing with son*".

I want to finish on a more positive and happy note. This is a memorable occasion, a happy one and, as I have indicated, one in which you have every reason to be proud and thankful, just as your friends and family here have every reason to be proud of you and thankful that you have reached this stage of your career.

Once again, I congratulate and welcome you to the profession.

The Court will now adjourn.

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Specialist Accreditation: Graduation 2005

SPECIALIST ACCREDITATION: GRADUATION 2005

Justice Keith Mason
Banco Court
8 November 2005

From time to time, an august member of the senior bar is pointed out and described as the “*last of the true generalists*”. They have existed to some degree, but not all modern sightings are reliable. We have always had specialists, although past areas of specialisation may appear generalist to our modern eyes.

It is however undoubtedly true that leading barristers and solicitors of one generation past practised across a wider expanse of law than they do at present. Multi-skilling was essential when juries were commonplace, the profession was small and the Workers Compensation Commission was the only specialist court.

There were definite advantages from such a culture. Michael McHugh said in a 1994 lecture [1]:

My practice at the NSW Bar was a wide ranging one involving both trial and appellate work in fields ranging from the criminal law and industrial law at one end of the spectrum to fields like intellectual property and constitutional law at the other end. Practice in such diverse fields naturally forces a lawyer to seek to understand the general body of law as a coherent whole and to perceive and question the anomalies and inconsistencies generated by particular rules in particular fields. Moreover, you often find that ideas acquired in one branch of the law are transferable to other branches of the law. Practical examples of the working of the law in one of its branches frequently provide persuasive analogies in other branches. The wider the scope of the lawyer's practice the better lawyer he or she is likely to be.

My own practice at the Bar lacked the breadth of Michael McHugh's. I did but one personal injury case and one criminal jury trial, excellent training for the Court of Appeal and the Court of Criminal Appeal. Fortunately, I acquired some familiarity with the criminal law in my decade as Solicitor General when I appeared frequently in the Court of Criminal Appeal. I used to take all the Crown briefs for a day, thus getting access to a wide range of ordinary matters, albeit viewed through the appellate lens. I well remember one of my earliest forays involving a one-armed Molotov cocktail thrower conducting his own appeal. He was startled to see the arrival of the Solicitor General in what he correctly thought was a simple case. “*I haven't been in the Court of Criminal Appeal before*” he plaintively exclaimed. I told him that it was only one of my first visits as well. I too was a learner.

When referring to his generalist practice at the Bar, Justice McHugh (as he then was) was addressing on the topic of **Growth of Legislation and Litigation**. He went on to observe that “*the growth of legislation is to render it more difficult for legal practitioners to develop broad ranging practices*”.

In the law, as in other endeavours, specialisation is partly a response to complexity and increased regulation. The added complexity in social organisation in modern times has promoted legislation of added intricacy. There have also been additional layers of regulation, often in the form of licensing and compulsory insurance. These developments in turn have furthered the growth of specialisation.

The American academic Grant Gilmore once said:

*In Heaven, there will be no law, and the lion will lie down with the lamb.
In Hell, there will be nothing but law, and due process will be meticulously observed.*

The growth of mediation – itself a field requiring specialist practitioners – suggests that we have not yet reached the Hell of “*nothing but law*”. But we are moving that way at a great pace.

Ignorance of the law may be no excuse, but we all suffer from it in large measure. For the sake of clients and sanity lawyers carve out areas in which they try to keep abreast, recognising the mere existence of other areas in which they can do no more than hopefully recognise the problem of their own ignorance. I used to live in fear of missing the very presence of a trust problem that engaged the rule against perpetuities. I never encountered it in my time as a solicitor or barrister. At least I hope I never encountered it.

The problem of spotting the problem remains. Not just for the practitioner. Judges have to be careful as well, even judges from intermediate courts of appeal. Only the High Court of Australia is infallible in our legal polity. And even for that institution the justices are, as Justice Robert Jackson once remarked, *"not final because [they] are infallible, but ... infallible only because [they] are final"*.

Specialisation in any field confers neither perfection nor immunity. On the contrary. Some of you will no doubt have read Robert Megarry's **Miscellany at Law**. One chapter contains a long list of Equity judges and eminent Chancery counsel who left behind defective wills. One Master of the Rolls left his fortune to pay the National Debt, a bequest which Lord Mansfield unsympathetically called *"a very foolish one. He might as well have attempted to have stopped the middle arch of Blackfriars Bridge with his full-bottomed wig"*. Apparently the learned author of **Hawkins on Wills** died intestate.

The law exacts a higher standard of care from the professed specialist. This well-established principle was applied by the Full Federal Court in **Yates Property Corporation (in liq) v Boland**. **Yates** was a decision notable for having been overturned in the High Court on not less than six grounds of identified error. Nevertheless, the case remains sound law in its discussion of the standard of care expected of the professed specialist. The rationale given for such a higher standard also partly explains why the push towards specialisation has occurred in solicitors' practice. Their Honours in the Federal Court said [2]:

When a firm, whether large or small, has developed a particular expertise in some area of the law it is difficult to see why as a matter of principle the standard of care in accordance with which that a firm should carry out its professional work should be judged by reference to the standard of care of an ordinary practitioner. Indeed there is every reason to think that this should not be the case. Not too long ago a client would utilise the services of one particular firm of solicitors for whatever legal work that client required from time to time. Nowadays that client will look for advice from a firm that is expert in that area of the law that is of concern to the client. He may even use two or three firms in one matter where that matter involves discrete areas of the law and one firm is not expert in all of those areas.

When a client retains a firm that is or professes to be specially experienced in a discrete branch of the law that client is entitled to expect that the standard of care with which his retainer will be performed is consistent with the expertise that the firm has or professes to have.

Life is not easy for the specialist, because it will often be the specialist who is called in to rescue a very difficult situation, sometimes when the patient is close to death or suffering in consequence of the inadequate ministrations of a professional forebear.

Higher standards have begotten higher expectations of the specialist. Tort law has kicked in with higher accountability mechanisms which in turn have promoted greater resort to professional indemnity insurance. This in turn has had flow-on effects both good and bad. One of the good ones is greater attention being paid to specialist training and accreditation. All of this may seem a little circular in outcome, hopefully not entirely so.

An additional challenge for the specialist is that he or she may have to run fast to stay in the same spot, given the pace of change in particular areas of the law. Indeed, some spots will move or disappear altogether and the specialist may need to consider fishing in a different pond. This is no new phenomenon, although the pace of change is faster in modern times. It is one of the reasons why Michael McHugh is right to emphasise the need to keep abreast of the wider expanse of the law. Skills in one area are transferable. Indeed, they may be essential. For example, the personal injury lawyer and the industrial lawyer must now have a general grounding in administrative law; and the property lawyer must keep abreast of environmental law, to give a couple of examples.

Seventy years ago Sir Owen Dixon described the bare essentials of an “adequate appreciation of the law” to be [3]:

... an acquaintance ... with the history of institutions, the development of social and political ideas, the theories of deductive and inductive logic, some of the doctrines of moral philosophy, and, last but not least, with the Latin tongue.

He was talking of the essentials for general practice, yet none of his check-list of skills would be found in the curriculum for a modern general practitioner specialist accreditation course in modern times. Perhaps Dixon’s standards were always unattainable.

Bret Walker SC recently spoke some harsh words on the topic of lawyers and money in this year’s annual St James’ Ethics lecture. He said that:

... the published aspirations of many big law firms have much more in common with large accounting combines and dazzling millionaires factories, than with their legal colleagues in small firms, in the country and in sole practice.

So too, it may appear, much of the work of commercial lawyers, and not only in big firms, has a diminishing connexion with justice, let alone an involvement in its administration. The wrong fork in the road was taken when the profession determined to specialize and sub-specialize its brightest graduate almost as soon as they had obtained their generalist law degree and practical legal training. In many cases, the commercial lawyers are really part of the clients’ entourage, being served with the client by the litigators and counsel. Perhaps it is time for that division to be recognized formally: by the business-services part of the legal profession, the lawyers closest to the big money of their business clients, having nothing really to do with the general corpus of law and no real interest in the administration of justice, to leave the legal profession and join with the management consultants, accountants, finance brokers and merchant bankers.

This is not a condemnation of specialisation, but a strong call to every lawyer not to leave behind the core business of the administration of justice. Specialist study and accreditation of the genuine specialist are to be encouraged, at least so long as the encouragement is accompanied by reminders to stay rooted in professionalism. Extra training carries extra cost that is entitled to be reflected in charging rates. But extra skill can usually be expected to enable the specialist to get to the heart of a problem sooner. The best and most honourable practitioners are those who are able to apply their talents and training efficiently, at the service of many, and in a way that promotes the common good as well as their and their firm’s legitimate financial interests.

Although I have dwelt on some of the difficulties associated with specialisation I would not want you to think I am against it. Clients want it. Judges need it. Your own capacity to function competently demands it.

I wish you well in this next phase of your careers in the law.

End Notes

[1] 1994 Sir Ninian Stephen Lecture, University of Newcastle, 17 March 1994, quoted by Bryan Pape, “To specialise or not to specialise? That is the question.” **Bar News** Winter 2001, p22.

[2] (1998) 157 ALR 30 at 50.

[3] “The Law and the Scientific Expert” in Wainarski ed, **Jesting Pilot**, Law Book Co, 1965 at p24.

BELIEVERS IN COURT: Sydney Anglicans Going to Law

BELIEVERS IN COURT: Sydney Anglicans Going to Law

Justice Keith Mason [1]
Cable Lecture
9 September 2005

Ken Cable was a gentle scholar with an eye for detail. His interest in Anglican history never lost sight of the human interactions. He would look beneath rules, forms and ceremonies to discern the Church's true impact upon the society in which it was embedded, and which it was called to serve. Ken was a fine lecturer and I was fortunate to study English Reformation history at his feet in 1964. It is a privilege to be given this opportunity for sustained reflection on a topic that has long interested me.

According to Sir Owen Dixon in the *Red Book Case*, the Church of England in New South Wales was an established church for some decades after the foundation of the colony.[2] It depends a bit on one's definition of "establishment", but there is much support for Dixon's view.

Thomas Hobbes Scott first came to New South Wales as secretary to Commissioner Bigge. Subsequently ordained, he returned as Archdeacon in 1825, nominally accountable to the Bishop of Calcutta in which diocese New South Wales then lay. Anglican establishment reached its apogee under Scott's five-year tenure. Scott was appointed by the Crown and became an ex officio member of the Legislative Council. An Act in Council of 1825 recognised the jurisdiction of an Archdeacon's Court. The Church and School Corporation, founded in 1826 for the support of the Anglican Church and an educational system under its control, was endowed with 1/7 of the surveyed land of the colony.

The special relationship between the Anglican Church and the State had some fierce critics. One of the most outspoken was Edward Smith Hall, who worshipped here in St James'. [3] After an unsuccessful attempt at farming, he turned to journalism and became the editor of the more radical of the two "emancipist" or pro-convict newspapers, *The Monitor*. He frequently attacked Governor Darling, who regarded him as a "revolutionary scribbler" and a "fellow without principles, an apostate missionary". [4]

Hall and Archdeacon Scott were at loggerheads on several fronts. Scott accused Hall of fraud, treachery, blasphemy and a love of anarchy because of his attacks on government policy, education and religion. Hall returned the compliment with an article published in 1828 satirising Scott's attachment to his annual salary of £2000. Scott, who was close to John Macarthur and other "exclusives", was also criticised for being involved in politics. Worst of all, Hall alleged that Scott was not a man of peace.

For his attack on Scott, Hall was prosecuted for criminal libel of a public official. After he was found guilty, Scott intervened, pleading for a light sentence. Dowling J imposed a fine of 20 shillings, also requiring Hall to enter into a £500 recognisance to be of good behaviour for 12 months. The judge ordered Hall to be gaoled until the fine was paid and the security provided. Hall appears to have raised the bond, but the following April he was sent to gaol for 12 months, this time for libelling Governor Darling whom he accused of making a partisan choice of jurors in the earlier proceedings involving Scott. Hall continued to publish the *Monitor* while in gaol, committing further criminal libels that saw his imprisonment extended to three years. The litigation against Scott described below was conducted from prison.[5]

A squabble between Scott and Hall over occupation of a pew in St. James Church erupted into two notable trials in the fledgling Supreme Court. Determined individuals went to law over issues that seem trivial in retrospect. The litigation would titillate the public, harm the mission of the Church and produce unexpected outcomes. A pattern of Sydney Anglicans going to law would be set that would be repeated in later years.

My principal source for information about Hall-Scott struggles is a paper by Professor Bruce Kercher entitled **Establishment, freedom of speech and the Church of England: Pew disputes in the early 19th century New South Wales and Newfoundland**. In Professor Kercher's words, "*St James' was the second church in Sydney and the better of the two, socially. Its parishioners included official Sydney, whereas St Phillip's, the older church, was closer to the convicts at the Rocks and to the military barracks.*"

St James' was built on Crown land, at Crown expense. In 1823 Governor Brisbane had issued a proclamation appointing a committee to let pews by the year. Hall, who was a widower responsible for eight children, including six daughters, leased a pew and wished to continue the arrangement. But on 25 June 1828 he was informed by the incumbent, the Rev Richard Hill, that as from 1 July he was to move to a less desirable part of the church. Ostensibly, the pew was needed for government officials. When Hall refused to move, Hill (acting on the directions of the registrar of the Archdeacon's Court) ordered his eviction. Hall resisted and subsequently took matters into his own hands. Four times he tried to get into the pew, over the opposition of beadles and constables. The church authorities placed a lock on the door of the pew and even had it boarded over with decking to keep him out. Eventually Hall forced the lock and, as an assertion of right, remained in the pew for three hours with his hapless daughters.

Scholars including Professor Kercher and Professor Brian Fletcher, who gave last year's Cable lecture, have concluded that the real reasons for Hall's eviction were personal and political, traceable directly to the Archdeacon. [6] This probably explains the vehemence of Hall's resistance.

Two sets of proceedings followed in the Supreme Court.

The first was a claim by the Crown against Hall for damages for trespass when Hall broke into the pew and remained there. The trial took place before Forbes CJ and assessors. The Crown was represented by the Solicitor General. Hall represented himself and argued that Scott had no power to dispossess him of his pew according to "*mere capricious whim*".[7] Hall said that he would not accept a "*cold, comfortless pew*" while his own pew was barred against him, forcing him and his family "*to stand like paupers in the aisle; from motives which were too notoriously known to need ... farther explanation or comment*".

The assessors found the facts in the form of a special verdict, an outcome that left it to the Supreme Court to determine the legal consequences. Three months later the Crown obtained an order for a new trial on the ground that there was uncertainty as to whether St James' Church was to be considered parochial or government property.

Dowling J's summing up in the new trial contains a masterly survey of the non-existent state of ecclesiastical law in the Colony. [8] The Judge commenced by expressing "*deep regret that such a question should have been presented to the consideration of a Court of Justice*". He then proceeded to explain the law in a manner that would have been quite shocking to Archdeacon Scott. The case was described as no more than "*a question of Contract*". The "*peculiar foundation of the Church Establishment in this Colony*" was said to be "*in no degree analogous to the other religious institution of the Church Establishment in the Mother Country, so far as the disposition of pews and seats in a Church are concerned*".

In England, the ultimate disposition of pews rested with the Church Wardens, subject to the control of the Ordinary (ie the Bishop, or his delegate the Archdeacon). But according to Dowling J, in New South Wales "*none of the well known incidents of parochial Government in England apply We have here no Church Wardens, properly so called, no Church Rates, no tithes, in short none of the institutions which ... exist in the Mother Country*" Since St James' had been built by the Crown on Crown land and since the pews had been let at St James' under contractual arrangements entered into by a committee appointed by the Governor, the ordinary rules of contract applied.

At this point the case descended into technical contract law with Hall losing because the pew had been originally let to himself and another person jointly. Nevertheless, the assessors made it clear where their sympathies lay by awarding derisory damages in the sum of one shilling, instead of the £110 claimed by the Crown.

Scott was most unhappy. He requested Governor Darling to send a report of the case to the

British government for advice. He thought that Dowling's charge to the assessors was inconsistent with the rights conferred on him by letters patent from the Crown appointing him Archdeacon. The authorities in England backed Dowling, pointing out that St James' was not a parish church but "*a mere Royal Foundation, ... not subject to the disposition of the Ordinary*". [9]

Scott's fingers were badly burnt, but Hall was not finished. In 1829 he launched his own action against the Archdeacon, claiming £100 damages in trespass for having been wrongly ejected from the pew. The writ was served on the morning Scott departed finally from the Colony.

The action was tried in April 1830 before Dowling J and a jury.[10] The first witness for the defence was James Norton who had been the Registrar of the Archdeacon's Court in 1828. Norton gave equivocal evidence about whether letters requiring Hall to vacate the pew were written on Scott's instructions, vaguely hinting that it was the Church Corporation and not Scott that had been the moving party. A juror chimed in with a question that forced Norton to admit the Archdeacon's high status in that body. Later evidence established that Scott presided at Corporation meetings unless the Governor was present. In any event, the letters did not come from the Corporation, but were written by Norton in his capacity as Registrar of the Archdeacon's Court.

Mr Hill, the incumbent at St James', then endeavoured to take responsibility for putting Hall out of his pew. But he was forced to concede under cross-examination that he had acted with the sanction of the Archdeacon, believing at the time that the Archdeacon alone had power to apportion the seats in the church.

A constable named Hamilton gave evidence about Hall's many attempts to assert his rights, including one occasion when Hall turned up with a large screw-driver to force open the pew.

In his address to the jury, Scott's counsel Therry accused Hall of having brought the case out of spite, effectively after Scott's back was turned. Turning a blind eye to the law expounded by Dowling J in the previous St James' case, Therry asserted that the Archdeacon had legal possession of the pews and the power to assign and reassign them. Appealing to sentiment, he told the jurors that he did not know why the law for the people of England should not be good enough for people in the Colony. Counsel then waxed lyrical in an attempt to blacken Hall's character:

"Gentlemen, look at the plaintiff's conduct Forcing his way, with a burglarious instrument, gentlemen - seeking to provoke a contest, and make the Church of God, the Waterloo of his fame!"

The jury were warned that a verdict against the Archdeacon would be seen as a scandal in the English newspapers and put the infant institution of trial by jury at risk.

Dowling J told the jury that the ecclesiastical law of the mother country concerning the interior arrangements of churches did not apply in New South Wales. The real issue was whether the acts were done with Scott's privity, consent or advice. The judge said that the verdict in the earlier trial was irrelevant, because in the present case Hall did not claim any title to the pew, simply a right not to be disturbed in his possession of it without lawful authority. After a short retirement the jury returned a verdict for Hall in the sum of £25. These substantial damages were later paid by the government.

Bishop Barker arrived in Sydney in 1855. In their book **Sydney Anglicans**, Judd and Cable describe him as "*a plain Evangelical*", [11] explaining this term in its mid-nineteenth century context. Barker's nickname, "*the High Priest*", was as much a comment on his low churchmanship as on his great height, 6ft 5½ ins.

Like his predecessor Broughton, Barker was appointed to the bishopric by letters patent from Queen Victoria. The instrument declared him entitled to exercise full power and authority to call his clergy before him "*to inquire as well concerning their morals as their behaviour*".[12] Barker's evidence to the Select Committee of the Legislative Council appointed to report on the "**Church of England Synods Bill**" shows that he saw the colonial Church as an integral part of the Church in the Mother Country. Dr Bruce Kaye has described Barker's position as: [13]

"... closely reflecting the English situation, where ecclesiastical law was part of the

law of the land. He [showed] the disposition of the English evangelical churchman to maintain the connection of the Church with the State."

The problem was, in Kaye's words, that *"in England, ecclesiastical law, including the canons which dealt with the discipline of clergy, had the same force as Crown law. The decisions of the ecclesiastical courts could be imposed because they were part of the law of the land."*[14] The rulings in the Hall litigation showed that this was not the situation here in New South Wales.

Barker was not the last Anglican in Sydney to hold these attitudes. The notion that "the law of the land" in New South Wales gave direct *entré* to English ecclesiastical law has been a persisting legal heresy. In early days it stemmed from attitudes about Anglican Church establishment. When the establishment crutch was knocked away by rulings of the Privy Council in the mid-nineteenth century, many would turn to the law of contract for a legal prop or nexus that might allow the English law to be summoned up against non-conformity. It would be argued that members of the Church of England in a particular place had (at some mystical time) impliedly bound themselves to a contract or "compact" to be governed as if the ecclesiastical law in England applied, at least to the clergy, or at least in church trust property.

Bishop Barker's belief about the application of English ecclesiastical law was to get him and his Chancellor into trouble with the Supreme Court of New South Wales in 1861.

Barker's predecessor Broughton had licensed the Rev George King as the minister in the Church of St Andrew here in Sydney. King swore canonical obedience to the Bishop of his diocese. By the 1850s St Andrews had become the Cathedral Church. Mr King, a staunch and combative Ulsterman, took objection to Barker's decision to appoint the Rev William Cowper as Dean. King decided on direct action when his remonstrations fell on deaf ears. In September 1860 there was an ordination service at St Andrews, on a day when it was not required for parochial purposes. King deliberately locked the door, barring his Bishop from entering the cathedral church.

Bishop Barker requested the Chancellor, Sir William Burton (a former Supreme Court judge), to cite King to appear before the Chancellor and four licensed incumbents of the diocese in order that King's behaviour might be inquired into and reported to the Bishop. King was to be allowed to nominate two of the four incumbents. This was all very fair, and strictly according to Hoyle as things were done in England. But the ungrateful Mr King went off to the Supreme Court and obtained a writ of prohibition, based upon findings that Bishop Barker had no power to proceed in the manner proposed.

Dickinson ACJ pointed out that the Queen's letters patent did not validly confer the powers of a bishop in England. Barker was *"a bishop ... here only over those who voluntarily submit to his jurisdiction"*. [15]

The Judge demonstrated that English statute and common law had force in New South Wales only to the extent spelt out in s24 of **The Australian Courts Act 1828** (9 Geo IV c83). That provision adopted English law *"so far as the same can be applied"* in the colony. This did not include the Ecclesiastical Law of England, because it was incapable of ready application to a colony without statutory parishes, a system of tithes and the many other badges of Church establishment in England. His Honour boldly declared that local enactments had never given Anglicans any precedence over members of other denominations and faiths. This was an overstatement, but the tide of religious equality had been running strongly for decades. Dickinson's language generally mirrors that of Dowling J who had delivered a similar lecture to Archdeacon Scott in the Hall litigation 30 years earlier.

Wise J was equally firm in declaring that English ecclesiastical law was no part of the common law in New South Wales. Adverting to the contrasting positions of Presbyterians and Anglicans, he asked rhetorically: [16]

"... how could a colony, open alike to Englishmen and Scotchmen be governed by a law which should be applicable only to a portion of its inhabitants? Just as a Scotchman, on his arrival in the colony, ceased to enjoy any rights peculiarly Scotch – so an Englishman, being a member of the Church of England, loses all legal rights which are incapable of being shared by his fellow colonists."

Bishop Barker's attempt to establish what Wise J described as a *"jurisdiction by usurpation"*[17] by "the holding of a pretended Court" [18] brought down a writ of prohibition because the Bishop

and his Chancellor were invading the exclusive patch of the Supreme Court itself. In my opinion, this is the most problematic part of the Court's reasoning in **King's Case**, because it is hard to see what skin was taken from the Court's nose by essentially private proceedings. Intervention occurred because courts were striving to demonstrate that the local Anglican Church had to stop thinking and acting as if it were established. By the twentieth century pretended establishment was no longer an issue, and courts in Australia began to apply to the Anglicans doctrines they had developed for all churches to avoid getting embroiled in church disputes if humanly possible.

Poor Bishop Barker. He had bent over backwards to be fair, only stumbling because he resorted to English procedures instead of simply revoking Mr King's licence. The Supreme Court said he had power to do so, subject to the dictates of natural justice. King later appeared before Barker under protest and his licence was revoked. Barker subsequently restored the licence and appointed King to St Peter's, Cook's River. [19]

St Paul's **First Epistle to the Corinthians** contains one of the key texts invoked by those who are opposed to women exercising authority within the Church. A passage in Chapter 11 refers to man being "*the head of the woman*". Conservative biblical scholars view this as a timeless proscription against equality within the Church.

Earlier in the same Epistle, the Apostle tendered strong reproof about what is referred to in the King James Bible as "*go[ing] to law before the unjust and not before the saints*". Let me set out the passage in the New Revised Standard Version: [20]

When any of you has a grievance against another, do you dare to take it to court before the unrighteous, instead of taking it before the saints? Do you not know that the saints will judge the world? And if the world is to be judged by you, are you incompetent to try trivial cases? Do you not know that we are to judge angels – to say nothing of ordinary matters? If you have ordinary cases, then, do you appoint as judges those who have no standing in the church? I say this to your shame. Can it be that there is no one among you wise enough to decide between one believer and another, but a believer goes to court against an unbeliever – and before unbelievers at that?

In fact, to have lawsuits at all with one another is already a defeat for you. Why not rather be wronged? Why not rather be defrauded? But you yourselves wrong and defraud – and believers at that.

There are echoes of Christ's injunction to turn the other cheek, and of the Lord's Prayer reference to the need for forgiveness as we would have others forgive us. But the main thrust is the scandal of washing dirty linen in public.

Commentators are generally agreed that St Paul was not casting doubt on the fundamental impartiality of Roman law courts. The famous **Romans** 13 passage shows his attitude to the God-given institutions of government. Rather, Paul was drawing on a tradition that lives on to this day in Jewish orthodoxy. Believers should resort to the mediation and (if necessary) adjudication of the rabbis or wise men in the religious community and not display their disharmonies in public. [21]

On my reading the message from **Corinthians** is clear, indicated by the eschatological rhetoric and the explicit sermonising about the two-fold nature of the evil, namely the ultimate irrelevance of injustice to a victim who should turn the other cheek and the shame that public vaunting of disputation brings upon the Church. The language of disapproval is indignant and sarcastic. The believer who as plaintiff seeks public vindication of legal rights against a fellow Christian is saying that he or she does not believe God can work in the circumstances to accomplish His will.

Some would confine the passage to litigation over personal disputes and see no scriptural impediment to taking religious disputes to secular courts. This was the view expressed by Archbishop Robinson in an *ad clerum* letter published during the height of the public relations crisis precipitated by the interlocutory injunction in **Scandrett v Dowling** that temporarily stopped Bishop Dowling from ordaining women priests on 5 February 1992. It was also the exegesis provided to Standing Committee that was published in **Southern Cross** in April 1992

by the Rev Dr Peter O'Brien, vice principal of Moore Theological College. Each scholar drew support from St Paul's own appeals as a Roman citizen to the magistrates at Philippi and to Caesar in his own defence and for the sake of his mission. [22]

Like Donald Robinson and Peter O'Brien, I was involved in the dispute, never a good position to be called upon for dispassionate judgment. Nevertheless, I respectfully disagree with their narrow interpretation of the **Corinthians** passage, in light of the reasons so strongly advanced by the Apostle. It is difficult to see why concerns about "pagan courts" are not heightened in the context of disputes over matters of doctrine and church order. And there is a world of difference between a defendant invoking legal process in self-defence against a non-believer and a believer taking a fellow believer to a secular court.

I respectfully agree with the exegesis of Mr Michael Orpwood QC, currently Chancellor of this Diocese, who gave an excellent paper entitled **The Christian and Litigation** in September 2001. [23] Mr Orpwood concludes his analysis of many Biblical texts in the Old and New Testament as follows: [24]

Paul does not advocate a total absence of redress for Christians who are in dispute with one another. He does not leave the problem without a solution. In fact, he offers two. First, like Jesus before him, he suggests that disputes between believers are to be resolved before believers. As well as the words of Jesus, Paul may have had Moses and the judges of Israel in mind as a precedent. Second, Paul advocates the voluntary forfeiture of legal rights.

You will not have missed the irony of lawyers challenging clergy over the interpretation of Holy Scripture touching the invocation of legal rights. Fortunately, the widespread doctrine in this diocese of the headship of the (male) priest has not yet quenched the great Reformation principle of the priesthood of all believers. While none of us is free from error, all of us need to be critically aware of the scriptural guidance that is on offer. The laity are at the frontline of engagement with society. Yet their need to keep up to speed is, if anything, increased in an environment where more and more younger clergy in this diocese subscribe to Dr Broughton Knox's teaching that the "real Church" on earth is confined to the physical gatherings for "fellowship" in the local congregations. [25]

The framers of our Church's Constitution that came into effect on 1 January 1962 had the Apostle's words firmly in mind when they established a system of Church Tribunals for resolving internal disagreements that threaten order in our shared belief system. At the apex is the Appellate Tribunal, a body consisting of three diocesan bishops and four laypersons with significant legal qualifications. The members are appointed by the General Synod as follows: a bishop and a layperson on the nomination of the House of Bishops, a bishop and a layperson on the nomination of the House of Clergy, and a bishop and two laypersons on the nomination of the House of Laity. The Appellate Tribunal has jurisdiction to hear and determine appeals from all inferior church tribunals. This appellate jurisdiction enables charges brought against clergy for misconduct or breaches of obligations in matters of faith, ritual, ceremonial or discipline to be taken on appeal (by both the person bringing the charge and the person charged). This is a mechanism for resolving constitutional and other disputes within the Church.

The Appellate Tribunal has also a broad original jurisdiction to resolve constitutional disputes. It may determine the validity of canons or proposed canons of General Synod. It may also provide what are described as determinations or opinions in all manner of constitutional issues if questions are referred to it by the Primate at his discretion or if requested to do so by 25 members of General Synod or a provincial synod affected thereby. [26] The decision of the Appellate Tribunal may extend to questions of doctrine, faith, ritual, ceremonial or discipline as well as the interpretation of the Constitution itself. Unless unanimous, the Tribunal is required to consult with the House of Bishops and a board of priestly assessors in matters of doctrine. [27]

In matters involving any question of faith, ritual ceremonial or discipline the consensus of at least two bishops and two laypersons and in any other matter the consensus of at least four members shall be necessary for the determination of the appeal or the giving of the opinion. [28]

The Constitution declares the decisions of the Appellate Tribunal concerning the validity of canons and proposed canons of General Synod to be final, effectively resolving any controversy as to contravention of the Fundamental Declarations, Ruling Principles or constitutional procedures for the due enactment of canons. [29]

By clearest implication, the Constitution also treats all other determinations and opinions of the Appellate Tribunal as binding on members of the Church. Indeed, there is a provision that treats "opinion" and "determination" interchangeably. [30] There is one minor exception that really makes the rule. Section 73 [31] distinguishes between "permissive" and "obligatory" determinations: determinations that are inconsistent with or at variance with decisions of judicial authorities in England having jurisdiction in relation to the ecclesiastical law of England are said to be permissive, not obligatory or coercive unless they concern canons. [32]

Regrettably, some senior churchmen within this diocese do not appear to hold these views about the role of the Appellate Tribunal or the status of its decisions. Such attitudes encourage the notion that only a secular court can provide definitive rulings in doctrinal and constitutional disputes. Let me instance two matters.

Some proclaim the view that "opinions" of the Tribunal are no more than provisional, personal utterances that are open to be disregarded by any member of the Church who is not happy to abide with them. I have frequently heard this expressed in debate within the Synod of the Diocese of Sydney. With the utmost respect, it is quite contrary to the fair reading of the Constitution and it also flies in the teeth of the scriptural principles I have referred to. The Constitution distinguishes between determinations and opinions, but it treats each as the "decision" of the Tribunal. The difference between determinations and opinions relates only to the procedure whereby the question is posed for the Tribunal's decision. Determinations are the outcome of appeals, opinions are the outcome of references. There is simply no point in giving jurisdiction to the Tribunal if the outcome of its solemn and costly deliberations can be disregarded if it is unsatisfactory to a bishop or a group within the Church. [33]

A second problem lies in the fact that not all members of the Appellate Tribunal have regarded earlier Tribunal decisions as determinative. What I am about to describe is a species of judicial activism that has occurred within the High Court of Australia in times past, with similar problematic consequences. [34] Once an appellate body has spoken on an issue (by majority, only if need be), its decision is final and binding for all purposes unless and until it decides as a body to change its collective mind. That, to my understanding, is an aspect of the rule of law, a principle that binds individual members of appellate courts as well as the general citizenry. It follows that, if the Appellate Tribunal (or the High Court for that matter) makes a ruling, then such ruling should also be applied faithfully by every member of the Tribunal or Court itself until the Tribunal or Court departs collectively from it. Naturally there may be disputes about the meaning or scope of an earlier ruling, but this qualification may be placed aside for present purposes. Without this attitude to the bindingness of earlier decisions, the voting in a later proceeding will be skewed if the individualist sticks to his or her own guns and decides not to address other critical issues presented for determination in that proceeding.

During the 1980s, the Appellate Tribunal repeatedly determined that the ordination of women to the priesthood would not contravene either the Fundamental Declarations or the Ruling Principles set out in our Church Constitution. Sometimes these decisions were by majority, at times they were unanimous. When the issue came yet again to the Tribunal in the late 1980s one member of the Tribunal refused to accept this consensus. Acting out of conscience, but still sitting and voting as a member of the Tribunal, the Archbishop of Sydney decided constitutional issues on the basis of holding that the Fundamental Declarations and/or Ruling Principles were contravened.

The case of the Rev George King referred to above shows that the courts of the land will never concede to any other body their asserted monopoly of determining legal disputes conclusively. But this does not mean that secular courts relish getting involved in religious disputes. Quite the contrary. Nearly every case discussed in this lecture contains unusually strong statements by the judges condemning the parties for not resolving their differences privately. There are also many legal principles that enable courts to defer to the rulings of private arbitrators and tribunals of voluntary associations, including churches.

Secular courts do not approach matters with the **Corinthians** passage uppermost in their minds. But they do endeavour to respect the true intent of members of voluntary associations. If that intent is to give finality to certain types of private dispute resolution or to treat constitutions as binding in honour only, then the courts will strive to respect this as the upholders and not the destroyers of contracts and trusts. It is only when a dispute spills into the public domain, as it will if property rights are involved, for example if a sacked clergyman refuses to vacate the rectory, that courts will reluctantly get involved. These principles have been stated over and over again

in cases in the Privy Council and the High Court of Australia over the last 150 years, as demonstrated in the detailed reasons of Mahoney JA and Priestley JA in **Scandrett v Dowling**. [35]

Of course, the rules about when the secular law gets involved in church disputes should not be the measure of what is right for a Christian who is thinking of suing a fellow believer.

The **Red Book Case** refers to protracted litigation that took place in this State in the late 1940s before Roper J, twice before the Full Court, and before the High Court of Australia. The litigation takes its name from a service book entitled **The Holy Eucharist** that was issued for use in the Diocese of Bathurst by its bishop, Arnold Lomas Wylde. It owed much to the 1928 Prayer Book approved in England within the Church, but rejected by the English Parliament that exercises ultimate temporal control over the established Church in that country. Those opposed to Bishop Wylde's Red Book detected endorsement of the Anglo-Catholic doctrine of the Real Presence. [36] The introduction of the book in All Saints Canowindra in 1943 provoked immediate opposition from some parishioners and led to a relator suit that was continued after Bishop Wylde withdrew permission for the use of the Book in the particular parish.

A relator suit is the means whereby allegations of breach of charitable trust are tried. A charitable trust does not have a beneficiary, but the property is devoted to a purpose that the law recognises to be deserving of protection. One such purpose is a trust for religion. The relators, who were 13 men from various parishes in the Bathurst Diocese, charged that to conduct a service in accordance with the Red Book in church buildings constituted a breach of the charitable trusts upon which some, but not all, church property was held in the Diocese. The defendants were Bishop Wylde and the Church of England Property Trust in the Diocese of Bathurst.

A brief excursus to nineteenth century England is required to set the scene. In 1832 supreme ecclesiastical jurisdiction in the Church of England was transferred to the Privy Council. According to Desmond Bowen, **The Idea of the Victorian Church**, the result was that ecclesiastical law was: [37]

... placed upon the shoulders of a group of amateurs. The members of the new court had not usually, and were not obliged to have, any legal training in the law they were expected to administer. They were acquainted with some matters that were of concern in ecclesiastical law, property, revenues, and personal freedom; and perhaps statutory legislation was the best way to regulate them. But other matters such as the administration of the sacraments, the conduct of public worship, and the outward pattern of devotional life required a different approach. Admonition was of more use here than the imposing of ecclesiastical discipline upon tender consciences. The long history of the Church had taught ... that any attempt to enforce the strict letter of the law by coercive measures had usually proved disastrous.

Matters came to a head in the Gorham Controversy. Bishop Philpotts refused to institute Rev George Gorham to his new benefice because of unhappiness with his Calvinistic ideas regarding the sacrament of baptism. The Privy Council's ruling that Gorham's opinions were not "contrary or repugnant to the declared doctrine of the Church of England as by law established" [38] caused great consternation to the many High Churchmen who thought they were indeed repugnant in this sense. Many Anglicans of every persuasion were also troubled about a civil court being the supreme arbiter in matters of church doctrine. The **Gorham** decision stimulated the spread of the Oxford Movement in the late nineteenth century in England and elsewhere.

The Evangelicals in England were generally content with the relationship between Church and State illustrated in the **Gorham** judgment. In the 1870s they pressed on, launching several prosecutions of clergy under the **Church Discipline Act 1840**. A body called the Church Association collected funds and organised the prosecution of ritualists, hoping to establish conformity through coercion. These efforts had precisely the opposite effect. Many observers unsympathetic to ritualism were indignant that the heavy hand of the secular law would be used to coerce those who deviated in good faith and with the general support of their local congregations. The ancient lessons of Christendom – that persecution begets martyrs and martyrdom begets followers – were to be learnt afresh.

In the second half of the nineteenth century English courts resolved complex theological issues in favour of one warring church party against another if they found themselves unable to give innovators the benefit of the doubt or were forced to address property disputes. The most famous of all such cases, **General Assembly of the Free Church of Scotland v Overtoun**,^[39] was said by the legal historian F W Maitland to have seen “*the dead hand [of the law fall] with a resounding slap upon the living body of the Church*”.^[40]

The English Parliament responded to the wave of prosecutions with the **Public Worship Regulation Act** of 1874. It was introduced by Disraeli as a bill “*to put down Ritualism*” and its showpiece was the creation of a court whose single judge was appointed by the two English Archbishops with power to try ritual cases, subject to a right of appeal to the Privy Council. But the key provision became the bishop’s right of veto to individual prosecutions.

Priests were prosecuted and imprisoned when they refused to acknowledge the legitimacy of the new court, continuing ritualistic practices with the assent of their flocks. In the upshot, the bishops started using the new veto to block prosecutions. In 1888 the Church Association responded by prosecuting the bishop himself. The Bishop of Lincoln was charged with using the eastern position, lighting candles on the altar, using the sign of the cross at absolution and blessing, and other ritualist practices. Most of the charges failed all the way up to the Privy Council, although the use of the sign of the cross during the absolution and the benediction and the mixing of water and wine as part of the service were held to be unlawful.^[41]

This was virtually the last of the prosecutions. The promoters were disappointed that several ritualist practices were not declared illegal, thereby becoming safe to adopt. But the bigger damage to the evangelical cause came from their occasional successes. One priest, Sidney Faithorn Green was imprisoned for a year and seven months as he refused to submit. His plight attracted widespread sympathy. According to Owen Chadwick,^[42] “*the evangelical party was more damaged by [the case against the Bishop of Lincoln] than by any other circumstance in the entire controversy over ritual, even the imprisonments of clergymen.... Almost all evangelicals now disapproved of the policy of prosecution.*”

This message never reached Sydney, or if it did, the lessons of history were forgotten or overlooked. In the **Red Book** and **Scandrett** litigation, leading churchmen in this diocese were to encourage resort to civil courts for compulsive orders designed to resolve theological disputation and coerce uniformity.

I return to the **Red Book Case**. After protracted interlocutory disputes and the taking of evidence in England, judgment at first instance was given in favour of the relators by Roper J, who issued injunctions restraining any departure of the Service of Holy Communion according to the Prayer Book and specifically declaring that the making of the sign of the cross and the use of the sanctus bell constituted breaches of the trusts of church lands. Bishop Wylde appealed directly to the High Court and the appeal was heard over five days in August 1948.

By the time the case got to the High Court the central issues were (1) whether strict compliance with the Book of Common Prayer was required generally within the Diocese, or at least in churches subject to charitable trusts “*for the erection of a church*”; (2) whether certain ritualist practices including the use of the sanctus bell and the making of the sign of the cross at absolution and benediction were contrary to the Thirty Nine Articles and the Book of Common Prayer; (3) whether, if they were, this constituted a breach of trust in properties devoted to the purposes of the Church of England; (4) whether the bishop had authority to licence deviations and variations of the type involved (the so-called *ius liturgicum*); and (5) whether it was appropriate for an Equity Court to issue injunctions where breaches of ritual, but not doctrine, were alleged.

There was much evidence that the Book of Common Prayer was no longer adhered to strictly in England or anywhere else. According to the Chancellor of the Diocese of Leicester, it was common knowledge that every clergyman departed from the Book of Common Prayer.^[43] Bishop Wylde also pointed to forms of divine service departing from BCP that had been authorised by the Archbishop of Sydney.^[44]

Originally a charge of heresy or false doctrine was preferred against Bishop Wylde, but it was withdrawn after evidence taken in England revealed widespread acceptance there of the practices objected to.

Four judges heard the case in the High Court, the other members being unable to sit due to illness or absence abroad. The justices were evenly divided as to the outcome. Latham CJ and Williams J would have dismissed the appeal subject to varying Roper J's orders in a significant respect. Rich J and Dixon J would have upheld the appeal and dismissed the suit entirely. The **Judiciary Act** gave the Chief Justice a casting vote in those circumstances, so his orders prevailed.

Latham CJ had accepted jurisdiction on the basis that a breach of trust had been alleged. He considered that it was not for the court *"to determine the soundness of any particular doctrine or the wisdom of a particular ritual"*, [45] but he held that the practices in question were deviations from the Book of Common Prayer and hence unlawful. The injunctions granted in the Supreme Court of New South Wales were however to be formulated more narrowly in order to confine them to proven deviations restricted to identified church properties in Bathurst diocese. Williams J agreed, describing the adjudication as *"distasteful"*. In contrast, Dixon J held that courts of Equity lacked any jurisdiction to deal with matters of liturgy, the present case being no more than that. The fourth judge, Rich J, saw the controversy as unfit for a civil court once what he described as the *"recklessly"*[46] advanced charge of heresy had been withdrawn. He would have declined on discretionary grounds to deal with what he described as *"abstract questions involving religious dogma"*. [47] He pointed out that, if the relators were correct, one likely result of the *"mischievous suit"* would be that several services conducted regularly at St Andrews Cathedral could be restrained by injunction.

In the High Court, the case was limited to the enforcement of trusts said to stem from the dedication of particular properties for use as a Church of England. No one challenged the nineteenth century cases already referred to that rejected Anglican establishment in New South Wales. And, as later pointed out in **Scandrett v Dowling**, all four High Court justices rejected any notion that all Anglicans in New South Wales were linked by a legally enforceable contract.

In my view, the reasoning of Rich and Dixon JJ is clearly the more compelling. The **Act of Uniformity** of 1662 imposed personal obligations on Church of England clergy, but it was expressly confined to England, Wales and the town of Berwick-upon-Tweed. It never applied to New South Wales. Trust law had never been the vehicle for enforcing ritual uniformity [48] in England or elsewhere. And, even in England, not every addition to or departure from the liturgy prescribed in the **Book of Common Prayer** was treated as a personal breach of the **Act of Uniformity**.

If Latham CJ was correct, the position in Australia was radically different to that in the home country. For him, the law of charitable trusts did the same work as the **Act of Uniformity**, without the mollifying influence of the English nineteenth century statute law permitting the use of shortened BCP services. But Latham's uniformity was even more stringent than in England, where the nineteenth century legislation gave bishops an effective veto of any prosecution to enforce liturgy or doctrine said to be mandated by the Book of Common Prayer. [49] I cannot refrain from pointing to the irony that Sir John Latham was for some years the President of the Rationalist Society of Victoria.

The two-all split robs the High Court decision of precedential force even in the religious charitable trust area. But the standing of Sir Owen Dixon and the cogency of his reasoning makes it likely, in my opinion, that his view would prevail in the unlikely event that the same matter went again to the High Court. If there are trends in these matters, the tide is also flowing swiftly in the direction of judicial non-interference in ecclesiastical disputes. [50]

Regardless of how a modern High Court would react to a repeat of **Red Book**, one lesson clearly drawn from it is that doctrinal and liturgical uniformity is most efficiently enforced through the episcopal licensing and disciplining of clergy. But there are drawbacks with such a system. For the laity, this keeps them out of the loop if the bishop is too harsh, too gentle or too lawless in his interpretation of what is sound doctrine, ritual and order. The problem for bishops is that this puts them directly into the loop. In one sense, this goes with the episcopal territory in a Church one of whose Fundamental Declarations commits to preserve the three-fold orders in the sacred ministry. However, it is not easy for a bishop to combine pastoral and disciplinary roles where the right to discipline turns upon charges first being laid and established.

The Archbishop of Canterbury intervened more than once during the **Red Book** litigation to urge settlement, fearing that an appeal from Australia to the Privy Council would expose the English Church to unpleasant fresh judicial interpretations of the Book of Common Prayer, thereby reopening the wounds of the Gorham controversy. A threatened appeal to the Privy Council was

not proceeded with in return for the defendants being released from the crippling costs orders pronounced by Roper J and upheld in the High Court.

Thus far, I have described the **Red Book Case** in cold, formal terms. The litigation was anything but that. The inside story is revealed in the doctoral thesis of David Galbraith aptly entitled **Just Enough Religion to Make us Hate. An Historical Legal Study of the Red Book Case**. Dr Galbraith's title picks up on the opening remarks in the judgment of Rich J who said:[51]

The subject of this unhappy controversy is only fit for a domestic forum and not for a civil court. Unfortunately it is not an example of "charity" in the New Testament sense or of the command to love one another. The dispute illustrates a saying of Dean Swift that "we have just enough religion to make us hate, but not enough to make us love one another".

Those opposed to the Red Book within Bathurst made early contact with Archbishop Mowll who promptly referred them to Canon T C Hammond. On behalf of the Bathurst laymen, Hammond engaged the Sydney firm of Allen Allen & Hemsley whose senior partner, H Minton Taylor, was a member of the Sydney, Provincial and General Synods and had been in the centre of the church constitutional debates for the past 30 years. [52]

As was to happen 35 years later in the **Scandrett** litigation, leading figures within this diocese were to support litigation touching events within another diocese because they feared that developments elsewhere would impact on their perception about where to draw the limits of Anglican diversity. It is not easy to see the links of reasoning that demonstrated that Sydney was affected by liturgical innovations in Bathurst or the ordination of women priests in Canberra-Goulburn. It is even harder to discern how it was thought by those supporting the plaintiffs in **Scandrett** that the interests of this diocese would be furthered by obtaining a declaration that cut down the legislative powers of diocesan synods in this State. But the links were definitely drawn, in good faith, fired up with the heat of righteous indignation about the plight of evangelical minorities elsewhere. In **Red Book** and **Scandrett**, leading Sydney Anglicans were prepared to promote litigation for the enforcement of liturgical and doctrinal lines they confidently drew, while asserting liberty to act according to their own conscience in other matters.

To those on both sides who saw doctrinal issues represented by what a priest did with his hands during the Communion Service, the issues behind the Red Book dispute were important. But the chosen field of battle strikes us as strange in modern times. It is difficult to think that today's Anglican Church League would be at the vanguard of insistence upon following the liturgy of the Book of Common Prayer to the letter. On its face, the **Red Book** fight was about liturgy (at least after the heresy charge was abandoned). At a deeper level it was about church order. But, as with most of the other disputes considered in tonight's lecture, the real fight was over **who** decided things. Bishop Wylde was not prepared to compromise on matters of his episcopal authority. The Hammond-led laymen were not prepared to allow the clergy to depart from their vision of the Reformation settlement.

I agree with Judd & Cable's assessment that the **Red Book Case** "*highlight[ed] the fact that the laity were as much part of the Church of England as the clergy and the bishop*". [53] But the direct and indirect costs of the struggle and its uncertain outcome did nothing to displace the wisdom or authority of the Apostle Paul's own injunctions. Bishop Wylde's leading counsel was F W Kitto KC, later a High Court Justice. He endorsed the compromise promoted by the Archbishop of Canterbury in a letter written from London where he was appearing before the Privy Council in the **Bank Nationalisation Case**. Kitto observed that the litigation left the Church right where it was when the litigation had started because the two-all split in the High Court meant that legal uncertainty prevailed except for the certainty that any fresh litigation would be cripplingly costly. [54]

The uncertainty generated by the **Red Book Case** was a factor that drove the warring dioceses to submit to the national Constitution of the Church that came into effect in 1962. I have already discussed the Tribunal system that it established. The Constitution also prescribed substantive rules about the inheritance of the law of the Church of England [55] and the limits upon the law-making powers of synods. [56] Statutory backing for the Constitution was sought in every jurisdiction upon the clearest of assurances that it was required only for property purposes. [57]

This brings me to **Scandrett v Dowling & Ors**, litigation in which I disclose that I was one of a team representing the defendants. In a series of Opinions given in the 1980s, the Appellate

Tribunal decided that the ordination of women as priests would not be contrary to the Fundamental Declarations or the Ruling Principles of the Constitution of our church. On the basis of these Opinions, the power to act lay with the Church in Australia.

This statement requires one important qualification to which I have already alluded. Some Anglicans were on record as not accepting the constitutional rulings embodied in these Opinions. In this group were leading clergy and laity of this diocese, including its Archbishop who sat as a member of the Appellate Tribunal. Archbishop Robinson declared himself (both judicially and extra-judicially) unwilling to accept the Tribunal's earlier rulings about the Fundamental Declarations and Ruling Principles.

There was also widespread uncertainty as to who had the authority to change the inherited situation of a male priesthood. Some thought the power resided in the episcopal breast. Others believed that synodical authority was required, in turn disagreeing as to whether the triggering power resided exclusively in the General Synod. If it did, this meant that a Bill for a canon had to achieve two-thirds majorities in each House of General Synod before it could pass; and that the canon would thereafter come into force only in those dioceses that adopted it for their own. Those strongly opposed to women priests hoped that they had more than one-third of the votes in at least one of the Houses of General Synod.

In 1989 the Synod of the Diocese of Canberra-Goulburn enacted an **Ordination of Women to the Office of Priest Ordinance**. Without the springboard of a General Synod canon, it purported to authorise the Bishop of that diocese to ordain a woman to the office of priest. Bishop Dowling was later persuaded by his episcopal brethren to hold his hand until the Appellate Tribunal addressed a series of questions referred for its Opinion by the Primate at the instigation of opponents of women's ordained ministry. Bishop Dowling indicated to his synod that he would respect the Tribunal's ruling, but that if it was not adverse to validity then he would proceed.

There was a protracted hearing in the Appellate Tribunal. Several dioceses intervened to put submissions. The Tribunal consulted with the bishops and assessors, according to the Constitutional procedures. On 6 December 1991 it published an Opinion in the form of answers to the several questions raised in the Reference. Some of the questions could not, however, be answered for want of a constitutional majority of two bishops and two laymen as required by s59 of the Constitution. While the answers that were provided ruled out the possibility of a bishop acting lawfully merely in reliance upon his episcopal powers, no answer was given by the Tribunal to the questions addressing the powers of Bishop Dowling as affected by his diocese's Ordinance of 1989.

Noting that the Appellate Tribunal had not declared the Ordinance invalid, nor stated that the ordination of women was contrary to the Fundamental Declarations, Bishop Dowling announced that he intended to proceed with the ordination of a number of women on 2 February 1992.

The Metropolitan, Archbishop Robinson, requested and later directed Bishop Dowling not to proceed with his stated intention. Bishop Dowling informed the Archbishop that he intended to proceed. In his letter, Owen Dowling noted:[58]

It is an ironical position for us to be in. You from the reformed tradition, delivering me an episcopal injunction in the prelatical and catholic tradition, and me, from a more catholic background, saying, as I do: 'Here I stand, I cannot do otherwise'."

On 16 January 1992 three plaintiffs commenced proceedings in the Equity Division of the Supreme Court of New South Wales against Bishop Dowling. The Court later required the proceedings to be amended by joining the affected female deacons.

When Bishop Dowling declined to undertake not to proceed, there were contested interlocutory proceedings during the Court Vacation. Initially they were dismissed by Rogers J, but the Court of Appeal granted an injunction two days before the proposed Service. The appeal court emphasised that it was acting to maintain the status quo and not deciding any issue in the main proceedings. The last minute injunction caused significant disruption, expense and sadness to the ordinands and their supporters.

Later, there was a full hearing before the Court of Appeal, differently constituted. Those with an eye for providence or irony might have observed that one of the three judges was called

PRIESTLEY and another called HOPE. The priestly hopes of Bishop Dowling and his eleven deacons were realised on 3 July 1992 when the Court of Appeal dismissed the proceedings with costs, dissolving the interlocutory injunction. [59]

In opening the case before the Court of Appeal, counsel for the plaintiffs Mr David Jackson QC had said that the case was

“in truth, a case about the location of a power to change. In connection with that, the claimants accept that there is power within the governing bodies of the Anglican Church to change the present position so that it would then be possible to ordain women as priests.

The ultimate question in the proceedings, however, is which body in the Church has the power to effect the change. We contend that it is the General Synod and only the General Synod which has that power’[60]

It therefore became common ground in the proceedings between the three plaintiffs and the twelve defendants that ordination of women to the priesthood was not contrary to the Fundamental Declarations in Chapter I of the Constitution. For the third judge, Mahoney JA, this was to prove a critical matter, enabling him to decline relief as a matter of discretion.

The three plaintiffs were prepared to make such a concession. But those backing them were not stepping forward with any similar commitment. Based on their publicly stated doctrinal positions and their consistent voting patterns in synod, one is driven to infer that they were seeking to reserve to themselves a right to act according to their conscience that they and the **Scandrett** plaintiffs were not prepared to accede to Bishop Dowling. The proceedings attempted to enforce the Constitution against twelve defendants, yet (despite warning) there was no claim for a representative order that would have made the Court’s ruling binding on all members of the Church.

Although the plaintiffs invoked no doctrinal impediment to Bishop Dowling’s threatened action, the defendants tendered in their pleadings the contention that the Phillimore rule supposedly banning women priests was incapable of adoption by the Anglican Church of Australia because of the Church’s commitment in the Fundamental Declarations ever to obey the commands of Christ. [61] This assertion, based on **Galatians** 3:28, had been announced by Bishop Dowling to his Synod and advanced on his behalf in the proceedings before the Appellate Tribunal. Although (if correct) it would have been determinative in his favour, all but one member of the Appellate Tribunal refused to address the issue. [62]

My excursion about the parties to the **Scandrett** proceedings may strike some as an exercise in technicality. But the point I am seeking to make is that it was ultimately impossible to place a contract-based or trust-based dispute in the hands of the Supreme Court of New South Wales without yielding to that tribunal the power, indeed the duty, to go if necessary to the heart of the vexing doctrinal disagreements within the Church about women’s ministry, including those based on competing views of Scriptural exegesis and hermeneutics. One can only speculate about the Gorham-like screams that would have followed a secular court’s binding determination either way on such delicate and divisive issues.

Unlike the **Red Book Case**, the plaintiffs in **Scandrett** did not invoke the law of charitable trusts that would have forced the court to take a position on the very issue that split the High Court 2-1. In any event, relief based on the reasoning of Latham CJ and Williams J would have stopped at the door of churches subject to charitable trusts in favour of the Anglican Church, trusts that may possibly have been within the power of the Synod of the Diocese of Canberra & Goulburn to vary. Instead, Dr Scandrett and his fellow plaintiffs pressed for declaratory and injunctive relief that would, if granted, have prevented Bishop Dowling from ordaining women anywhere, on pain of contempt. It was contended that, if he did so, he would be breaching a contract binding him as a member of the Anglican Church of Australia as well as breaching the statute in this State that gave force of law to the Church’s national Constitution “for all purposes connected with or in any way relating to the property of” the Church. [63] The words quoted were to prove decisive, because the plaintiffs did not suggest that any right of property was affected by Bishop Dowling’s threatened actions. [64]

In the final hearing the plaintiffs put their case on two alternative bases, described by Priestley JA as the “statutory argument” and the “contractual argument”. [65] The two arguments, and his

response to them in summary form, were stated at the beginning of his judgment:[66]

“The first is that because the Constitution is a Schedule to an Act of the New South Wales Parliament, Act 16 of 1961, it had legally binding effect on all members of the Church in New South Wales not only in regard to Church property, but also in regard to the organisation of the Church. Therefore the obligations and duties it creates are enforceable in the same way as those created by any statute.

*I do not agree with this. Section 2 of Act 16 of 1961 in my opinion makes it as clear as words can make it that the binding **legal** effect of the Constitution is limited to purposes connected with or in any way relating to the property of the Church. Matters of faith and organisation not connected or related to Church property are not made any more binding at law than they were before the Act was passed.*

Secondly, it was said that all members of the Church in New South Wales were parties to a consensual compact embodied in the Constitution and that this compact had contractually binding legal effect on every member.

I do not agree with this either. In my opinion the parties to the consensual compact upon which the plaintiffs rely are bound to it by their shared faith, not the availability of the secular sanctions of the judgments, orders or decrees of State courts of law. The belief of Church members is that they are all one in Christ Jesus; an acceptable way of describing the Church, as I understand it, is that it is constituted by this unity.

*The consensual compact is thus based on religious, spiritual and mystical ideas, not on common law contract. It has the same **effect** as a common law contract when matters of church property become involved with the other matters dealt with by the consensual compact. I do not think the claims made in this case get out of the area of the consensual compact which does not have the legally binding effect here relied on.*

It follows, in my opinion, that the claims made in this case must be resolved by the Church’s internal procedures, and these proceedings must be dismissed.”

Much of Priestley JA’s lengthy judgment is devoted to explaining these conclusions. His Honour also observed [67] that the answer to each argument had been given by the reasoning of all four of the High Court judges in the **Red Book Case**. [68] In my opinion, the position was arguably stronger for the defendants in the **Scandrett** case, because the so-called contract sought to be enforced was not the consensual compact relating to doctrine and liturgy, based on the perceived nexus between the Church in Australia and the Church in England. Rather, the relief that was sought was directed at enforcing the plaintiffs’ perception of an entirely different contract embodying the terms of the Constitution that came into existence in 1962. [69] I do not, however, recall much attention being given to how, for example, Dr Scandrett (a layman) was a party to the contract embodying the 1961 Constitution that was averred against Bishop Dowling and his eleven deacons.

Priestley JA (Hope AJA concurring) saw s2 of the 1961 New South Wales Act as **negating** the argument that the 1961 Act gave effect to the Constitution outside property-related matters or those matters of detail covered by ss7-9 of that Act. [70] For him, this was reinforced by s70 of the Constitution itself, [71] and by the historical material which showed the intention of the promoters of the 1961 statute as represented to the New South Wales Parliament to be limited in the way he interpreted the Act. [72]

Time prevents me from expounding at length the reasons of the third member of the Court of Appeal in **Scandrett v Dowling**. Mahoney JA effectively agreed with Priestley JA in holding that the rules of the Church embodied in its 1961 Constitution did not have the general force of statute and, even if broken by the threatened ordination, would not attract the remedy of injunction. Furthermore, the concession about no doctrinal breach of the Fundamental Declarations or Ruling Principles meant that there was no basis for concluding that any relevant breach would occur in any event. That concession meant that the case was reduced to a dispute about constitutional procedure. [73] The point at which Mahoney JA diverged from the majority concerned the issue whether the constitutional and other rules of the Church as a whole were intended to have any binding effect beyond matters of property. His Honour thought that they did

in matters of doctrine. But beyond that, they were not of such a nature as to attract equitable relief in the form of declaration or an injunction in the particular dispute before the Court. [74]

If the plaintiffs had been prepared to wait, there may well have been an available mechanism for addressing the issue internally. It might not necessarily have had everything that the plaintiffs or Bishop Dowling wanted, but it might nevertheless have been more consonant with the **Corinthians** directives. A charge could have been laid against Bishop Dowling under s2(1) of the **Offences Canon 1962** for wilful violation of the Constitution or under s56(2) of the **Constitution** for breach of "*faith ritual ceremonial or discipline*". (I imply nothing as to the outcome of such charges had they been laid.) The charge would have been heard and determined in the first instance by the Special Tribunal constituted under s56 of the **Constitution**. That Tribunal would have had jurisdiction to determine any constitutional or other issues necessary to be addressed. From its decision an appeal would have lain to the Appellate Tribunal and the latter body's capacity to determine such appeal would have been subject to the requirement that, if the matter involved any question of faith ritual ceremonial or discipline, the concurrence of at least two bishops and two laypersons was necessary. [75] The issues in such putative proceedings would not necessarily have been identical to those previously tendered to the Appellate Tribunal in the abovementioned reference. If, however, the Appellate Tribunal had remained constitutionally impotent, then this would have left in place the determination of the Special Tribunal (whichever it was). It is of course conceivable that either Tribunal might have given Bishop Dowling the benefit of the doubt in such prosecution, but the nineteenth century history of prosecutions in England to which I have already referred shows that liberty stemming from an outcome of this nature is both traditional and inevitable.

Several of the cases I have discussed were horrendously costly. Sometimes unwilling defendants raised technical and procedural points designed to block access to the civil court for what was seen as inappropriate litigation. Sometimes the plaintiffs' own lawyers got them into terrible tangles. This was the fate of the relators from Christ Church St Lawrence who in 1933 attempted unsuccessfully to invalidate an ordinance passed by Standing Committee designed to reallocate outside that parish trust funds that were no longer required for a school. The case ran for eleven days with senior and junior counsel on both sides and the relators were left paying most of their own costs. [76] The reasons for judgment contain the recurring judicial reproof about the "*unedifying*" nature of the dispute. [77]

For the **Red Book Case**, fighting funds were drummed up for both sides from sympathetic parishioners in Bathurst and Sydney. After **Scandrett v Dowling** was launched, the Archbishop of Sydney with the approval of a divided Standing Committee offered \$50,000 from the Endowment of the See to each side for assistance in meeting legal costs. Standing Committee was warned at the outset that Bishop Dowling would never accept money from such a source for such a purpose, and thus it turned out. When he declined the offer, his \$50,000 was then added to the sum provided to the plaintiffs. [78]

This action shows that the majority of those in leadership in this diocese in 1992 formed the view that litigation in the civil court against Christian brothers and sisters was appropriate and that the claims of the plaintiffs raised issues relevant to this Diocese. I can only say that, for me personally, this act of formal endorsement and funding was the most heartbreaking event in a generally sad and painful experience.

I would not want you to think that the diocese of Sydney has always been the aggressor or that every Supreme Court case involving this diocese was an attempt to enforce doctrinal or ritual uniformity by resort to secular courts.

There have been two cases involving property in which opposing views were presented to the Supreme Court for the purpose of ensuring full argument and satisfying the law's need for a "proper contradictor". Each case involved Moore College. The first occurred in the 1890s. Proceedings before the Chief Judge in Equity and later the Full Court resolved, at least in the eyes of the law, a long-standing dispute as to whether Sydney Diocese alone was the beneficiary of Thomas Moore's bequest in favour of "*William Grant Broughton, Lord Bishop of Australia, and to his successor and successors*". It was held that the country dioceses that were carved out of the original diocese of Australia did not share in this benefaction. [79]

More recently, there was litigation of a similar type to determine whether various funds held on trust to provide scholarships for students at Moore Theological College were "church trust property", thereby falling subject to the extraordinary powers to vary such trusts conferred by the **Anglican Church of Australia Trust Property Act 1917**. The name of this case is **Gotley v**

Robinson, the leading participants being the Diocesan Secretary and the Archbishop. [80] Neither of these matters engage the matters addressed in tonight's lecture. They involved property issues untouched by theology; they were "friendly suits"; and no injunctive or coercive relief or crushing order for costs was sought by the plaintiff against the defendant.

Baker v Gough [81] were proceedings brought by the Reverend H W Baker against the Archbishop of Sydney and the Council of the Kings School. Mr Baker was the Chaplain and a teacher there. Incidentally, he taught me history in the middle school. A sub-committee of the school council formed the view that he was too strong a personality for the younger headmaster that the school was hoping to appoint after the long tenure of the inimitable H D Hake. If the members of the school council had particular objections about Mr Baker they kept them close to their chest. When Baker declined an invitation to resign, a resolution for his dismissal was carried by the majority of councillors. None of the councillors who voted for dismissal gave evidence in the lengthy trial in which Baker was represented by his brother-in-law Edward St John QC and Mr W P Deane, who later became a member of the High Court and a distinguished Governor General. Jacobs J held that the Chaplain was entitled to procedural fairness and that this required the council to specify the particular matters of character, conduct or personality that were truly involved in the decision. The case illustrates that courts will become involved in intra-church disputes where matters of property including the right to paid employment are involved. The legal issues did not turn upon any point of religious doctrine.

Family disputes that go to court are usually disastrous for all concerned. Unless the litigants are terribly rich or terribly poor the monetary costs are prohibitive and quickly outstrip the value of what is in dispute. But the real costs can be totally destructive. Litigation has a way of hardening hearts, if only because the original matter in dispute becomes overlaid with layers of additional slights and misunderstandings. Intimate bystanders are forced to take sides. The employment of lawyers creates walls of separation and ever-widening zones of secrecy and misunderstanding.

Family disputes may concern relationships (such as guardianship or custody), but more often than not they relate to money. Behind both categories there will usually lie questions of power and control as people convince themselves that taking a firm stance in the litigation is the right or necessary thing to do.

Disputes within a congregation or a wider church may relate to property or the right to control property. Each warring party may be utterly convinced that holding a position reflects the intentions of a founder or scriptural principle to whom all profess total allegiance. Yet Article XX of the **Thirty Nine Articles** proclaims that Churches can err in matters of faith. Scripture and human experience convince us that we are all capable of immense self-deception and that many things we take to be fundamental are in truth ephemeral.

It may be extremely vexing to see a Christian brother or sister saying or doing things that are thought wrong or not doing things that are thought right. This is particularly so, if the offending conduct is perceived to be driven by doctrines that strike at the fundamentals of a supposedly shared belief system. Thus, the **Red Book** liturgical practices were viewed by some as challenging the doctrine of the atonement. The disputes over women's ordination included, or were ratcheted up by, disagreements over scripture and fidelity to scripture, latterly exacerbated by allegations and counter-allegations involving the doctrine of the Trinity.

Tolerance is never an easy virtue, and it is severely tested in such contexts. Quiet departure or open secession are available options. So too is perseverance in faith. This said, every church and voluntary organisation needs to patrol its boundaries if it is to pursue its mission. The law recognises this and will assist to preserve public order. It will brook no *alsatias*, being prepared (if necessary) to assist even the Flat Earth Society in expelling its own heretics. The law's standards do not however necessarily represent best practice for the Christian.

It is easy to look back and condemn Hall for his obstreperousness, Scott for his spite, King for his insubordination, Wylde for his stubbornness, Hammond for his meddling combativeness. Each man acted out of conviction for truth, for justice, for the gospel as he saw it. But it is debatable whether his actions in the particular matters I have addressed were truly consistent with the gospel of love as expounded in Scripture.

None of the men would have claimed to be free of fault and each would have wished further opportunity to explain his actions. These matters can be acknowledged, without yielding the historian's right to address the past, holding our forebears accountable. In doing so, the historian

may seek to apply timeless values. But time “*bears all its sons away*” and we too will in turn be judged by later sojourners on earth and by a higher Authority than ourselves. [82]

END NOTES

1. Member, Appellate Tribunal of the Anglican Church of Australia; President, New South Wales Court of Appeal.
2. ***Wylde v Attorney-General (NSW) (at the relation of Ashelford & Ors)*** (1948) 78 CLR 224 at 284. See also Latham CJ at 257, Rich J at 275.
3. See Erin Ihde, **Edward Smith Hall and the Sydney Monitor**, Australian Scholarly, Melbourne, 2004 pp51-6.
4. **Historical Records of Australia (HRA)** Series 1, vol 12 p762; vol 15, p53.
5. **HRA** xv pp53-61.
6. Kercher **op cit**; Brian H Fletcher, **Ralph Darling: A Governor Maligned**, Melbourne, OUP, 1984 p271.
7. **R v Hall (No 1)**, Supreme Court of New South Wales, Forbes CJ, 25 September 1828 as reported in the **Australian**, 26 September 1828. See http://www.law.mq.edu.au/scnsw/Cases1827-28/html/r_v_hall_no_1_1828.htm
8. **R v Hall (No 1)**, Supreme Court of New South Wales, Dowling J, 12 March 1829, **HRA**, Series 1, vol 15, pp132-140.
9. **HRA**, Series 1, vol 15, pp475-6.
10. **Hall v Scott**, Supreme Court of New South Wales, Dowling J, 6 April 1830; **Sydney Gazette**, 10 April 1830. See http://www.law.mq.edu.au/scnsw/Cases1829-30/html/hall_v_scott_1830.htm
11. Stephen Judd & Kenneth Cable, **Sydney Anglicans**, Anglican Information Office, Sydney, NSW, 2000, p70.
12. Set out in **Ex parte the Rev George King** (1861) 2 Legge 1307 at 1308.
13. Bruce N Kaye, “The Role of Tradition in Church State Relations in Mid-Nineteenth Century N.S.W. The Cases of Bishops Broughton and Barker” in D Dockrill and R Tanner (ed), **Tradition and Traditions**, Prudentia, 1994.
14. **Id**, p236.
15. **Ex parte The Rev George King** (1861) 2 Legge 1307 at 1311.
16. At 1324.
17. At 1391.
18. At 1330.
19. **Australian Dictionary of Biography** “King, George (1813-1899)”.
20. 1 Corinthians 6:1-7.
21. See Jean Hering, **The First Epistle of Saint Paul to the Corinthians**, London, Epworth Press, 1962 pp39-40; Ben Witherington III, **Conflict and Community in Corinth. A Socio-Rhetorical Commentary on 1 and 2 Corinthians** Wm B Eerdmans Publishing Co, 1995 pp162-5.
22. **Acts** 16:37, 25:11.
23. It is published in Sarah Buckle-Dykes (ed) **First Century Answers to Twenty-first Century Questions**, Croydon, NSW: Sydney Missionary and Bible College 2002.
24. Citing Exodus 18:24-26; Deuteronomy 16:18-20; Matthew 18:15-17; 19:28; Luke 22:30; 2 Timothy 2:12; Revelation 3:21 and 20:4.
25. Cf Knox’s role as a witness for the plaintiffs in the **Red Book Case** discussed below.
26. See ss29, 63.
27. Section 58.
28. See s29(7), 59(1).
29. Section 29(9).
30. Section 29(6)(a).
31. Cf s29(9).
32. It has been pointed out that one of the arguments presented by me on behalf of the defendants in the Court of Appeal in **Scandrett** raised the contention that the Constitution does not treat Appellate Tribunal Opinions as determinative except as provided in s73(3). Counsel may not advance arguments that they believe to be untenable, but there is a difference between an advocate’s submission and an opinion of a lawyer which necessarily comes down on one side of a line. Advocates frequently find that what they think are their least worthy arguments find

- acceptance and *vice versa*. Views can also change over time, with further opportunity for reflection. (Sometimes, of course, the earlier view may be the better one.) From time to time judges are confronted with their earlier opinions expressed in written advices as counsel or in earlier judgments. There are collections of judicial palinodes written in such circumstances (see **McGrath v Kristensen** 340 US 16 (1950) at 177-8). My favourite, which I would adopt here, is Bramwell B's statement that "*the matter does not appear to me now as it appears to have appeared to me then*". In the unlikely event that, as a member of the Appellate Tribunal, I had to address a submission on the topic of the bindingness of earlier Opinions I would, of course, approach the matter with an open, though not empty, mind.
33. A bishop who ignored the Opinion of the Tribunal relevant to the operation of the Constitution could be exposed to a charge before the Special Tribunal for the offence of wilful violation of the Constitution: see **Offences Canon 1962**, s2(1).
 34. See Keith Mason, "The Rule of Law" in P D Finn (ed), **Essays on Law and Government, Vol 1, Principles and Values**, Law Book Co Ltd, 1995 at pp135-9.
 35. (1992) 27 NSWLR 483 at 491, 554-562.
 36. See the submissions in 78 CLR at 250 and 252 for the opposing positions as to whether the Real Presence doctrine was endorsed or merely recognised.
 37. McGill University Press, Montreal, 1968 at p94.
 38. **Gorham v Bishop of Exeter** (1850) 7 Not Cas 413 at 434.
 39. [1904] AC 515.
 40. Professor Maitland, "Moral Personality and Legal Personality" (1905) 6 **J Soc Comp Legis** 192 at p200.
 41. **Read v The Bishop of Lincoln** [1891] P 9, [1892] AC 644.
 42. **The Victorian Church** 1966, OUP, Oxford, p354.
 43. **Wylde** at 262.
 44. Canon Hammond (referred to below) admitted that he made his own omissions from BCP services, claiming that they were insignificant: see 78 CLR at 280-1.
 45. 78 CLR at 262-3.
 46. At 273.
 47. At 282.
 48. See **Attorney-General v Dean and Chapter of Ripon Cathedral** [1945] Ch 239 at 7, cited by Rich J at 283 and Dixon J at 289.
 49. For Dixon J's withering riposte, see 78 CLR at 292-6.
 50. For a contrary view, see Hon Mr Justice B H McPherson CBE, "The Church as Consensual Compact, Trust and Corporation" (2000) 74 **ALJ** 159.
 51. 78 CLR at 273.
 52. Judd & Cable, **op cit**, p253.
 53. **Sydney Anglicans** p254.
 54. Galbraith, **op cit**, p 269.
 55. Sections 71-73.
 56. See Chapter I (Fundamental Declarations) and II (Ruling Principles).
 57. See **Scandrett** at 546-552, 563 for the situation in New South Wales.
 58. Annexure "U" to affidavit of L A Scandrett sworn 23 January 1992. I imply no view either way as to the legal or moral propriety of Bishop Dowling's decision in the circumstances to refuse canonical obedience to his Metropolitan. Nor am I aware whether there was any attempt at mediation between the two men. A clergyman in the Diocese contacted me to inquire about the possibility of mediation. This, however, to my firm recollection, was after the injunction had been obtained and the Ordination Service had had to be postponed.
 59. **Scandrett v Dowling** (1992) 27 NSWLR 483.
 60. Court of Appeal transcript of argument, p2.
 61. See Defence, para 9(c). See also **Scandrett** at 517G.
 62. Bishop Holland found in favour of Bishop Dowling on the point. The Tribunal's attention was drawn to this apparent oversight in correspondence. However the Tribunal declined to revisit the issue, without conceding that it had been overlooked.
 63. **Anglican Church of Australia Constitution Act 1961, (NSW)**, s2.
 64. I should point out that, within the Diocese of Canberra and Goulburn all clergy of whatever order had identical salary rights, affected only by years of service. In argument before the Court of Appeal the plaintiffs did not press a case based on property rights beyond submitting that

membership of a church that owned property (including, given that ordinations were proposed to be effected in the name of a church, goodwill attaching to the name of the church) was sufficient. No claim based on a more concrete interference with property rights was pleaded.

This was noted by the Court in the final judgment (at 500, 564).

65. At 520.
66. At 512-3.
67. At 521 B-G.
68. At 560-2.
69. See esp Mahoney JA at 489, 494-5.
70. **Scandrett** at 562-3.
71. See at 562-3.
72. See at 563. Interestingly, the person who wrote to the Attorney General on behalf of the promoters of the 1961 Act had been counsel for the relators in the **Red Book Case** (see reference to Mr Clive Teece KC at 563G).
73. See at 487, 488.
74. See esp at 505-8.
75. **Constitution**, s59(1).
76. **Attorney General v Church of England Property Trust Diocese of Sydney** (1933) 34 SR (NSW) 36.
77. Per Long Innes J at 51.
78. The plaintiffs' costs, the costs ordered to be paid to the defendants and the defendant's losses flowing from the interlocutory injunction that had to be reimbursed in consequence of the plaintiffs' undertaking as to damages would have exceeded \$100,000 by a large margin. It is understood that the greater part of this excess was borne by Dr Scandrett personally.
79. See Report received by the 9th Provincial Synod held in July 1898 (copy made available by Mr Mark Payne); Report in **Sydney Morning Herald**, 18 November 1896, 3 May 1897.
80. Supreme Court (NSW), McLelland J, unreported, 22 March 1989.
81. (1962) 80 WN(NSW) 1263 (Jacobs J).
82. This is a longer and slightly revised version of the lecture as delivered. Some of the additions were prompted by helpful observations from some who attended the lecture.

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THE VIEW FROM THE OTHER SIDE - Judicial Experiences of Legislation

THE VIEW FROM THE OTHER SIDE - Judicial Experiences of Legislation

Justice Keith Mason
Fourth Australasian Drafting Conference
3 August, 2005

In *Rowe v Russell*,^[1] Scrutton LJ concluded his judgment stating:

*"I regret that I cannot order the costs to be paid by the draughtsmen of the **Rent Restrictions Acts**, and the members of the Legislature who passed them, and are responsible for the obscurity of the Acts...."*

Similar expressions of judicial angst are collected in the texts on statute law. The harder the problem of statutory interpretation, the more likely judges will inveigh against the person they think responsible, namely parliamentary counsel. Often the frustration directed at the drafter treats that personage as some sort of Thomas the Tank Engine Fat Controller, someone who has the full capacity to prevent all misunderstandings and avoid all litigation.

The personal criticisms are seldom justified.

Sometimes they proceed from ignorance as to the exigencies of the legislative drafting process. Judges may need to remind themselves that legislative drafters often work to produce gold from dross within particularly short timeframes. From personal experience, judges know that the very discipline of writing a reserved judgment can itself expose issues and problems requiring further attention. That is the main theme of Sir Frank Kitto's famous essay, "Why Write Judgments?"^[2] Alas for parliamentary counsel, there may not be time for a further draft. And the attention span of those giving instructions may be limited, at least in the amount of time that the policy makers are able to invest in a particular project.

Chief Justice Wilmutt wrote in 1767 that "*words are only pictures of ideas on paper*".^[3] Sometimes the principles of legislation are themselves inadequately formed by those who are responsible for the policies designed to be embedded in statute. Their rosy vision of desired outcomes may blind them to the need to cover all bases so as to pre-empt the avoidance techniques of those not favourably disposed to the new dispensation.

Alternatively, the policy-makers may be unable to resist having an each-way bet. This occurred, in my opinion, in the insider trading legislation discussed in the 2001 Court of Criminal Appeal decision of *R v Firms*.^[4] There is continuing debate about the theories offered for prohibiting insider trading. Some experts emphasise fairness and "equal access" to a market as the overriding goal. Others contend that insider trading is inefficient, because it damages the integrity of the financial market. The former policy was adopted by the Griffiths Committee on whose Report the 1991 legislation was drafted, according to the Explanatory Memorandum. Even insiders were to be permitted to rely on "generally available information", defined in effect as information disclosed by the company in a manner that would be likely to bring it to the attention of a reasonable investor in a reasonable time. But the Bill as introduced and passed also permitted the clever, swift and efficient to act forthwith if they relied upon "readily observable matter", an undefined term. The upshot was that an insider was permitted to get the jump on the market by dealings on the Stock Exchange in Sydney effected immediately after the announcement by the Supreme Court of Papua New Guinea of a price-sensitive judgment.

Those having the carriage of the legislation thus produced a clearly bifurcated enactment of legislative policy. In my reasons (with which Hidden J agreed) I said:^[5]

"The language of the statutory definition of "generally available" and the drafting history of that definition demonstrate that the Griffiths Committee's clear vision of an underlying policy of promoting fairness in the market through equal access to information became badly blurred in the legislative

process. This did not happen through oversight, although it is possible that different participants in the legislative process concentrated on one factor to the exclusion of the other or persuaded themselves that two essentially conflicting policies could be brought into sharp focus at the point of statutory definition. Regrettably for the courts at least, this has not happened. The result has been a form of legislated astigmatism because the attempt to converge essentially incompatible policy goals has produced a patchy blurring of the image ..."

There is little that parliamentary counsel can do if faced with unresolved and unresolvable divergences of policy instructions. The best one can hope for is that the problem is laid before the legislative masters before the Bill is finalised. Like Walter Bagehot's monarch, parliamentary counsel have the right to warn if alerted to potential problems. In doing so they may alert starry-eyed or astigmatic policy makers. The art of drafting hopefully develops minds "alveolated with suspicion", to pick up a phrase of Justice Michael McHugh.[6] But crystal balls are not yet standard issue.

As a last resort, the government that perceives a problem that must be addressed, but does not know how to do so, can always pass the problem to the judiciary. When this occurs one often finds a weak instruction about doing what is just and equitable in the circumstances accompanied by a non-exclusive checklist of factors to be taken into account.

Sometimes enacted concepts resist reduction to sharp-faced rules, despite the best of intentions. Laws attempting to define insider trading or unfair contracts are prime examples. Judges who complain about the vagueness of such legislation should remember that the common law is full of similar problems, although it has had hundreds of years to get its rules stated clearly and sharply prioritised. Diplock LJ once remarked that:

"... the law is nearly almost most obscure in those fields in which the judges say: 'the principle is plain, but the difficulty lies in its application to particular facts'." [7]

Or as Dawson J put it in the **David Securities Case**: [8]
"Facts tend to be black or white but the law very often is not."

Putting "*the law*" into a statute does not necessarily make its concepts more tractable.

Judges sometimes get snaky when faced with apparently contradictory statutory commands. There is a tendency to blame the drafter, because it is assumed that the difficulty would have been removed had it been perceived before the legislation was enacted. It is certainly a step along the way to solving a problem to know that it exists, but many policies and legal principles are ambiguous and contradictory in their nature. Even the canons of statutory interpretation have been said to be incompatible one with the other.[9]

Most difficult questions of statutory interpretation involve reconciling competing commands. The clash may only become apparent when litigants ask questions never dreamed of by legislators or posed to parliamentary counsel. Difficulties are multiplied when the apparent conflict exists between different statutes. Contending parties may agree that the meaning of a statute is plain, but violently disagree about what is revealed. The New South Wales Court of Appeal recently had cause to construe s101 of the Proceeds of Crime Act 1987 (Cth). Santow JA wryly observed [10] that:

"there is some irony in the fact that both appellant and respondent began by considering that s101 as it stands is clear and unambiguous. Yet they come to diametrically opposed views as to that supposedly patent meaning. That is usually a precursor to finding either ambiguity or a wholly specious argument for one of the supposedly competing interpretations".

Judges who criticise the drafter for ignorance or oversight do well to remember that prioritising and reconciling generally stated legal principles is the very pith and substance of the common law. In matters of general law we are used to wrestling without the aid of clear hierarchies of principle. We look to hierarchies of precedents and of appeal courts to guide us. But legislation purports to speak in a single imperious voice and at a constant volume. To pursue the metaphor, we accept as an ultimate principle of statutory interpretation that "the legislature cannot speak with a forked tongue". [11] This, of course, is a myth, but a necessary one. It would be intolerable for a court to tell a litigant that he or she is caught in a cross-fire of conflicting statutory demands. The problem for judges is that we take up the strain of reconciling conflict between statute and common law and between statute and statute. Judges do not have the option of saying "*It is too hard*" or "*No answer to your problem is available*" or "*The matter is remitted to Parliament to have a second attempt at explaining itself*". Sometimes therefore the judicial labour becomes Herculean because the reality is that the conflict was

not perceived by those who made the earlier statutory or common law rules; or because it was perceived, but deemed incapable of resolution other than by fuzzy legislation or honest delegation to the courts. These difficulties will be with us to the end of time. My point is that the bedrock principle that the law is a coherent unity^[12] forces the court to come up with answers and drives the court into searching for a sometimes non-existent intention.

Judges need to recognise that their experience of legislation is bound to be jaundiced. Most issues of statutory interpretation are resolved on the advice of lawyers. Few persist into the public well of the courtroom. Of those that do, many will be genuine and some quite vexing in their complexity.

The exigencies of the drafting task and the constancy of human imperfection guarantees that hard questions of statutory interpretation will always be with us. Parliamentary Counsel will never have to adopt the work practices of the rug weavers of Qum who deliberately insert a mistake into their handiwork because only Allah is perfect. Those who write judgments are in a similar position.

Legislation may be the end product of the process of debate, in which amendments are inserted to obtain assent without always having the opportunity to check the flow-on effects. Thankfully it is now permissible to track the parliamentary history, thereby ascertaining changes made to the Bill as presented to Parliament. Of course, the Bill itself will often be the product of last minute horse-trading. Late changes may hit their target, but at the cost of skewing the thrust of the instrument unintentionally. Yet these will usually be undetectable to the reader of the Act. For example, if there are changes to a draft Bill set out in a schedule to a law reform commission report then there may be no legitimate way of learning why they were made. Is there a role for the Explanatory Memorandum to contain a schedule from the drafter explaining the textual changes not intended to reflect changes in substance?

As often happens, when several people are involved in settling a report or agreeing on a Bill, some only read the draft when it is at its final stage. Others may have read it earlier, but only twig late to its impact in a particular matter.

I was a member of the Special Committee of Solicitors General during the final stages of preparing the Cross-Vesting legislation. The Commonwealth had the carriage of the drafting exercise. I remember well the response of Mr Dennis Rose QC, then Chief General Counsel in the Commonwealth Attorney General's Department, in relation to a sensible suggestion for amendment to the "final draft" of the Bill that was being settled by the Committee. "Your point is a good one, but it is just too late to take the Bill back to Parliamentary Counsel. But let me promise this: I will have a statement put into the Minister's Second Reading speech saying that the legislation is intended to operate in the way you have proposed."

I will tell you another Second Reading speech story later.

My anecdote reminds about the danger of confusing the expressed intent of the promoter and the language adopted by Parliament. I recently had my attention drawn to the early decision of **Nolan v Clifford**,^[13] where the High Court was considering the interpretation of a section of the **Crimes Act 1900 (NSW)**. That was a consolidating statute, although there were some changes recorded in the note of the consolidating commissioner. Barton J pithily expressed the judicial task in the following terms^[14]:

"We have been asked to refer to the brevier, the note of the consolidating commissioner, to find out what he meant. I do not think this reference is of any value, because we are not to consider what the commissioner thought, but what Parliament has said, and what it meant by what it has said."

Sometimes judges make unjustified assumptions about the relationship between the Executive and Parliament at the time when the legislation was enacted.

Legislation used to be enacted by the Crown on the petition of Parliament. The old approach may still be reflected in Constitutions such as the New South Wales **Constitution Act** that speaks of the Legislature as "*His Majesty the King with the advice and consent of the Legislative Council and the Legislative Assembly*". During the medieval era the King's Council drew statutes based on proposals that had been initiated by Parliament. In this context, the judges often had a leading role in drafting. This explains the remark of Hengham CJ who told counsel in 1305:

"Do not gloss the statute: we know it better than you do, because we made it."^[15]

In the eighteenth and early nineteenth century, when the executive government was relatively weak, legislation tended to become more verbose and variegated in style. Holdsworth has observed that:^[16]

"History shows that those periods in which Parliament has had a large amount of independence, and the Executive has had a small amount of control, have been periods in which the statute book has shown the greatest lack of symmetry."

Presumptions of interpretation based on consistency of style or concept are at their weakest in such contexts. Sir Harold Kent, a legislative draftsman, referred to the statutes of the mid-nineteenth century *"with their appalling tracts of unparagraphed, unpunctuated matter, with the conveyancer's predilection for repeating everything again and again"*.^[17] It would be careless to construe legislation of this era by assuming that different words are necessarily intended to convey different ideas.

These phenomena are not just a matter of distant history. They may impact on modern legislation and it may be something that judges need to take into account before venting their spleen on Parliamentary Counsel. For a time when I was Solicitor General for New South Wales the government of the day controlled neither House of Parliament. This made it cautious about introducing any legislation into Parliament and it certainly made it harder for Parliamentary Counsel to get his hands on amendments, particularly late amendments, to Bills. There were of course mechanisms for providing confidential drafting assistance to opposition and cross-bench members, but these were not always availed of. Non-governmental MPs are naturally free to draw on private legal assistance. But, as occurred in the eighteenth century, this can mean that accumulated drafting wisdom is by-passed and that more than the usual number of "i"s are not dotted or "t"s crossed. It helps the judges at least to be aware of this phenomenon.

Most statutes are designed to take the law outside the judicial comfort zone (ie the realm of the common law). This causes many judges to get their hackles up, often unreasonably. History is littered with prolonged rearguard battles by judges reluctant to understand or accept ground-breaking legislation. Consider for example the judicial response to the Statute of Frauds or the business records provisions of the Evidence Acts. In the process of resisting change to the familiar wisdom of the common law, judges may feel like hitting out at the messenger rather than the message. Many statutes transport judges into a universe of discourse in which they have no familiarity at all. That is often Parliament's intent.

Change usually generates opposition from those who are most affected. Changing law affects judges sharply, especially if it challenges attitudes we have taken over half a lifetime to learn.

Sir Robert Torrens did not accuse the legal profession of seeking to feather its own nest in opposing his reforms. Rather, he reflected upon the difficulty which any body in control of an arcane and complex art has as regards the capacity to see the need for reform. In his partly autobiographical work **Registration of Title**^[18] he wrote this, under the heading "Professional bias incapacitates for the work of reform":

The work of law reform has been left in the hands of lawyers; and without adopting the ancient proverb, "Hawks dinna pick out hawks' een," [Hawks do not pick out hawks' eyes] and without attributing any sordid motive, there are other influences no less powerful which operate to deter the professional mind from realizing the idea of thorough radical reform of the law. As Lord Brougham says - "They love and revere the mysteries which they have spent so much time in learning, and cannot bear the rude hand which would wipe away the cobwebs, in spinning which they have spent their zeal and their days for perhaps half a century." The effect of education may be such as to prevent men seeing clearly or judging impartially. How else can we account for the fact that in the most important affair that can occupy the mind of men here below - "religion" - we find men adhering to that creed, be it what it may, in which they have been brought up?

It would seem as though the mind, confined for a length of time to run in grooves, loses the power to draw out from the deep-worn track. Hence, upon examining the projects of law reform emanating from legal men, even the most learned, we find them to be little better than palliatives.

Oliver Wendel Holmes once observed that "ignorance is the best of law reformers". ^[19]

Legislation today is very different from older enactments in form and structure. But the greatest distinguishing point lies in the modern drafting style which has been labelled as "fussy", in contrast to the "fuzzy" law of the past or as found in the civilian tradition in Europe. Fussy law concentrates on detailed distinctions thrown up by a focus on specific circumstances. Fuzzy law on the other hand, provides general principles in the context of broad legislative purposes. The differences and their consequences are expounded in an excellent article called "Legal Drafting Styles: Fuzzy or Fussy?" in the Murdoch University Electronic Journal of Law.^[20] The author, Lisbeth Campbell, points out that the

English/Australian style of drafting that is elaborate and complex is a response to sustained and continuing judicial reluctance to permit statutory tinkering with the common law. Campbell points out that:

"By being specific in its instructions to drafters Parliament sought to control judicial construction of its enactments. Courts responded by becoming even more literal and restricted in their reading of statutes thus generating a vicious spiral of convoluted detail which resulted in the lack of intelligibility referred to by the Renton Report which was set up to address this problem."[21]

Fussy law has advantages and disadvantages that are pointed out by the author. Australian judges may not be consciously aware of the distinction between fussy and fuzzy law, but they should be prepared to change gear when confronted with an interpretative task involving law of the latter character. The prime example in the present era is s52 of the **Trade Practices Act 1974**. It took several years before judges came to accept that this thin provision was designed to drag them brutally away from their comfort zone. It compelled them to apply a radical, widely intrusive provision in situations where neither Parliament nor Parliamentary Counsel had provided many clues. As we know, judicial grumbling on this account has led to a cluster of later fussier provisions surrounding and partially qualifying the core enactment in s52.

Recent developments in the law of statutory interpretation have dramatically assisted the search for the true (though limited) intentions of those who frame or promote legislation. The real issue is whether the judges are interested in discovering those intentions, and if not, why not. I shall return to that topic.

For the moment it is well to remember that only within the last generation has it become compulsory to consider legislative context in the first instance, and not merely at some later stage when ambiguity might be thought to arise.[22] Nowadays, we acknowledge the permissibility (indeed essentiality) of purposive construction, yet this was a radical idea before the judgment of McHugh JA in **Kingston v Keprose Pty Ltd (No 3)**. [23]

Thankfully, we have moved away from the belief that the meaning of a statute can often be discovered by consulting dictionaries and encyclopaedias of words and phrases. In the House of Peace case I observed: [24]

A dictionary may offer a reasonably authoritative source for describing the range of meanings of a word, including obsolete meanings. Dictionaries recognise that usage varies from time-to-time and place-to-place. However, they do not speak with one voice, even if published relatively concurrently. They can illustrate usage in context, but can never enter the particular interpretative task confronting a person required to construe a particular document for a particular purpose. I agree with the following remarks of Judge Randolph of the United States Court of Appeals for the District of Columbia Circuit: [25]

"... citing ... dictionaries creates a sort of optical illusion, conveying the existence of certainty - or 'plainness' - when appearance may be all there is. Lexicographers define words with words. Words in the definition are defined by more words, as are those words. The trail may be endless; sometimes, it is circular. Using a dictionary definition simply pushes the problem back."

I would not want this to discourage you from inserting Dictionaries into statutes. They are most helpful, especially where the dictionary itself is easily identifiable and where the reader is directed to it in the substantive text.

The mischief rule has been around for at least as long as **Heydon's Case** in 1584,[26] but only comparatively recently have judges been assisted by knowing what materials may be consulted in order to determine the mischief addressed by Parliament and by having ready access to those materials. When, in 1978, Mason J suggested that courts might consult Law Reform Commission reports to identify the mischief at which a statute was directed[27] this was a controversial proposition. His Honour added that he did not favour resort to Law Reform reports for any broader purpose. How things have changed since then!

Of course, matters can be taken to extremes. I once heard the submission that an enactment meant X because, when the Bill was in the Committee stage, an opposition member urged a particular amendment, asserting that if it were not made X would follow. The amendment was opposed, but without the minister denying the assertion. Counsel was about to take the Court to the caselaw on admissions by silence when the judge exploded.

My former colleague, Mr Tom Pauling QC, the Solicitor General for the Northern Territory, once told me

about research he had done concerning a statute dealing with riparian rights. He went to the South Australian nineteenth century parliamentary debates. In the Lower House, the minister told the members that this was a reforming statute that would open up the great waterways of South Australia to smallholding farmers. The promoter's speech in the Upper House commenced with the words:

"Fellow pastoralists need have no fears about this legislation..."

This reminds us that Parliament is sometimes the venue of genuine debate, where reports, explanatory memoranda and second reading speeches are designed to persuade a particular audience, not just to inform the public.

Judges like Antonin Scalia in the United States who scorn interpretative assistance from secondary sources have actually been accused of being undemocratic in outlook, anxious to avoid anything that reflects messy democracy in action. In polities like ours, responsible government paradoxically ensures a greater level of Executive control over Parliament. The cold reality may be that the majority in Parliament intend the legislation to mean whatever the Government of the day intends it to mean. In this context, judges who resist being taken to the secondary materials are really advancing principles about of the proper place of Parliament vis a vis the Executive rather than searching for the political realities of the lawmakers' "intent". The judicial viewpoint is thus unashamedly "from the other side" to that of the politicians and those who act on the instructions of politicians, including parliamentary counsel. I am not apologising for this instance of judicial stubbornness in importing high constitutional principle into an essentially interpretative task. Rather, my concern is that we should try to view things as they are.

As you know, the House of Lords has been very reluctant to go down the path of accessing Hansard to construe legislation. **Pepper v Hart** [28] opened the door in 1993, but only so far as permitting consultation of clear statements made by the minister or other promoter of a Bill directed to the very point in question in the litigation.[29] Later decisions of the House of Lords have confined English courts to permitting reference to statements in Parliament only where (a) legislation was ambiguous or obscure, or led to an absurdity; (b) the material relied on consisted of one or more statements by a minister or other promoter of the Bill together, if necessary, with such other parliamentary material as might be necessary to understand such statements and their effect; and (c) the effect of such statements was clear.[30]

The precise application of these principles in Australia is not my present concern. But I do wish to identify the constitutional principles perceived by the judges, here and abroad, as colouring their frequent unwillingness to follow the Executive's at times sloppy signposts and move away from the enacted text of legislation. What lies behind this judicial reluctance is a mixture of distrust of the prescience of ministers, suspicion that ministers sometimes know that what they are saying is not necessarily reflected in the text, and affirmation of the high constitutional principle about statute law being the prerogative of Parliament, not the Executive.

These views have been articulated most clearly in an influential article by Lord Steyne, "Pepper v Hart; A Re-Examination".[31] My anecdote about the drafting of the Cross Vesting legislation suggests that caution should be the order of the day, even (or particularly) with the statements of ministers promoting legislation. The House of Lords has recently moved from caution to positive mistrust, basing their stance upon constitutional principle. In **Wilson v First County Trust Ltd (No 2)**[32] their Lordships were at pains to demonstrate that reliance on ministerial statements actually skews the court away from the true, so called objective or enacted intention of Parliament, the only source of law-making power (judges aside). Lord Nicholls said[33] that "[i]t should not be supposed that members necessarily agreed with the minister's reasoning or his conclusions". Lord Hobhouse was even blunter in stating [34] that it was "a fundamental error of principle to confuse what a minister or a parliamentarian may have said (or said he intended) with the will and intention of Parliament itself".

There is also a strong judicial preference for the accessibility of law. In **Watson v Lee**,[35] the case about gazettal of regulations, Barwick CJ asserted that:

"No inconvenience in government administration can ... be allowed to displace adherence to the principle that a citizen should not be bound by a law the terms of which he has no means of knowing."

The text of a statute is always available, not so the secondary materials. For example, the vital Australian Law Reform Commission **Interim Report on Evidence**[36] is a rare collector's item. In this context, it is harsh to criticise a judge or litigator for not going behind the text of the **Evidence Act**,

especially since it was intended as a ready tool of practical assistance.

Judicial and statutory permission to examine extrinsic materials may well lessen the chances of the true intention of the framers being disregarded, at least by default. But if anything, it has heightened the stringency of the academic and judicial debate about "legislative intent". As you know, the stakes are at their highest with virtually unamendable statutes, ie Constitutions. But, if the American experience is anything to go by, those who are most insistent on "original intent" are generally the most hostile about going behind the text on ordinary legislation. It is a curious paradox.

My favourite Scalia quote is his reference to the use of legislative history as "*the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one's friends*".[37] Scalia added that "*the greatest defect of legislative history is its illegitimacy. We are governed by laws, not by the intentions of legislatures.*" Equally pithy, was his statement in ***Pennsylvania v Union Gas Co***[38] that: "*It is our task, as I see it, not to enter the minds of the Members of Congress - who need have nothing in mind in order for their votes to be both lawful and effective - but rather to give fair and reasonable meaning to the text of the United States Code, adopted by various Congresses at various times.*"

This is the notion developed by the House of Lords in explanation of its extreme reluctance to give weight to ministerial statements.

As well as significant developments in the law of statutory interpretation, there have been recent improvements in the science of legislative drafting. Some changes are bound to be faddish, but most represent welcome developments based on the accumulated wisdom of experts. This conference is a tribute to the emerging art. I encourage you in your endeavours. May I also thank you for the opportunity to speak at it. I urge you to continue your attempts to engage legal practitioners, especially judges, in your endeavours. Dialogue will increase mutual understanding about needs and the best means to address them.

We live in an exciting time of transition. The great commons of the common law are being engulfed by a tsunami of legislation. Even the principles of statutory interpretation are increasingly found in statute. In these circumstances, it is amazing that law schools do not include a greater component of statute law in the curriculum. Courts themselves have been slow in developing the common law for the age of statutes (to pick up Guido Calabresi's phrase).[39]

Judges are forced daily to adjust and accommodate the existing body of reasonably coherent law with the engulfing tide of new statutes. We have to reconcile the sometimes irreconcilable commands of the primary lawmaker, Parliament. At times, judicial stubbornness is due to concern to protect core values, including key constitutional principles and basic fairness as embodied in the doctrines of natural justice. But sometimes judges are just angry that they do not have Parliament's option of doing nothing when faced with a problem.

One thing is sure. The dialogue between the three arms of government will continue to be vigorous and constructive.

End Notes

1 [1928] 2 KB 117 at 130.

2 (1992) 66 ALJ 787.

3 *Roe d Dodson v Grew* (1767) Wilm 272 at 278, 97 ER 106 at 108, cited by Isaacs J in *Fell v Fell* (1922) 31 CLR 268 at 276.

4 (2001) 51 NSWLR 548. The key provisions were ss1002B and 1002G of the Corporations Law. 5 At 558[53].

6 *Registrar-General v Northside Developments Pty Ltd* (1988) 14 NSWLR 571 at 599 per McHugh JA.

7 *Ilkiw v Samuels* (1963) 2 All ER 879 at 889.

8 *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 at 402-3.

9 Karl Llewellyn, "Remarks on the Theory of Appellate Decision and the Rules or Canons about how Statutes are to be Construed" (1950) 3 Vanderbilt Law Review 395.

10 *Diez v Director of Public Prosecutions* (2004) 62 NSWLR 1 at 8[24].

11 *Waugh v Kippen* (1986) 160 CLR 156 at 165 per Gibbs CJ, Mason, Wilson and Dawson JJ.

12 See Justice Keith Mason, "*The Unity of the Law*" (1998) 4 TJR 1.

13 (1904) 1 CLR 429.

14 At 449.

- 15 Year Book 33-35 Ed I (RS) 83, cited Holdsworth, A History of English Law vol XI p366. For other examples, see F Bennion, Statutory Interpretation 4th ed, 2002 p553.
- 16 A History of English Law vol XI p371.
- 17 Quoted in F Bennion, op cit, p352.
- 18 (1859), pp5-6.
- 19 The Common Law, p64.
- 20 Vol 3 No 2 (July 1996).
- 21 This is a reference to The Preparation of Legislation, Report by the Committee appointed by the Lord President of the Council (the Renton Committee), HMSO London May 1975.
- 22 *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) CLR 175 at 315; *Repatriation Commission v Vietnam Veterans' Association of Australia NSW Branch Inc* (2000) 47 NSWLR 548 at 575-6.
- 23 (1987) 11 NSWLR 404.
- 24 *House of Peace Pty Ltd v Bankstown City Council* (2000) 48 NSWLR 498 at 505.
- 25 "Dictionaries, Plain Meaning and Context in Statutory Interpretation" (1994) 17 Harvard Journal of Law and Public Policy 71 at 72.
- 26 3 Co Rep 7a, 76 ER 637 at 638.
- 27 *Wacal Developments Pty Ltd v Realty Developments Pty Ltd* (1978) 140 CLR 503 at 520-1.
- 28 [1993] AC 593.
- 29 See *Melluish v BMI (No 3) Ltd* [1996] 1 AC 454 at 481.
- 30 See *R v Environment Secretary, Ex parte Spath Holme Ltd* [2001] 2 AC 349 at 391. See also *Wilson v First County Trust Ltd (No 2)* [2004] 1 AC 816.
- 31 (2001) 21 OJLS 59.
- 32 [2004] 1 AC 816. See also Aileen Kavanagh, "Pepper v Hart and Matters of Constitutional Principle" (2005) 121 LQR 98.
- 33 At 843[66].
- 34 At 864[139].
- 35 (1979) 144 CLR 374 at 381.
- 36 ALRC 26 (1985).
- 37 *Conroy v Aniskof* 507 US 511, 519 (1993).
- 38 491 US 1 (1989).
- 39 Guido Calabresi, A Common Law for the Age of Statutes, Harvard University Press, 1982.

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Admission of Legal Practitioners (May 2005)

THE SUPREME COURT
OF NEW SOUTH WALES
BANCO COURT

Mason P
Young CJ in Eq
Sully J
Hamilton J
Bell J
McDougall J
Latham J

Friday 27 May 2005

ADMISSION OF LEGAL PRACTITIONERS

MASON P: The formal part of these proceedings is over, but before the Court adjourns, I wish to congratulate and welcome the new legal practitioners.

You are to be congratulated individually for the effort that has seen you here today commence as a legal practitioner in this State. It has involved a period of lengthy study and practical training. You are entitled to be proud of your achievements, just as your family and friends who are gathered here are also entitled to be proud of you.

The Chief Justice is unable to sit this morning. The Court sitting is the Full Court of the Supreme Court of New South Wales. On my right is Justice Hodgson; on my left, Justice Barrett. The Court sitting is the Full Court of the Supreme Court of New South Wales.

It is necessary and fitting that admission to practice occurs by virtue of an order made by the Supreme Court of New South Wales in proceedings such as this. Apart from its formal role, this proceeding is a symbolic representation of the function of the Supreme Court in setting and maintaining standards of legal practice. It reminds the new legal practitioners, and the older ones, and the wider communities with which you are involved, that legal practitioners have duties to the Court that are paramount.

Among the obligations you owe to the Court are: a duty of full disclosure of the relevant law; a duty of candour not to mislead the Court as to any of the facts or to knowingly permit your client to do so; a duty not to permit commencement or continuance of any baseless proceedings; a duty to exercise care before making an allegation of misconduct against any person and to test any instructions you might receive from your client in that regard; a duty not to assist in any form of improper conduct; and a duty to conduct cases efficiently and expeditiously.

The performance of these duties may, on some occasions, conflict with your client's interests or, indeed, his or her enthusiasms. Nevertheless, they are obligations of a professional character that you owe to the Court.

I mentioned wider communities and there are necessarily obligations and relationships involved towards those wider communities. First and foremost are the clients whom you will be called upon to serve with undivided loyalty and commitment. As well, there are the clients who perhaps may not have the funds of your regular clients for whom you may be called upon to give access to justice by making your services available free of charge. There is the community of your fellow practitioners to whom you owe duties of honesty, courtesy and cooperation. There is the community of the public. Your duty to use your legal skills is one that involves applying them in a way which is consistent with your other obligations to serve the public good.

As you enter various niches in the legal profession, you will experience considerable pressure to

conform to the cultures of the firm, the set of chambers, the government department, the faculty. This collective embrace is appropriate insofar as it educates, encourages and helps maintain proper professional standards. But never forget that you are a person first and a lawyer second. As individuals, you have the opportunity to project your values and your ideals into your chosen calling. Conversely, your personal well-being and the integrity of your life and belief system are vital to your ability to function as a legal practitioner.

The law is a demanding and exacting profession, but do not let it squeeze out your relationships with communities beyond the law and with those near and dear to you. Your professional life is important, but it is only a part of your wider calling.

It was said of Samuel Johnson's biographer Boswell that his father was a very closed and bookish man. The father was a busy barrister who was appointed a Judge in Scotland in 1754 when Boswell was 14. Throughout his life Boswell had a particularly fond memory of a day spent fishing with his father when he had been a small boy. We would now refer to this as "quality time" in a parent-child relationship. For Boswell it must have been a rare event whose memory remained with him into adulthood. After the father's death, Boswell came upon his diary and was able to turn up the entry of the happy day spent fishing. Sadly the father's note read something like this, "Unable to do any reading. Day wholly wasted fishing with son".

I want to finish on a more positive and happy note. This is a memorable occasion, a happy one and, as I have indicated, one in which you have every reason to be proud and thankful, just as your friends and family here have every reason to be proud of you and thankful that you have reached this stage of your career.

Once again, I congratulate and welcome you to the profession.

The Court will now adjourn.

Judicial humour Law Graduation Address – Sydney University

FRIDAY 20 MAY 2005

Entering this Great Hall jolts a flood of memories. Here I first came on Orientation Day in early 1964. Here I sat doing exams. Here I graduated. There have also been dinners, concerts, protests and memorials attended in this place. Above the Hall are the offices of the Vice Chancellor where (as an articulated clerk working for the University solicitors) I entered in 1970, late at night when the electricity had been deliberately shut off by the University, to serve injunctions on students participating in a candle-lit sit-in.

Today in this place the University has done me a great honour for which I am deeply grateful. Such talents as I have are gifts from God that have been nurtured by the lovingkindness of my family, teachers and friends. My heartfelt thanks to them also.

I congratulate the new graduates for their efforts and achievements. You should all be proud of yourselves, just as your family and friends gathered here are so obviously proud of you. The staff of the Law Faculty also deserve praise for their dedication and perseverance.

When strangers learn I am a judge their conversation often alludes gently to the foibles or failings of judges. There may be enquiries about judges who struggle with staying completely awake on the bench or who confront demons of alcoholism or depression. The ceremonies, trappings and language of the law may focus on principles and institutions. But public and media interest lies in the person under the wig, his or her background, gender, extra-legal passions (or lack thereof). Some judges are comfortable with this public interest in them as individuals. Many of us are not – whether or not brickbats or bouquets are being offered.

Judges are often spoken about for humorous incidents in their life, some of their own making, others in which they were the butt of uninvited laughter. Sir Heydon Erskine Starke was renowned for giving counsel and judicial colleagues a hard time. Legend has it that he accompanied Rich J to the funeral of Sir Isaac Isaacs. As they passed an open grave at the cemetery, Starke leant over to Rich, who was 85 years old and asked him: *“George, are you sure it’s worth your while to go home?”* Starke once commenced his judgment dryly remarking that the appeal had *“been argued by the Court over nine days with some occasional assistance from the learned and experienced counsel who appeared for the parties”*. ***Federal Commissioner of Taxation v Hoffnung & Co Ltd*** (1928) 42 CLR 39 at 62. On another occasion, counsel and judicial colleagues had the last laugh. Starke was sitting in court in Melbourne with a rug over his knees. He was giving Mr Miller QC a very hard time. Eventually Miller protested: *“Your Honour is very rude to counsel”*. Starke retorted: *“With justification.”* Miller demanded to know: *“Is your Honour suggesting some constitutional justification?”*, at which point Latham CJ intervened and announced a short adjournment. As the judges got up to leave unexpectedly, Starke tripped over his rug and fell flat on his face.

These examples touching Starke illustrate that judicial humour can occur in whispered asides between colleagues, during argument in court, and in judgments. And the humour doesn’t always come out as the judge intends it.

Chat between colleagues on and off the Bench is secretive and ephemeral. Whispered asides, passed notes and practical jokes are seldom observed or preserved. Many comments about counsel would challenge the boundaries of absolute privilege for defamation with respect to words uttered in the course of legal proceedings. The early drafts of circulated judgments, where overstated propositions may be met with hyperbolic rebuttals, are not retained. The unpublished memoranda of Judge Learned Hand circulated to colleagues as a first draft of his thoughts contained acerbic digs at colleagues, counsel and trial judges. These did not carry over into his opinions for judgment. Perhaps this was a way of getting things out of his system.

Humour has many functions. It may observe the silver linings on life’s clouds. It may be little more than ostentation. It may stem from embarrassment or be intended to defuse a tense situation. Its sociological aspects include expressing aggression in an acceptable way; or bonding internally as a protection against those perceived at times to make life difficult for a group. On my Court, many jokes

about trial judges, appellate counsel and the High Court of Australia fall into these categories.

Little is unique about humour on the Bench. Nevertheless, there are particular pitfalls for judges to avoid. W S Gilbert's Lord High Executioner in **The Mikado** had good reason to include in his hit list "*that Nisi Prius nuisance ... the Judicial humorist*". A judge's attempts at humour may elicit the polite laughter of counsel, but self-interest or sycophancy may really be in play. The man in the dock may also smile, but he is a captive audience who is not free to go to another establishment in search of an alternative sit down comic. Litigants may not appreciate any form of humour in what they view as **their** drama. They will rightly resent anything that smacks of scorn, condescension or the flim flam of a club for lawyers being supported at their expense. As Evelyn Waugh wrote to Nancy Mitford about the jokes of Mr Justice Stable:

The jury were not at all amused by the judge. All the £300-a-day barristers rocked with laughter at his sallies. [The jury] glowered. This was not what they paid a judge for, they thought. Gilbert M (ed), *The Oxford Book of Legal Anecdotes* (1986) at xii-xiii.

The Australian Institute of Judicial Administration advises judges that occasional humour is not out of place in a courtroom, provided it does not embarrass a party or witness. Whilst judges are advised to display tolerance, patience and good humour in the conduct of hearings, they are cautioned against the use of sarcasm, irony, humour and other figurative language.

Sometimes a judge's attempt at humour can backfire dramatically. Mildren J of the Supreme Court of the Northern Territory declared himself to be "*absolutely staggered*" that the serial burglar appearing in his court had been granted bail on a previous occasion. Demanding to know, "*Who is the idiot who did that?*" he later learnt that it was himself.

Few of us judges have resisted the temptation to embellish a judgment with what we consider to be wit or humour. This may include snatches from literary classics to make a point forcefully or simply to "*give artistic verisimilitude to an otherwise bald and unconvincing narrative*". Fortunately, the American pastime of producing judgments in verse has not caught on in this country. Litigants are therefore spared the likes of **Brown v State** 134 Ga App 771, 216 S E 2d 356 (1975). where the Georgia Court of Appeals commenced judgment with:

*The DA was ready
His case was red hot.
Defendant was present,
His witness was not ...*

Much subtler was Sir Ninian Stephen's epigram in **Western Australia v The Commonwealth** 134 CLR 201 at 251. when he said:
"*To read words into any statute is a strong thing and, in the absence of clear necessity, a wrong thing ...*"

Subtlety will often be a mark of humour in judgments, but it can still be biting. Priestley JA once described a witness as having an Achilles heel which reached up to his knee. **Attorney General for New South Wales v Radio Station 2UE Sydney Pty Ltd**, NSWCA unreported 28 August 1992, p4. Often barbs are directed at judicial colleagues (as with Starke's point about the High Court case being argued "*by the Court over nine days*"). At times the slight is aimed at counsel. One of my favourites is Sir Victor Windeyer J's response to a submission in a constitutional case relating to the conciliation and arbitration power in the Constitution. Counsel had argued that disputes are either industrial or not industrial. Windeyer dryly described the proposition as:
... logically incontestable ... Like Sinclair's well-known division of sleeping into two sorts, namely sleeping with or sleeping without a nightcap, it would seem to exhaust the subject. Ex parte Professional Engineers Association (1959) 107 CLR 208 at 272.

Even the subtlest of jokes can spread rapidly, especially in this age of the internet. A judicial quip may however offend an unintended target. A former Chief Justice of New South Wales once was addressing a claim under the Family Provision Act concerning a deceased who was survived by one lawful and two de facto wives. This distinguished judge wrote: **Green v Green** (1989) 17 NSWLR 343 at 346.

The deceased appears to have maintained simultaneous domestic establishments with all three women and their respective children. In terms of division of his time he appears to have given preference to Margaret Green, but it seems that he spent two nights a week, regularly, with the

respondent and, at least according to her evidence, gave what she regarded as a plausible explanation for his absences. Presumably, over a number of years, he managed to achieve the same result with the other women. This is consistent with his apparent success as a used car salesman.

The deceased and his families had no grounds of complaint with respect to this absolutely privileged statement. But the judgment raised quite a storm of protest from the second hand car sales industry.

After this Chief Justice was appointed to a higher judicial office he issued a warning about the pitfalls of judicial humour to which later reference will be made.

I would not want you to think that I am opposed to humour in the courtroom or in judgments. Imagery and humour may help to bring a dispute back down to earth. It can also crystallise a point and put it into context.

Biting irony or well-directed sarcasm in a judgment may draw attention to gross abuse or much-needed law reform. A famous example occurred when Maule J sentenced a bigamist in 1845. The prisoner had married a woman after he and his children had been deserted by his wife, who had gone to live with another man. In those days, the only way that the prisoner could have become free to remarry was by a complicated and expensive procedure involving a decree in the Ecclesiastical Courts followed by a private Act of Parliament. The estimated cost was over a thousand pounds, an impossible expense for the likes of the poor prisoner. Maule J solemnly recounted the procedure for obtaining a divorce that was theoretically open to the prisoner. He acknowledged the man's poverty, concluding nevertheless: *"... but, prisoner, that makes no difference. Sitting here as an English judge, it is my duty to tell you that this is not a country in which there is one law for the rich, and another for the poor."*

This widely reported incident contributed to the climate for change that led to the first English Matrimonial Causes Act in 1857.

In a 1998 speech about the role of a judge, Murray Gleeson, Chief Justice of Australia referred to *"what might generously be described as judicial humour"*. He continued:

"Some judges, out of personal good nature, or out of a desire to break the tension that can develop in a courtroom, occasionally feel it appropriate to treat a captive audience to a display of wit. Sometimes this is appreciated by the audience, but sometimes it is not. When it is not the consequences can be very unfortunate. Judges and legal practitioners may underestimate the seriousness which litigants attach to legal proceedings, and they can become insensitive to the misunderstandings which might arise if the judge appears to be making fun of someone involved in the case. Without wishing to appear to be a killjoy, I would caution against giving too much scope to your natural humour or high spirits when presiding in a courtroom. Most litigants and witnesses do not find court cases at all funny. In almost ten years of dealing with complaints against judicial officers to the Judicial Commission of New South Wales I have seen many cases where flippant behaviour has caused unintended but deep offence.

Our distinguished Chief Justice is himself no mean humorist. His wise advice cautions restraint but does not banish smiles from the courtroom. Humour must always be moderate, measured and appropriate to the occasion. But beyond this, humour needs no further justification. It is a legitimate expression of humanity and individuality. These are judicial virtues in the eyes of all except those who want courts to be staffed by robots preferably made in their own image.

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Fusion: Fallacy, Future Or Finished?

FUSION: FALLACY, FUTURE OR FINISHED? KEITH MASON FUSION CONFERENCE 16 DECEMBER 2004

The fusing of law and equity has been going on for centuries. It has generally been encouraged by all branches of government since the time that Chancery began behaving like a court of law. It reflects the law's striving for coherence and consistency.

James I intervened in 1615 to end the scandal of Chancellor Ellesmere's common injunctions being answered by Chief Justice Coke's writs of prohibition issued to the Court of Chancery. In the Earl of Oxford's Case^[1] the King upheld Lord Ellesmere's jurisdiction to grant an injunction against executing a judgment in ejectment in the common law Courts. Chancery's jurisdiction to issue a common injunction was secured. The power would be abused from time to time, but the circuit-breaker was in place. Over the centuries, judges at common law and in equity moulded principles whereby the two "systems"^[2] acted in aid of each other where appropriate, recognised and applied each other's rules when necessary to do so, and borrowed ideas from time to time. Movements towards a common Bar, especially strong in the colonies, encouraged the trend. In the 19th century Parliaments in England and elsewhere lent their hand, combining courts, sharing remedies across the board and promoting common procedures. Common procedures and fact-based pleadings encouraged plaintiffs to be less disciplined in confining themselves to traditional causes of action. But they also made courts contemplate both blended doctrines and the possible injustice of allowing plaintiffs to avoid the principled limitations of one cause of action/remedy by resort to another that differed only in name or history. Historical and at times accidental differences between law and equity in dealing with the same facts were no longer self-evidently justifiable.

The seeds of fusion have always lain in the judicial method. Significant developments since the Judicature Acts, especially in the late 20th century, have accelerated the fusion whose formal structure has been in place in most jurisdictions for well over a century. New South Wales was a very late arrival, but much groundwork was done there before 1972.

In these circumstances, questions about the institutional bifurcation of law and equity are becoming increasingly irrelevant, if not distracting. Legislation also covers many areas of former differentiation. Investigation of pedigree is being eclipsed by the greater need to have regard to the function served by a particular right or remedy and to the overlap of the parallel or discordant strands suggested by historical enquiries about "legal" and "equitable" rules.

Defining modern Equity in Australian law

Assuming its meaningful existence in modern Australian law, one is still driven to concede that Equity:

- is regarded by the High Court as an unidentified portion of the constitutionally unified "common law" component of the "single system of jurisprudence" administered by the "integrated" or "unified" judicial system of Australia;^[3]
- is administered throughout Australia in all courts of general jurisdiction with practically no distinguishing rules of procedure; and
- is as regulated by precedent as other branches of the law.^[4]

What then is Equity in modern Australian law? How is it defined by those who value its distinctiveness? What would an inquisitive layman (let us call him Socrates) be informed by an Equity scholar?

Socrates would first be told about a body of largely non-statutory rules tracing historical roots to the decrees of the late medieval Chancellors who intervened in cases when the common law was defective or out of reach of disadvantaged suitors. Unless Socrates is a legal historian, this would be like describing Australian common law by reference to the Year Books or Australian statute law by reference to the Parliament of Edward I.

Pressed for a precise definition, the Equity scholar would speak of that part of the law of England

enforced exclusively in the Court of Chancery before its abolition in 1875. Memory jogged, the scholar would testily qualify the answer by additional reference to the equity jurisdiction of the English Court of Exchequer until 1842 and of the Palatine Courts of Chancery until 1971.

A glimmer of courteous recognition appears on Socrates' face. If he had technical understanding about the topic, dialogue would follow about the maxim of the Court of Chancery that "Equity follows the Law". This would reveal that Chancery generally recognised and applied common law rules as well as its own "equity" rules. But Chancellors chose not to do so in particular cases; either (as with trusts) because the common law in a general field was trumped by an in personam (equitable) right enforceable if necessary by a common injunction, or because there was a body of particular rules covering the same field in which law and equity were known before 1875 to be in conflict when addressing identical situations.[5] Our patient scholar would also acknowledge that equitable principles, doctrines and procedures were occasionally introduced into trials of actions at common law, for example by Lord Mansfield.[6]

The conversation might continue along the following lines:

Socrates: But what does this mean for Australia in 2004? Are you telling me that this body of Chancery Court law was received here in 1875 and that it applies to this day?

Should I look for an 1875 English textbook on the subject that I can place next to my copy of the third edition of Bullen and Leake on Pleading?

Scholar (drawing breath slowly through teeth):

Actually, Chancery law was almost certainly received into Australian law upon white settlement in 1788 because of a common law rule discussed in Blackstone's Commentaries. An 1828 Imperial statute confirmed the reception into eastern Australia of the general corpus of English Equity (along with common law, statute law and ecclesiastical law - but not matrimonial causes law).

But don't worry about the dates too much. In the latter part of the nineteenth century the Privy Council enforced legal uniformity throughout the Empire, and until late into the twentieth century Australian courts generally applied the rulings of all English courts slavishly. So, if an English court decided an equity case in say 1920, Australian law would fall in line, even in New South Wales which did not completely fuse the administration of law and equity until 1972.

In any event, your idea of getting an 1875 English textbook is pointless, unless you are a collector of historical works. You see, Equity changed significantly in England after 1875. There have been major statutory developments and quite a few movements in the caselaw as well. There are doctrines like injunctions in public law, Mareva orders, Anton Pillar orders and promissory estoppel that would have shocked nineteenth century Chancellors. Some of these so-called "equitable" doctrines and remedies really stem from statute law or general law concepts like abuse of process developed across the board in recent years to prevent unconscionable use of legal rights. But, one may still speak of modern Equity, in reference to particular areas of English law derived from the pre-1875 Chancery law. Whether or not the progeny is legitimate, it represents a corpus of principle on a variety of topics that is binding in England today. You will read about it in the latest edition of Snell.

Oh, I forgot about trusts. It is a branch of property law that is part of Equity, but not usually included in Equity textbooks.

Socrates: Will Snell explain what unites and explains Equity?

Scholar: No, because there is no common theme or principle. Besides, equity scholars don't often talk about theory, even when considering whether a modern precedent is in line with nineteenth century caselaw. There are some maxims of equity, but they have fairly limited application. Equity applies "common law" rules of precedent and of legal reasoning by analogy. Some remedies (now usually statutory, but originally exclusively equitable) are discretionary, unlike most original "common law" remedies. Of course, some "common law" remedies were and are discretionary also, and most equity doctrines are quite rigid (especially in property matters). All branches of the modern law grapple with notions of promise-keeping, good faith, privacy, abuse of process, unconscionability and estoppel, etc etc that were once largely (but never solely) equitable in origin.

Socrates: So Snell's Equity is where I can find modern Australian Equity?

Scholar: Certainly not. You see, the High Court of Australia has in recent decades declined to follow some of the English Equity cases. If you buy Meagher, Gummow and Lehane,[7] an excellent text, you will find many suggestions for additional departures from English Equity, along with the occasional restrained criticism of the High Court itself. You would enjoy their treatment of Mareva orders which contains twelve pages proclaiming Equity's lack of "jurisdiction" to award them, pouring scorn on any

suggested statutory basis for this remedy, and concluding with a tiny, begrudging acknowledgement that the High Court has four times approved the remedy.

At this stage, Socrates mutters in his vernacular that "It's all English to me" and changes the topic. What he has learnt so far makes him wonder whether it matters to define or identify Equity in the 21st century.

This paper seeks to explore whether Socrates' original question does matter. The topic of fusion of law and equity generates interest and heat in certain circles, which of course is enough to justify a Conference. The relevance of the supposed law/equity divide has become a focus for those who endeavour to propound a rational, coherent and efficient scheme of Civil Obligations.

It is remedial and doctrinal fusion (or confusion) that generates most disputation, with claims ranging from those who believe fusion has already happened to those who believe that it is doctrinally impossible for "jurisdictional" reasons.

I want to start by unpacking the varieties of fusion, if only to identify matters of common ground and the true nature of underlying controversies.

Varieties and stages of fusion

When we speak about the fusion of law and equity we need to distinguish between four types of fusion: fusion of administration, procedure, remedies and doctrines. We must examine caselaw and legal theory as much as statutory developments. And we need to be on guard against distraction by sometimes fictional passwords like trustee, trust property and fiduciary.[8] Care is also needed in the use of different words to describe similar legal concepts and the use of the same word to serve different purposes.[9]

As fast as we distinguish the varieties of fusion, we must acknowledge that developments in one field have impacted on others. We inhabit a legal system that regards jurisdictional questions as primary, thinks of doctrines in terms of causes of action, views rights through remedies, and approaches remedies through procedure.

It is often stated that fusion of law and equity in England occurred in 1875, but this is quite misleading. Fusion of whatever nature represents an ongoing and interactive process, not an event that occurred in its definitive form at a particular moment of time. The processes and levels of integration (or non-integration) may differ from one law area to another. In any event, Judicature Acts are only constitutional in nature if you choose to treat them that way; and all Constitutions would surprise their founders more than a century after promulgation.

To my knowledge, debates about fusion have arisen in every legal system deriving from English law. Different attitudes about the relationship between law and equity are however, more than a product of when English law was received and when and how "law" and "equity" were statutorily fused. Academic cultures have also played their part.[10]

I shall hereafter use "general law" when referring to the inheritance of judge-made common law, equity, ecclesiastical and maritime law derived from English law. "Common law" in its stricter sense refers to the systems of law practised at trial level in England before 1875 in the Queens Bench, Exchequer and Common Pleas Courts. I suppose that is an accurate definition, although it is something of a mystery why no one treats "common law" in the same way as equity (usually spelt with a capital "E") in the present universe of discourse. Can it be that common law scholars (if they exist in the same sense that we talk of Equity scholars) have simply moved on? To my knowledge, no law school teaches "common law" as a subject.

In referring to a modern Judicature System, we envisage trial courts of general jurisdiction (subject to monetary limits in some cases) whose judges hear and determine disputes, whether arising under statute law or general law in all of its manifestations. These courts may have specialist lists, but litigants can advance claims and defences however arising. Proceedings will be moved sideways to appropriate judges or courts if commenced in an inappropriate forum or list. The choice of initiating process, pleading system, method of adducing evidence, interlocutory procedures, method of trial and right of appeal are generally unaffected by concerns as to whether asserted rights or defences are statutory, legal, equitable, ecclesiastical or maritime in derivation. There may be pockets of resistance in matters of practice (eg the order of addresses), or culture (eg the style or volume of counsel), but these are diminishing. Trial of "common law" matters by jury is now very exceptional.

Modern pleadings concentrate first on facts giving rise to substantive causes of action based eg on contract, tort, trust, statutory obligation etc. They then claim a variety of remedies in the alternative. Very

few causes of action or remedies will be exclusively equitable in historical derivation and even these are now statutory in most cases.

Some court statutes, like the Supreme Court Act 1970 (NSW), contain provisions re-enacting nineteenth century steps towards procedural fusion, but in a form that usually confers the power to award any variety of injunctions, declarations etc. This is not to imply that the reader does not need to know the circumstances in which the particular remedies are available. He or she is, however, more likely to go to the applicable specialist text on substantive law (torts, defamation, contract, trusts) or to practice books or books on remedies generally, rather than to Equity texts to find the remedial and procedural rules referable to a field of law.[11]

Other statutes, like the Trade Practices Act 1984 (Cth) offer a smorgasbord of remedies in terms that indicate the need for real caution lest judges wrongly assume that traditional "equitable" principles apply to the minority of available remedies that would have been available only in Chancery before 1875.[12] It can be misleading to approach statutes like the Trade Practices Act with preconceptions about the continuing role of equity doctrine, even when what formerly were purely equitable remedies like rescission and injunction are mentioned.

In the 21st century it is hard to think of a non-Judicature system. Priestley JA once quipped that "Even in New South Wales all common law judges are chancellors now".[13] Advocacy is becoming increasingly specialised, but the lines of division have nothing to do with any doctrinal common law/equity division. There may be different levels of complexity between different types of case, but this is presently irrelevant. I estimate that less than 10% of the work done in the Equity Division of the Supreme Court of New South Wales involves Equity in the sense explained to Socrates. Some is probate, much is contract, most is statutory (eg Family Provision Act, Corporations Act, revenue law).

Occasionally we are reminded of the problems inherent in a pre-judicature system. This is when Parliament creates specialist courts with exclusive jurisdiction. Then it really can matter that the plaintiff has filed in the wrong court or that part of the matter in dispute lies outside that court's jurisdiction.

All four types of fusion of law and equity identified above were addressed in the Judicature Act 1873 (UK), although it was not itself the original model for fusion .[14]

The Judicature Act 1873 created a single Supreme Court of Judicature divided into the Court of Appeal and the High Court of Justice (with five Divisions, merged into three in 1881). Section 24 addressed the relationship between legal and equitable procedures, with the general object of securing a complete and final determination of all matters in controversy between the parties and avoiding multiplicity of proceedings. The section gave all branches of the Court power to administer equitable remedies, enabled equitable defences to be invoked, required all branches of the Court to recognise equitable titles, prohibited the issue of common injunctions within the Court and gave general power of determination of legal titles.

The predominant feature of the common law system of pleading had been the requirement that the plaintiff choose a cause of action in which to bring the claim. The parties thereafter exchanged pleadings that were designed to produce either an issue of law by way of demurrer or an issue of fact for decision by the jury. There were many technicalities and fictions, although some were abolished by pleading reforms in the mid-19th century.

In Chancery, the plaintiff pleaded by Bill in Equity, a complex, prolix and repetitive document. Once again mid-19th century reforms removed a number of technical excrescences, requiring the Bill to state the material facts, matters and circumstances relied on.

The Rules of Court made under the Judicature Acts[15] prescribed the modern system of pleading which sought to combine the best features of the two former systems, the brevity and the simplified forms of the common law with the Equity principle of stating facts and not the legal conclusion which the pleader put upon the facts. This system enabled parties to allege in one process facts giving rise to causes of action, defences or replies recognised at law, in equity or by statute. The origin of a right did not need to be stated unless silence might take the opponent by surprise.

The Judicature Act 1873 was mainly procedural in motivation. Lord Selborne LC said as much during the debate on the Bill. So too did Sir George Jessel MR in *Salt v Cooper* in 1880 when he said that the Act "simply transferred the old jurisdictions of the Courts of Law and Equity to the new tribunal, and then gave directions to the new tribunal as to the mode in which it should administer the combined jurisdictions".[16] Section 25 addressed areas of substantive clash, but initially it was thought that most bases had been covered and that the catch-all provision (subs 11) would have little work to do.

Contrary to what one sometimes reads, the reformers perceived that a system of fused administration might provide the means of ironing out inconsistencies and discordances in the practical administration of the law. Thus, the Judicature Commission responsible for the Judicature Act reported in 1869 that:

[17]
The litigation arising out of Joint Stock Companies has constituted a very large proportion of the business which has engaged the attention of Court of Law and Equity for some years. Directors of Joint Stock Companies fill the double character of agents and trustees for the companies and shareholders; and the effect of their acts and representations has frequently been brought into question in both jurisdictions, and sometimes with opposite results. The expense thus needlessly incurred has been so great, and the perplexity thereby occasioned in the conduct of business so considerable, as to convince most persons, who have followed the development of this branch of the law, of the necessity that exists for a tribunal invested with full power of dealing with all the complicated rights and obligations springing out of such transactions, and of administering complete and appropriate relief, no matter whether the rights and obligations involved are what are called legal or equitable.

The merging of administration, procedure and remedies (with rule-making power that would enable further developments in that direction over the years to come) was the cornerstone of a system of fused administration of law and equity. But it was not the first or last legislative step on the topic in England. Earlier in the 19th century, statute provided the Common Law Courts with a limited power to grant injunctions;[18] and Chancery the power to decide legal titles,[19] together with a power to award damages[20] that with hindsight appears to have been unnecessary.[21]

As the years progressed after 1875, statute law and court rules further integrated common law and equity procedure. As early as 1879 the English Court of Appeal held that, in cases where no rule of practice was laid down by the Rules made under the Judicature Act, and there was a variance in the old practice of the Chancery and Common Law Courts, that practice was to prevail which was considered most convenient.[22] Procedural coalescence continued in the 20th century with the gradual abolition of jury trial, greater use of the summons as an initiating process, increasing resort to evidence by affidavit or statement and other developments.

Other legal systems proceeded towards administrative, procedural, remedial and substantive fusion in different ways and at different times.[23]

Thus, administration within a single Supreme Court came to New South Wales from the founding of the colony, whereas full procedural and substantive fusion only arrived in 1972. But long before then, several of England's pre-1873, 1873 and post-1873 reforms were introduced piecemeal.

English legislation of 1854 that had conferred on the common law Courts limited powers to grant injunctions and to recognise equitable defences was adopted in New South Wales by the Common Law Procedure Act 1857. But the latter provision was held to be only available in circumstances entitling the claiming of an absolute, perpetual unconditional injunction, otherwise it was still necessary to seek a common injunction in separate proceedings in the equity side of the Supreme Court. An attempt to plug this gap on condition that the proceedings were transferred into the jurisdiction of the Court in Equity was enacted in 1957.²⁴ Continuing difficulties with this provision were a fillip for the complete fusion enacted in New South Wales by the Supreme Court Act 1970.²⁵

Why legislation was necessary in New South Wales

New South Wales never had separate superior courts. The administration of law and equity was the business of the Supreme Court from the outset, with statutory backing from the time of the Second Charter of Justice in 1814. Yet this was insufficient to bring about the other varieties of fusion, however much the idea may have appealed to the first two Chief Justices of New South Wales.

In 1765, William Blackstone in his Commentaries on the Laws of England, formulated the general law rule of reception of English law into "settled" colonies, which all Australian colonies were later presumed to be. He proclaimed that "all the English laws then in being ... [were] immediately there in force". This principle was qualified by the statement that the colonists carried with them "only so much of the English law as is applicable to their own situation and the condition of an infant colony". The uncertain operation of Blackstone's rule had led to difficulties in New South Wales by the 1820s, but no one doubted that the general law of England (including Chancery law) was part of the colonists' inheritance.[26] Ellis Bent who was Judge-Advocate during Governor Macquarie's time granted equitable relief where appropriate, although he had no specific statutory authority to do so.[27] The Civil Supreme Court created under the second Charter of Justice in 1814 was declared among other things to be a Court of Equity having equitable jurisdiction.

Section 24 of the Australian Courts Act 1828 (Imp), which applied in Australia by paramount force, was applicable to New South Wales as well as Tasmania, Victoria, Queensland and the Australian Capital Territory as they later emerged out of New South Wales. It provided that all laws and statutes in force in England on 25 July 1828 were to be applied "so far as the same can be applied". The Supreme Court of New South Wales founded in 1823 (which continues to this day) was a creature of statute and the royal prerogative. Its statutory parent was the New South Wales Act 1823.[28] The 1823 Act declared it lawful for the King to establish a court of judicature styled "the Supreme Court of New South Wales". The Act defined the principal jurisdictions of the Court, largely by reference to English models. Jurisdiction at common law was assimilated to the civil and criminal authority of the Judges of Kings Bench, Common Pleas and Exchequer in England. As a court of equity, the Supreme Court was to have the equitable jurisdiction exercised by the Lord High Chancellor within England. In 1828, this last grant of jurisdiction was supplemented by adding "and all such acts matters and things can or may be done by the said Lord High Chancellor within the realm of England in the exercise of the common law jurisdiction to him belonging".[29] This neatly makes my point that procedural and remedial fusion in England started long before the Judicature Act 1873 (UK).

For New South Wales the systems of common law and equity were never, as in England, to be administered by separate courts, but always by one and the same Supreme Court. But procedures and doctrines remained distinctive. A single judge wearing his equity wig could issue a common injunction directed at the prosecution or enforcement of common law proceedings or judgments pending before one of his brethren or in the Supreme Court generally.

A line was however firmly drawn when in 1882 Manning J purported to grant an injunction restraining certain proceedings pending an appeal to the Privy Council from a Full Court decision in a matter involving no grounds of equity. A Full Court was convened and Martin CJ gave his judicial brother a ticking off in the following terms:[30]

"This was a very singular state of things ...

The superior authority assumed by the Primary Judge to control the action of the Court cannot be submitted to for one moment, because, if it were allowed in this instance, we do not know where it would stop. We should find it applied in cases which altogether depend upon the common law principles, and which ought to be disposed of in a common law Court. His Honour is no more than a member of the Court. When sitting in equity in a suit disclosing equitable grounds, he would have the power exercised by him in this instance. But, where no such case was before him, he had no such power, still less had he a right to express an opinion condemnatory of the course taken by the Court in any case. I regret that His Honour has not only arrogated this position to himself, but that he should have gone out of his way to endeavour in an elaborate manner to throw discredit upon the judgment of the Court in a case triable only at common law."

All judges of the Supreme Court of New South Wales were vested with common law and equity jurisdiction. However, readiness and capacity to hear equity cases were largely dependent upon the individual judge's experience at the Bar, his learning and enthusiasm. For some judges, equity work went into the "too hard basket". The twice amoved John Walpole Willis fought to do these cases, going so far as to propose a separate Equity Court under his control as "Chief Baron in Chancery". His colleagues and the Governor demurred.[31]

The 19th century judges in New South Wales were well aware that law and equity were different systems, each with their different procedures. Certainly by the 1840s any thought of adopting a single procedure was abandoned. English court dress, precedents and practice came to be followed with as much rigour as colonial conditions allowed. The Privy Council also curbed centrifugal tendencies, as elsewhere throughout the Empire. English reforming statutes were followed and adopted for use within the single Supreme Court. In 1850, the Full Court of the Supreme Court of New South Wales in *Bank of Australasia v Murray*[32] declined to grant any relief to a plaintiff who had proceeded by bill in equity instead of at common law. There the matter rested until the Queenslander Sir Samuel Griffith became the first Chief Justice of the High Court of Australia in 1903 (see below).[33]

The substantive and procedural rules pertaining to matters on the common law and equity "sides" of the Supreme Court of New South Wales operated in separate and seldom intersecting spheres, albeit administered by a single Supreme Court. The size of the Court never rose above seven in the 19th century. The shortage of judges skilled in equity and mid-century delays in handling equity matters actually encouraged moves to differentiate the Equity side of the Court. A Primary (later Chief) Judge in Equity was designated. There was even a proposal to create a separate building for Equity. The fusion reforms of the English Judicature Act 1873 were resisted, although the judiciary and profession were divided on the issue.

Differing analyses of the nineteenth century milestones are offered by Dr J M Bennett in his many writings on the topic[34] and in an excellent Macquarie University Legal Research Thesis (regrettably still unpublished) by Justine Eloise Rogers, *Legal Argument and the Separateness of Equity in New South*

Wales 1824-1900.[35] Ms Rogers has, in my view, convincingly challenged Bennett's thesis that the failure to achieve substantive fusion from the springboard of a single Supreme Court represented a lack of will or possible misreading of the Charter of Justice on the part of the 19th century judges.

Echoes of the nineteenth, twentieth and twenty-first century debates about fusion and its consequences surfaced as early as the first volume of the Commonwealth Law Reports.

In *McLaughlin v Fosbery*[36] the High Court refused to overturn an order of the New South Wales Chief Judge in Equity staying all proceedings on an action for damages for assault and false imprisonment. The underlying dispute related to the confinement of the appellant, a lunatic, on the basis of an order by his committee. The High Court held that the Supreme Court ought to have stayed proceedings in the exercise of its inherent jurisdiction to stay vexatious actions, ie reliant on the exercise of common law jurisdiction. It was therefore an error that the stay of the common law action had been granted by the Chief Judge in Equity in reliance on (Equity) lunacy jurisdiction. Since, however, the Full Court of the Supreme Court had power on appeal to disregard formal defects and irregularities in the proceedings, the High Court decided by majority to do the same. Accordingly the appeal was dismissed.

Griffith CJ (speaking for himself and Barton J) explained that the Supreme Court of New South Wales was:[37]

".... one Court, having under its original constitution all the powers which the Courts of Chancery and the Common Law and Ecclesiastical Courts had in England. Every Judge of the Court has the powers and authority of a Judge of the Court, and his powers are not in fact or in law impaired if he erroneously attributes the source of any particular power to the wrong Statute

All powers of the Supreme Court of New South Wales are derived from Statute, and, in one sense, there are as many jurisdictions as there are Statutes conferring jurisdiction. But in another, and the truer sense, the jurisdiction of the Court, qua Court, is single, and an order of the Court made within its jurisdiction, in the sense that it is made by virtue of the authority vested in the Court by law, cannot be impeached merely because the formal documents describe it as made under a Statute different from that which actually confers the authority. If, as was formerly the case in England, but was never the case in New South Wales, the general judicial power of the State were distributed among several different Courts, an order of one Court not within its province could not be supported by showing that it could have been made by another Court. But this argument is not applicable to a single Court in which all the judicial power of the State is vested."

O'Connor J dissented strongly, stating:[38]

"It is said there is only the one Supreme Court invested with both common law and Equity powers, and that it is always open to the Court to apply any of its powers to facts that come before it. It is true that there is only one Supreme Court invested with all these powers, but ever since the establishment of the Court under the Charter of Justice its powers in Equity and its powers at common law have been exercised by separate divisions of the Court - separate not only in name and form, but administering in many respects different systems of jurisprudence. In many Statutes of this State the distinction is recognized. Take as an example, sec 252 of the Companies Act, under which the rights of an applicant may vary considerably according as his application is made in the common law or in the Equity jurisdiction of the Court. It may or may not be convenient or necessary to have this separation of jurisdictions. That is not a matter for us to consider. The separation of jurisdictions exists, not as a mere matter of form or of headings, but as a substantial separation of different systems of jurisprudence, and so long as it does exist the Supreme Court could not, and would not, apply in the exercise of the one jurisdiction the principles of the other."

Griffith CJ's references to the universal judicial power to prevent abuse of process is interesting. This now frequently encountered judicial power is universally available to all courts to thwart a broad and undefined band of procedural and substantive chicanery.[39] Many fields in which it now operates would once have been the sole province of Chancery. This is one of many examples of developments in the general law that represent a form of substantive fusion where a composite principle claiming no particular derivation now covers the field.

By 1910 Griffith CJ abandoned any thought he may have had of using the single Supreme Court of New South Wales as a springboard for procedural fusion. In *Turner v The New South Wales Mont de Piete Deposit and Investment Co Ltd*,[40] the High Court held unanimously that the traditional separation of law and equity within the Supreme Court of New South Wales had to be respected. Without additional statutory modification it was not possible to permit an equitable replication setting up an equitable title in a common law action in which the plaintiff commenced by pleading his legal title. Griffith CJ grumbled about "supposed ancient technicalities of the law, which are said to linger in New South Wales, after they have been abolished in, I believe, all the rest of His Majesty's dominions".[41] Similar comments

were advanced by O'Connor J (at 549) and Isaacs J (at 554), without quite so much grumble from O'Connor, the former New South Wales practitioner and Acting Judge of the Supreme Court of New South Wales.

Statutory reforms were introduced to the Supreme Court of New South Wales in stages, culminating in the fusion of administration of law and equity and adoption of a common pleading system with the Supreme Court Act 1970. Section 57 of that Act commands the Court to "administer concurrently all rules of law, including rules of equity". There were other borrowings from the English provisions.[42]

The early stirrings in the High Court nevertheless suggest that a bolder resort to existing judicial power might have broken the waters of separation for New South Wales, which had by 1900 become a legal Jurassic Park. They certainly affirm my proposition (developed below) that any distinction between law and equity is non-jurisdictional. The orthodoxy that redescended in 1910[43] indicated the need for additional statutory procedural fusion, but it did not condemn Law and Equity to permanently separate spheres of existence. The High Court of Australia would return to the integration of the general law in Australia after the last procedural barriers had been knocked down with the passing of the Supreme Court Act 1970 in New South Wales. When it did, it brought in some (probably unnecessary) constitutional guns.[44]

Substantive fusion achieved by the Judicature Act

Section 25 of the Judicature Act 1873 (UK) also directly fused substantive law and equity. On the orthodox view, it did so, only to a limited degree. It is, however, possible to see s25(11) as the statutory capping of a process that had started in 1615. Parliament confirmed Equity's precedence as a matter of last resort (if Judges of a single Court could not sort out remedial and doctrinal differences between Law and Equity by their own devices).

The side-note to s25 was "Rules of law upon certain points". Subsections (1) to (10) dealt with particular conflicts between law and equity in respect of the same subject matter. The "conflicts or variances" thereby resolved related to assignments of choses in action, stipulations as to time in contract, the custody of infants, equitable waste, merger of estates, administration of insolvent estates and actions for trespass by mortgagors in possession. Resolution was generally in favour of Chancery's rule, but a statutory amalgam of law and equity was devised as regards assignments. The miscellany of topics is itself testimony to the extent to which the two systems were treading on each other's toes when administered separately.

Section 25(11) was the catch-all, providing:

Generally in all matters not herein-before particularly mentioned, in which there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail.

By the time that New South Wales took its great leap forward to the 19th century by enacting the Supreme Court Act 1970[45] most of the matters covered by s25(1)-(10) of the Judicature Act 1873 (UK) had already been addressed by the New South Wales Parliament. It was only thought necessary to enact a modern variant of subs(11).[46]

The framers of the English statute thought that s25(11) would have little work to do. It turned out that they underestimated the situations in which later courts would discover direct "conflict or variance" between law and equity "with reference to the same matter". Later caselaw disclosed several topics where equity and law were seen to produce different outcomes on the same issue, areas where the pre-1875 Chancery rule prevailed in accordance with the subsection.[47]

Section 25 was never intended to do away with the distinction between law and equity. Maitland in his Equity Lectures[48] was however at pains to stress the general absence of conflict between law and equity, thereby explaining the minimal scope of s25(11). He expounded Equity as a gloss on the common law, albeit a collection of appendices between which there was no very close connexion. Using a Biblical metaphor, he stated that:

"Equity had come not to destroy the law, but to fulfil it. Every jot and every tittle of the law was to be obeyed, but when all this has been done something might yet be needed, something that equity would require..."

He illustrated his point by reference to the law of trusts.

There was a flaw in Maitland's gloss metaphor, with its message of continuing confluence between law

and equity, like Ashburner's reference to "two streams of jurisdiction [which], though they run in the same channel, run side by side and do not mingle their waters".[49] Congruence, stemming from Equity's supremacy before and after 1875, was a more accurate picture than confluence. Hohfeld answered Maitland in a famous article on "The Relations between Equity and Law" when he pointed out that: [50]

"As against the proposition that there is no appreciable conflict between law and equity, the thesis of the present writer is this: while a large part of the rules of equity harmonise with the various rules of law, another large part of the rules of equity - more especially those relating to the so-called exclusive and auxiliary jurisdictions of equity - conflict with legal rules and, as a matter of substance, annul or negative the latter pro tanto. As just indicated, there is, it is believed, a very marked and constantly recurring conflict between equitable and legal rules relating to various jural relations; and whenever such conflict occurs, the equitable rule is, in the last analysis, paramount and determinative. Or, putting the matter in another way, the so-called legal rule in every such case has, to that extent, only an apparent validity and operation as a matter of genuine law. Though it may represent an important stage of thought in the solution of a given problem, and may also connote very important possibilities as to certain other, closely associated (and valid) jural relations, yet as regards the very relation in which it suffers direct competition with a rule of equity, such a conflicting rule of law is, pro tanto, of no greater force than an unconstitutional statute."

On this basis, Hohfeld wrote, s25(11) had been added only out of an abundance of caution. Its fundamental idea was "anything but a novelty".[51]

Arguments that the Judicature Act directly changed substantive rules (outside the working out of s25) have been rebuffed on the few occasions that they surfaced. One of the earliest examples is *Britain v Rossiter*[52] where the English Court of Appeal rejected a submission that the Judicature Act permitted damages to be awarded with respect to an unwritten contract where the conduct of the parties did not attract the doctrine of part performance that triggered resort to Lord Cairns' Act as a source of the power to award damages. The substantive doctrine of part performance as a key to equitable remedies was in truth too firmly fixed to justify further expansion of an already bold doctrine without clear legislative endorsement.

But it was or should have been equally clear that the Judicature Act did not forbid the continuing development of law and equity, including development in the direction of integration of principles, if the single Court otherwise considered this an appropriate application of earlier precedents. *Walsh v Lonsdale* was decided in 1883. Unloved for its boldness by MGL and others, it nevertheless became undoubted authority for the proposition that a specifically enforceable agreement for lease would, in a Judicature Act court, be regarded as between the original parties as the equivalent of a lease at law.[53]

There is a more specific corollary to the proposition that s25(11) and its counterparts have limited direct effect. Outside cases falling within its scope, courts are free to develop the law in a principled manner by preferring legal rather than equitable analogies or precedents. This was the stance affirmed by the English Court of Appeal as early as 1879 in procedural matters.[54] A much more recent example is *AMEV-UDC Finance Ltd v Austin*[55] where, in the area of penalties, modern equity chose to follow the common law and, with the advent of the Judicature System, allow a discordant stream of equitable doctrine to "wither on the vine"[56] in the interests of coherence in the law generally. As I pointed out in *Harris*,[57] many of the instances when this borrowing has occurred (before and after 1875) are parked in Equity texts under the rubrics of the maxim "equity follows the law" or equity's "concurrent jurisdiction".

I shall later suggest areas where similar developments might be expected.

Section 25(11) did not purport to stop or even affect the development of legal and equitable doctrine. Nothing in the Judicature reforms precluded the continuing trend towards a more integrated, internally-consistent and principled system of general law, a task assisted by progressive steps (before and after the Judicature Act) taken towards a single system of court administration, procedure and remedies. Despite his attitude to s25(11), Maitland in his lectures nevertheless forecast that: [58]

"The bond which kept [these doctrines] under the head of Equity was the jurisdictional and procedural bond. All these matters were within the cognizance of courts of equity, and they were not within the cognizance of the courts of the common law. That bond is now broken by the judicature acts. Instead of it we find but a mere historical bond - 'these rules used to be dealt with by the Court of Chancery' - and the strength of that bond is being diminished year by year. The day will come when lawyers will cease to inquire whether a given rule be a rule of equity or a rule of the common law: suffice that it is a well-established rule administered by the High Court of Justice."

Maitland's prediction is yet to be fulfilled, although matters have hastened in the last couple of decades for reasons discussed below. For the moment, I draw attention to his observation that the procedural coalescence of the separate courts would be as much a trigger for fusion as s25(11).

Fusion fallacies

It is not possible to discuss fusion without reference to the notion of "fusion fallacy" that is important to some Equity scholars. The concept must be taken seriously, whether it represents an orthodox category, a fallacy in its own right, or those scholars' version of "ghosts of the past [that] stand in the path of justice clanking their medieval chains [for which] the proper course for the judge is to pass through them undeterred".[59] To those who believe in them, fusion fallacies are real and dangerous. The successive editions of Meagher, Gummow & Lehane present them as a rogues gallery invented by offending jurists who deserve to be pilloried to deter others.

The current edition of MGL commences its discussion of the topic[60] by pointing (correctly) to the minimalist and largely procedural intent of those responsible for drafting the English Judicature Act.

MGL then identify as "fusion fallacies" instances of change or development in relation to legal or equitable doctrines not deriving from s25 or its counterparts, yet "stated or implied" to be a consequence of the Judicature system and thus dictated by statute. If one puts proper emphasis on the word "dictated"[61] there is little difficulty with this category of fallacy. I acknowledged it in *Harris v Digital Pulse Pty Ltd*. [62] But it is something of a non-existent bogeyman. In fact, the only authorities cited by MGL that contain reasoning invoking the Judicature Act to justify a change in doctrine are Sir George Jessel's short-lived decision in *Redgrave v Hurd*[63] where he relied upon the Judicature Act to justify damages for innocent misrepresentation; and the obiter dictum by Eve J in *Re Pryce*[64] that the Act precluded an action for damages for breach of a voluntary covenant.

On my reading, all of the other examples provided by the learned authors involve applying common law concepts to once exclusively equitable situations (occasionally doing the reverse) in contexts where the direct role of the Judicature Act is neither stated nor genuinely implied. Often this occurs with a relationship that has been within the cognisance of both law and equity for centuries but over which Equity claims some hegemony.[65] The cases held up as fusion fallacies may or may not have been correctly decided, but they should not be slated undeservedly for this type of fallacious reasoning. Furthermore, the cases are usually of such standing that they ought to be accepted as a point of departure to which the further development of legal principle must accommodate itself.

To illustrate my point, *Hedley Byrne & Co Ltd v Heller & Partners Ltd*[66] is criticised[67] for borrowing from *Nocton v Lord Ashburton*[68] the idea that compensation may be awarded against a fiduciary who causes loss due to equitable fraud and applying that concept to explain an award of damages for misleading advice. If this is a fusion fallacy, the undoubted status of *Hedley Byrne* suggests that it may be time to move on, or at least to see this example as an indication that the fusion fallacy idea itself may be flawed. But the point I wish to emphasise is that to invoke the analogy of *Nocton* is not to state or imply (false) reliance on the Judicature Act. *Nocton* itself is treated as pure orthodoxy by MGL and others. It occupies a significant place in the history of fusion, but that is a separate story addressed below. It is, I suggest, irrelevant, unhelpful and misleading to criticise the *Hedley Byrne* doctrine by asking what provision of the judicature legislation permitted the recovery of common law damages for negligence merely because a breach of fiduciary duty had been established.[69]

MGL's critical analysis of *Cuckmere Brick Co Ltd v Mutual Finance Co Ltd* (mortgagee's duty when exercising power of sale),[70] the caselaw as to directors' duty of care,[71] exemplary damages for breach of all categories of fiduciary duty,[72] damages in equity[73] and the doctrine of *Walsh v Lonsdale*[74] do not support their thesis that these cases illustrate a fusion fallacy based upon wrongful application of the Judicature Act. This last proposition needs slight qualification as regards a small portion of the reasoning in *Walsh v Lonsdale*, but once again one is left to ponder about the nature of the supposed categorical error in such a well established doctrine.[75] *Cuckmere Brick* has never been accepted as good law in this country. This is not because of fear of fusion fallacy, but because its formulation of the duty of "care" does not accommodate the true nature of the mortgagee's power of sale in the mortgagee's own interest.

MGL reveal their slide into a different type of fusion fallacy, where they state that (emphasis added):[76] "The fusion fallacy involves the administration of a remedy, for example common law damages for breach of fiduciary duty, not previously available either at law or in Equity, or in the modification of principles in one branch of the jurisdiction by concepts which are imported from the other and thus are foreign, for example by holding that the existence of a duty of care in tort may be tested by asking whether the parties concerned are in fiduciary relations."

The learned authors give the cases cited in my previous paragraph as examples of this phenomenon. They do not in terms brand the Mareva order as a fusion fallacy, but the jurisdictional language used by them to criticise the concept^[77] and the categorical nature of their criticism of this now universally accepted right and remedy indicates to me that they would include it in their list. Perhaps they refrained out of concern that such labelling would raise eyebrows about the "fusion fallacy" concept itself, given that Mareva orders have been endorsed four times by the High Court of Australia in recent years.^[78]

The fusion fallacy concept is often discussed in the language of Ashburner's metaphor referring to "two streams of jurisdiction".^[79] But this language has its own built-in circularity of reasoning, because talk of want of jurisdiction (or even lack of power) signals a limitation that the body charged with the administration of the relevant principle is never free to cross. Herein lies a major problem for this "fusion fallacy" concept, because the law/equity divide ceased to be jurisdictional in this sense in New South Wales at least as early as 1814 and in England in 1875 when the Supreme Court of Judicature was created there.

Let us however permit the fusion fallacy believer to recast want of "jurisdiction" as a reference to the historical truth that there were some rights and remedies incapable of being obtained (even within a pre-Judicature single Supreme Court of New South Wales) unless claimed in a common law action or an equity suit respectively. If you filed the wrong process the Court would refuse to vindicate the extraneous right (or defence) and the litigant would be forced to commence fresh proceedings on the correct "side" of the Supreme Court (in New South Wales) or in the correct Court (in pre-Judicature Act England). This is really the sense in which Ashburner, Pettit and MGL speak of want of "jurisdiction" or power in the present area of discourse. But, if the Judicature Act did anything, it made this problem redundant by arming a single Court with a plenitude of statutory jurisdiction, with access to every conceivable remedy and jurisdiction to hear and determine all manner of disputes.

MGL's version of fusion fallacies goes well beyond substantive errors of law falsely attributed to (or said to be "dictated" by) the Judicature Act or its counterpart elsewhere. They are trying to make something special out of battles lost long ago that are no more than contestable decisions that ignored, overruled or blended earlier precedents. It is simply unhelpful to enter a debate about legal principles in 21st century Australia with such outdated tools whose root of title in England is now over 125 years old. Too many conveyances, consolidations, subdivisions, statutory dealings and other events have intervened to make it helpful or even relevant to think of how the doctrine or remedy might have stood in England in 1875 as regards the separate legal system that putatively administered it exclusively before then.

To harp about this particular class of "fallacy" is really a smokescreen for pursuing a goal to maintain the historical distinction between law and equity for its own sake. It is, in fact, harmful to legal development if it causes a judge to refrain from considering borrowing or blending ideas that may have been exclusively the province of one system in the distant past.

Post-Judicature Act developments encouraging more complete harmonisation

The fusion of administration, pleading and procedure presented opportunities to bold advocates to press new claims in a single proceeding and armed judges with tools to break down historical barriers and mindsets. But it would be wrong to conclude that the present-day relationship between law and equity is no more than the working out of the Judicature Act reforms. Several additional factors came into play in the second half of the 20th century.

First, there was the long-term impact of legal realist thinking and the more functional approach that often went with it. Influential judges like Lord Atkin and Lord Wright challenged black-letter ways of viewing precedent. Others like Lord Diplock sought to craft a more ordered legal universe. Others like Sir Anthony Mason encouraged examination of non-English precedents. Others, like Lord Denning and Lord Cooke, "pushed the envelope" in their quest for rationality and individualised justice. Others like Deane J quietly slipped natural law concepts into legal discourse. Academic lawyers were openly cited for the first time, some of them becoming judges in the ultimate courts of appeal. Some of those academics, like Professor Birks, forced judges to respond to a vigorous modern debate about the structure of the law of civil obligations.

These judges and academics have all drawn their share of criticism, especially from those wedded to preserving Equity intact. But their influence in debate about the framework of the law has been significant, to some degree because their more conservative brethren have tended not to enter such structural debates, proclaiming Equity's pragmatism as a virtue as well as an explanation.

I do not, however, imply that any judge or commentator stands in a particular "camp" or even that bright line camps exists. (My recently retired colleague, Mr Justice Meagher, may be the exception for his

uncompromising certainty on these issues. He would not, I think, like to be thought of as having a tenderly nuanced view on the topics addressed in this paper.)

In recent years, Gummow J has made extremely important contributions about the continuing role of equitable principles and the distinctiveness of Australian Equity, which (as he points out) is much more comfortable than its English counterpart with discretionary remedialism.[80] These matters may readily be accepted. Peter Birks' sharply defined roadmaps of the universe of civil obligations with their emphasis on rights and not remedies have little prospect of acceptance in this country. This, however has little bearing on the "fusion debate", which is no more concerned with dumbing down the sharp edges of the law of trusts, tracing, injunctions, unconscionability etc etc than with restricting the nuanced and principled development of the law of patents, negligence or real property. My point is that a proper understanding of the law concerning any of these topics is actually hindered by viewing them as if a "common law" or "equity" label revealed anything in common or even useful about the principles highlighted for discussion. Gummow J has generally pressed for coherence and rationality, emphasising the importance of substance over form and calling for proper acknowledgement of the role of statute law in shaping the general law and its structures. In his words, "The spirit of the times is unfavourable to the preservation of existing legal fictions and hostile to the creation of new ones." [81]

These developments in legal thinking at the appellate level mean that traditional Equity cannot presume that an ancient pedigree is enough to command recognition, or even attention, in a post-Judicature Act world.

Secondly, and of particular significance in Australia, is the recent assertion by the High Court of the unity of the Australian legal system, especially the unity of the "common law of Australia". [82] This concept appears at times in a constitutional garb, but its main reinforcement stems from the Court's legitimate assertion of primacy and independence as the ultimate arbiter of legal disputes in this country. A badge of that unity is the frequently cited notion of coherence, a basal legal norm that assumes and works towards integration of legal principles. [83] Integration requires the general law not to be at odds with constitutional and statutory provisions and principles, and not to be at odds with policies found within itself. Coherence sets the law the aim of "devis[ing] principles which provide a way of solving disputes between private persons (including of course corporations); rivalry between principles, as opposed to a study of their interaction and interrelation, is unlikely to be productive". [84]

A third development has been the march of statute law (especially federal statute law) into the heartland of the general law, Equity included. In some key areas, this has made many of the traditional law/equity distinctions simply irrelevant. For practical purposes, the Trade Practices Act 1974 (Cth) and the cognate State and Territory Fair Trading Acts have created several equitable redundancies, with their overarching norm of proscribed misleading or deceptive conduct and their smorgasbord of remedies, old and new. The Corporations Act 2001(Cth) has rendered most of the duties of company directors and officers statutory, again with a comprehensive array of civil and criminal remedies. There is a limited preservation of the general law, but its impact is likely to be minimal. [85] In *Rich v Australian Securities Investments Commission* [86] the High Court was at pains to scotch the notion that there is any meaningful distinction between "punitive" and "protective" functions with respect to a statutory power to impose a range of civil sanctions on delinquent company officers. The distinction was described as "elusive" at best and suffering the same difficulties as attempts to classify all proceedings as either civil or criminal. [87] This suggests to me that it is unhelpful to think of the vast corpus of "Equity" as definable by reference to such concepts, at least in the area of company officers. [88]

A lawyer who failed to avail his or her client of the mechanisms and added protections of statutory assignment of a cause of action (compared to an assignment recognized only "in equity") would be a prime candidate for a professional negligence claim. The nearly ubiquitous Torrens system attracts the same comment, as well as the observation that its detailed regulation of priorities in interests in land overreach much traditional equity learning. Detailed rules as to caveats have pushed interlocutory injunctions to the margins in that field.

I am not suggesting that "equitable" rights and remedies are excluded altogether from this statutory world. As part of an integrated general law they will continue to play a role, but along with the tort of deceit, contractual claims and statutory claims that do not have supporters claiming that special recognition is vital to an understanding of their elements or the structure of law itself. Statutes may also exercise gravitational influence upon general law doctrines, and Equity has not been immune from this process.

Fourthly, most modern textbooks present their topics systematically, discussing rights in broadly-recognized categories and proceeding to address all appropriate remedies. The practitioner exploring a contract issue will go to authorities such as Treitel and Carter for a complete exposition of contractual

rights and remedies (statutory, common law and equitable; personal, proprietary or restitutionary). Likewise with specialist areas like trade practices, real property, corporations law, industrial law, defamation, agency and intellectual property. Procedure texts and services will be consulted for practical and tactical concerns. This is not to imply that the treatment of equitable rights and remedies in Equity texts is deficient, but the searcher is necessarily taken away from the particular context of interest. Of course the Equity texts may offer analogies as they present doctrines and remedies across different topics of law as perceived by the modern practitioner. But in a sense this reinforces my thesis about the mutual interaction of all sources of law and the undesirability of hiding it away under increasingly irrelevant historical categories. Some Equity texts (most notably MGL) are seeking to meet readers' demand by including discussion about common law and statutory remedies that have superseded, or that run in parallel with, "equitable" remedies. Again, this illustrates my thesis.

Fifthly, there has been the direct challenge from the restitution theorists, most notably Goff, Jones and Birks. They have sought to explain a sizeable portion of traditional Equity under the concept of unjust enrichment and to use this as an analogical bridge to related common law doctrines and remedies. Every edition of Goff and Jones, *The Law of Restitution*[89] commences: "The law of restitution is the law relating to all claims, quasi-contractual or otherwise, which are founded upon the principle of unjust enrichment. Restitutionary claims are to be found in equity as well as at law."

Unjust enrichment theory may come in several varieties, but all offer a theoretical template for seeing workable analogies between "common law" and "equitable" doctrines addressing a wide range of frequently encountered legal relationships. Aspects of the template may be contestable, but the law-equity crossovers are already acknowledged by the Equity textwriters, who (usually) deal with the topics by acknowledging the related, parallel or subsumed "common law" principles covering approximately the same field.

I have written recently about these developments in Australian law, drawing particular attention to restitution theory's offer to explain and integrate areas where traditional Equity's contribution is incomplete, generally unprincipled and at times discordant (*vis a vis* a near parallel common law right). [90] Areas that have recently developed or are in the process of developing in this direction include the recovery of money paid under mistake, unauthorized use or detention of land and goods, improper pressure, recovery of misdirected or stolen funds and non-contractual claims for contribution.[91]

A related development, but worth separate mention, is the recent but now orthodox insight that tracing and following are universally applicable processes concerned with identifying property as it changes various forms and passes through various hands. General law rules are involved, most notably the principle that money is currency, with protection afforded to persons who give value without notice of defect in title. Tracing and following operate independently of the (legal and equitable) causes of action to which the processes are appurtenant. The scholarship of Professor Lionel Smith and the judicial scholarship of Lord Millett have been particularly influential in this area.[92] We now see that there is nothing peculiarly legal or equitable about tracing and following, but that these processes may be the prelude to the application of "legal" and "equitable" remedies and rights, both personal and proprietary, designed to vindicate the title of the owner who has lost possession of something of value, often through a species of "legal" or "equitable" (but most likely statutory) wrongdoing.[93]

This area of discourse leads inevitably into discussion of notions of property, a topic addressed by the House of Lords in *Foskett v McKeown*. It was in this area that the late Professor Birks took such a categorical stance in recent years, with his passionate distrust of the discretionary remedialism that is the law in this country.[94] Much is still to be resolved about the remedial constructive trust as both a personal and a proprietary remedy, but if there is one area where Equity has placed its discretionary, pragmatic yet principled mark in Australian law, it is this one.[95] It can also be stated with confidence that Australian law no longer subscribes to the view, stated in *Re Diplock*[96] and awaiting its coup de grace in England, that a fiduciary relationship must first be identified before an "equitable" remedy based on tracing or following can be granted. These are all significant developments, but none are inconsistent with viewing legal doctrine as a unified whole, understood meaningfully without reference to pre-1873 notions.

Finally, there occurred in the latter part of the 20th century a belated but inevitable realisation that the complete administrative and procedural fusion effected by the Judicature Acts has changed life forever. Lord Diplock bemoaned the fact that "the innate conservatism of English lawyers may have made them slow to recognise" the effect of fusing the two legal systems. Other jurisdictions, like Canada and New Zealand, were not as slow; and their generally pro-fusionist jurists have (like Lord Diplock) received strong rebuke from certain New South Wales quarters. Worldwide experience does however confirm that the greater the time lapse from a Judicature Act reform, the less important are the traditional

law/equity distinctions. This is particularly so in the United States, despite a constitutional embargo there on complete integration, stemming from a preserved right to trial by jury in "suits at common law". Whether the distance of time breeds sloppy ahistoricity or puts things in their proper perspective will probably depend on whether the question is asked of a committed fusionist, a fusion-sceptic or a committed anti-fusionist.

Damages in Equity: A case study

The question of exemplary damages for breach of an exclusively fiduciary duty has been addressed recently in New Zealand,[97] Canada[98] and Australia[99] and has proved a catalyst for discussion about the fusion of law and equity. Fusion-related questions arise if only because most "fiduciary relationships" bear "common law" and "equitable" faces on opposite sides of the same coin and because of the availability of parallel rights and remedies "at common law", "in equity" or under statute.

But the wider topic of damages in equity has been a fascinating touchstone for developments over a century and a half that illustrate several points in the current debate.

A trustee whose breach causes loss falls under an "equitable" obligation to make good the loss to the trust property, a duty to put the trust estate in the same position as if the breach of trust had not been committed.[100] The obligation was described by James and Baggallay LJJ as an "equitable debt or liability in the nature of a debt"[101] and by Street J as an "obligation to make restitution".[102] The former expression was used to emphasise the distinction between an obligation of Equity's creation and a (common law) specialty debt that would only arise if the trustee was bound by a covenant in the trust instrument that gave such effect to a breach thereof.[103] But Equity's curious choice of the word "debt" showed that it was borrowing an idea from the common law, with its emphasis on the immediacy of the obligation and the absence of any requirement to prove any more than unauthorized conduct. Street J brought out this point in *Re Dawson*, when he stated that "considerations of causation, foreseeability and reasonableness do not readily enter into the matter" [104] and when he observed[105] that: "The principles embodied in this approach do not appear to involve an inquiry as to whether the loss was caused by or flowed from the breach. Rather the inquiry in each instance would appear to be whether the loss would have happened if there had been no breach."

The "debt" analogy was Chancery's way of saying that relief would follow as of course if loss were proved. It required statutory intervention before the strictness of the old Chancery law was lifted by enactment permitting the court to relieve a trustee who had acted honestly, reasonably and in circumstances fairly justifying excusal. This was an area where remedial Equity was every bit as stringent as the common law.

In its original form, Lord Cairns' Act conferred power on the Court of Chancery to award damages in addition to or in substitution for an injunction "in all cases in which the Court of Chancery has jurisdiction to entertain an application for an injunction". This statutory power enabled the Court to give damages even where they were unavailable in a court of common law, because, for instance the injury was merely threatened or apprehended or where the right was purely equitable. The Act was widely adopted. [106]

In 1883 the statute was repealed in England.[107] The omission may have been inadvertent and the provision was reenacted there in 1981. In 1924 the point was taken, in *Leeds Industrial Co-Operative Society Ltd v Slack*,[108] when damages were sought in lieu of an injunction *quia timet*. The House of Lords brushed aside the submission that power to award such damages had gone with the repeal of Lord Cairns' Act in 1883. The reasoning of some of the Law Lords is an extremely forced reading of certain savings clauses and it has been widely criticised.[109] Lords Sumner and Carson proceeded directly to the same conclusion on the basis that the Judicature Act rendered Lord Cairns' Act unnecessary.[110] Some may see this as a gross fusion fallacy, but it again illustrates my point about such "fallacies" being discoverable in all the right places.

Pettit's *Equity and the Law of Trusts*[111] and MGL[112] cite Goff J's statement in *Grant v Dawkins*[113] in which he doubted Chancery's power to award damages before the passing of Lord Cairns' Act in 1858. MGL also states[114] that "Equity had no power to award damages as they were known at law". Sir Frederick Jordan in his highly influential *Chapters in Equity in New South Wales*[115] stated that: "Until Lord Cairns' Act [Chancery] had no power to award damages".

These learned authors treat damages and "equitable compensation" as falling within categorically distinct spheres, a proposition that I question below. But more significantly, the researches of Peter McDermott have exploded the issue directly. His article on the "Jurisdiction of the Court of Chancery to Award Damages"[116] discloses statutory and non-statutory awards of damages well prior to Lord

Cairns' Act. He demonstrates that by the early 19th century Chancery would award or assess damages (at law) in appropriate instances, where it had the machinery to do so and if it considered that its equitable jurisdiction had been genuinely invoked in the first place.[117]

There was a hardening of attitude under the Chancellorship of Lord Eldon in this as in several other aspects of Equity,[118] justifying Atiyah's observation that: "The Court of Chancery itself went into a period of decline from which it never wholly recovered. Partly, if not directly, this decline was due to the purely fortuitous nature of Lord Eldon's disposition".[119] Chancery's unwillingness to award damages during the early 19th century was seen by some writers at the time to have been jurisdictional, in the sense of establishing an absence of power.[120]

But Turner LJ reasserted Chancery's power in 1855 in *Phelps v Prothero*[121] and there were American decisions to similar effect.[122] McDermott[123] cites several other decisions, including those of Shadwell VC, Sir James Knight Bruce VC, Lord Langdale and Owen CJ in *Eq* as to Chancery's inherent power (in a proper case) to award damages rather than compel a creditor to have recourse to law, or as ancillary to equitable relief.

In *Raineri v Miles*,[124] Lord Edmund-Davies saw *Phelps* as authority for the proposition that, upon a vendor's default, a purchaser who proceeded in a court of equity "could recover damages whether or not he had also sought specific performance". His Lordship added:[125]

"The fact is that for some years before the Judicature Acts of 1873 and 1875 the common law and Chancery courts had been mutually making increasingly friendly overtures, and these had modified the attitudes of each."

This observation is echoed in the judgments of the Supreme Court of Canada in *Canson Enterprises Ltd v Boughton & Co.*[126] Like *Harris*, this was a case about remedies flowing from breach of "fiduciary" duty. There were significant differences in opinion, but the whole Court recognized that discriminate borrowing between common law and equitable concepts was appropriate.[127] In McLachlin J's words "we may take wisdom when we find it, and accept such insights offered by the law of tort... as may prove useful."

In *Raineri*, [128] Lord Edmund-Davies gave examples of the "assimilative process" that was accelerated by the Common Law Procedure Act 1854 and Lord Cairns' Act 1858. In *King v Poggioli*[129] Starke J had spoken to similar effect.

The provision in Lord Cairns' Act enabling the Court of Chancery to award damages for breaches of obligations not sounding in damages at law was all the more curious in light of Chancery's longstanding power to require defaulting trustees to do just that. Yet the first clear indication that Equity embraced an inherent power to award compensation with respect to breaches of fiduciary duty occurred in England with the seminal decision in *Nocton v Lord Ashburton*. [130] There is earlier authority in the Supreme Court of Victoria to like effect,[131] although the 1927 decision of Dixon AJ pointing this out in *McKenzie v McDonald*[132] is usually regarded as the root of title for equitable damages/compensation in this country. Nowadays equitable damages is so much a part of the landscape that it has its own textbook. [133]

The principles relating to this remedy are not applied uniformly to all equitable obligations or all categories of breach, and they do not necessarily replicate the rules as to assessing damages at common law. For some categories of fiduciary relationships and in some situations at least the rules as to remoteness and the time of assessment of compensation are much stricter than for breach of contract. But this observation contributes little to the fusion debate. Different rules on these matters may apply as between intentional torts and the tort of negligence[134] and contractual damages are also nuanced and contextual.[135] Common law analogies may offer assistance in many situations (for example in understanding the normative approaches involved in most causation enquiries in the law). The massive academic and judicial debate about different categories of fiduciaries, much of it focussing on *Target Holdings Ltd v Redfems*[136] and *Henderson v Merrett Syndicates Ltd*,[137] suggests that the idea of holding a single "Equity" line on the approach to assessing compensation for equitable wrongs is both doomed and distracting.[138]

One lesson to be derived from the late emergence of non-statutory equitable damages or compensation is pointed out by MGL.[139] There was really no need for Lord Cairns' Act to have conferred on Chancery the power to award "damages" for breaches of purely equitable obligations. In other words, the general law (then on its Chancery side) contained within itself the capacity to develop by providing this additional remedy.

Another lesson is that the use of "damages" as an equitable remedy for infringements of equitable rights has legislative endorsement, with the consequence that judicial language to similar effect[140] should not be decried as a fusion fallacy. [141]

Labels can operate as signposts, but they can also be misleading either because they may conflate separate concepts or (when different labels are seized upon as automatic indicators of distinctive legal concepts) because they may impede parallels or analogies being drawn (ie principled fusion). The brickbats are shared equally between the common law and Equity when one considers the proven capacity of words such as trustee, agent, trust property, fiduciary, damages, compensation and injunction to generate their own misleading fictions and confusion. Confusion as to whether company directors should be seen as "agents", thereby attracting entry to common law courts or as "trustees", thereby attracting entry to Chancery, offers an early example of the unhelpful dangers of labels and how perceiving differences that do not really exist and justifying them by a law/equity divide can be positively harmful.[142]

This brings me to the issue of exemplary damages. My views are set out in *Harris v Digital Pulse Pty Ltd*, but they did not prevail in the New South Wales Court of Appeal. It is appropriate for me to leave it to others to analyse the reasoning in the three judgments. I content myself with the observation that it is satisfying that the disagreement within the Court did not turn on arid historical disputation about Chancery's traditional jurisdiction. Issue was properly joined as to the scope and function of remedies protective of fiduciary relationships, the gravitational pull of contractual and/or tortious principles for assessing damages generally and in relation to the very relationships involved, and the characterisation of such relationships by reference to their function and the analogy of contract.[143]

What is the fusion debate all about?

It will be apparent from what I have written that I share Lord Goff's view in *Lord Napier v Hunter* that: [144]

"... our task nowadays is to see the two strands of authority, at law and in equity, moulded into a coherent whole"

But it does not follow that historical differences between different concepts and principles are to be glossed over for the mere sake of simplicity or uniformity. If a doctrine can genuinely be described as equitable this may at least warn against insouciant or unprincipled fusing of doctrines.

Equity in Australia is vibrant and in no way past the age of child-bearing. Justice Gummow's recent article "Equity: too successful?"[145] outlines a body of jurisprudence that is vibrantly self-assured and that appears much more comfortable with discretion and pragmatism than English Equity. But it does not follow that when judges administer "Equity" in Australia they are using different methods or applying different underlying values than when dealing with concepts deriving from the common law or litigation relating to statute law.

Anthony Duggan warns against viewing appellate judges as having split personalities, applying different values and principles when deciding cases in equity, at common law and under statute. His thesis is that, despite the emphasis on altruism in the "new equity rhetoric", actual case outcomes really reflect efficiency concerns. Equity's promotion of "other regarding" behaviour is achieved by appealing to actors' self-interest, not their better nature.[146] He wrote in 1997. It is indeed possible to detect a trend towards a stricter view of unconscionability and even greater Equity deference to contractually negotiated (ie "common law") outcomes since then.[147]

The process of greater integration has and will continue to gather pace to the extent that all branches of the general law use common concepts and common terminology (or at least realize that different language does not necessarily import different principles).[148]

Our adversary system allows plaintiffs to put their best foot forward and to plead claims in the alternative. Properly advised, plaintiffs will still choose to press an equitable/common law/statutory right or remedy if it is in their interests and to seek to blend the best of all worlds if that helps too.

But courts are not always obliged to go along with such a trisected view of the law. Parallel universes are not to be fostered for their own sakes. Defendants have rights too. And it is sometimes necessary or appropriate for the values inherent in one legal concept to mean that it takes primacy, or even occupies a field to the exclusion of others. In recent years, these sorts of issues have been addressed as regards the relationship of contract and tort,[149] contract and restitution,[150] negligence and defamation[151] and in other areas. Where remedies are seen as discretionary, principles have been developed to identify when they should issue.

These various enquiries are assisted by reference to the policies found in the precedents for triggering legal recognition of the right or remedy. But they are hindered by glib and unhelpful labelling based upon categories such as "common law", "equity", "statutory". In Harris, Heydon JA and I expressed differing views about Equity's "punitive" function. I remain to be convinced that any overriding and helpful pattern can be detected at such a level of historical abstraction.[152]

However, the accumulated judicial wisdom of the ages remains a starting (and usually finishing) point for decision-making, even at the appellate level. The tectonic plates under particular precedents shift slowly, even though pressure builds up in places.

It is helpful to distinguish between rights and remedies in this area of discourse.

As regards rights, law and equity may offer different legacies that plaintiffs may choose at will. If the discordance is so direct a "conflict or variance" as to engage s25(11) of the Judicature Act or its counterpart, statute decrees that Equity trumps law. But this provision is seldom engaged nowadays.

Nevertheless, the general law has developed techniques for choosing and/or fusing traditional legal and equitable principles. Sometimes the legal and equitable rights overlap to such a degree that the appellate guardians of the general law are ashamed to recognize the existence of nearly parallel, but ultimately divergent universes. In those cases the better right is allowed to cover the field, bringing with it the associated doctrines that may distinguish it in detail from its legal or equitable cousin. Often the doctrine that prevails is that which developed more flexibly, ie usually that which was once fostered exclusively in Chancery. This phenomenon is discernible as regards the atrophying of the common law actions for account, contribution and recoupment. As regards the latter two "restitutionary" causes of action, courts have recognized that equitable principles now provide all the answers.[153] MGL[154] accept this as a situation where equitable principles cover the field. A similar development has been recognised in the law of privilege, where the privilege against exposure to penalties has long been recognised by the general law and is no longer simply a rule of equity relating to discovery.[155]

These developments are not the outworking of s25(11) of the Judicature Act and they illustrate the general law's capacity (by techniques deserving to be labeled "fusion fallacies" by those who believe in them) for a rule from one "system" to "somehow annihilate" the situation prevailing in the other.[156] It is likely that estoppel by representation may also be developing in this manner.[157]

"Common law" doctrines may supplant or modify rules of Equity. Short-circuiting of the traditional law/equity divide may also occur in the interests of justice. AMEV v UDC Finance Ltd (discussed above) is an example of the equitable doctrine yielding place to the better common law rule in the hands of a post-Judicature Act court. A fascinating development is also occurring in the heartland of the paradigmatic exclusively equitable institution, the trust, and it is occurring with due acknowledgement of the influence of the Judicature Act. A body of caselaw now recognizes that a beneficiary can in "exceptional circumstances" claim on behalf of the trust damages for breach of a "common law" obligation where the trustee disappears or neglects to act.[158] One assumes that Maitland would have been shocked by this sensible elision that cannot be explained away by assuming a fictional appointment of replacement plaintiff trustees.

Lord Browne-Wilkinson's speech in Henderson and the decision of the Western Australian Full Court in Permanent Building Society (in liq) v Wheeler[159] concerning the duty of care of company directors are other examples of this beneficent phenomenon, although I realise that these are fighting words and that an opposite position will be advanced in other papers. Unlike for trustees, Chancery never asserted a monopoly over directors. Indeed, in its reflective moments, Equity has acknowledged the dangers of loose thinking prompted by invocation of the "fiduciary" label.[160] There is in my view no reason, beyond history, why (over a century after the English Judicature Act) Equity should assert as of right that the law about a director's duty of care should continue to be worked out according to "its" rules, without at least offering justification for separate treatment. A fortiori, where this may produce a lengthy list of discordances affecting not just the immediate parties but also third parties.[161] As with the overlap between contractual and tortious claims upon professional people, these differences call to be justified, not merely identified, unless the law is to abandon concern for coherence and to risk ever-widening circles of liability by always giving plaintiffs the logical consequences of their demands, without questioning the justice of defendants' positions.

Sometimes it is the very differences between two sets of rights that lead appellate courts to choose which system has primacy. This phenomenon has already been mentioned. To take an example away from the present area, the notions of allocation of risk and the doctrine of efficient breach have seen contractual solutions squeeze out tortious alternatives in appropriate cases. The fusing of common law and equitable rights may partake of this process also. There is, of course, no reason why blending may

not borrow the best of both worlds (if you are not troubled by an accusation of committing a fusion fallacy).

Turning to remedies, the processes of fusion are conceptually much simpler. Since the early 19th century Parliaments have been giving equitable powers to common law courts and common law powers to equity courts.[162] The Judicature Act was the culmination of this statutory process. But the courts have been acting in aid of each other and borrowing from each other for much longer. The process gathered pace in the 19th century and received a significant fillip with the Judicature Act reforms to procedure.[163] Unless false fear of committing a fusion fallacy stands in the way, there is simply no jurisdictional or power-related impediment to complete adaptation of remedies. Chancery in its auxiliary and concurrent jurisdictions was always pleased to assist common law whenever appropriate. Within a single court there is no continuing impediment to the "cross over" of remedies, whether it be "damages" in aid of equitable rights or the full gamut of equitable remedies in aid of common law rights. I am not saying this should happen invariably, but (at least with discretionary remedies) there is no problem with adapting them to new situations if justified by the analogical application of precedent or the proper application of general principles. Courts faced with choices in this area will have to examine the values and functions underlying the remedies: but they should be doing this anyway.[164]

Nothing herein stops the principled and coherent development of a general law of remedies. Some remedies will issue as of course, others will have special requirements and/or be discretionary. Appropriate principles in that regard can continue to be developed without the need to hearken back to false stereotypes of a long receding pre-Judicature Act system.

Conclusion

The general law, of whatever derivation, is largely found in precedent, operates within ever-diminishing interstices between statute law, and is developed according to common principles of judicial method supervised in each law area by an ultimate appellate Court.

It is no longer true to describe common law as a single system, or to brand it as rigid, rule-driven, incapable of change and disproportionate. These were its badges at the time when the Court of Chancery flowered "to soften and mollify the extremity of the law", to use Lord Ellesmere's phrase in his successful claim for Equity's supremacy before James I.[165] The early 19th century Court of Chancery depicted in Bleak House itself needed statutory reform and a judicial wake-up call every bit as much as the Common Law Courts of that era.

Much water has flown under the bridge since the enactments culminating in the Judicature Acts throughout the "common law" world. Equitable doctrines and remedies have become available in all courts of general jurisdiction, if judges (following the tradition of the Chancellors) think them appropriate for application or adoption in accordance with the judicial method, or are required to take them into account by modern statutes. A misapplication of precedent, principle or legal policy will be corrected on appeal. Disagreements will ultimately be resolved in the highest courts.

Equity may take some of the credit for this state of affairs, because for centuries her Chancellors prevailed through use of the common injunction, before the 19th century her doctrines tended to be more nuanced than those of the common law, and because her ultimate supremacy in things deemed equitable was affirmed by Parliament. In one sense, success has come with a loss of distinctive identity, because of the theoretical postulate of an undivided and coherent legal system.

But Equity cannot take all of the credit for the modern legal system. Common law doctrines and remedies have in the last century moved apace especially in the areas of procedure, remedies, contract, property, restitution and commercial law where equity and common law claim continuing and interacting roles. Statutory reforms have been very significant. The general law has developed the ubiquitous idea of abuse of process to check and frustrate unconscientious resort to legal rights and remedies.

In short, the myth of Equity as saviour is now so outdated that its continued promulgation is as harmful to the understanding of the structure and development of the civil law as it is fictitious. "Equitable" doctrines should now take their proper place as part of a unified system of judge-made law, alongside and integrated with "common law" and statutory developments in those and other areas of legal discourse.

Fusionists come in all shapes and sizes, generally united by concerns for coherence, rationality, efficiency and respect for general principles that serve as guides in legal education and appellate decision-making. Anti-fusionists may also share these goals, but they are generally united in their greater respect for a static legal framework and their love of history.

One aim in this paper has been to demonstrate the historicity of the ongoing quest for realising the values served by "fusion" in its many guises. Let me conclude by invoking historical support for Maitland's vision of a more complete fusion.

Blackstone in his 1768 Commentaries^[166] observed that "there cannot be a greater solecism, than that in two sovereign independent courts, established in the same country, exercising concurrent jurisdiction, and over the same subject matter, there should exist in a single instance two different rules of property clashing with or contradicting each other".

Australia's greatest judicial legal historian, Sir Victor Windeyer wrote in *Felton v Mulligan*:^[167] "Mine may be an ingenuous view, but to me it seems that the law that a court must apply and administer, in the exercise of whatever jurisdiction pertains to it, may be derived from different concerns, but that it is still, so far as any particular case is concerned, a single though composite body of law."

Debate about the fusion of law and Equity goes back for centuries. And for centuries it has been bedevilled by confusion stemming from the use of a single metaphor to do work on many different fronts. The metaphor may change but the idea of capturing the impact over time of a single event remains. There have been the metaphors of fusion, confluence, integration, interaction and intermingling. Justice Tipping has offered the metaphor of a rope in which discrete strands work separately yet together to do the task required of the whole rope. He offers "intertwining".^[168]

For some, the debate is seen in terms of exegesis of a statutory event occurring at a single point of time in the legal history of a particular law area. For England, the date was 1875. If the fusion debate starts and finishes from this premise, the debaters will discover much in common. But they will be viewing a sliver of ancient history, like an MRI image of a thin slice of a living body at a moment of time long past. The academic and judicial guardians of the modern law can do much better than this.

President, New South Wales Court of Appeal.

I gratefully acknowledge the research assistance of Tim Breakspear and Michael Rehberg.

End Notes

1 See 1 Ch Rep 1, 21 ER 485, which sets out the Chancellor's submissions.

2 There were also ecclesiastical law and maritime law, each with their own later fusion stories to tell (see Stephen Waddams, *Dimensions of Private Law*, Cambridge University Press, 2003, pp13-14).

3 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 570 at 564, *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 574^[110], *Lipohar v The Queen* (1999) 200 CLR 485 at 505^[44], *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 at 534^[66].

4 *Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298 at 419 (Heydon JA).

5 The body of rules said to be in "conflict or variance" was addressed in s25 of the Judicature Act 1873 (UK).

6 See *Roxburgh v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516 at 548^[84] (Gummow J).

7 R D Meagher, D Heydon, M Leeming, Meagher, Gummow & Lehane's *Equity Doctrines and Remedies* 4th ed 2002 (hereafter MGL).

8 Equity's counterparts of "agent" (cf *Pinkstone v The Queen* (2004) 78 ALJR at [60]). "Trust property" is often used fictionally to explain a company's right to trace and follow misdirected funds. Millett LJ described the use of "trust" as a precursor to a personal remedy as "nothing more than a formula for equitable relief" (*Paragon Finance plc v DB Thakerar & Co* [1999] 1 All ER 400 at 409). Labels touching the status of company directors ("trustee" or "agent") led to unseemly and expensive conflicts between Chancery and the Common Law Courts in the mid 19th century: see below.

9 Cf the variety of words used to describe an award of compensation (damages, compensation, indemnity, Lord Cairns' Act damages) and the use of "injunction" to describe orders that were never part of classical Equity or which were or now are statutory (cf *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380 at 394^[28], 412^[80]).

10 The role of Sydney University Law School cannot be ignored. It has produced generations of well-informed defenders of Equity. When I was an undergraduate, Sydney Law School prided itself on historically-based, black letter law. My teachers in Equity were proud to be practitioners in the world's last pre-Judicature system.

11 MGL has many sections in which equity doctrines and remedies are helpfully explained in a context

that includes the common law or statutory material referable to the single field of legal discourse (eg assignments, misrepresentation, mistake, estoppel, duress, declarations, injunctions, set off, confidential information, passing off). At times, one might be excused for thinking that statute law had minimal impact (eg duties of company directors).

12 See *Akron Securities Ltd v Iliffe* (1997) 41 NSWLR 353, *Visy Paper Pty Ltd v Australian Competition and Consumer Commission* [2003] HCA 59 at [24]. This type of error could perhaps be described as a fusion denial fallacy. As to "fusion fallacies" see below.

13 *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234 at 269.

14 See MGL at [2-010] discussing fusion that came to New York State in 1848.

15 The first Rules were a Schedule to the Act, accompanied by a Note - "Where no other provision is made by the Act or these Rules the present procedure and practice remain in force". The ambiguity of this direction had to be addressed as early as 1879 (see fn 22 below).

16 (1880) 16 Ch D 544 at 549. Lord Jessel expressed a different view in *Walsh v Lonsdale* (1882) 21 Ch D 9 at 14 when, in the context of estates in land, he said "there is only one Court, and equity rules prevail in it".

17 First Report, p7.

18 Common Law Procedure Act 1854.

19 15 & 16 Vict c86, s62, a later version being 25 and 26 Vict c 42, s1 (Sir John Rolfe's Act)

20 Chancery Amendment Act 1858 (known as Lord Cairns' Act).

21 See below.

22 *Newbiggin-By-The-Sea Gas Co v Armstrong* (1879) 13 Ch D 310.

23 As to Canada, see Paul M Perrell, "A Legal History of the Fusion of Law and Equity in the Supreme Court of Ontario" (1988) *Advocates Quarterly* 472. As to the United States, see C T McCormick, "The Fusion of Law and Equity in United States Courts" (1928) 6 *NCL Rev* 283, Dobbs, *Law on Remedies* 2nd ed, 1993, Wests p148ff.

24 Supreme Court Procedure Act 1957, replacing s98 of the Common Law Procedure Act 1899.

25 See MGL at [1-260]. As to other Australian States, see MGL at [1-160]-[1-195].

26 The Hon Justice B H McPherson CBE has very recently published a lecture entitled "How Equity reached the colonies" demonstrating that American colonists and scholars were not nearly as accepting that Chancery law was part of their legal system.

27 Bennett, *A History of the Supreme Court of New South Wales*, Law Book Co, 1974 pp94, 279.

28 4 George IV c 96, a temporary enactment rendered permanent by 9 George IV c 83, the Australian Courts Act 1828.

29 Australian Courts Act 1828, s11.

30 *Brown v Patterson* (1883) 4 NSWLR Eq 1 at 10, 11-12. It seems that the law reporter got the last laugh, by reporting the decision in the Equity side of the NSWLR. On one definition, Manning J committed a "fusion fallacy" (see below).

31 Bennett, op cit, p95.

32 (1850) 1 Legge 612.

33 According to Justice McPherson, op cit, Queensland was the first place outside England to adopt the Judicature Act (in 1876).

34 See especially his *History of the Supreme Court of New South Wales*. A fuller statement of his research on the present matter is his unpublished 1963 thesis "The Separation of Jurisdictions in the Supreme Court of New South Wales 1824-1900" (hereafter, Separation) (copy in New South Wales Law Reform Commission Library).

35 Macquarie University, Law 514 Legal Research Project, Second Semester 2002. Copy made available by Mr G C Lindsay SC.

36 (1904) 1 CLR 546. See also *Maiden v Maiden* (1908) 7 CLR 727 where Isaacs J (a Victorian) agreed with Griffith CJ's views. Higgins J dissented on the point.

37 At 568, 569.

38 At 574-5. O'Connor J had practised at the New South Wales Bar.

39 See *Smiles v Commissioner of Taxation (Cth)* (1992) 37 FCR 538, *Director of Public Prosecutions v Shirvanian* (1998) 44 NSWLR 129. According to Sir Victor Windeyer, the necessity for the common injunction to prevent dishonestly obtained judgments at law diminished when common law courts themselves took adequate steps to prevent the fraudulent abuse of their own processes (*Lectures on Legal History* 2nd ed (revd), Law Book Co pp260-1). Cf *CSR Ltd v Cigna Insurance Australia Ltd* (1997) 189 CLR 341 at 390-2.

40 (1910) 10 CLR 539.

41 At 543.

42 See Part IV (ss58-64).

43 See Sir Frederick Jordan's Chapters on Equity in New South Wales.

44 See cases cited in fn 3.

45 It commenced on 1 July 1972.

46 Section 64, later re-enacted so as to apply to all courts in the Law Reform (Law and Equity) Act 1972 (see *Pelechowski v Registrar, Court of Appeal* (1999) 198 CLR 435 at [33] and [37]). The New South Wales Law Reform Report on Law and Equity (LRC 13, 1971) pp9-10, documents the earlier adoption in New South Wales of subsections (1) to (10) of s25 of the Judicature Act 1873 (UK). For example,

- subsections (3)-(7) were addressed in the Conveyancing Act 1919 (NSW).
- 47 See MGL [2-055]-[2-060].
- 48 Brunyate ed, *Equity A Course of Lectures* by F W Maitland (revised, 1947, Cambridge).
- 49 D Browne, *Ashburner's Principles of Equity* 2nd ed (1933) London, Butterworths at 18.
- 50 (1913) 11 Mich LR 537 at 543-4.
- 51 Id at 545.
- 52 (1883) 11 QBD 123.
- 53 *Chan v Cresdon Pty Ltd* (1989) 168 CLR 242 at 252.
- 54 *Newbiggin-By-The-Sea Gas Co v Armstrong* (1879) 13 Ch D 310.
- 55 (1986) 162 CLR 170.
- 56 Per Mason and Wilson JJ at 191.
- 57 At 326[143].
- 58 Op cit, at p20.
- 59 *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1 at 29 per Lord Atkin.
- 60 At par [2-100].
- 61 MGL at [2-105]. See also Arthur Dean, "What Did the Judicature Act Really Do?" (1935) 1 Res Judicatae 13.
- 62 (2003) 56 NSWLR 298 at 326[139].
- 63 (1881) 20 Ch D 1 at 12. MGL point out at [2-140] that "orthodoxy" was restored in *Smith v Chadwick* (1884) 9 App Cas 187. This fusion would occur later, by statute.
- 64 [1917] 1 Ch 234 at 241, referred to by MGL at [2-170].
- 65 Eg company directors, who were regarded as both "agents" and "trustees" in the nineteenth century and solicitors, whose relationship with clients may in some respects be seen as contractual, fiduciary and (latterly) giving rise to a common law duty of care. Apart from trustees proper, the label "fiduciary" with reference to a relationship is often a warning that loose thinking and a claim of Equitable hegemony is about to follow.
- 66 [1964] AC 465.
- 67 MGL at [2-135].
- 68 [1914] AC 932.
- 69 Cf J D Heydon, "The Negligent Fiduciary" (1995) 111 LQR 1 at p3.
- 70 [1971] Ch 949. See MGL at [2-150].
- 71 MGL at [5-295]ff.
- 72 MGL at [2-310].
- 73 MGL at [2-155]. See further below.
- 74 (1882) 21 Ch D 9. See MGL at [2-180].
- 75 See MGL at [2-180]-[2-225].
- 76 At [2-105].
- 77 See MGL at [21-435].
- 78 *Jackson v Sterling Industries Ltd* (1987) 162 CLR 612, *Patrick Stevedores Operations No 2 Pty Ltd v Maritime Union of Australia* (1998) 195 CLR 1, *Cardile v LED Builders Pty Ltd* (1999) 198 CLR 380, *Pelechowski v Registrar, Court of Appeal* (1999) 198 CLR 435.
- 79 See, eg MGL at [2-100], Pettit, *Equity and the Law of Trusts*, 9th ed, 2001, at 9.
- 80 See WMC Gummow, *Change and Continuity: Statute, Equity and Federalism*, OUP, 1999, his Australian Law Journal article referred to below and his judgments generally.
- 81 *Scott v Davis* (2000) 204 CLR 333 at 376[128]. I do not think that his reference to "legal fictions" was intended to exclude equitable ones.
- 82 See cases cited in fn 3.
- 83 See generally *Sullivan v Moody* (2001) 207 CLR 562 and *Tame v New South Wales* (2002) 211 CLR 317. See also Justice Keith Mason, "The Unity of the Law" (1998) 4 TJR 1.
- 84 Gummow J in *Hill v Van Erp* (1997) 188 CLR 159 at 231, quoting Professor Francis Reynolds, "Contract and Tort: The View from the Contract Side of the Fence" (1993) 5 *Canterbury Law Review* 280 at p281.
- 85 Sections 179, 191 and 192.
- 86 [2004] HCA 42.
- 87 At [32].
- 88 Cf Harris.
- 89 1st ed, 1966 to 6th ed, 2002.
- 90 Keith Mason, "Where has Australian restitution law got to and where is it going?" (2003) 77 ALJ 358.
- 91 See generally Andrew Burrows, "We Do this at Common Law But That in Equity" (2002) 22 *Ox Jo LS* 1. Particularly as to misdirected funds, see *Koorootang Nominees Pty Ltd v Australian and New Zealand Banking Group Ltd* [1998] 3 VR 16 at 100-105 (Hansen J). As to overlapping legal and equitable doctrines and remedies touching the unauthorized use of land and goods, see Mason & Carter, *Restitution Law in Australia*, Butterworths, 1995 chapter 16.
- 92 See Lionel D Smith, *The Law of Tracing*, 1997, Clarendon Press, Oxford, *Boscawen v Bajwa* [1996] 1 WLR 328 at 334 (Millett LJ), *Foskett v McKeown* [2001] 1 AC 102.
- 93 Most wrongful receipt claims stem from breaches of statutory duties of company directors with regard to company funds.

- 94 See eg Peter Birks, "Rights, Wrongs, and Remedies" (2000) 20 Ox Jo L S 1.
- 95 See *Bathurst City Council v PWC Properties Pty Ltd* (1998) 195 CLR 566 at 585, *Giumelli v Giumelli* (1999) 196 CLR 101 at 113, 127, *Parsons v McBain* (2001) 109 FCR 157, *Kais v Turvey* (1994) 11 WAR 357, *Ikeuchi v Liu* (2001) 160 FLR 94, *Hancock Family Memorial Foundation Ltd v Porteous* (2000) 22 WAR 198, *Robins v Incentive Dynamics Pty Ltd (in liq)* (2003) 45 ACSR 244.
- 96 [1948] Ch 465 at 520-1, 532, 540.
- 97 *Aquaculture Corporation v New Zealand Green Mussel Co Ltd* [1990] 3 NZLR 299.
- 98 *M(K) v M(H)* [1992] 3 SCR 6, *Whiten v Pilot Insurance Co* (2002) 209 DLR (4th) 257 at 287[67].
- 99 Harris.
- 100 See generally R P Meagher and W M C Gummow, *Jacob's Law of Trusts*, 6th ed, [2203].
- 101 Ex parte Adamson; *Re Collie* (1878) 8 Ch D 807 at 819. See also *Wickstead v Browne* (1992) 30 NSWLR 1 at 14-15.
- 102 *Re Dawson* [1966] NSWLR 211 at 216.
- 103 *Wynch v Grant* (1854) 2 Drew 312, 61 ER 739. The equitable derivation of the remedy also had consequences for the ready availability of compound interest or an account of profits against particular defaulting trustees or fiduciaries.
- 104 At 215. Note that he did not exclude such factors altogether.
- 105 Ibid.
- 106 In New South Wales it was adopted by the Equity Act 1880 and the provision deriving from it is now found in s68 of the Supreme Court Act 1970.
- 107 Statute Law Revision and Civil Procedure Act 1883, s3.
- 108 [1924] AC 851.
- 109 See Peter M McDermott, *Equitable Damages*, Butterworths, 1994 at pp42-3, citing Jolowicz, Heuston, Bennion and Atiyah.
- 110 See per Lord Sumner at 872-3, Lord Carson at 873. This had been the view of Lord Esher in *Chapman, Morsons & Co v Guardians of Auckland Union* (1889) 23 QBD 294 at 299. See also *Board v Board* [1919] AC 956 at 962.
- 111 9th ed, 2001 at p552.
- 112 At [23-030].
- 113 [1973] 3 All ER 897 at 899, 900.
- 114 At [1-225].
- 115 6th ed, p13.
- 116 (1992) 108 LQR 652. MGL acknowledge the existence of this article at [23-025], but in effect as a footnote that leads to no revision of the thesis in the text.
- 117 See the cases cited by McDermott at pp661-4.
- 118 See *Todd v Gee* (1810) 17 Ves 273, 34 ER 106.
- 119 P S Atiyah, *The Rise and Fall of Freedom of Contract* (1979) pp392-3.
- 120 McDermott op cit cites Fonblanque, Hovenden, Maddock and an 1832 edition of Bacon's *Abridgment*.
- 121 (1855) 7 De GM & G 722 at 734, 44 ER 280 at 285.
- 122 See McDermott op cit at pp668-9.
- 123 Op cit, pp670-2.
- 124 [1981] AC 1050 at 1081.
- 125 At 1082.
- 126 [1991] 3 SCR 534.
- 127 See esp *McLachlin J* at 545-6, *La Forest J* at 587-8.
- 128 [1981] AC 1050 at 1081.
- 129 (1923) 32 CLR 222 at 246. See also *Minter v Geraghty* (1981) 38 ALR 68 at 80.
- 130 [1914] AC 932.
- 131 See *Robinson v Abbott* (1893) 20 VLR 346.
- 132 [1927] VLR 134.
- 133 Peter M McDermott, *Equitable Damages*, Butterworths, 1994.
- 134 See *Palmer Bruyn & Parker Pty Ltd v Parsons* (2001) 208 CLR 388.
- 135 *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64.
- 136 [1996] 1 AC 421.
- 137 [1995] 2 AC 206.
- 138 See Charles E F Rickett, "Equitable Compensation: Towards a Blueprint?" (2003) 25 Syd L Rev 31.
- 139 At [23-010].
- 140 For example in *Seager v Copydex (No 2)* [1969] 2 All ER 718, *Talbot v General Television Corp Pty Ltd* [1980] VR 224, *Aquaculture Corp v New Zealand Mussel Co Ltd* [1990] 3 NZLR 299, *Attorney-General v Observer Ltd* [1990] 1 AC 109 at 286 and *Wentworth v Woollahra Municipal Council* (1982) 149 CLR 672 at 676.
- 141 See MGL at [2-155]. See also my remarks in Harris at 322[118]-[129].
- 142 See text referable to n 17 above.
- 143 Spigelman CJ did not find it necessary to join Heydon JA in ruling that the Supreme Court of New South Wales lacked power to award exemplary damages for any equitable wrongs. The Chief Justice limited his remarks to breach of fiduciary duties arising in the context of a contractual relationship.

- 144 [1993] AC 713 at 743.
145 (2003) 77 ALJ 30.
146 Anthony J Duggan, "Is Equity Efficient?" (1997) 113 LQR 601 at p602.
147 *Bridgewater v Leahy* (1998) 194 CLR 457, *Tanwar Enterprises Pty Ltd v Cauchi* (2003) 77 ALJR 1853.
148 This probably explains why the Equity traditionalists fight so hard to retain traditional or distinctive labels.
149 *Hawkins v Clayton* (1988) 164 CLR 539.
150 *Dimskal Shipping Co SA v International Transport Workers Federation (the Evia Luck)* [1992] 2 AC 152 at 165, *Roxburgh v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516 at [58], [75], [95], [166], [197].
151 *Tame* at 335[28], 342[58], 361[123].
152 Cf *Rich*.
153 *Cunningham-Reid v Public Trustee* [1944] KB 602, *Armstrong v Commissioner for Stamp Duties* (1967) 69 SR(NSW) 38 at 48, *Burke v LFOT Pty Ltd* (2002) 209 CLR 282 at 299[38].
154 At [10-010].
155 *Daniels Corporation International Pty Ltd v Australian Competition and Consumer Commission* (2002) 213 CLR 543 at 554[13].
156 Cf *Heydon op cit*, p3.
157 See *Commonwealth v Verwayen* (1990) 170 CLR 394 at 412 (Mason CJ), 431-40 (Deane J).
158 *Parker - Tweedale v Dunbar Bank Plc (No 1)* [1991] Ch 12 at 19-20, *Lidden v Composite Buyers Ltd* (1996) 67 FCR 560 (Finn J), *Lamru Pty Ltd v Kation Pty Ltd* (1998) 44 NSWLR 432.
159 (1994) 11 WAR 187.
160 *Re Coomber* [1911] Ch 723 at 728-9 per *Fletcher Moulton LJ*.
161 See *Heydon op cit* suggesting different outcomes in relation to measure of damages, limitation, contribution, contributory negligence, conditionality of remedy, unclean hands, exemplary damages and causation.
162 See *Holdsworth, A History of English Law vol xv pp122-127*.
163 *Priestley JA* pointed out that the "crossover of remedies" is more advanced in the United States than in England or Australia (Hon Mr Justice LJ Priestley, "A Guide to a Comparison of Australian and United States Contract Law" (1989) 12 UNSWLJ 4 at 29).
164 See *Douglas Laycock, "the Triumph of Equity"* (1993) 56 *Law and Contemporary Problems* 54 at p81.
165 *Earl of Oxford's Case* (1615) 1 Ch Rep 1 at 7, 21 ER 485 at 486.
166 Vol 3, chapter 27.
167 (1971) 124 CLR 367 at 392.
168 Rt Hon Justice Tipping, *Causation at Law and in Equity: Do We Have Fusion?* (2000), 7 *Canta LR* 443.

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On Dust And Ashes

ON DUST AND ASHES

AIJA Appellate Judges' Seminar
29-30 April 2004
Sydney

The preparation and delivery of this speech is a metaphor for its topic. I was originally scheduled to speak at the Dust Diseases Tribunal Conference in Pokolbin in December 2002. Bush fires prevented me leaving Sydney. At that stage we were also in the grip of drought and the English cricketers were having a terrible tour. Last December I proposed opening my remarks in the following terms:

To some, my topic may conjure up thoughts of drought and cricket. Our English friends are certainly having a terrible drought. Australia has won the Ashes hands down. One British tabloid proposes a new Ashes trophy with the suggestion that England should let Australia keep the bails and burn the players instead. There are also reports that the English players are demanding increased match payments because someone has let on that Ashes Tests sometimes go to a fourth day.

My chosen topic **On Dust and Ashes** touches on themes of durability and impermanence, constancy and change. After the result of the World Cup Rugby final I have stopped making sporting jokes at England's expense. At least the uncertainty of the weather endures, as does the England-Australian sporting rivalry.

Dust is all around us. It is in the air we breathe and the water we drink. It gets everywhere – in our eyes, up our nose, deep into our lungs.

And in more ways than one it is part of our very essence as human beings.

Billions of tons of tiny particles of dust rise into the air annually – the dust of deserts and volcanos, sea salt, vegetable fragments, fireplace soot, shreds of man-made objects and specs of man himself.

Given the right conditions, dust can hitch a ride on the wind and travel the globe. In April this year, skiers in the Swiss Alps got a dramatic reminder of its mobility when some 80,000 tons of fine sand fell over Geneva and the resorts of Zermatt and Verbier, turning the snow a reddish-brown colour. The sand hailed from the Sahara, thousands of kilometres away.

In August last year the United Nations drew the world's attention to the "brown cloud" hanging over Asia. This is a noxious mix of particles and gases from forest fires, vehicle exhausts and millions of small inefficient cookers burning wood and cattle dung. The pollution is thought to kill thousands a year in the region and is probably disrupting its climate. The Asian "brown cloud" extends to some three kilometres high and stretches from the Arabian Peninsula across India, South East Asia and China. It cuts the amount of sunlight reaching the ground by between 10%-15%, possibly reducing evaporation and rainfall, and affecting crop yields.

Movements of dust definitely affect climate. For example, dirty snow melts faster and dust falling on the ocean cools it. Dust in the stratosphere alters the heat balance of the globe by reflecting sunlight away, cooling the surface, and by reflecting heat rising from the earth back downwards, warming it. This is part of the greenhouse effect.

But scientists believe that the overall effect of dust clouds is that they cool the earth. After the eruption of Mount Pinatubo in the Philippines in 1991, the world cooled by about half a degree celsius over the ensuing 18 months.

It has been estimated that natural sources are the biggest contributor to dust in the air, releasing ten times as much particulate matter into the atmosphere as humans do. The problem is that *"the deadliest particulates are the finest, and we are responsible for pretty much all of them"*[1]. The most dangerous air pollutants include sulphur dioxide, nitrogen dioxide, ozone, carbon monoxide and various

particulates including benzene, aerosols, lead particles and certain petroleum by-products.

You know the extent and cost of the problem much better than me.

During the notorious London smogs of the 1950s, poisonous mixtures of fog and smoke from coal-burning power stations and domestic fires are thought to have killed at least 4,000 people. And as recently as 1991, the number of deaths in London from respiratory disease shot up by 22% during a bad four day smog. Particulate pollution is believed to kill as many as 9,000 in southern California each year.

Dust has made significant contributions to the law. I don't mean just the specialist jurisprudence of the Dust Diseases Tribunal. Dust and dust diseases have produced many of the issues that are at the forefront of the modern law on causation, *forum non conveniens* and limitation of actions.

Litigation involving tobacco dust is pressing the boundaries of the law of negligence. Tobacco goes well beyond tort law. I recently read of a family law case in which a parent was ordered not to smoke in the presence of her child. And the recent case involving Clayton Utz's advice to British Tobacco about "document retention" has opened up whole new fronts in relation to the law of discovery and the impact of document destruction upon substantive rights.

It may be stretching the point, but I would also include the legal concepts of further and better particulars and particulars of title. As you know, particulars are metaphorical particles and particles are dust. (If you think my reference to "particulars" is a bit lame, you will be glad that I decided not to include mention of the author of **Crime and Punishment**, Fyodor D[ust]oyevsky.)

The neophyte barrister that became Gilbert's Lord Chancellor swore never to throw dust in a juryman's eyes. But some barristers are not averse to this stratagem. Others raise storms of confusion unintentionally. Judges also have to be careful. In an oft cited passage, Lord Greene described a judge who takes over the examination of a witness as one who "*descends into the arena [and who] is liable to have his vision clouded by the dust of the conflict*".

"Dust" is a very ancient word in the English language. The Oxford English Dictionary cites Old English usage extending back to the 9th century, meaning (then as now) earth or other solid matter in a minute state of subdivision so that the particles are small and light enough to be carried in a cloud by the wind.

Many figurative meanings have ensued. Thus we speak of "*throwing dust in some one's eyes*", "*biting the dust*" and "*shaking the dust from one's feet*". The last mentioned expression is found in four passages in the New Testament. It may represent a near Eastern custom of Biblical times. Jesus spoke of the action as a solemn sign of repudiation and separation of one who rejected the gospel.

The expression "*waiting until the dust settles*" is obvious in its meaning, but it does suggest that dustiness is a state of normalcy.

In many cultures dust placed on the head is a symbol of mourning or repentance. There are references in the book of Job to this connotation.

A recent book by Hannah Holmes is called **The Secret Life of Dust**. Holmes describes dust as a messenger, full of information about past, present and future. This notion of messenger is graphically illustrated by the Tempel-Tuttle comet. Every 33 years its highly elliptical orbit brings it close to the sun, causing the comet to boil and shoot dust and gas into space. After passing the sun, the comet heads back out beyond the orbit of Uranus with its dust clouds streaming along behind. What is fascinating is that two celestial fireworks shows from the comet that were visible on Earth on 19 November 2002, approximately 7 hours apart, were explosions that happened in 1767 and 1866 respectively.

"Dust" is often used in a figurative sense to describe a corpse and (by transference) the grave or the state of death. Biblical references to this connotation abound. Poetic ones as well. Thus, Gray's famous Elegy Written in a Country Churchyard asks:

*"Can storied urn or animated bust
Back to its mansion call the fleeting breath?
Can honour's voice provoke the silent dust,
Or flattery soothe the dull cold ear of death?"*

The final chapter of **The Secret Life of Dust** is full of interesting material about the way people go about disposing of human remains. The author's bottom line, as it were, is that we never really succeed, whatever method is used. She states:

"A human body is mainly water and bone. Bone is mainly calcium phosphate, plus traces of other elements, including stored pollutants like lead. The watery parts are tinged with carbon and nitrogen, iron and sulfur, chlorine and sodium, and a suite of trace elements from arsenic to zinc. All of these elements, of course, originated in space and were bundled into the planet during the birth of the solar system. They're yours for as long as you live.

But as soon as you die, your borrowed elements start to slip back out of your body, to recirculate. Even people who go in for modern mummification and storage in a stainless-steel pod aren't going to last forever. When the Sun begins to throb like an overtaxed heart, there will be no exceptions to the rule: Dust thou art, and unto dust shalt thou return."

My favourite burial story was told to me by Bret Walker QC's father, who was the rector of the Anglican parish in which I grew up. Ronnie Walker presided at the cremation of a man whose widow rang him up the next day asking how soon she could pick up the ashes. "What's the rush?" he asked. "I want to flush him down the toilet" was her response.

When God said to Adam *"For dust thou art, and unto dust shall thou return"* (Genesis 3:19) he was making more than a scientifically accurate statement. But, before I leave the realm of science, it must follow that, if we return to dust, then at the very least we have the certainty of a random reincarnation. Shakespeare touched on this point when he wrote (in Hamlet iv sc 3):

"A man may fish with the worm that hath eat of a king, and eat of the fish that hath fed off the worm."

Echoing the double meaning in God's description of Adam, Shakespeare made a famous pun in Cymbeline, when he said that

*"Golden lads and girls all must,
As chimney-sweepers, come to dust.*

To some the dust of death is sad and endless. Thus Fitzgerald's Omar Khayyam urges his listeners:

*"Ah, make the most of what we yet may spend,
Before we too into the Dust descend;
Dust into Dust, and under Dust, to lie,
Sans Wine, sans Song, sans Singer, and – sans End!"*

Of course, to many death is only a transition. Thus the sonorous confidence of the Book of Common Prayer:

"We therefore commit his body to the ground; earth to earth, ashes to ashes, dust to dust; in sure and certain hope of the Resurrection to Eternal life."

Henry Wadsworth Longfellow also saw things in a more positive light than Fitzgerald, because he wrote, in A Psalm of Life:

*"Life is real! Life is earnest!
And the grave is not its goal;*

*Dust thou art, to dust returnest,
Was not spoken of the soul."*

The Christian's prayer on Ash Wednesday that is offered before ashes are applied to the penitent's forehead is breathtaking in its presumption as creature addresses Creator:

*Blessed are you, God of all creation,
you have formed us out of the dust of the earth
and breathed into us the breath of life:
may these ashes be to us a sign of our mortality
and penitence, that we may know that it is by your grace
alone that we are restored to eternal life;
through Jesus Christ our Lord and Saviour.*

Death is a milestone, but different views are held as to the existence and nature of the journey beyond. Those of us who believe that men and women are of infinite worth may find support for that belief in Scripture. To me, additional corroboration comes from recognising the essential nature of a dusty human while yet he or she lives.

In his dialogue with Rosencrantz and Guildenstern, Hamlet describes man as "*this quintessence of dust*".

"What a piece of work is a man! How noble in reason! how infinite in faculties! in form and moving, how express and admirable! in action, how like an angel! in apprehension, how like a god! the beauty of the world! the paragon of animals!"

Men and women can be very grubby at times. Yet, their dusty frailty is also the dust of the eternal spark that merits them being described as made in the image of their Creator.

END NOTES

1. John Merefield, **Dust to Dust**, New Scientist 21 September 2002.

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What is wrong with top-down legal reasoning?

WHAT IS WRONG WITH TOP-DOWN LEGAL REASONING?

Justice Keith Mason

Sir Maurice Byers Memorial Lecture
26 February 2004

"Top-down legal reasoning" is not a term of art. In recent years it has become a term of abuse. On my researches, it entered Australian legal discourse in 1996 in the judgment of McHugh J in *McGinty v Western Australia*.^[1]

1996 was also the year in which the High Court delivered judgments in the last two cases argued before it by Sir Maurice Byers QC, *The Wik Peoples v Queensland*^[2] and *Kable v Director of Public Prosecutions (NSW)*.^[3] I had the uncomfortable privilege of being opposed to Maurice in *Kable*. I also had the pleasure of representing a plaintiff in similar interest to his client in the *Political Advertising Case*, his antepenultimate High Court foray.^[4] These three decisions stand as remarkable tributes to his innovative and persuasive advocacy. They also illustrate legitimate judicial creativity that surfaces from time to time in every age. It is practised by all leading jurists however much some of them deny its universality or castigate those who admit it.

Both *Political Advertising* and *Kable* are connected with the topic of my address, although I hasten to add that Maurice was never accused of top-down reasoning - at least not to his face.

As you know (a beguiling preamble much beloved by Maurice), *McGinty* involved a challenge to Western Australian electoral laws that ensured significant disparities in the numbers of voters as between rural and metropolitan regions. The claim of constitutional invalidity was dismissed by a majority of the High Court comprising Brennan CJ, Dawson, McHugh and Gummow JJ. Toohey and Gaudron JJ dissented. Kirby J joined the Court after *McGinty* was argued. One gets the impression from his remarks in the 2003 *Marquet* decision that he would have been a *McGinty* dissenter.^[5]

Each justice in the *McGinty* majority declined to find any constitutional basis for a principle of "equal value" of votes. They accepted the correctness of the *Political Advertising Case*, but regarded its implication of "representative democracy" as too narrow a toehold to support a constitutional proscription against grossly disproportionate electorates.

The *Engineers' Case*^[6] established that Dicey's notion of Parliamentary sovereignty underlay the express grants of legislative power to the Commonwealth Parliament. For a time, it seemed that the *Engineers'* juggernaut would carry all before it, with its emphasis upon the plain meaning of the constitutional text and its rejection of federal or other unstated limitations upon the powers of the Commonwealth Parliament. But, as you know, Sir Owen Dixon found implied limitations in various areas. The most notable and enduring were to be the principles expounded in *Melbourne Corporation v Commonwealth* ^[7] a modified version of which was applied very recently in *Austin v Commonwealth*.^[8]

Those who thought that the list of constitutional implications had closed (like the canon of scripture) upon the death of Sir Owen Dixon were surprised, even angered, by the discovery of another implied limitation upon Commonwealth legislative power, in the *Political Advertising Case*. The Samuel Griffith Society put the case on its blacklist, along with *Mabo* and other post-Dixonian heresies.

Mason CJ uttered pure orthodoxy in the *Political Advertising Case*, when, citing Dixon J, he said:^[9]

It is essential to keep steadily in mind the critical difference between an implication and an unexpressed assumption upon which the framers proceeded in drafting the Constitution. The former is a term or concept which inheres in the instrument and as such operates as part of the instrument, whereas an assumption stands outside the instrument. Thus, the founders assumed that the Senate

would protect the States but in the result it did not do so. On the other hand, the principle of responsible government ... is not merely an assumption upon which the actual provisions are based; it is an integral element in the Constitution.

In *Political Advertising*, this integral element of responsible government was held to have given rise to a secondary implication that a right of freedom of political speech was necessary to ensure that elected governments would continue to be responsible through Parliament to the people of Australia.

The four justices in the majority in *Political Advertising* (Mason CJ, Deane, Toohey and Gaudron JJ) held that the free speech right was an implication from the doctrine of representative or responsible government. The secondary implication was drawn because freedom of communication was indispensable to the efficacy of such a system of government.[10] This is the implication that attracted the hostile attention of the critics.

In *Political Advertising*, Mason CJ suggested a distinction between textual and structural implications when he said:[11]

It may not be right to say that no implication will be made unless it is necessary. In cases where the implication is sought to be derived from the actual terms of the Constitution it may be sufficient that the relevant intention is manifested according to the accepted principles of interpretation. However, where the implication is structural rather than textual it is no doubt correct to say that the term sought to be implied must be logically or practically necessary for the preservation of the integrity of that structure.

Brennan CJ[12] and McHugh J[13] cited this passage with approval in *McGinty*. Dawson J doubted the helpfulness of Mason CJ's distinction between textual and structural implications, but endorsed implications so long as they were necessary to accommodate the text of the Constitution.[14]

The *McGinty* majority included the three justices who dissented or partially dissented in the *Political Advertising* case (ie Brennan, Dawson and McHugh JJ). In *McGinty*, their Honours accepted the correctness of the earlier decision, but were at pains to construe its ratio narrowly. I imply no criticism by this observation. This is common law method at its purest.

McHugh J was not one of the majority in *Political Advertising* who had declared Part IIID of the Broadcasting Act 1942 (Cth) wholly invalid. His Honour would have struck much of it down, but for reasons considerably narrower than those adopted by Mason CJ, Deane, Toohey and Gaudron JJ. When, in *McGinty*, McHugh J addressed the ratio decidendi of *Political Advertising* he therefore had the difficult task of describing a recent decision that bound the Court of which he was a member, but that rested upon reasoning with which he disagreed. The epiphany of the joint judgment in *Lange v Australian Broadcasting Corporation*[15] lay yet in the future.

I have already indicated that McHugh J endorsed Mason CJ's test in *Political Advertising* for deriving constitutional implications. But he drew a sharp line of disagreement with two other justices who had, with Mason CJ and Gaudron J, formed the majority in that case. He said:[16] However, I cannot accept, as Deane and Toohey JJ held in *Nationwide News Pty Ltd v Wills*, that a constitutional implication can arise from a particular doctrine that "underlies the Constitution". Underlying or overarching doctrines may explain or illuminate the meaning of the text or structure of the Constitution but such doctrines are not independent sources of the powers, authorities, immunities and obligations conferred by the Constitution. Top-down reasoning is not a legitimate method of interpreting the Constitution. ... [A]fter the decision of this Court in the *Engineers' Case*, the Court had consistently held, prior to *Nationwide News* and [*Political Advertising*], that it is not legitimate to construe the Constitution by reference to political principles or theories that are not anchored in the text of the Constitution or are not necessary implications from its structure.

Gummow J endorsed these remarks when he said that:[17]

... as McHugh J explains in his judgment, the process of constitutional interpretation by which the principle [of an implied constitutional freedom of political discussion] was derived (being an implication at a secondary level), and the nature of the implication ... departed from previously accepted methods of constitutional interpretation.

Brennan CJ[18] and Dawson J[19] were also critical of attempts to find any content in the concept of "representative democracy" from sources outside the text and structure of the Constitution itself.

I should say at the outset that, in my respectful view, McHugh J did less than justice to his two former colleagues. In the passage that he cited, Deane and Toohey JJ had referred to doctrines "which underlie the Constitution and form part of its structure" (emphasis added).[20] Furthermore, they had instanced the doctrine of representative government, which was a primary implication accepted by the entire McGinty Court. It is also unclear why McHugh J said nothing about Gaudron J's judgment in Political Advertising. Gaudron J recognised explicitly that "fundamental constitutional doctrines" could be assumed in the Constitution[21] and she included the common law as the source of revelation about the constitutional importance of free speech.[22]

There was a time when Sir Owen Dixon's views about s92 of the Constitution were contrary to the trend of existing authority. In this context he once remarked that:[23]

It is better that I should not attempt any restatement for myself of the principles upon which the decisions rest. Probably my grasp of those principles is imperfect and, as a rule, it is neither safe nor useful for a mind that denies the correctness of reasoning to proceed to expound its meaning and implications.

We may be unsure whether Sir Owen's humility was feigned, but we know for certain that these remarks were an early gambit in a quest by that great jurist to persuade his brethren to overturn existing orthodoxy on s92 of the Constitution. In this, Dixon would succeed entirely - for a time.

I have digressed, and I cannot for the life of me think why Sir Owen's observation occurred to me in the context of discussing McHugh J's critique of Political Advertising in McGinty, to which I return.

Sir Maurice's argument in Political Advertising, that the Court adopted, had invoked orthodox statements about necessary implications in aid of beguiling submissions that led the Court into the previously uncharted waters of a constitutional guarantee of freedom of speech. His final submission, as reported in the Commonwealth Law Reports, contended that "in a democracy the right to freedom of speech is part of the fabric of society. There cannot be democracy if the voters are gagged and blindfolded." [24] This appeal to principles external to the text and structure of the Constitution left the justices wide leeways of choice as to the means whereby they might bridge the gap between assumption and implication.

The concept of "top-down reasoning" proscribed by McHugh J in McGinty had been identified by Judge Richard Posner. In a frequently cited article,[25] to which McHugh J referred, Posner explained top-down and bottom-up reasoning as follows:

In top-down reasoning, the judge or other legal analyst invents or adopts a theory about an area of law - perhaps about all law - and uses it to organise, criticise, accept or reject, explain or explain away, distinguish or amplify the existing decisions to make them conform to the theory and generate an outcome in each new case as it arises that will be consistent with the theory and with the canonical cases, that is, the cases accepted as authoritative within the theory. The theory need not be, perhaps never can be, drawn "from" law; it surely need not be articulated in lawyers' jargon. In bottom-up reasoning, which encompasses such familiar lawyers' techniques as "plain meaning" and "reasoning by analogy", one starts with the words of a statute or other enactment, or with a case or a mass of cases, and moves from there - but doesn't move far, as we shall see. The top-downer and the bottom-upper do not meet.

Posner pointed out that legal reasoning from the bottom up was the "more familiar, even the more hallowed, type". But, as we shall see, he was critical of bottom-up reasoning as a genuine explanation of what happens, and he strongly endorsed the inevitability and legitimacy of top-down reasoning.[26]

Sir Maurice's advocacy was an appeal to top-down reasoning by these criteria. A political principle or theory about the importance of free speech was said to be an assumption necessarily underlying the constitutional concept of responsible government, reflected in the common law's support for free speech.

Soon after McGinty, anathemas against any form of constitutional top-down reasoning entered the currency.

McHugh J was not being complimentary when, in *Gould v Brown*, the Commonwealth Solicitor General's argument in favour of the validity of the cross-vesting scheme was described as involving "a lot of top-down reasoning".[27]

But just as quickly, it emerged that the charge could be hurled from different quarters. One year after McGinty, during argument in *Ha v New South Wales*,[28] a submission supporting the broader view of "excise" in the Constitution as including a tax on distribution was castigated by Dawson J in the following terms:[29]

The majority judgment in *Capital Duplicators* simply asserts that... what was achieved was a customs union and then it asserts that was an economic union and from that it asserts that it was the purpose of that union to secure control over commodities and the taxing of commodities to the Commonwealth, but it is a perfect example of top down reasoning that we have been talking of before. A customs union is not an integrated economy.

The *Capital Duplicators* majority railed against by Dawson J included Brennan and McHugh JJ (admittedly in the dangerous company of Mason CJ and Deane J). But the real villain in Sir Daryl Dawson's sights was Dixon. Constitutional reasoning that moved from the idea of an Australian customs union, to an integrated economy, to "excise" being a tax on distribution came directly from the observations of Dixon J in *Parton v Milk Board (Vic)*. [30]

When the Solicitor General for the Commonwealth, Mr Griffith QC argued in support of the broader view of "excise", there was the following exchange:

DAWSON J: That is top-down reasoning and you have no basis on which to support it except the assumption that Sir Owen Dixon made.

MR GRIFFITH: Your Honour, our submission is it is not top-down reasoning. It is based on the words of the Constitution itself.

DAWSON J: That is to make an assumption as to their meaning.

The Dixonian view was to prevail in *Ha's Case*, albeit that what Dixon J had asserted was now underpinned by historical references, including references to the Convention Debates that the Dixon Court never openly admitted to consulting. I respectfully share Dawson J's view about this being a species of top-down reasoning, but (in light of the decision in *Ha*) am simply content to add *Ha* to the list of cases showing that top-down reasoning is not bad root and branch.

If you read the key passages from *Parton*, *Capital Duplicators* and *Ha* you may, I think, be forced to acknowledge the following three propositions:

- (A) Top-down reasoning is part and parcel of constitutional discourse and has always been so;
- (B) A top-down argument consistent with the text and structure of the Constitution may take legitimate root if adopted by an authoritative jurist or in a leading precedent; and
- (C) Constitutional reasoning that invokes assumptions is facilitated by reference to common law cases and the modern practice of referring to Convention Debates and historical materials.

Dixon J once warned against confusing "the unexpressed assumptions upon which the framers of the [Constitution] supposedly proceeded with the expressed meaning of [a constitutional] power".[31] But this was a warning against sloppy thinking, not a command to disregard all assumptions.

There is a famous passage in Dixon J's judgment in the *Communist Party Case*. [32] Speaking of the power in s51(xxxix) to make laws with respect to "matters incidental to the execution of any power vested by this Constitution in ... the Government of the Commonwealth", Sir Owen said:

The power is ancillary or incidental to sustaining or carrying on government. Moreover, it is government under the Constitution and that is an instrument framed in accordance with many traditional conceptions, to some of which it gives effect, as, for example, in separating judicial power from other functions of government, others of which are simply assumed. Among these I think that it may fairly be said that the rule of law forms an assumption.

The passage has been frequently cited, most notably in *Cheatle v The Queen*,^[33] where the unanimous Court pointed out that:

It is well settled that the interpretation of a constitution such as ours is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of the common law's history.

I repeat, Dixon J said there are constitutional conceptions some of which are "simply assumed". The rule of law is one such assumption. Dixon mentioned two others in his paper on *The Law and the Constitution*,^[34] namely parliamentary sovereignty and the supremacy of the Crown as a formal concept. He wrote:^[35]

The fundamental conceptions, which a legal system embodies or expresses, are seldom grasped or understood in their entirety at the time when their actual influence is greatest. They are abstract ideas usually arrived at by generalization and developed by analysis. Sometimes indeed they are but instinctive assumptions of which at the time few or none were aware. But afterwards they may be seen as definite principles contained within the ideas which provided the ground of action. Further, when such conceptions have once taken root they seldom disappear. They persist long after the conditions in which they originated have gone. They enter into combinations with other conceptions and contribute to the construction of new systems of law and of government.

This surely is authoritative recognition of top-down constitutional reasoning.

Like many bedrock principles, the concept of the rule of law is protean. To recognise that it lies behind the Constitution leaves much room for movement (including further leeway for top-down reasoning). It is therefore perhaps unsurprising that McHugh and Gummow JJ recently observed that:^[36]

In Australia, the observance by decision-makers of the limits within which they are constrained by the Constitution and by statutes and subsidiary laws validly made is an aspect of the rule of law under the Constitution. It may be said that the rule of law reflects values concerned in general terms with abuse of power by the executive and legislative branches of government. But it would be going much further to give those values an immediate normative operation in applying the Constitution.

Yet an "immediate normative operation" is surely the horse that bolted in the much-lauded Communist Party Case. Top-down theories that gain judicial acceptance cannot easily be returned to their stable or bridled.

Those who have struggled to frame an instrument hope that the hard won final text will cover all eventualities. But the best-drawn contracts, statutes and constitutions may throw up unconsidered issues. Close examination of text and context may reveal clear answers, but not always. Gaps in private contracts redound to the disadvantage of those who would enforce them. It is not so easy with statutes and constitutions that are framed as enduring instruments of governance. The language may be opaque and the area of application may become more and more removed from the original context with the passing of time. But the judicial imperative to find a workable meaning is necessarily stronger with such instruments.

Sir Owen Dixon wrote to Chief Justice Latham in 1937 suggesting that:^[37]

In [s92] cases relating to transport ... I think it is almost clear that we must proceed by arbitrary methods. No doubt there will be limits but political and economic consideration will guide the instinct of the court chiefly. In time the thing will work back to some principle or doctrine.

This surely was a call to road-test theories lying outside the constitutional text and structure in order to check their consistency, with a view to adoption if accepted by the Court as an institution. It is a thousand miles away from a search for strictly necessary implications. It is driven by the unavoidable judicial function of resolving justiciable disputes in relation to a working instrument of government. In short, this was further recognition of an appropriate role for top-down reasoning.

McHugh J's anathema in *McGinty* stated that "underlying or overarching doctrines... are not independent sources of the powers, authorities, immunities and obligations conferred by the Constitution". Since he did so in the context of criticising Deane and Toohey JJ for finding that a constitutional implication could arise from a particular doctrine that "underlies the Constitution", it

seems reasonable to add "implications" to the concepts that McHugh J said could never be sourced in underlying or overarching doctrines. I do not think that this view can stand in light of Sir Owen Dixon's compelling analysis and the case law to which I have made reference.

To that case law I would add the Political Advertising Case itself. The High Court unanimously endorsed its legitimacy in *Lange*, albeit underpinned by different reasoning that seems to track McHugh J's approach rather than that of the majority in the earlier case. The constitutional implication of free speech is now grounded in the interstices of the phrase "directly chosen by the people"[38] as much as in the structural concept of responsible government. But I venture to suggest that the top-down theories based upon the desirability of free speech are still quite visible. There is discussion in *Lange* about communications between electors and representatives being "central to the system of representative government, as it was understood at federation".[39] I submitted earlier that resort to history and common law are at times the way of pointing to the assumptions of the framers of the Constitution before moving quickly to finding a necessary implication. There is still a leap beyond logic - an entirely legitimate leap in my respectful view - from words such as "directly elected" to the free speech implication.

The relevant part of the joint judgment in *Lange* concludes with the following statement:[40]
To the extent that the requirement of freedom of communication is an implication drawn from ss7, 24, 64, 128 and related sections of the Constitution, the implication can validly extend only so far as is necessary to give effect to these sections. Although some statements in the earlier cases might be thought to suggest otherwise, when they are properly understood, they should be seen as purporting to give effect only to what is inherent in the text and structure of the Constitution.

This obliquely acknowledges that the ratio of *Political Advertising* has been completely reworked. But it does not, in my most respectful submission, reveal the processes whereby the free speech implication is found to inhere in the text and structure of the Constitution.

Something more is still at work. I dare not repeat its name.

The list of underlying or overarching principles that may come to bear upon constitutional issues will not be a large one. Any that do emerge will have to be hammered out through the dialectic, collegiate processes of decision-making in the High Court. Some ideas will surface and be rejected, others will be refined over time. Those that achieve acceptance will have been tested in the fire and beaten thin like gold. Hopefully the debate will take place without sloganeering about judicial activism or attacks ad hominem or ad feminam.

One likely contender for a constitutional assumption that will develop into a constitutional implication is a rule for resolving inconsistencies between the statute laws of different States where they clash at the margin.[41]

I come now to *Kable's Case*. Sir Maurice's submission about the Community Protection Act 1994 (NSW) not being a law at all was rejected. So too was a submission that a Boilermakers-style separation of powers was part of the New South Wales constitutional polity.

It was Maurice's third argument that succeeded. Its major premise was the proposition that State courts had to be kept pure vessels to receive invested federal judicial power. Its minor premise was that the 1994 Act sullied the Supreme Court of New South Wales by requiring it to exercise jurisdiction that would lower public confidence in the integrity of the judiciary.

I am only concerned with identifying the type of reasoning adopted in support of the major premise. In what follows, I imply no criticism of the premise itself.

In *Kable*, Sir Maurice cited the very passage from Dixon J's judgment in *Australian Communist Party* to which reference has already been made. He argued that the rule of law required that a citizen may only suffer loss of liberty upon conviction of an offence. From this, he moved to Chapter III's scheme for investing Commonwealth judicial power in State courts, arguing that no legislature, State or federal, might impose jurisdiction on State courts incompatible with the potential exercise of that federal judicial power.[42]

This argument prevailed at least as regards State Supreme Courts, and with some refinements.

The Constitution's express terms provided for what Gaudron J described as "an integrated Australian judicial system for the exercise of the judicial power of the Commonwealth".[43] This is found in the very text of Chapter III, so it was (with respect) an easy, though novel, step to imply the pure vessel requirement for State Supreme Courts.

But whence came the secondary implication that courts (State or Federal) in an integrated system are constitutionally required to conduct themselves in a manner consistent with "traditional judicial process"[44] lest they bring justice itself into disrepute? These are important and commendable values and I am not for a minute criticising anyone for taking them into account. Much of the burgeoning Chapter III jurisprudence proceeds from a similar proposition. My point is that this commendable notion is an assumption standing outside the constitutional text and structure. It is a principle about how judges ought to conduct themselves, how the common law sometimes required them to act and historically how they usually conducted themselves around the time that the Constitution was formed.

In *Chu Kheng Lim v The Minister for Immigration, Local Government and Ethnic Affairs*[45] Brennan, Deane and Dawson JJ said that the legislative power of the Commonwealth does not extend: ... to the making of a law which requires or authorizes the courts in which the judicial power of the Commonwealth is exclusively vested to exercise judicial power in a manner which is inconsistent with the essential character of a court or with the nature of judicial power.

In recent times there have been many statements by High Court justices to similar effect, some of them identifying particular matters as constituting essential characteristics of the judicial process that Parliament may not infringe.[46]

But these now constitutional desiderata are not to be found in the text or structure of the Constitution. They are not nestling inside the meaning of words like "court" or "matter". Nor are they implications that are logically or practically necessary for the preservation of the integrity of the constitutional structure.[47] One can readily point to constitutional democracies that function without the underpinning of the entrenched principles of our growing Chapter III jurisprudence.

In my opinion, this Chapter III jurisprudence should be recognised for what it is, a species of top-down reasoning that has received legitimate acceptance through the time-honoured processes of constitutional litigation.

Recently, in *Roxburgh v Rothmans of Pall Mall Australia Ltd*[48] Gummow J cited with approval McHugh J's hostile reference to top-down reasoning in *McGinty*. Gummow J applied it outside the realm of constitutional law, when cautioning against judicial acceptance of "any" all-embracing theory of restitutionary rights and remedies founded upon a notion of "unjust enrichment". Gummow J continued:

To the lawyer whose mind has been moulded by civilian influences, the theory may come first, and the source of the theory may be the writing of jurists not the decisions of judges. However, that is not the way in which a system based on case law develops; over time, general principle is derived from judicial decisions upon particular instances, not the other way around.

This is not the place for me to engage in debate about the concept of unjust enrichment. On the particular issue, I content myself with the observation that the varieties of restitutionary theory deriving from the case-based scholarship of jurists like Goff & Jones, Birks and Burrows are as entitled to compete for acceptance in the judicial market-place as property-based theories, or theories based upon unconscionability, or theories that strive to maintain at all costs the separate integrity of Equity (with a capital-E).

Some scholars distinguish between "high theory" and "middle theory", using the latter as a description of a construct that is "case-law-focussed".[49] Presumably Gummow J had the former in his sights. I suggest, however, that the difference is only one of degree. No one in the real world of judicial decision-making seeks to make everything "all tidy and four-square like the Marx brother who took shears to the bits of clothes which stuck out of his suitcase", to use a telling phrase of Professor Tony Weir.[50] Conversely, there can be nothing wrong per se in using a theoretical construct to criticise a precedent that does not fit: this happens frequently in appellate advocacy and decision-making.

We need theories for road maps or hypotheses and for deciding whether an existing authority is to be applied, distinguished or overruled. Even the professed incrementalist is confronted with deciding what is "an increment too far".[51] Like Monsieur Jourdain and prose, we judges may be ignorant of any or all of the theories that shape our reasoning, but we are truly ignorant if we deny their existence. We look to scholars like Salmond, Fleming, Treitel, Birks and Stapleton to map out structures for understanding fields of law or the essence of particular causes of action. As with the grand summaries of our greatest jurists (for example Dixon J's exposition of estoppel), these theories help explain the jumble of existing case law. They also point the way towards orthodox developments and offer guidance in knowing when to distinguish or overrule apparent departures from orthodoxy.

Such assistance is prized in the modern era where "legal coherence" is valued highly.[52] Naturally, we must guard against theories turning into a dogma that may "tend to generate new fictions in order to retain support for its thesis", as Gummow J put it in Roxburgh.[53] But this problem should not be exaggerated. I suspect that all theories used by judges as working tools have exceptions and qualifications.

I do most firmly join issue with Gummow J's suggested antipathy between "civilian" theory-based discourse on the one hand and the "case law" system on the other; implying that it is a mark of the latter that general principle is always derived from judicial decisions upon particular instances.

Posner's famous article demonstrated roles for top-down and bottom-up reasoning outside the realm of constitutional interpretation. But a categorical assertion about top-down theoretical reasoning being alien to bottom-up common law method is as startling as it is at variance with Posner's views.

I do not suggest for a moment that Gummow J represented his views as consonant with Posner. Only Posner's definition of "top-down reasoning" was cited. But I do respectfully submit that Gummow J's dichotomy is a startling misdescription of what happens day in and day out in the High Court of Australia, and on red letter days in inferior Australian courts.

I start by explaining Posner's thesis in a little more detail.

Posner gives as examples of familiar and hallowed bottom-up reasoning the principle that interpretation of a statute must start from its words, and the technique of reasoning by analogy from decided cases. But Posner wrote that "there isn't much to bottom-up reasoning" and he was highly critical of those who see the top-down and bottom-up approaches as dichotomous.

Unlike McHugh J, Judge Posner did not condemn top-down reasoning.

For Posner, decided cases might offer material for creating or testing a theory about a field of law. But without a theoretical template to view them or to know when an analogy is close and legitimate they are no more than decided cases. In his words: "But there must be a theory. You can't just go from case to case, not responsibly anyway."

Thus, constitutional and textual interpretation will involve suppositions or theories about original intent, legislators' intent, stare decisis, the role of context, the relevance of international norms, presumptions against overturning deeply-held values of the common law etc etc etc. Judges must work through these and many other issues when addressing disputes presented for resolution.

It is no different in the realm of case law. To say that *Donoghue v Stevenson*[54] is canonical tells you little about when and how its principles are to be applied in later cases. And when another major planet enters the solar system (*Hedley Byrne & Co v Heller & Partners*[55] for instance), we need theories and techniques to know how to respond. The answer may differ between England and Australia, because different forces may be at work. How these are discerned and applied by judges involves techniques at the highest levels of abstraction, ie theories.

In Posner's words, "bottom-up reasoning is not reasoning but is at best preparatory to reasoning ... legal reasoning worthy of the name inescapably involves the creation of theories to guide decision". Posner listed examples of top-down theories associated with well-known scholars, including one or two of his own. He naturally acknowledged the contestability of all theories.

Unlike scholars, judges tend not to enunciate the theoretical underpinnings of their judicial worldview. We are simply too busy deciding cases to step back and contemplate the broader patterns that underlie our words and actions. And we are reluctant to offer a broadside to scholars and other jurists

unless it is really necessary. Some of us get snippets of time during sabbaticals to pursue studies in particular areas. We may open windows that show bigger pictures that help shape our understanding of the daily task. On these occasions some of us may range over wide fields of law or legal theory. For others, refreshing and occasionally useful insights may come through religious studies, history, the philosophy of the mind or probability theory.

We judges, and those whom we serve, are (I believe) the better for these glimpses into a world that is broader than the law viewed as a closed circle of self-referential ideas. That world is a reality that impacts upon the law at its every step. Why should we turn it away at the door for fear that it may enter our deliberations from the top down?

Some big picture ideas are plain wacky and others may be irrelevant or harmful to legal discourse within the confines of the judicial oath. But not all. All ideas, theories and concepts must be contestable and available for scrutiny in accordance with the processes of judicial accountability to which all are subject in differing ways.

My concern is with those who deny the universality and legitimacy of "top-down" reasoning that is part of the common law tradition. I am not advocating a role for the judicial superman (or woman) who does nothing but bring extra-legal theories or concepts into legal discourse. I have yet to meet such a character. He or she is in the class of the unicorn, as non-existent as the legal purist who is said to bring nothing to the task but a high judicial technique that finds everything within the four corners of a revealed but closed canon of legal scripture.

Top-down and bottom-up reasoning are not converse ways of approaching a single problem. As Posner puts it, "top-downer and bottom-upper do not meet". Rather, the two concepts seek to capture clusters of different types of legal reasoning each of which is widely practised by everyone (including those who sometimes profess denial). If you don't believe me, I suggest that you read Kirby J's "I told you so" in dialogue with some of his more legalistic brethren in the footnotes to his reasons in *Cattanach v Melchior*.

Some types of top down reasoning are illegitimate and their very method of introduction offends orthodox judicial method. Philosophies and concepts that flaunt established principle, or that are applied by individual judges in the teeth of existing authority or the plain text of statutes or constitutions must be rejected. But that is because they are poor theories, or conflict with binding precedent, or fail to gain judicial acceptance. It is not because they may originate in academic writings, or decisions from overseas legal systems, or the insight of an individual judge.

Theories may, in Posner's words, be invented or adopted. Some can be traced to their birthplace which may be a single judge or an academic writer. None, I suggest, can truly be described as "deriv [ing] from judicial decisions upon particular instances, not the other way around", as if the two were mutually exclusive.

Lord Atkin had the parable of the Good Samaritan as much as the existing case law in mind when he enunciated the morality-based neighbour principle that turned much of the earlier law on its head.[56] Lord Wright imported an exotic plant into English jurisprudence when he introduced the principles of the American Restatement of Restitution.[57] This was a grand top-down theory (of still debatable content) that would displace the implied contract theory of quasi-contract and may yet do further damage to inherited certainties.[58] Many ideas have entered the common law when a judge picked up a theory from an academic article, road-tested it and ran with it.

My difficulty with Gummow J's description of judicial method is that it offers a false dichotomy and presents only half the picture.

The last 30 years has been an era in which the High Court has generally welcomed the insights of comparative law, international law, academic theory, social history, moral discourse etc etc etc. Read the judgment of Gleeson CJ in *Cattanach* for an instance where all of these factors are brought into focus in addressing a novel legal issue. But even for less exotic topics than the one considered in *Cattanach*, the connections and disconnections between existing precedents within our judicial system are often perceived "top-down" through such lenses. It is obviously true to say that general principles derive from existing judicial decisions. But that is only part of the picture. Other factors are at work, from the top-down as it were. They may provide the tools for "deriving" principles from existing case law. They may assist in "prioritising" conflicting decisions or introducing or spurning legal ideas from abroad. Top-down theories (of the finest kind) are the usual spur for a major shift in legal reasoning.

Let me illustrate by two examples drawn from the recent law of negligence.

Thirty years ago the leading courts in Australia and England treated causation issues as questions of fact to be answered with no more than a hearty dose of robust common sense. How things have changed. In *March v E & MH Stramare Pty Ltd*,^[59] Mason CJ said that the "but for" test, applied as an exclusive criterion of causation, "yields unacceptable results and ... the results which it yields must be tempered by the making of value judgments and the infusion of policy considerations". Today, even this profound acknowledgement is just the signpost to further pathways for approaching causation issues in a principled (ie theory-based) manner. In the last decade you can hardly read an appellate decision on the topic that fails to acknowledge the insights of Professor Jane Stapleton. Many of her views stem from pure philosophy mediated to lawyers through Hart & Honore's *Causation in the Law*. Of course, Stapleton has worked with the caselaw, but in a highly critical manner. Theories have been tested against the decided cases. The decided cases have been tested against the theories. In turn, Stapleton's constructs have been tested and applied (to a degree) by the High Court and the intermediate appellate courts.

This judicial reception is top-down reasoning of the highest legitimacy.

My second example relates to concepts that have simply been introduced over the top of existing precedent because of what Holmes described as the "felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, even the prejudices which judges share with their fellow men".^[60]

A lawyer who gave advice today about the law of negligence by reference to principles derived from High Court decisions when Sir Gerard Brennan was Chief Justice would be an easy target in a professional negligence claim. There have been tremendous changes over the last decade. For example, the notion of general reliance has been rejected. Some justices of the High Court now pay open regard to the availability and cost of insurance as a factor relevant to imposition of a duty of care.^[61] There is much emphasis upon taking responsibility for one's own actions, so much so that it is now built into the duty of care owed to footpath pedestrians.^[62] Categories of strict liability are disappearing. Non-delegable duties are harder to find. The seismic shifts have not all been in the one direction, as Brodie and Tame demonstrate.

I am not concerned to debate whether these trends show that the earlier law was wrong. That is an irrelevant question for anyone who is not a member of the High Court. For everyone operating in the law below the High Court, what that Court said was right in 1984 was right in 1984 and what it says is right in 2004 is right in 2004.

My point is that these dramatic swings of the negligence pendulum didn't just emerge by deductive reasoning from the earlier case law. If this were the whole story, one would not expect to see the violent shifts that are now the norm in tort law. Policy issues crop up frequently - and I don't mean just the "policy of the law" found in the reports of decided cases.^[63] Several extra-legal policy factors have entered the recent law of tort from the top-down.^[64]

In my submission, these changes have been the product of entirely legitimate species of top-down reasoning adopted by the High Court. They were derived from much more than reading earlier precedents. In *Tame's Case*, the learning from psychiatry and the philosopher's call of coherence were too strong for old distinctions to hold. The enthusiastic judicial reception of the notion of taking care for one's own safety reflects a public mood of impatience against the culture of ambulance-chasing and blaming, as well as concern about the prohibitive cost of state-run and private insurance. It will be obvious that I imply no criticism of the judicial method that has influenced these fundamental shifts in tort law. I refrain from suggesting that they are instances of judicial "activism" that is widely-applauded, but only because "judicial activism" is an overworked cliché that lies mainly in the eye of the beholder.

Judges must listen to counsel and each other. And they must bow to superior judicial authorities and the ineluctable texts of statutes and constitutions. A judge who, in Posner's words, "invents or adopts a theory about an area of law" will always have an uphill battle to achieve its acceptance. No single jurist, not even a Dixon urged on by a Byers, can work in isolation or free of the constraints of judicial method.

To revert to Holmes, "we have too little theory in the law rather than too much".^[65] Theories are

essential, including those introduced from outside local case-law. There is nothing wrong with theories, even grand theories. They must of course gain acceptance through the proper exercise of judicial power, ultimately by the High Court of Australia.

In the final analysis, the justices of the High Court will decide what theories bear upon the structures of the law from time to time. They are the keepers at the gate that leads to and from the vast world of ideas. It would be sadly misleading if they saw themselves as no more than guardians within an enclosed cave.[66]

1 (1996) 186 CLR 140.

2 (1996) 187 CLR 1.

3 (1996) 189 CLR 51.

4 Australian Capital Television Pty Ltd v The Commonwealth; New South Wales v The Commonwealth (1992) 177 CLR 106.

5 See Attorney-General (WA) v Marquet [2003] HCA 67, 202 ALR 233 at [160]-[164]. He observed at [104] (ruefully?) that no attempt was made to reopen the holding on the constitutional implications decided in McGinty.

6 Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (1920) 28 CLR 129.

7 (1947) 74 CLR 31.

8 (2003) 77 ALJR 491.

9 (1992) 177 CLR 106 at 135. Mason CJ cited Dixon J in Australian National Airways Pty Ltd v The Commonwealth (1945) 71 CLR 29 at 81 in support of the first sentence.

10 (1992) 177 CLR 106 at 138-40 per Mason CJ, at 168 per Deane and Toohey JJ (who incorporated their reasons in Nationwide News Pty Ltd v Wills (1992) 177 CLR 1 at 72-75), at 208-214 Gaudron J.

11 (1992) 177 CLR 106 at 135.

12 (1996) 186 CLR 140 at 168-9.

13 Ibid at 231.

14 Ibid at 184-5.

15 (1997) 189 CLR 520.

16 McGinty v Western Australia (1996) 186 CLR 140 at 231-2, footnotes omitted.

17 Ibid at 291.

18 Ibid at 169-71.

19 Ibid at 184-5.

20 Nationwide News Pty Ltd v Wills (1992) 177 CLR 1 at 70.

21 (1992) 177 CLR 106 at 209). Gaudron J cited Australian Communist Party v The Commonwealth (1951) 83 CLR 1 at 193 per Dixon J, a passage discussed below.

22 (1992) 177 CLR 106 at 211-212.

23 Riverina Transport Pty Ltd v Victoria (1937) 57 CLR 327 at 362-3.

24 177 CLR 106 at 123.

25 Richard A Posner, "Legal Reasoning from the Top down and from the Bottom Up: The Question of Unenumerated Constitutional Rights" (1992) 59 U Chi L Rev 433. A revised version appears as a chapter in Posner's *Overcoming Law*, 1995 Harvard University Press.

26 Cf McHugh J's footnote in McGinty at 232 (247).

27 Transcript 8 April 1997.

28 (1997) 189 CLR 465.

29 Transcript 11 March 1997.

30 (1949) 80 CLR 229 at 260. See *Capital Duplicators Pty Ltd v Australian Capital Territory (No 2)* (1993) 178 CLR 561 at 585-7.

31 Australian National Airways Pty Ltd v The Commonwealth (1945) 71 CLR 29 at 81, cited by Dawson J in McGinty at 184. See also n9 above.

32 Australian Communist Party v Commonwealth (1951) 83 CLR 1 at 193.

33 (1993) 177 CLR 541 at 552.

34 Reproduced in *Jesting Pilate*, 1965 Law Book Company pp38-9, 42.

35 Ibid at p38.

36 *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 77 ALJR 699, 195 ALR 502 at [72].

37 Letter 1 June 1937. Quoted by Bennett, *Keystone of the Federal Arch* p67.

38 Constitution, s24.

39 *Lange* at 560 per curiam.

40 (1997) 189 CLR 520 at 567.

41 See *Port MacDonnell Professional Fisherman's Association Inc v South Australia* (1989) 168 CLR 340 at 374, *Pearce v The Queen* (1998) 194 CLR 610 at 630, *Lipohar v The Queen* (1999) 200 CLR 485 at 553-4.

42 189 CLR at 54-55, 61-62.

43 Ibid at 102.

44 Ibid at 98 per Toohey J.

45 (1992) 176 CLR 1 at 27. See also per Gaudron J at 55, per McHugh J at 68.

46 See eg *Nicholas v The Queen* (1998) 193 CLR 173 at 185 [13]-[14] per Brennan CJ, 208 [73] per Gaudron J, 220-221 [112] per McHugh J, 232 [146] per Gummow J. See generally, Justice McHugh, "Does Chapter III of the Constitution protect substantive as well as procedural rights?" (2001) 21 *Aust Bar Rev* 235 esp at 237-241, The Hon JJ Spigelman AC, "The Truth can cost too much: The principle of a fair trial" (2004) 78 *ALJ* 29 esp at pp32-33.

47 Cf the passage cited at fn 11 above.

48 (2001) 208 CLR 516 at 544.

49 See Jane Stapleton, "Comparative Economic Loss: Lessons from Case-law-focussed 'middle theory'" 50 *UCLA Law Review* 531 (2002).

50 Tony Weir, Book Review of *An Analysis of the Economic Torts* (2002) 118 *LQR* 164 at 165, quoted by Stapleton, op cit p580.

51 The phrase is that of Beldam LJ in *Barrett v Ministry of Defence* [1995] 3 *All ER* 87 at 95.

52 See *Sullivan v Moody* (2001) 207 CLR 562, *Cattanach v Melchior* (2003) 199 *ALR* 131 at [35] (Gleeson CJ).

53 (2001) 208 CLR 516 at 545 [74].

54 [1932] AC 562.

55 [1964] AC 465.

56 See Geoffrey Lewis, Lord Atkin, *Butterworths* 1983 pp57-8.

57 See *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32 at 61-64. The Restatement was published in 1937.

58 See Justice Keith Mason, "Where has Australian restitution law got to and where is it going?" (2003) 77 *ALJ* 358.

59 (1991) 171 CLR 506 at 516.

60 Holmes, *the Common Law*, 1881, Little Brown & Co, p1.

61 See *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords* (1997) 188 CLR 241 at 282-3 (McHugh J), *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at 595-6 (Kirby J), *New South Wales v Lepore* (2003) 195 *ALR* 412 at 424-5 [36] (Gleeson CJ).

62 *Brodie* at 581 [163].

63 Cf *Cattanach* at [73]-[75] per McHugh and Gummow JJ.

64 See generally D A Ipp, "Policy and the swing of the negligence pendulum" (2003) 77 *ALJ* 732.

65 Oliver Wendell Holmes, "The Path of the Law" 10 *Harv L Rev* 457 at p476 (1897).

66 I am indebted to Michael Coper, David Ipp and Leslie Katz for their suggestions about earlier drafts. I also acknowledge the research assistance of Michael Rehberg and Tim Breakspear.

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Recurring Issues in the Court of Appeal

RECURRING ISSUES IN THE COURT OF APPEAL

District Court Judges Conference

2 April 2002

*Justice Keith Mason
President, Court of Appeal*

CAUSATION

Betts v Wittingslowe (1945) 71 CLR 637 at 649 “... the breach of duty coupled with an accident of the kind that might thereby be caused is enough to justify an inference in the absence of any sufficient reason to the contrary that in fact the accident did occur owing to the act or omission amounting to the breach of [statutory] duty ...”.

Bendix Mintex Pty Ltd v Barnes (1997) 42 NSWLR 307

Chappel v Hart (1998) 195 CLR 232 at 239, 247-8, 257, 273 (shifting evidentiary onus - breach)

Naxakis v Western General Hospital (1999) 197 CLR 269 at 279, 296, 312

State of NSW v Broune [2000] NSWCA 3 (unlit stairway - adult education class at high school – open to infer probable link to jarring as last step missed)

Muller v Lalic [2000] NSWCA 50 (chain of causation not necessarily broken by act of plaintiff or third party which constitutes more immediate cause (***Medlin v SGIC***))

AMP v RTA [2001] NSWCA 186, ATR ¶81-619 (suicide as result of depression stemming from adverse reaction to cross-examination – general discussion about causation)

TC v State of NSW [2001] NSWCA 380 (negligence by omission – causation – onus of proof – shift of evidentiary onus)

CONTRACT

Construction and formation

Magill v National Australia Bank [2001] NSWCA 221 at [50]-[51] (post contractual dealings irrelevant to meaning of contract as distinct from issue whether contract formed)

Brambles Holdings Ltd v Bathurst City Council [2001] NSWCA 61 at [24]-[27] (relevance of pre- and post- contractual conduct to contract formation and meaning)

Objective theory: Objective circumstances determine existence and terms of contract

Pobjie Agencies v Vinidex Tubemakers [2000] NSWCA 115 (objective evidence governs unless proof that **all** parties intended subjectively not to enter into contract (cf **Air Great Lakes Pty Ltd v KS Easter Pty Ltd** (1985) 2 NSWLR 309) – contract may be inferred from conduct)

Brambles Holdings Ltd (supra)

See also **Ermogenous v Greek Orthodox Community of SA Inc** [2002] HCA 8 at [25]

COSTS

Bullock/Sanderson orders

Generally unsuccessful D must have contributed to P's decision to sue Ds in alternative

Gould v Vaggelas (1985) 157 CLR 215 at 229

RTA v Snape [1999] NSWCA 47

Almeida v Universal Dye Works Pty Ltd & Ors (No.2) [2001] NSWCA 156 at [32]ff

Calderbank, Evidence Act, S131(2)(h)

SMEC Testing Services Pty Ltd v Campbelltown City Council [2000] NSWCA 323

Rolls Royce Industrial Power (Pacific) Ltd v James Hardie & Co [2001] NSWCA 461 (filing of cross claim after Calderbank Letter, costs of contribution if successful on X-claim:)

Indemnity costs, when ordered

Arian v Nguyen [2001] NSWCA 5 (lpp AJA)

Successful party, when deprived of costs or ordered to pay opponent's costs

Arian v Nguyen (supra)

Unaccepted costs offers

Morgan v Johnson (1998) 44 NSWLR 578 (Pt 39A's costs allocations to be applied or cogent reasons given)

Melville v Tadros [1999] NSWCA 162 (limited relevance of litigant being unrepresented)

DAMAGES**Aggravated**

Grey v Motor Accidents Commission (1998) 196 CLR 1 at 4 (aggravated and exemplary damages distinguished)

Hunter Area Health Service v Marchlewski (2000) 51 NSWLR 268 (aggravated damages are compensatory; (*obiter*) no aggravated damages for negligence)

Tan v Benkovic (2000) 51 NSWLR 292 at [35] (claim for aggravated damages should be pleaded/particularised: aggravated damages not to overlap compensatory damages)

Compensation to relatives

RTA v Cremona [2001] NSWCA 338 (general principles re damages assessment (including remarriage prospects) stated at [43]ff, [71]ff – widow's lost superannuation entitlements at [96]ff)

Axiak v Pezzano [2002] NSWCA 338 at [139]ff (percentage of dependency table, private school fees, cost of child care)

Contingencies

RTA v Cremona [2001] NSWCA 338 at [139]ff

Exemplary

Grey v Motor Accidents Commission (supra)

Tan v Benkovic (supra) (need to be contumelious disregard of Plt's rights)

Adams v Kennedy (2000) 49 NSWLR 78
(police officers - false arrest)

(Special leave refused 4.5.2001, on basis that State did not dispute its vicarious liability)

Griffiths v Kerkemeyer**RTA v Lolomania** [2001] NSWCA 268**Interest on past losses****RTA v Cremona** [2001] NSWCA 338 at [146]ff**Professional negligence**see **PROFESSIONAL NEGLIGENCE DAMAGES****DOUBLE SATISFACTION****General rule against double compensation****Thompson v Australian Capital Television Pty Ltd** (1996) 186 CLR 574 at 608 (Gummow J)**Franklins Self Serve Pty Ltd v Wyber** (1999) 48 NSWLR 249**Baxter v Obacelo Pty Ltd** [2001] HCA 66, 76 ALJR 114 (where P settled claim against D1 and then pursues D2)**Rooty Hill Medical Centre v Gunther** [2002] NSWCA 60 (absent agreement, (expert) evidence required re value of **WC Act** weekly benefits)**WC Act, s151Z****Franklins Self Serve Pty Ltd v Wyber** (supra)**Hampic Pty Ltd v Adams** NSWCA 455, (2000) ATPR [1999] ¶41-737 (extends to actions for breach of statutory duty: **Leonard v Smith** (1992) 27 NSWLR 5 to be followed)**Leighton Contractors Pty Ltd v Smith** [2000] NSWCA 55 (**Leonard v Smith** to be followed)**State of New South Wales v Kennelly** [2001] NSWCA 71 (S151z (2) does not have reference to s5(1)(c) of LR(MP) Act or principles of contribution at common law or equity: operation of subsection discussed)**ECONOMIC LOSS DAMAGES IN PERSONAL INJURIES****Do the best you can principle****State of NSW v Moss** [2000] NSWCA 133

Evidence of comparable earnings (whether essential)

State of NSW v Moss (supra) (Heydon JA) (difficulty of assessment and absence of evidence of comparable earnings not necessarily fatal for plaintiff)

Global or “cushion” awards

Arrowsmith v Haines CA 21.8.90

McDougall v Cullen CA 29.3.95

Armitage v Haines [1999] NSWCA 141 at [39]

Hunter Area Health Service v Marchlewski (2000) 51 NSWLR 292 at [54]

Husband/wife partnerships for income splitting

Husher v Husher (1999) 197 CLR 138 (important that H had legal capacity to terminate partnership at will)

Conley v Minahan [1999] NSWCA 432

Loss of earning capacity: general

Norris v Blake (1997) 41 NSWLR 49 at 63-73

Retirement age

Rooke v Tagaloa [2000] NSWCA 228

Bridge Printery Pty Ltd v Mestre [1999] NSWCA 342 (no fixed rule of 65: caution in accepting hypothetical evidence of injured P)

Vicissitudes

State of NSW v Moss (supra)

ESTOPPEL**Interlocutory rulings**

Nominal Defendant v Manning (2000) 50 NSWLR 139
- but repeated applications may be abuse of process. **Manning**
does not give **entitlement** to multiple applications (see cases under
LIMITATION OF ACTIONS, Multiple applications)

Issue estoppel

Tiufino v Warland (2000) 50 NSWLR 104 (breach issue
determined in earlier property case binding in later personal injury
case)

EVIDENCE**Expert witness**

Makita (Australia) Pty Ltd v Sprowles [2001] NSWCA 305 (expert must provide criteria enabling evaluation – basal facts must be proved although they need not correspond with complete precision)

JUDICIAL METHOD**Admissions have great probative value: can undermine case of apparently credible witness**

Voulis v Kozary (1975) 180 CLR 177 at 193

Carian v Elton (2000) 31 MVR 421; [2000] NSWCA 175 at [15]

Bourke v MacNeil [2000] NSWCA 144 at [238] (medical histories)

Delay in delivery of judgment

Hadid v Redpath [2001] NSWCA 416 at [29]ff

Expert witnesses

Barbosa v Di Meglio [1999] NSWCA 307 (“argumentative” experts should be judged on the strength of their arguments)

Observing what happens in court (procedural fairness)

Government Insurance Office of NSW v Bailey (1992) 27 NSWLR 304

Kassem v Crossley [2000] NSWCA 276

Presumption of continuance

- always depends on facts
- wrong to require “unequivocal evidence” to displace it.

Swinburne v NSW Insurance Ministerial Corporation CA 27.10.1997

Carian v Elton (supra)

Reasons (exposing)

Maynard v Dabinett [1999] NSWCA 296 at [15]-[18] (Giles JA)

Beale v GIO (1997) 48 NSWLR 430

Bar-Mordecai v Rotman [2000] NSWCA 123 at 211-212 (no need to discuss every hopeless point)

Hadid v Redpath [2001] NSWCA 416 (explanation of preference between key witnesses necessary)

Reasons (altering)

Todorovic v Moussa [2001] NSWCA 419 at [41]ff (material alteration after judgment is not permissible - critical finding re credibility added)

Trial by ambush

Nowlan v Marson Transport Pty Ltd [2001] NSWCA 346 at [21]ff

LIMITATION OF ACTIONS

Economic loss claims (when cause of action arises)

Scarcella v Lettice (2000) 51 NSWLR 302 at 306

Applications for extension

(i) General principles

Brisbane South Regional Health Authority v Taylor (1997) 186 CLR 541

Jones v Royal Hospital for Women CA 24.7.98 (principles summarised)

Milperra Marketing Pty Ltd & Ors v Bayliss [2001] NSWCA 315 (evidence of no prejudice cannot be dismissed by general principles of presumptive prejudice (arising from 20 year old records) and speculation as to difficulty)

Itek Graphix Pty Ltd v Elliott [2001] NSWCA 442 (extensive review by Ipp AJA at [45]ff of cases under s52(4) **MA Act** and s151D(2) **WC Act** – discussion of rationales for limitation statutes – deliberate decision to let period expire a powerful adverse factor)

Yu v Speirs [2001] NSWCA 373 (not just and reasonable to extend time in light of no prima facie case – level of evidence to show viable cause of action)

Nowlan v Marson Transport Pty Ltd [2001] NSWCA 346 (no trial by ambush – capacity of doctors to express causation opinion re past matters)

Parsons v Doukas (2001) 52 NSWLR 162 (restating **Holt v Wynter**: absence of prejudice not conclusive)

(ii) Multiple applications

Nominal Defendant v Manning (2000) 50 NSWLR 139, (2000) 31 MVR 524

- **Manning** does not mean that second judge is bound to allow rehearing: repeated applications may be abuse of process (**Planet Build (NSW) Pty Ltd v Lassgol Pty Ltd** [2001] NSWCA 48, **Grant v Rafferty** [2001] NSWCA 244, **Telstra Corp Ltd v Rea** [2002] NSWCA 49 at [22])

Gladesville RSL Club Ltd v Bartsch (1998) 44 NSWLR 674 (previously extended period is “relevant limitation period” for s60I)

Edmondson Memorial Club v Bartsch [1999] NSWCA 348 (order may be varied or rescinded)

(iii) **Limitation Act 1969, ss60G, 60I [causes of action accruing before 1990]**

**Don't weigh prejudice.
Plaintiff has onus.
Fair trial is the key
Actual and General (presumptive) prejudice)**

Dow Corning Australia Pty Ltd v Paton CA 24.4.1998

Australian Croatian Cultural Association v Benkovic [1999] NSWCA 210

South Western Sydney Area Health Service v Gabriel & Anor [2001] NSWCA 477

Commonwealth of Australia v Nelson [2001] NSWCA 443 (whether P was aware or ought to have been aware of "nature and extent of injury" – PTSD – whether "just and reasonable" to extend time)

Telstra Corporation Ltd v Rea [2002] NSWCA 49 (s60I is concerned with what actual P knew or ought to have known)

(iv) **Limitation Act 1969, s60C** (cause of action accruing on or after 1 September 1990)

Sydney City Council v Zegarac (1998) 47 NSWLR 195 (apply criteria set out in s60E(1) - relevance of prejudice discussed - plaintiff's evidentiary and persuasive onus)

Schering-Plough Pty Ltd v Page [2002] NSWCA 4 (inadequate reasons fatal, s. 60 E particulars – extension set aside)

Malone v NSW National Parks and Wildlife Service [2001] NSWCA 345 s. 151 D(2) **Workers Comp Act**

(v) **Motor Accidents Act, s52(4)**

Holt v Wynter (2000) 49 NSWLR 128

Seib v Morton [2000] NSWCA 139, (2000) 31 MVR 488

Astill v Newman [1999] NSWCA 43, (1999) 28 MVR 561 (persuasive onus)

Huckel v Norris [2001] NSWCA 301 (restating ***Holt v Wynter***)

Itek Graphix (supra)

(vi) **Workers Compensation Act s151A**

Uniting Church in Australia Property Trust v Lea [2002] NSWCA 55 (loss of material witness caused material prejudice rendering trial unfair – rationales for limitation bars – onus of persuasion remains on applicant)

MEDICAL NEGLIGENCE

Failure to warn (*Rogers v Whittaker*)***O'Brien v Wheeler*** CA 23.5.98***Chappel v Hart*** (1998) 195 CLR 232 at 246, 272-3 (caution in accepting P's hypothetical reconstruction)***Johnson v Biggs*** [2000] NSWCA 338 at [45], [87]***Bourke v MacNeil*** [2000] NSWCA 144***Rosenberg v Percival (2001) 75 ALJR 734***
(*Rogers v Whittaker* re affirmed - Duty to warn of material risk inherent in proposed treatment -materiality). *would P have undergone procedure if warned?*

Subjective test but probabilities critical

a) likelihood of happening

b) seriousness of outcome

c) pressure to relieve existing condition

Gleeson CJ at [14]

Alirezai v Smith [2001] NSWCA 60

(risk of failure and of detrimental outcome)

Damages and causationSee also **CAUSATION** (supra)***Rosenberg*** (doubts re ***Chappel*** being treated as loss of chance case)***Chappel*** at 239, 247-8, 257, 278 (reasoning from breach to causation)***Shed v Hooley*** [2000] NSWCA 362 (likely prognosis pre-operation to be taken into account)**Medical histories contrary to plaintiff's current claims*****Bourke*** (supra)**MOTOR ACCIDENTS ACT****Duty to give details before suing (s50A(d))*****Atikulla v Sefton*** [2001] NSWCA 385 (proceedings may be dismissed in part if breach)

Interest on damages (s73(4))

Tran v GIO (2001) 51 NSWLR 733

NEGLIGENCE (GENERAL)**Carrier's duty of care to intoxicated passenger**

State Rail Authority v Schodel [2001] NSWCA 394

Criminal conduct of third parties, when duty to protect against

Modbury Triangle Shopping Centre Pty Ltd v Anzil (2000) 176 ALR 411 (HC)

Oxlade v Gosbridge Pty Ltd CA 18.12.98 (no general duty unless hotelier knows or ought to know of facts requiring intervention - difficult causation issues)

Guildford Rugby League Football Club v Coad [2001] NSWCA 139, ATR ¶81-623 (hotelier's failure to evict brawlers or to provide security guards – causation)

Ashrafi Persian Trading Co Pty Ltd t/a Roslyn Gardens Motor Inn & Anor v Ashrafinia [2001] NSWCA 243 (sleeper in motel bashed by person reaching through narrow gap - duty only arises in exceptional cases)

Duty of care

Trustees of RC Church v Kondrajian [2001] NSWCA 308 (school playground games)

Desmond v Cullen [2001] NSWCA 238 (hotel licensee's duty to patron – causation)

McDonald v State of NSW [2001] NSWCA 303, ATR ¶81-620 (duty owed by State to public officers)

Reynolds v Katoomba RSL [2001] NSWCA 234, ATR ¶81-624 (duty to gamblers)

Employer's duty of care to employees

Connors v Simplot Pty Ltd [2001] NSWCA 205

Boral Transport Pty Ltd v Whitehead [2001] NSWCA 395
(general discussion at [42]ff, including duty to skilled employee)

Professional negligence, standard of care

Heydon v NRMA Ltd (2001) 51 NSWLR 1

Voluntary assumption of risk

Canterbury Municipal Council v Taylor [2002] NSWCA 24 at [144]-[147] (principles re defence)

OCCUPIER'S LIABILITY

Generally Judge Sidis, “Ramping up occupiers’ liability” in (2001) 4 Butterworths Direct Link No 8

Jones v Bartlett (2000) 75 ALJR 1, 176 ALR 137

Wilkinson v Law Courts [2001] NSWCA 196 (occupier of public building – steps without handrails – duty does not require occupier to make premises as safe as reasonable care can make them)

Marrickville MC v Moustafa [2001] NSWCA 372 (interrelationship of duty, breach, damages causation – object buried in park later used to cause explosion)

Causation

Franklins Ltd v Hunter CA 1.5.98

Oxlade v Gosbridge Pty Ltd CA 18.12.98 at pp9-10 (circumstances in which it is permissible to reason from breach to causation)

Guildford Rugby League Football Club v Coad [2001] NSWCA 139

State Rail Authority of NSW v Schadel [2001] NSWCA 394 intoxicated person walking into train.

Marrickville Municipal Council v Moustafa [2001] NSWCA 372 foreseeability question relating to duty.

Commercial premises

Franklins Selfserve Pty Ltd v Bozinovska CA 14.10.98 (supermarkets - duty to take reasonable care has regard to assumption that entrants will exercise some care for own safety - causation where absence of hypothetical warning sign)

Buttita v Strathfield Municipal Council [2001] NSWCA 365 (“Golf courses are not nurseries” – some dangers speak for themselves)

David Jones v Bates [2001] NSWCA 233 (duty is reasonable care, not whether safety could be improved)

SRA v Madden [2001] NSWCA 252, ATR¶ 81-629 (child injured on escalator at station)

Evidence

Makita (Australia) Pty Ltd v Sprowles [2001] NSWCA 305 (expert evidence re slipperiness of stairs)

Landlord’s duty to tenant’s visitors

Assaf v Kostrevski CA 30.9.98 (visitor suffers electric shock while attempting to rig extension light in laundry with defective ceiling light)

Jones v Bartlett (2000) 176 ALR 137 (HC)

Limited duty to protect against criminal acts of third parties

See **NEGLIGENCE (GENERAL)****“Occupier”**

State of New South Wales v Broune [2000] NSWCA 3 (there may be shared occupation)

Parks and public places

Waverley Council v Lodge [2001] NSWCA 439 (Council’s control of rock pool cannot be assumed – when failure to erect warning signs re obvious risks is negligent)

Marrickville MC v Moustafa (supra)

State of New South Wales v Steed [2001] NSWCA 178 (school grounds – lawful entrant – dangerous activities contrasted at [47]ff)

Residential premises

Stannous v Graham (1994) Aust Torts Rep ¶81-293

Ordukaya v Hicks [2000] NSWCA 180

Australian Postal Corporation v Gallard [2000] NSWCA 316

Drotem Pty Ltd v Manning [2000] NSWCA 320 (distinction between public commercial premises and residential premises discussed)

Trespasser

Coffs Harbour City Council v Backman [2001] NSWCA 202, (2001) ATR ¶81-614

PROCEDURE**Discharging jury (s79A)**

Germain v Cordina Chicken Farms Pty Ltd [2002] NSWCA 56 (principles stated – need to consider if redirection sufficient)

Dismissal for want of prosecution

Micallef v ICI Australia Operations Pty Ltd [2001] NSWCA 274

Jurisdiction of District Court under s134(1)(h)

Commercial Bank of Australia v Hadfield [2001] NSWCA 440 (mortgagor’s claim for “damages” for wrongful exercise of power of sale fell within s134(1)(h) – discussion about DC’s equitable jurisdiction)

No case submissions

Hunt v Watkins (2000) 49 NSWLR 508

Pleadings

Kirby v Sanderson Motors Pty Ltd [2002] NSWCA 44 (material facts plus causes of action to be identified (Pt 5 r6A))

Security for costs

Philips Electronics Australia Ltd v Matthews [2002] (CAV – whether Pt 40 categories are exclusive for natural persons – possible independent operation of s156)

Transfer of proceedings to Supreme Court

KBRV Resort Operations Pty Ltd v Chilcott (2001) 51 NSWLR 516

PROFESSIONAL NEGLIGENCE DAMAGES

Assessing damages in cases involving solicitors negligence and Limitations Act

Phillips v Bisley CA 18.3.97

Damages not to be assessed as if breach of warranty

Thomas v Adam [2000] NSWCA 127 (solicitor)

Tan v Benkovic (2000) 51 NSWLR 292 (doctor)

Solicitor-negligence in conveyancing transaction

Thomas v Adam [2000] NSWCA 127

PSYCHIATRIC INJURY

Aggravated damages inappropriate in claim based on pure psychiatric injury (“nervous shock”)

Hunter Area Health Service v Marchlewski (2000) 51 NSWLR 268

Duty of care

FAI Insurance Co Ltd v Lucre (2000) 50 NSWLR 261 (no immediate victim exclusion, but “mere bystanders” still different unless within LR(MP) Act 1944)

Morgan v Tame (2000) 49 NSWLR 21 (absent actual knowledge of particular susceptibility, duty to avoid pure psychiatric injury only owed to person of “normal fortitude” - sudden affront (“shock”) still generally necessary - PTSD discussed) (HC has heard appeal)

State of New South Wales v Seedsman [2000] NSWCA 119 (duty to employee - “shock” not required)

Gifford v Strang Patrick Stevedoring Pty Ltd (2001) 51 NSWLR 606 (**WC Act 1987**, s151P merely limits damages and does not displace other limits on recovery – actual perception of accident or aftermath – normal grieving response excluded)

Motor Accidents Compensation Act 1997, s141 (s77 of MAA)

Hoinville-Wiggins v Connelly [1999] NSWCA 263 (non-relative needs to be “present at the scene” at time of accident)

Physical injury leading to psychiatric injury

Kavanagh v Akhtar (1998) 45 NSWLR 588 (general rules of duty and foreseeability apply)

Worker’s Compensation Act 1987, s151 P

Gifford

TORT (GENERAL)**Joint and concurrent tortfeasors**

Baxter v Obacelo Pty Ltd [2001] HCA 66, 76 ALJR 114

Non delegable duty of care

Lepore v State of New South Wales [2001] NSWCA 112, ATR ¶ 81-609 (High Court has granted special leave)

- Qld CA has not followed it

- cf **Lister v Hesley Hall Ltd** [2001] 2 WLR 1311 (HL) (warden of school boarding house – sexual abuse – vicarious liability)

Vicarious liability

Hollis v Vabu Pty Ltd [2001] HCA 44
(see discussion in Colin Phegan’s paper)

TRADE PRACTICES/FAIR TRADING ACTS**Damages for breach of s52/42**

Auyeung v Chan [1999] NSWCA 417 (misleading conduct - restaurant - downturn of business - causation - damages, how assessed)

VICTIMS COMPENSATION

Victims Compensation Fund Corporation v Ainsworth (2001) 51 NSWLR 466 (aggravation of existing condition – District Court’s jurisdiction (s39(3)(a)) and limited powers (s35(5)(b)))

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Should Judges Speak Out?

Justice Keith Mason
JCA Colloquium, Uluru
9 April 2001

The ambiguous title covers a multitude of sins, or at least challenges:

- Should the judiciary explain and defend itself? If so, is the responsibility joint or several and what are the respective roles of chief and puisne judges?
- When is it permissible for a judge to speak extra-judicially about “controversial”, “political” or “ethical” issues?
- Are there issues where there is an ethical duty to speak out or at least where we should accept and honour the individual judge who does?
- What are the topics that judges should never speak about?
- What protocols should regulate individual speaking out?
- How can constraints be enforced internally?
- What role should the Judicial Conference of Australia play?

The purpose of this session is to stimulate debate. What follows is an amended version of a speech given by me at the Bench and Bar Dinner for the New South Wales Bar in May 2000 which is published in **Bar News**, Spring 2000. My focus is upon the rights and duties of individual judges, but I try to do so having regard to the “public interest” and not just private interest. I also attach a memorandum from Justice David Ipp based upon his experience in South Africa.

Until fairly recently, few doubted or challenged the view that it was the duty of judges always to keep their opinions to themselves and not to speak or write extra-judicially on any matters of controversy. Reference is often made to the so-called Kilmuir Rules. In a letter to the Director General of the BBC written in 1955, the Lord Chancellor had said:

But the overriding consideration ... is the importance of keeping the Judiciary in this country insulated from the controversies of the day. So long as a Judge keeps silent his reputation for wisdom and impartiality remains unassailable: but every utterance which he makes in public, except in the actual performance of his judicial duties, must necessarily bring him within the focus of criticism....

Somewhat sanctimoniously, Lord Kilmuir noted that it would in any event:

...be inappropriate for the Judiciary to be associated with ... anything which could be fairly interpreted as entertainment.

The entertainment that Kilmuir feared was a series of radio lectures about great judges of the past. Little wonder that many of us Scots have a reputation for being killjoys.

Now there were several unstated exceptions to the Kilmuir rules. It hardly comes as a surprise that the Lord Chancellor did not intend to limit his fellow Law Lords from plunging into controversial waters when wearing their legislative hats as members of the British Parliament. Indeed, there are many recent examples of serving Law Lords becoming involved in politically contentious issues. Thus, Lord Taylor of Gosforth, as Lord Chief Justice, supported a controversial Government measure which encroached upon the right of the accused to remain silent. On the other hand, he opposed the introduction of mandatory custodial sentences. Lord Browne-Wilkinson was strongly critical of a Government measure empowering the police to conduct electronic surveillance without a warrant. When Master of the Rolls, Lord Woolf opposed the provision in the **Criminal Justice Bill 1997** for mandatory sentences. For these and other examples, see **JUSTICE, The Judicial Functions of the House of Lords**, 19 May 1999 pp6-7.

But the Kilmuir rules had more problems than the element of double standards. In some respects they were against the public interest, not to say the rights of individual judges as citizens. I do not believe

that they can or should be supported, for reasons which I shall endeavour to explain. In challenging the Kilmuir rules and the defences erected around them I am not calling for anarchy. But I hope to show that this is an area where demolition followed by reconstruction of a different building on firmer foundations will be more productive than harking back to a bygone era in a jurisdiction whose attitude to the separation of powers was somewhat different to ours.

No one questions the right of a judge expressing opinions in an official capacity. Indeed, a judge has a duty to expose his or her true reasons for decision, no matter how unpalatable. The freedom extends to *obiter dicta* and is occasionally used by some judges to question the wisdom of legislation, or official action; and frequently used to criticise antisocial conduct by litigants or their representatives. Many judges who act this way would strongly endorse the Kilmuir principles and see no incongruity in their own conduct even though it may bear on "*controversies of the day*".

Of course, a judge will be accountable on appeal and in the court of public opinion for anything said, whether by a studied judgment or a loose off the cuff remark. And unrestrained utterances may possibly be used as the basis of an application to have the judge removed from office. These exceptions really prove the rule: which is that in a context where judges will be judged for what they say on or off the bench there is a public interest in freedom of speech even though some may abuse the freedom.

Of course, the Kilmuir rules never applied after a judge retired. The much-speaking former judge is now commonplace. Invariably, he will be introduced by reference to his former judicial office. Yet no one treats him as using the office as a springboard or would regard his former court as affected by what he chooses to say. People can tell when someone is speaking in an official capacity.

Another exception to the Kilmuir principle, now widely recognised, is the right of judges, especially Chief Justices, to speak out on matters affecting the interests of the judiciary. (This has coincided with the lapse into silence of most Attorneys General as protectors of the judiciary.) Sometimes these remarks enter troubled waters of current controversy.

A further exception, one that starts to drive a cart and horse through any absolute principle, is the recognised right of a judge to criticise laws or government policies through participation in a law reform commission, as a textbook writer or as the holder of a royal commission. If a judge has something useful to contribute in these areas, then he or she may publish personal views which can be judged on their merits. Of course, those views cannot qualify the judge's sworn duty to uphold current "laws and usages" if the matter arises in a case. Obedience to the law is essential, but obedience and criticism are never confused in these areas. Why should such confusion step in if the subject matter is one of controversy?

I would support the **right** of every judge to contribute to public debate. I am not advocating that we all speak out. Indeed, I would prefer that most of my colleagues would keep their views entirely to themselves, especially those with which I disagree. And if they speak out, I would hope that the arguments would be compelling and appropriately restrained, as befits a judge. But it would not surprise me that I did not approve of everything written or the style in which it is written. That is a small price to pay for an important principle.

Significant contributions to the marketplace of ideas have been made in recent years by serving judges speaking or writing in their private capacities on a range of topics of current political controversy, including an Australian republic, a Bill of Rights, sentencing, drug control and aspects of environmental law. Other judges have done controversial things within broad subsets of society, involving for example churches, environmental matters and the national trust. Some of the judges in each category would subscribe strongly to the Kilmuir Rules, while treating them as inapplicable to what they considered were their own (restrained) political discourse.

Sometimes, for some judges, speaking out may be more than a right, it may be a moral duty, one deserving of praise and encouragement.

In November 1999, Justice James Wood spoke at the Uniting Church, Ashfield on the topic of "Matters of Principle - a Reflection on the Judicial Conscience". He reminded us of brave individual judges who stood out against the majorities and mobs of their day in South Africa and the southern United States. He contrasted those brave spirits with judges who collaborated in Nazi Germany, Eastern Europe and South America by their silent conformity with gross structural injustices. He wrote:

Disgracefully, the judges of Nazi Germany took no collective stand against the removal

from the Bench of their Jewish colleagues, 643 of them in 1933 alone, the passing of the Nuremberg race laws, or the other horrors of this era. The only known occasion on which they collectively stood up to Hitler was when they wrote a letter to him complaining of a proposed alteration in their pension rights.

In similar vein, I append a memorandum from my colleague David Ipp which is based upon his experience and observations as counsel in South Africa.

Not every judge wants to exercise the freedom to be a public commentator. Some maintain that their job is to speak only through their judgments. That is their right. (Indeed it is their duty if they get seriously behind in reserved judgments.) But even reticent judges tend to have non-judicial lives and they choose to speak out on matters that interest them in these venues. Thankfully we are a pluralistic society and free to indulge in our several passions. One person's area of acute concern may be an immense bore for others.

For some people in Australia today aboriginal reconciliation in any form is controversial. On my reading of the Kilmuir principles as expounded by their defenders it would be improper judicial conduct even to show support by attending a public meeting relating to that issue.

Judicial officers need no reminding about the capacity of debate to hammer out truth. But even if truth does not prevail, there are significant public benefits in allowing freedom of discourse. Indeed, it is the unpopular or unfashionable view that may be most deserving of being ventilated and tested with a view to rebuttal or adoption. Sometimes judges have useful contributions to make. Furtherance of these free speech values is a small price to pay for winning at utterances that go over the top.

It is only when a judge says something that is counter-cultural that he or she can expect to receive anything but applause or ennui. The judge who makes a politically correct statement on or off the bench will attract no censure and probably no attention. Of course, attracting attention should never be an end in itself.

Lord Kilmuir's "*controversies of the day*" is more often than not doublespeak for matters which displease the government of the day or the supporters of mainstream political parties, whether in government or opposition. And this really is the rub, because ruling majorities (in politics or public opinion) never like being challenged in their certainties, especially by articulate contenders.

In **Quadrant** (May 2000) the Honourable Athol Moffitt QC wrote defending the Kilmuir principles and strongly criticising one of my colleagues on the New South Wales Court of Appeal for breach of them. It was suggested that a judge is in breach of public duty if he or she expresses a personal view of the merit of any valid law. To describe a law as "unjust" was said to use a judicial term, to confuse the public that the person is speaking as a judge, to breach the separation of powers doctrine, and to mount a direct attack on judicial independence.

With the utmost respect, I strongly disagree. No one has a monopoly to speak about what is "just", nor an absolute duty to refrain from doing so. Listeners and readers are capable of distinguishing between a judge speaking *ex cathedra* and when he or she is expressing personal views unrelated to deciding a case. Mr Moffitt conceded that it was all right for judges to say controversial things **after** retirement, or in secret gatherings where reporters were not present, or in exercise of powers conferred as a royal commissioner. The justification suggested for the lastmentioned privilege was that the royal commission gave the judge "executive authority or justification" to be a critic. The corollary appears to be that the ordinary judge lacks this executive authority to speak his or her mind.

Herein lies the heart of my concern with any variant of the Kilmuir principles and with my distinguished predecessor's views. They are, in my opinion, the very antithesis of judicial and personal independence. In retrospect, it is unfortunate that they were enunciated by a Lord Chancellor and not a Chief Justice. No one's right (or duty) to speak comes by way of permission from the Government or the societal majorities of the day, least of all members of the judiciary. Judicial independence may be a "fragile bastion" that rests upon structures, conventions and practices. Its genuine aspects need constant tending, especially by the judiciary itself.

But judicial independence has nothing to do with quiet subservience to perceived injustice. Independence relies not on a judge's silence out of court but on ensuring that he or she decides cases fairly, according to law, irrespective of political pressure. Surely a person who is a judge is free as a citizen to describe laws as "unjust" without betraying the judicial oath or putting judicial independence at risk.

As with all freedoms, some will speak or write in a manner that others find offensive. Some may succeed in doing so in a manner that all find offensive. But a freedom to speak only as others want you to speak or on topics of their choosing is no freedom at all.

Judges are expected to have calm dispositions. But do we really want them to have no fire in their bellies about anything? Of course any fire in a judge's belly should not colour or give the appearance of colouring decision-making in particular cases.

There are obvious dangers that any judge should take into account before speaking out. The judge may find himself or herself unable to sit in judgment in a matter touching that cause. But it does not follow that the judge who feels passionately about some cause and keeps his or her opinions to himself will avoid the duty of recusal. A secretly biased judge is still a biased judge, if one defines bias as a mind that is or appears incapable of alteration (*Re JRL; Ex parte CJL* (1986) 161 CLR 342 at 352).

When Lord Kilmuir said that "*so long as a Judge keeps silent his reputation for wisdom and impartiality remain unassailable*" he was making almost a direct take from the Book of Proverbs (17:28, KJV) where it is written that:

Even a fool, if he holdeth his peace, is deemed a man of understanding.

Is this really a good reason for making every judge a trappist in all things? If it were, why not extend it to judgments as well, and abolish the requirement to give reasons? Judicial silence doesn't always shore up the reputation for impartiality. Sometimes it causes problems in the opposite direction, as Lord Hoffmann discovered when his undisclosed involvement with a party (Amnesty International) only came to light after he gave judgment in the first *Pinochet Case*.

There is always danger that a person who makes a controversial public utterance will say something foolish or say something wise in a foolish manner. Judges are not immune from this - on or off the bench. A deserved or undeserved reputation for wisdom may suffer and there may be a slight trickle-down effect that makes life uncomfortable for colleagues. But judicial independence produces broad shoulders and we should be able to carry each others burdens in this matter. We may wince when Justice X is reported to have said something outrageous, but more often than not it is because we disagree with the particular sentiment. It is only if we can honestly say that we wince even when something acceptable is said publicly by a serving judge that we can genuinely defend the Kilmuir Rules.

A last resort for those who would silence judges minded to say anything politically controversial is to tell them: "*If you want to speak on these matters you should come down from the Bench and stand for election*". This is a cheap shot because the right of freedom of speech is not the monopoly of the elected or those seeking election. If it were otherwise, then our politicians had a simple method of silencing any criticism from women who dared to speak out before the 20th century, aboriginal people who dared to speak out before 1967 and children who still dare to speak out on any political topic. The simple fact is that many people are too busy doing other useful things to wish to stand for (or in the United States, to run for) political office.

My remarks are themselves controversial. An opposing view is forcefully stated by Mr Justice Thomas in his book, **Judicial Ethics in Australia**. However, I draw comfort from the announcement of Lord Mackay of Clashfern (yet another Scot) in 1987 that the Kilmuir Rules should be abolished in the United Kingdom. His Lordship said:

.... I believe that [judges] should be allowed to decide for themselves what they should do Judges should be free to speak to the press, or television, subject to being able to do so without in any way prejudicing their performing of their judicial work. ... It is not the business of the Government to tell the judges what to do.

I would not want it to be thought that I am encouraging any judge to seek publicity or to see his or her office as a springboard for causes (however worthy). Nor am I suggesting that serving judges have the right to talk about any and every topic. For example, it would be unthinkable that a judge would offer public endorsement to a politician standing for election, or public criticism of the fitness of a colleague

appointed to the Bench. There are obvious “no go areas” and it behoves the judiciary to formulate them. My concern is with the suggestion that judges must never engage in controversy and with the reasons offered for enforced silence.

Controversy causes pain, and the judge who speaks out on anything should weigh anxiously the cost to colleagues and the institution of justice. Sir Anthony Mason reminds us that:

Judicial reticence has much to commend it; it preserves the neutrality of the judge, it shields him or her from controversy, and it deters the more loquacious members of the judiciary from exposing their colleagues to controversy. Judges are not renowned for their sense of public relations.

We all have a number of callings. One of them is to be a humane and moral citizen. For all of us there is “a time to keep silence, and a time to speak” (Ecclesiastes 3:7) and each one of us will enter these times in different ways and on different issues. Our right to do so and the public interest in doing so should be recognised.

I have tended to speak in terms of individual rights and duties. These lie in a state of constructive tension with our individual and collective duties to the institution of the judiciary. While we hold public office our primary obligation is to serve the administration of justice and any private rights (as distinct from duties) that we possess must yield to that overriding obligation. Doyle CJ’s paper, which I have read in draft, lays proper emphasis on this institutional duty. In seeking to stimulate debate I have tried to focus upon the public interest in ridding ourselves of the Kilmuir rules. There is a strong public interest in erecting and enforcing an alternative structure of principles regulating when judges may and may not speak out.

(Attachment to “Should Judges Speak Out” by Justice Mason)

(Some comments by Justice Ipp on what occurred in South Africa)

1. It is to be remembered that the erosion of civil liberties occurred very gradually in South Africa. In 1948, before the Nationalist government took power, there was little difference in the laws and the attitudes of the people to those which you would find in most western countries. Changes in attitudes were gradually effected by propaganda (involving largely appeals to patriotism) and changes in the law. The fundamental proposition was that any person who did not agree with the changes to the laws was not a true patriot and an enemy of the people. Gradually, it became difficult to speak out without being faced with government and community opprobrium.

2. Of course, it is now accepted that in the period from 1948 to about 1990 the laws that were passed in South Africa involved a fundamental negation of human rights. In hindsight, there is now very strong criticism of the judges who failed to speak out at each stage of this gradual process. There are few who disagree with this criticism, although there are some South African judges who defend themselves on the basis that it was not their duty to speak out, it was their duty to apply the law.

3. I shall mention a few examples of the particular changes to the law that might be thought to have played an important role in the gradual evolution from a largely democratic society to one which in many ways was totalitarian.

4. Firstly, there were changes to the law relating to qualification for votes. The coloured people (that is, those of mixed blood ancestry and Malay) were removed from the Common Voters’ Roll. They were allocated (from memory) two or three (white) members who would represent them in Parliament. They no longer had the right to vote for a particular candidate in a particular constituency as the white citizens did. They were thereby substantially disenfranchised. The black citizens were also allocated white members of Parliament to represent their interest. There were only a few of these. The blacks were thereby given no practical vote.

6. The next category of laws that were critical to the establishment of the racist and totalitarian society were those that defined ownership of property and access to particular places and things by reference to colour. A hierarchy of colour was created. From white to Chinese to Indian to Malay to mixed blood to black. The lower one was in the hierarchy the fewer rights one had. The means of determining whether a particular individual fell within one racial group or another were humiliating and degrading.

7. Then there were those laws that concerned the abolition of habeas corpus. Like all the other laws this occurred gradually and was an evolving process. They started off with something called the 90 day detention law. By this law a person arrested on particular offences could be detained without trial for 90 days. The rules applicable to this detention gradually became more oppressive. The persons detained would be kept in solitary confinement without access to other prisoners. Then they were deprived of access to lawyers. Then the whereabouts of their prisons were concealed. Then they were deprived of reading and writing material, soap, clean clothes and the other accoutrements of ordinary life. This was all done by legislative fiat. Then the 90 day period was extended and the police were allowed to re-arrest a prisoner immediately upon expiry of the 90 day period. The result was that the 90 day period became indefinite and prisoners could be kept indefinitely without anyone being able to communicate with them. The courts did nothing and judges said nothing. Everything was done by Act of Parliament.

8. The onus of proof in criminal cases having any political content was changed. This, also, happened very gradually. Firstly, there were only a small category of cases where this was the law. Secondly, the onus was reversed only in regard to particular issues. Gradually this developed so that the reversal of the onus became generally accepted in all categories of cases involving the maintenance of the existing regime and its system. Also, it applied in a most broad ranging way to virtually every issue in each case. The effect was that it became extraordinarily difficult to obtain an acquittal. Severe mandatory sentences were required to be imposed.

9. Finally, another category of laws prevented the courts or anyone else having access to government documents, prevented appeals on fact, and which generally protected executive action from court interference.

10. It is to be emphasised, again, that everyone of these laws came from an act of Parliament. Sections of the press constantly criticised them. This resulted in censorship. Again by Act of Parliament. But everything was lawful (now, some say, the laws should have been disobeyed, as in Nazi Germany).

11. Throughout this period there were certain law faculties, individual academic lawyers, Bars and individual barristers who publicly criticised the laws. Some judges did their best to ameliorate the harshness of the legislation by enlightened judgments. As time went by the public opposition to criticism of the system increased. One academic, Barend Van Niekerk, who was particularly outspoken in his criticism of judges who applied the laws in a mechanical way, was found guilty of contempt of court and sent to prison for a significant period. This had a profound effect on his life.

12. Many lawyers publicly and privately implored judges to speak out extra-judicially. They did not. Most declined to speak out in the course of their judgments. They thought they were duty bound to remain silent. The judges had many opportunities in the course of their judgments to alleviate the laws by way of processes of construction. Some did but most did not.

13. With the recent transformation of South Africa there has been a great deal of criticism of the judges who failed to speak out. This criticism has been accepted, not only by lay people and lawyers but by many of the judges themselves.

14. I went to a conference in Durban in 1993 or 1994 when Sidney Kentridge QC praised the individual barristers and two or three Bars who had continually done their best to oppose the injustices and alleviate the situation. Some judges present who had been amongst those who had vigorously and with enthusiasm applied the laws in question cheered Kentridge's remarks and shouted "Hear Hear".

15. Certainly, at a later stage, from the late 1980's, some judges actively did speak out. They made an enormous difference. They are spoken of with great respect in the country. They include judges such as Didcott J, Goldstone J, Kriegler J and Friedman J. Didcott J spoke out vociferously both extra-judicially and in court. The others were very critical in the course of their judgments. The general consensus of opinion is that they were very important in effecting change, and bringing about a less rigid climate of opinion.

17. Questions have now been asked - What would have happened had judges earlier done what these judges did? At the height of the apartheid regime, that would have been particularly difficult, although possible. It would have been easy, early on, when the gradual evolution began at that stage, less courage would have been required. It was then that the judges were restrained and inhibited only by the view that they were there solely to apply the law. This led, in the end, to an abuse of the law, to an overriding set of unjust laws and to an unjust society.

18. The informed view in South Africa today is that experience has taught that judges are the guardians and custodians of the administration of justice and of human rights generally. They are duty bound to protect and warn society against laws which are fundamentally inimical to a democratic society. In this task, mild inroads into those laws are as important as frontal assaults. It is usually through the mild inroads that an executive conditions the people and gains sufficient strength to make the frontal assaults.

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Unconscious Judicial Prejudice

Keith Mason
Supreme and Federal Courts
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***"We may try to see things as objectively as we please. None the less, we can never see them with any eyes except our own."*[1]**

Our sworn duty is to administer justice according to law, not private whim. We are guardians of a tradition that is not of our own making and we err if we see the law in our own image.

Nearly all of the time our task is to ascertain relevant legal principles and to apply them to the controversy at hand. These principles supply the substance of the law we apply and the procedure by which we administer it. The insights of the Realist school, tinged with pride as we perceive a "fresh" insight, and the ever-present temptations of post-modernism do not free us from the obligation to apply the given corpus of legal principles.[2] Even when performing the exceptional task of determining the law in a "new" area, we are severely restrained by the judicial method. Sitting in public and producing reasons for judgment help ensure that we remain faithful to our goals. Appellate review and majority rule within appellate courts promote conformity. Mistakes in determining legal rules will still occur, but they are usually the product of oversight, not wilful blindness to principle.

In all of these ways we strive for a "government of laws, not of men".

But it is men and women enjoying judicial independence who administer justice, not automata or computers. In many areas judges are given broad discretions, for a variety of reasons. If our legislators wish to guide, inform or limit those discretions they are generally free to do so, but much room for movement is left - often deliberately. Within the rules, judges "have the capacity, and sometimes the obligation, to exercise qualities of judgment, compassion, human understanding and fairness".[3]

In this paper I seek to explore the impact of unconscious prejudice upon judicial decision-making in law and fact. At times I have found the topic as elusive as the "inaudible sound" that is sometimes mentioned in trial transcripts.

JUDICIAL IMPARTIALITY AND NEUTRALITY

Judicial neutrality is a central tenet of the rule of law. Judges are sworn to administer the law without fear, favour, affection or ill will. The right to a fair hearing by an impartial tribunal is a fundamental right guaranteed by numerous Conventions and most Constitutions. The virtues of neutrality and impartiality also serve utilitarian goals, because they promote accuracy of decision-making and reduce enforcement costs through greater public acceptance of decisions. Public confidence depends upon the impartial administration of justice.

"Fundamental to the common law system of adversarial trial is that it is conducted by an independent and impartial tribunal".[4] Indeed, a key object of an adversarial system for deciding justiciable issues is to preserve the neutrality of the tribunal. The essence of adversarial procedure has been identified by Lon Fuller as participation in the decision-making process by the presentation of reasoned proofs by partisans before a neutral umpire.[5]

Many legal principles encourage judicial neutrality. The two branches of the rules of natural justice are prime examples. So too are the law of contempt, many exclusionary rules of evidence, rules against judges descending into the arena, and the duties to sit in public and give reasons.

Where there is proven bias or even the appearance of bias, a judicial decision will be set aside. Subject to waiver or necessity, decisions made by judges in circumstances where a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the

resolution of the question will be set aside.[6]

This is all familiar territory. The difficult task I have been set goes further because duties of neutrality and impartiality are concerned with more than avoiding the appearance of bias or even the risk of actual bias being found.[7] And we are going beyond compliance with external yardsticks like the rules of evidence, procedural fairness and the like, however much those yardsticks promote impartiality.

At this Conference last year, David Ipp informed us of the controversy that erupted in Canada over remarks of L'Heureux-Dube and McLachlin JJ in *R v RDS*[8] where they distinguished judicial impartiality and judicial neutrality.[9] A Youth Court judge in Nova Scotia had acquitted a (black) youth on charges of assaulting a (white) police officer. The judge (Corinne Sparks) was the only black judge in Nova Scotia. In her extempore reasons acquitting the accused and in response to the prosecution's submission "why would he lie?", the judge observed that "police officers have been known to [mislead the court] in the past" and that "certainly police officers do overreact, particularly when they are dealing with non-white groups". The question whether she should have disqualified herself was debated all the way up to the Supreme Court of Canada.

Three dissenting justices in the Supreme Court (Lamer CJ, Sopinka and Major JJ) concluded that the judge's comments stereotyped all police officers as liars and racists and applied the stereotype to the officer in the present case. This was impermissible propensity reasoning that was not based on evidence relating it to the officer in question. It was reasoning about police officers that was "no more legitimate than the stereotyping of women, children or minorities".[10]

The majority in the Supreme Court rejected the claim of reasonable apprehension of bias, but their reasons diverged sharply. Two members of the majority (Cory J, with whom Iacobucci J agreed) thought the remarks unfortunate and very close to the line, but concluded that they did not give rise to a reasonable apprehension of bias when read in context. The five judges I have mentioned in this and the preceding paragraph agreed that Judge Sparks' "life experience" was not a substitute for evidence in the matter at hand, ie determining the veracity of the particular police officer allegedly assaulted.

L'Heureux-Dube and McLachlin JJ (with whom Gonthier J and La Forest J agreed) saw nothing wrong with the trial judge's approach to her task. In explaining their reasons, they distinguished between judicial impartiality and judicial neutrality. They said that "while judges can never be neutral, in the sense of purely objective, they can and must strive for impartiality". The test for reasonable apprehension of bias recognized "as inevitable and appropriate that the differing experiences of judges assist them in their decision-making process and will be reflected in their judgments, so long as those experiences are relevant to the cases, are not based on inappropriate stereotypes, and do not prevent a fair and just determination of the cases based on the facts in evidence".[11]

These justices stated that the hypothetical reasonable bystander would recognise and understand that "triers of fact will be properly influenced in their deliberations by their individual perspectives on the world in which the events in dispute in the courtroom took place. Indeed, judges must rely on their background knowledge in fulfilling their adjudicative function".

Unlike David Ipp, my impression is that the views expressed in *RDS* are not that far apart and that the differences are partly semantic. The furore that the case created was the product of its facts and would not have occurred if the trial judge's suppositions had related to a less sensitive area. The real points of disagreement seemed to lie in (1) the application of the doctrine of judicial notice to racism and police conduct in Canadian society; and (2) the impropriety of trial judges deciding credibility issues by reference to generalisations about how classes of people behave.[12]

As I read the joint judgment of L'Heureux-Dube and McLachlin JJ, judicial neutrality and judicial impartiality are distinguished because neutrality is seen as a human impossibility. Be that as it may, six of the justices in *RDS*[13] endorsed the following statement of the Canadian Judicial Council:[14] ... [T]he need for neutrality of attitude and expression ... does not mean that a judge does not, or cannot bring to the bench many existing sympathies, antipathies or attitudes. There is no human being who is not the product of every social experience, every process of education, and every human contact with those with whom we share the planet. Indeed, even if it were possible, a judge free of this heritage of past experience would probably lack the very qualities of humanity required of a judge. Rather, the wisdom required of a judge is to recognise, consciously allow for, and perhaps to question, all the baggage of past attitudes and sympathies that fellow citizens are free to carry, untested, to the grave.

True impartiality does not require that the judge have no sympathies or opinions; it requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind.

Much more controversial was the extra-judicial suggestion of L'Heureux-Dube that:[15] Judges should not aspire to neutrality. When judges have the opportunity to recognize inequalities in society, and then to make those inequalities legally relevant to the disputes before them in order to achieve a just result, then they should do so.

Such an aspiration becomes debatable if it is taken outside of a context, like Canada, where broad equality rights are constitutionally entrenched.[16] It is one thing to recognise human differences in outlook, experience and vulnerability and to apply such perception in the neutral application of legal rules. It is another to see the judicial function as directly concerned with reversing inequalities except when there is a clear pre-existing mandate. We are to do right to all manner of people. Nevertheless, fresh insights may reveal or confirm (cf Garcia's Case) the unintended discrimination of facially neutral legal principles. The judge who shuts his or her eyes to such revelation may merit criticism for failing to give effect to higher legal principles posited upon true equality.

Even the most rule-bound judge or the most strict and complete legalist decides cases in context. The common law may develop but incrementally, but it does respond to the felt needs of society of the day and the informed perceptions of the judiciary, acting collegially through appellate processes. I suggested that the real tension within the judgments in RDS relates to the application of the doctrine of judicial notice. Prejudice or its appearance can occur in fact-finding as well as the determination of legal principles. But in neither field does it walk out self-announced. Judges may nevertheless disclose general attitudes, sometimes intentionally sometimes unintentionally. With fact-finding, predispositions may appear in stated or unstated suppositions that influence the judge at point of decision in relation to classes of witnesses (eg police, plaintiffs from a particular ethnic background, children, sexual complainants, persons accused of crime). Such suppositions may relate to the credibility of classes of witnesses (as in RDS), but they can affect other factual decisions. Thus, attitudes about the value of domestic work or the likelihood of women remaining in the workforce may have a significant impact in damages assessment, sometimes unawares.

Usually, general suppositions about classes of people are themselves based upon underlying attitudes, not necessarily incontestable or inaccurate propositions. As in all areas, disclosure of the full reasoning process is an essential prerequisite to testing and refining what lies beneath. Holding general views does not necessarily betoken prejudice, unless those views are universally proscribed. Bias exists or appears only when the judicial mind is or appears incapable of alteration.[17]

Sun was a rare case in which actual bias was inferred in relation to a decision of the Refugee Review Tribunal. ("Actual bias" as distinct from the appearance of bias was the statutory ground of review under s476(1)(f) of the Migration Act 1958 (Cth).) Actual bias was inferred from repeated error and Wednesbury unreasonableness. It is relevant to my topic that one of the majority in the Full Federal Court (North J) described the actual bias as unintended. He said:[18]

A decision-maker may not be open to persuasion and, at the same time, not recognise that limitation. Indeed, a characteristic of prejudice is the lack of recognition by the holder. Some judges, including myself, who have in recent years attended gender and race awareness programmes, have been struck by the unrecognised nature of the baggage which we carry on such issues. Decisions made upon assumptions or prejudices concerning race or gender have been made by many well-meaning judges, unaware of the assumptions or preconceptions which, in fact, governed their decision-making. Thus, actual bias may exist even if the decision-maker did not intend or did not know of their prejudice, or even where the decision-maker believes, and says, that they have not prejudiced a case.

If a female aboriginal magistrate gives effect to her attitudes about police behaviour or systemic violence to women we tend to sit up and take notice. The media will usually ensure publicity and there will be no lack of critical commentators. Conversely, a white male judge who betrays a now controversial attitude about female sexual complainants can expect to be taken to task by a different section of the public also feeding off the publicity of judicial proceedings. It will be no answer in the court of public opinion that both judicial officers were expressing attitudes of perhaps sizeable sub-groups of the public or applying traditional legal principles (including the principles of judicial notice) or that their bruising remarks were an unintentional slip in an extempore judgment.

However, in the court of judicial opinion it is important that we should recognise that the same forces are at work in each situation (regardless of our approval or disapproval of the suppositions revealed in the remarks of the two hypothetical judicial officers). We must recognise this before the debate descends into the particular contexts and before personal sympathy or antipathy for the judicial officer clouds the reasoned debate about what is involved. Inherited, learnt or acquired attitudes of particular judicial officers may be deeply influential in the mundane tasks of the judicial life even if they only reveal themselves on spectacular occasions.

WHAT IS PREJUDICE?

McReynolds J was a noted misogynist and anti-semitic, even by the standards of his day. He was described by his own Chief Justice as "fuller of prejudice than any man I have ever known".^[19] Once McReynolds J wrote in a judgment:^[20]
Intense dislike of a class does not render the judge incapable of administering complete justice to one of its members. A public officer who entertained no aversion towards disloyal German immigrants during the late war was simply unfit for his place.

Prejudice does not usually come so neatly packaged. Usually it lies somewhat beneath the surface. Prejudice connotes improper influence, usually of an insidious kind. In Scalia J's words,^[21] it connotes:

... a favourable or unfavourable disposition or opinion that is somehow wrongful or inappropriate, either because it is undeserved, or because it rests upon knowledge that the subject ought not to possess ... or because it is excessive in degree....

Scalia J added that one would not say that world opinion was biased against Adolf Hitler.

But what would be said of a judge at Hitler's hypothetical trial if that person had suffered directly at the hands of his genocidal policies? Or what of the judge trying a charge of child murder whose own child had been the victim of such a crime? Most of us would perceive that such judges would have real difficulties in objectivity, going beyond the appearance of bias. We would feel uneasy about a verdict rendered by such a judge, especially if his or her history only came to light later.

Sometimes prejudice may be idiosyncratic in this sense, like the prejudice of the man who became the first judge of divorce in New South Wales, John Hargrave. Earlier in his life he had been a foundation judge of the District Court of New South Wales. According to Sir Alfred Stephen, Hargrave's judgeship had been "disastrous for women suitors" because he habitually decided against them. This misogynistic disability was apparently due to Hargrave's inability to forgive his wife for having committed him to a lunatic asylum in the mid 1850s.^[22]

Other "prejudices" like racism or sexism may be widely shared. For that reason, they may go unchallenged during their heyday. Yet times and fashions change.

We have all encountered judges who did not transgress the boundaries of apprehended bias, but who appeared to display generalised dispositions for or against classes of litigants: women, black persons, immigrants, workers, employers, police, government bodies, etc etc. There may even be judges of this ilk on the bench today, perhaps even at this Conference. If we disapprove of a judge's particular leanings, we focus on the types of litigant (dis)favouring and we may use words such as "biased", "prejudiced", "sympathetic for/against". If we approve of a judge's leanings, we tend to focus on the issues involved and we describe the judge as "understanding" or "appreciating" particular values.

Judges' tendencies to show generalised dispositions are likely to be chatted about rather than made the subject of formal complaint or appellate challenge. Most of us would feel equipped to characterise judges of our acquaintance as having a particular profile in categories of case, although we would feel awkward about raising it in their presence. Discussion is almost invariably about persons not present in time or place. Naturally we find it easier to detect prejudices in others than in ourselves.

In *Doctor Grenville v The College of Physicians*,^[23] Holt CJ (CJKB 1689-1710) gave a number of reasons for not following a dictum of Lord Coke (CJCP 1606-1613) in *Doctor Bonham's Case* (1610). One of them was,
"besides, he seems to have been under some transport, because Doctor Bonham was a graduate of Cambridge, his own mother university."

One is reminded of Megarry's account of the meeting of judges to consider a draft address to Queen

Victoria on the occasion of the opening of the Royal Courts of Justice in 1882. The address contained the phrase "Your Majesty's Judges are deeply sensible of their own many shortcomings....". Jessel MR strongly objected, saying "I am not conscious of 'many shortcomings', and if I were I should not be fit to sit on the bench". Bowen LJ suggested that the address record, instead, that the judges were "deeply sensible of the shortcomings of each other".[24]

(I shall later suggest that this capacity to view others more critically than ourselves is itself an unconscious prejudice.)

We have to be extremely careful with attributing prejudice to classes of people that are based upon externalities like age, race, gender and schooling. In this as in other areas, appearances may be important, but they can be deceptive as a gauge of an individual judge's attitudes. Indeed, focus on such externalities can itself betray the prejudices of the viewer as well as place improper pressure on the object to abandon true neutrality and impartiality. Some of the debate about the presumed attitude of female judges betrays these fallacies. We need to expose, debate and contest generalised attitudes so as to appreciate their proper influence upon judicial decision-making, and to remind all judges of the need to stand outside themselves and to question their own certainties.

The suggestion that the judiciary should itself be "representative" of the society it serves is a comparatively modern idea. But even within the last century there have been different phases of its particular application. Yesterday's concerns were about Roman Catholic/Protestant balance. Today gender issues are at the forefront.

I shall return to the issue of a more representative judiciary. However, we need to ensure that representativeness does not undermine our commitment to judicial impartiality. The spheres are quite distinct. We are equally affronted by the man who demanded an all male jury[25] and the man who sought to have an all male bench of the Full Federal Court disqualified on the basis of apprehension of bias stemming solely from their gender.[26] Each applicant confused impartiality and representativeness.

I agree with Cory J in RDS where he said:[27]

... the test for reasonable apprehension of bias applies equally to all judges, regardless of their background, gender, race, ethnic origin, or any other characteristic. A judge who happens to be black is no more likely to be biased in dealing with black litigants, than a white judge is likely to be biased in favour of white litigants. All judges of every race, colour, religion, or national background are entitled to the same presumption of judicial integrity and the same high threshold for a finding of bias. Similarly, all judges are subject to the same fundamental duties to be and to appear to be impartial.

PERSONAL AND IDEOLOGICAL ASSOCIATION

The decision in Pinochet (No 2)[28] was a stark reminder that a judge's open commitment to a noble cause may undermine the decision as much as pecuniary interest in the outcome. In the first Pinochet case,[29] Amnesty International had been given leave to intervene. One of the Law Lords was a Director and Chairperson of Amnesty International Charity Ltd, a related body whose chief function was to allocate funding to a third body, Amnesty International Ltd. The lastmentioned body had published research about human rights violations in Chile. Lord Hoffmann was not a member of Amnesty International, but his failure to disclose the link he had or to recuse led to the setting aside of the first appeal decision. Lord Browne-Wilkinson held[30] that:

If the absolute immunity of the judiciary is to be maintained, there must be a rule which automatically disqualifies a judge who is involved, whether personally or as a Director of a company, in promoting the same causes in the same organisation as is a party to the suit. There is no room for fine distinctions if Lord Hewart CJ's famous dictum is to be observed: it is "of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done."

On similar facts, the result would probably be the same under Australian law, despite the formulaic differences between English and Australian law as regards the test of disqualification for appearance of bias. Very recently, the High Court has equated the rules of disqualification whether based upon "personal, social, financial or ideological" association.[31]

We like to deal with tangibles, even the tangible of appearances. Thus, in Pinochet (No 2), the Lords concentrated upon the offices held by Lord Hoffman and the interrelationship of the various Amnesty organisations. In the end, it was the appearance of closeness to an intervening party in the proceedings that led to the overturning of Pinochet (No 1), accompanied with the conventional acquittal of the judge of any actual bias.

But what if another Law Lord held no office in Amnesty International but was passionately committed to human rights in the cone of Southern America? In what circumstances, if any, should he (or she) recuse? Or disclose? And what should be disclosed in such circumstances?

The warning in Pinochet (No 2) is clear. According to Lord Hutton, for a judge to hold a "strong commitment to some cause or belief [may] shake public confidence in the administration of justice as much as a shareholding".[32] In Hoekstra v H M Advocate (No 2)[33] the Scottish High Court of Justiciary set aside an earlier decision of that Court, differently constituted, which had refused to quash a conviction challenged on the ground of breach of article 8 of the European Convention on Human Rights (ECHR). The chairman of the earlier panel had given a press interview shortly after his retirement in which he said that the Canadian Charter of Rights and Freedoms - copied from the ECHR - would provide "a field day for crackpots, a pain in the neck for judges and legislators and a goldmine for lawyers".

Timmins v Gormley[34] was one of a group of post-Pinochet cases decided by the English Court of Appeal. The Court set aside the judgment of a recorder in a personal injuries case because of the trenchancy of expression in a handful of learned articles he had written for legal journals about personal injury law.[35] The Court (Lord Bingham of Cornhill CJ, Lord Woolf MR and Sir Richard Scott VC) acknowledged that there is nothing inappropriate in a judge holding firm views as to unacceptable practices of insurers, and that the views expressed were shared by other experienced commentators. Nevertheless, the issue was posed and answered as follows:[36]

We have ... to ask, taking a broad common sense approach, whether a person holding the pronounced pro-claimant anti-insurer views expressed by the recorder in the articles might not unconsciously have leaned in favour of the claimant and against the defendant in resolving the factual issues between them. Not without misgiving, we conclude that there was on the facts here a real danger of such a result. We do not think a lay observer with knowledge of the facts could have excluded that possibility, and nor can we.

This exposes the judge who speaks or writes extra-judicially or who participates in areas of community life giving involvement in "controversial" issues. There is ongoing debate whether this means that judges should adopt the silence and withdrawal of the trappist.[37] But once again, we are at risk of moving away from the topic at hand. Even trappists can have prejudices. Merely because a judge has not exposed his or her "prejudices" in speech or writing would not make it proper for them to infect a judgment.

For understandable reasons, the law is concerned about the appearance of partiality. But its actuality is equally pernicious. Indeed, there is a constant danger that we are tempted to think that appearances alone matter. It follows that the judge who lacks the disposition to "approach the issues ... otherwise than with an impartial and unprejudiced mind"[38] should no more sit than the judge who wears his or her heart on the sleeve.

One justification offered by Lord Kilmuir for the rule bearing his name about judges not giving public talks was that "so long as a Judge keeps silent his reputation for wisdom and impartiality remains unassailable". This is almost a direct take from the Book of Proverbs where it is written that:[39] Even a fool, if he holdeth his peace, is deemed a man of understanding.

The Kilmuir Rules have been formally discarded in the United Kingdom and have never seriously been enforced in Australia.

Cases involving human rights, the environment and other controversial issues are likely to increase. What will be the role of a judge who has strong views on such matters? Is there to be a different rule for trial judges, thereby precluding a judge with strong views about police corruption etc etc from sitting in particular cases, while appellate judges are free to formulate legal principles on such bases - at least if they do not publish trenchant views outside judgments? That cannot be right. I believe that the same principles apply in both cases, and that diversity of views is to be welcomed not hidden. We must all strive to expose our true reasoning processes. If we do, then even the unconventional attitude based upon an atypical judicial pre-history is free to compete in the market place of judicial ideas with the (perhaps) unconventional ideas of the "typical" male, middle aged judge.

HEURISTIC ILLUSIONS

Thus far I have concentrated upon attitudinal prejudices. These are more detectable, at least in others. In recent decades the "cognitive revolution" has focused attention upon the way decision-

making takes place across a range of disciplines. The study of "cognitive heuristics" has revealed judgmental rules of thumb that we use to simplify complex and uncertain tasks. Some heuristics are demonstrably valid in some circumstances, but in many circumstances they lead to systematic error or bias. The term "cognitive illusion" is often used to describe these inferential shortcomings.

Psychological studies reveal illusions such as:

- hindsight illusion, which often leads people to over-estimate what could have been anticipated by others and view what actually happened as inevitable before it happened;
- overconfidence concerning one's own judgments and predictions. Research has also shown that relatively difficult tasks tend to yield overconfidence more often than relatively easy tasks and that high levels of confidence are usually associated with high levels of overconfidence;
- false-consensus bias, whereby we view our own behaviour and responses as typical and appropriate while alternatives are odd and inappropriate;
- framing bias, in which the manner in which a decision is framed can significantly affect its outcome ("is custody to be awarded to parent A?" compared with "is parent A to lose the child?").

In this as in many other fields of psychology, the jury is still out. And there is a risk that the debate can be so postmodern that we deny the very rationality upon which the discourse itself takes place. But there are, I believe, insights from this area of cognitive heuristics. If so, they must apply to us judges and our decision-making processes, just as we judges test the fallibility of witnesses and juries by such processes.

Jerome Frank sought to apply psychological and other cross-disciplinary contributions to the law in his pioneering *Law and the Modern Mind*, first published in 1930. In a recent paper, "Cognitive Heuristics and Law: An interdisciplinary Appeal to Better Judicial Decision-Making", Lianne Sharpe has called for wide study of the impact of cognitive heuristics upon other decision-making processes of trial and appellate judges.[40] She argues that law theory has largely ignored "the black box of judicial decision-making".

Whether or not this is true of legal theory, it is true of judges themselves. Due mainly to our own ignorance in matters psychological (itself an unconscious prejudice?) we have kept well away from recognising the impact of cognitive illusions. Perhaps we are busy enough dealing with each other's and our own non-cognitive mistakes.

If we were to treat these psychological insights seriously, perhaps we might gain fresh understanding about the principles of reasonable foreseeability, causation, our ambivalent attitude to expert witnesses and our grasp of what is in the "public interest".

COMPENSATORY BIAS?

Sometimes a judge discovers that a former client is to be called as a witness in the case. Often this will require disclosure with a view to obtaining a waiver from the party whose interest may be thought adverse to the expected evidence of the witness. In my view, the question "Do you have any difficulty if I continue to sit?" should be addressed to both parties. That is because there will be situations where the hypothetical fair-minded lay observer would perceive that some clients will attract hostility as much as affection.

Could there be a wider reason for ensuring that the party thought likely to be favoured by the testimony is also given the opportunity to object?

There have been occasions when a party has sought to have a judge disqualified for "overcompensation" in the sense that there was a risk that the judge might have leant over too far in the opposite direction to avoid the actuality or appearance of prejudice in a particular direction. On my researches, these applications have received short shrift, which is unsurprising when one examines the particular contexts or the ambivalent way in which the submission has been put.[41]

A spectacular case in which the notion of compensatory bias was recognised by the United States Supreme Court was *Bracy v Gramley*.^[42] An Illinois judge had been convicted of taking bribes from criminal defendants to fix their cases. A defendant who did not offer a bribe and was convicted on a capital charge sought habeas corpus based on an allegation of bias. His complaint was that the corrupt judge was biased against those who did not bribe him, if only to cover his tracks by avoiding being seen as uniformly and suspiciously "soft" on criminal defendants. The Supreme Court granted an order for discovery in aid of the habeas corpus application.

Recognition of the possibility of compensatory bias was only part of the Court's reasoning in the American case. And the unusual facts preclude drawing too much from the decision. But there may be a wider lesson to be learnt. Sometimes the pressure to avoid the reality or appearance of prejudice in a particular direction may cause the scales to be weighed in the opposite direction. I believe that we

have perceived this phenomenon in our judicial and other lives.

If overcompensation is a form of unconscious judicial prejudice it is different in nature to other such prejudices, because it responds to that which is known, albeit in an unknown way. The Penguin Dictionary of Psychology defines "overcompensation" to mean:

Reaction in excess of the necessary amount, to allow for a tendency in himself in a certain direction, of which the subject has knowledge; also attempt to make up for a known defect, the attempt being determined sometimes by the unconscious.

WHAT IS TO BE DONE?

I have no idea what can be done about unconscious compensatory bias. But I shall try to draw the threads together by boldly suggesting two responses to the general question of unconscious judicial prejudice. The question at hand is one that affects us all at different times and to varying degrees: how best to be true to our judicial oath and to aspire to impartiality in deed as well as in appearance and word.

(i) Come clean and get real

The solution for unconscious prejudice is certainly not conscious prejudice. Nevertheless, recognition of the nature and extent of predispositions in all their forms is a good start. Whatever is meant by a strict and complete legalism, we should not kid ourselves into thinking that we attain it day in and day out.

Many predispositions are natural, sound and helpful. Others may unwittingly divert or hinder us. Acknowledging their existence is the first step towards debating and justifying them where appropriate.

The call to "come clean and get real" was made recently by Professor Ronald Dworkin in a speech "Must our judges be philosophers? Can they be philosophers?" [43]

Dworkin argues persuasively that judges and their observers fool themselves by denying that (appellate) decision-making frequently involves philosophical choices. We shrink from recognising this because of our profound ignorance on the topic as well as the assumption that our intuitive reactions are right and will be easily recognised as such by those who read our judgments. These and other heuristic illusions help us get on with the task of deciding cases and rescue us from a debilitating state of indecision.

How are we to respond? We cannot deny the force of ideas. Nor can we shut our ears to the lessons of other disciplines. They require us to acknowledge the impact of the many "prejudices" that affect our decision-making, both consciously and unconsciously. In this context, I would adopt Dworkin's peroration with amendment:

I can summarise my advice to my profession, and particularly to its judges, in two phrases with I hope a modern force "COME CLEAN" and "GET REAL". Come clean about the role that [unconscious prejudices] actually play both in the grand design and in the exquisite details of our legal structure. Get real about the hard work that it takes to redeem the promise of those concepts.

(ii) A more representative judiciary, but for the right reasons

We are indebted to feminist discourse and the responses to it for a sustained and continuing debate about the importance of a more representative judiciary. Vigorous defence and rebuttal of this proposition have brought insights that can be adapted outside gender "representation". [44]

There are two categories of arguments advanced in favour of appointing more women judges, one focusing upon the public perception of the judiciary and the other on substantive law-making. This duality reflects the discussion about impartiality, neutrality and bias. The public perception arguments are important in their own right, but they are not relevant to the present topic.

On the substantive side, some of the arguments advanced for and against the proposition involve crude stereotyping and gross caricatures. Sometimes the same distorted advocacy is used by supporters and opponents of a "more representative" judiciary. I would include within such arguments/caricatures:

- "If the judiciary is going to be more representative of women/black people/religious minorities etc why not include the criminal classes or the intellectually disabled?"
- The injustices of the past are sufficient reason to change the present.
- Judges are likely to espouse the views of their class/gender and should feel guilty if they do not.

These sorts of arguments should be exposed and discarded, so as to clear the way for a sharper joinder of issue.

Shorn of excrescences and misrepresentations, the argument proceeds along the following broad lines. Consciously or unconsciously, appellate and trial judges frequently give effect to views and attitudes which are products of their individual life experiences. There is broad consensus that this is both inevitable and defensible, subject to a genuine commitment to strive for neutrality and impartiality, according to the tenets of the judicial oath. The insights of the realist school will continue to reflect the reality of judicial method and the common law.

It is a fact and not a stereotype that a fair proportion of women tend to perceive human relationships differently and to use alternative cognitive processes to a fair proportion of men.^[45] The reasons for these differences are many and debatable, but the differences are real and are believed to be real by some men and many women. A more representative judiciary will make it more likely that "different voices" are heard in the market place of judicial ideas. Like all voices, they must bow to the hierarchies of statute law, reasoned decision-making, appellate review and (within appellate courts) majority rule.

Feminist studies in recent decades have revealed the (largely unconscious) male biases and prejudices that have informed many legal rules and aspects of judicial method. Those biases are not necessarily wrong any more than countervailing "feminist" responses to problems are necessarily right. Nevertheless the legal system will be better informed, more acceptable and juster in its outcomes if the body of its principal guardians has a fair infusion of people who may share some less conventional ideas.

CONCLUSION

At ancient Delphi the oracle spoke to Apollo's chosen intermediary. Originally a male monster (python), she had evolved in later mythology into a wise middle aged woman. Nevertheless, her disjointed babblings were recorded by attendant (male) priests who rendered them into ambiguous verse which was in turn open to endless interpretations. It all sounds like the attempt of an intermediate Court of Appeal to explain *Perre v Apard Pty Ltd* to trial judges and litigants.

At each stage of revelation and determination (ancient and modern) there are great opportunities for unconscious prejudices to intrude. Hence the warning inscribed in the temple at Delphi:
KNOW THYSELF

The warning is as apt for the modern judge as for the gullible visitor to ancient Delphi. It cautions against superstition and prejudice in all its forms. But, like my paper, it is not terribly helpful in showing what to do about them.

1 Cardozo, *The Nature of the Judicial Process*, 1921, p13.

2 Cf Kitto J's reference to "the waters of the common law - in which, after all, we have no more than riparian rights" (*Rootes v Shelton* (1967) 116 CLR 383 at 387).

3 The Hon Murray Gleeson AC, Chief Justice of Australia, *Judicial Legitimacy*, Australian Bar Association Conference, New York, 2 July 2000.

4 *Ebner v The Official Trustee in Bankruptcy* [2000] HCA 63 at [3] per Gleeson CJ, McHugh, Gummow and Hayne JJ.

5 Lon Fuller, "The Forms and Limits of Adjudication" (1978) 92 Harv LR 353.

6 *Ebner* at [6].

7 For a rare finding of actual bias, see *Sun v Minister for Immigration and Ethnic Affairs* (1997) 81 FCR 71.

8 [1997] 3 SCR 484, (1997) 151 DLR 4th 193.

9 D A Ipp, "Judicial impartiality and judicial neutrality: Is there a difference?" (2000) *Australian Bar Review* 212.

10 At 499 (SCR), 205 (DLR).

11 At 501 (SCR), 206-7 (DLR).

12 Compared with the propriety of appellate courts formulating and reformulating legal principles based upon conclusions about the way groups of people are likely to behave (cf *McKinney v The Queen* (1991) 171 CLR 468, *Garcia v National Australia Bank Ltd* (1998) CLR 395 and cases re corroboration of sexual complainants).

13 La Forest, L'Heureux-Dube, Gonthier, Cory, McLachlin and Iacobucci JJ.

14 Commentaries on *Judicial Conduct* (1991) at p12.

15 L'Heureux-Dube, "Reflections on Judicial Independence, Impartiality and the Foundations of

Equality" CIJL Yearbook, vol VII (January 1999) 95 at p106.

16 Canadian Charter of Rights and Freedoms, s15. This linkage was recognised by her Honour at pp95 and 101 of her article and it appears to have been the springboard for her remarks.

17 Re JRL; Ex parte CJL (1986) 161 CLR 342 at 352 (Mason J).

18 (1997) 81 FCR 71 at 135.

19 B Schwartz, A History of the Supreme Court (1993) p214.

20 Berger v United States 255 US 22, 43 (1921).

21 Liteky v United States 510 US 540, 550 (1994).

22 Hargrave, John Fletcher (1815-1885) in Australian Dictionary of Biography.

23 (1796) 12 Mod 386 at 389, 88 ER 1398 at 1400. For another example, see Morris v C W Martin & Sons Ltd [1966] 1 QB 716 at 733-4.

24 See Megarry, Miscellany at Law, pp8-9. The address survived in its original form: see 8 App Cas at 3.

25 R v A Judge of the District Court and Shelley; Ex parte Attorney General [1991] Qd R 170.

26 Lincoln v Kerr (1995) 57 FCR 284.

27 At 532 (SCR), 231 (DLR).

28 R v Bow Street Metropolitan Stipendiary Magistrate & Ors, Ex parte Pinochet Ugarte (No 2) [2000] 1 AC 119.

29 R v Bow Street Metropolitan Stipendiary Magistrate & Ors, Ex parte Pinochet Ugarte [2000] 1 AC 61.

30 At 135.

31 Ebner at [2], [182].

32 [2000] 1 AC at 145.

33 2000 SLT 605.

34 [2000] QB 451.

35 See at 491-7.

36 At 496.

37 For contrasting stances, see JB Thomas, Judicial Ethics 2nd ed chapter 7, and my views published in Bar News, the Journal of the New South Wales Bar Association, Spring 2000. While I defended the right of judges to speak extra-judicially I emphasised that there are some "no go" areas and that it behoves the judges to formulate them. The topic is to be discussed at the Judicial Conference of Australia Colloquium at Uluru on 7-9 April 2001.

38 Re JRL at 352 per Mason J.

39 Proverbs 17:28 (KJV).

40 The foregoing "introduction" to cognitive heuristics is based entirely upon my reading of this paper. See also the Hon Justice Michael Kirby AC CMG, "Judging: Reflections on the Moment of Decision" (1999) 18 Australian Bar Review 4.

41 See Sankey v Whitlam [1977] 1 NSWLR 333 at 358; Munro v Australian & New Zealand Banking Group Ltd, unreported, 29 June 1993, Federal Court of Australia, Ryan J; Ashton v Prentice [1999] FCA 671.

42 520 US 899 (1997).

43 New York Council for the Humanities Scholar of the Year Lecture (2000).

[HTTP://www.culturefront.org/culturefront/Dworkin.html](http://www.culturefront.org/culturefront/Dworkin.html).

44 The literature is vast and I do not pretend to have read it. My windows to this debate have been Shaun Cooney "Gender and judicial selection: Should there be more women on the Courts?" (1993) 19 MU L Rev 20; Pat O'Shane "Launch of the Australian Feminist Law Journal" (1994) 2 Aust Feminist Law Journal 3; Regina Graycar "The gender of judgments: some reflections on 'bias'" (1998) 32 UBC L Rev; Gregory Henry "Pinochet: In search of the perfect judge" (1999) 21 Syd L Rev 667.

45 The development of this idea is frequently sourced to Carol Gilligan, In a Different Voice; Psychological Theory and Women's Development (1982). I do not claim that it has universal support, even in feminist circles.

Administrative Decisions Tribunal Training Day : Good Conduct of Proceedings

Administrative Decisions Tribunal Training Day:

Good Conduct of Proceedings

Keynote Address 27 October 2000

Justice Keith Mason

Members of the Administrative Decisions Tribunal are singularly fortunate to have a template for “*good conduct of proceedings*” in s73 of the **Administrative Decisions Tribunal Act 1997**. The section builds upon provisions enacted elsewhere and it probably codifies the common law. However, you at the coal face and dare I say it we in the Court of Appeal should resist attempts to go behind the clear guidance spelt out in this comprehensive provision.

All the important signposts can be found there. Let me highlight three of them.

Control your own procedure

Subject to the Act and Rules, the Tribunal may determine its own procedure. You need not follow slavishly the procedures of a civil trial.

Innovation is to be encouraged.

What is right for one type of inquiry may not be suitable for another. Sometimes, only sometimes, it may be better to work through a matter issue by issue, at least as regards hearing evidence or submissions. Except where findings on one issue will dispose of the whole case, you should beware of issuing interim or piecemeal findings. There is the risk that the position you adopt (say on credibility) at one stage may need to be revisited later.

There might be circumstances where expert witnesses should be directed to consult first so that their evidence might concentrate upon genuine points of difference. In this regard you might pick up some good ideas from the recent amendments to Pt 36, r13CA of the Supreme Court Rules. Perhaps your Rule Committee might like to look at this some time down the track.

Don't overlook the power in s73(5)(c) to require evidence or argument to be presented in writing or to decide on the matters on which the Tribunal will hear oral evidence or argument. It is clear that these powers may be used in relation to specific issues. There is also power in s73(5)(d) to require the presentation of the respective cases to be limited to periods of time that the Tribunal determines are reasonably necessary for the fair and adequate presentation of the cases.

The powers to hold directions hearings (s73(6)) and preliminary conferences (s74) are also pregnant with opportunities. Last year Judge Kevin O'Connor gave a speech in which he said: “**Perspectives for a New Tribunal**”, (1999) Administrative Law Forum.

In the case of FOI disputes where the administrator has given complete or substantial access to personal documents but the applicant wishes to contest their contents through amendment requests, I see an important role for the preliminary conference. The material is sometimes voluminous and the individual may be seeking line by line correction. Cases with these dimensions if fought on standard adversarial lines could take many days. I have been trying to encourage parties in cases of this kind to attend a preliminary conference before a judicial member of the Tribunal. If the matter is not finally resolved, then those matters that remain in dispute are referred out, with the matter listed for hearing before another member. The conference format has the capacity in large cases to save several days of hearing time, with consequent benefits to the parties, their witnesses and the wider community through budgetary savings.

Understand and apply the rules of natural justice

This obvious obligation is mentioned in subs(2). Indeed the content of the *audi alteram partem* rule is itself spelt out in subs(4).

I do wish however to draw attention to two aspects of subs(4) which in my view reflect the common law of natural justice or procedural fairness, but which at times are overlooked.

The opening portion of subs(4) speaks of a duty “to take such measures as are reasonably practicable” to ensure or do specified things. The principles of natural justice or procedural fairness must always be viewed in context and tested against the benchmark of what is reasonably practicable.

Procedural fairness does not make a tribunal the passive captive of the party who is too rich, too poor, too manipulative or too stupid to cooperate in the focussed search for truth in the matter at hand. Remember that s73(5)(a) enjoins your Tribunal to act as quickly as is practicable; and that s73(5)(h) enables it to dismiss at any stage any proceedings before it if it considers the proceedings to be frivolous or vexatious or otherwise misconceived or lacking in substance.

In ***Gamester Pty Ltd v Lockhart*** (1993) 67 ALJR 547 the High Court was entertaining an application for judicial review in relation to the conduct of Lockhart J of the Federal Court. His Honour had dismissed proceedings before him because he was satisfied that they were vexatious and an abuse of process. The proceedings were being conducted by a litigant in person who had filed a great deal of material and was engaged in very lengthy cross-examination. Lockhart J stopped further cross-examination and sought to elucidate the subject matters that the litigant wished to ask questions about. It was very difficult to obtain any rational account of those matters. Such information as was forthcoming did not show any matter that the Judge regarded as relevant to the proceeding. He concluded that the case had reached a point where he would not allow it to go on any longer, because to do so would be a serious erosion of the resources of the Court and of the Commonwealth and a waste of everybody's time and money. (I would interpose that these considerations are equally relevant to the Administrative Decisions Tribunal, especially in view of its obligation “to act as quickly as is practicable” (s73(5)(a)).)

Gaudron J had dismissed the application for prerogative relief directed to Lockhart J. A further appeal to the Full High Court was dismissed. In the course of the Court's reasons their Honours approved the remarks of Gaudron J when she said that:

It seems to me that there is no denial of natural justice involved in terminating an opportunity to be heard when the evidence appears not to support the relief claimed and requests to state the matters which are said to support the grant of relief fail to produce a statement of those matters.

Their Honours also said this about a submission which asserted in effect that Gaudron J was obliged to pore through a huge mass of undifferentiated written material. The submission was described as suggesting:

... that a judge who has given a party a reasonable opportunity to state that party's claim for relief is under an obligation, without having the benefit of relevant and intelligible submissions, to extract from a mass of apparently non-supportive evidence any pieces of the evidence which could be regarded as supportive. The submission is misconceived. In court proceedings, a judge is bound to give a party a reasonable opportunity to state the party's claim for relief and to point to the evidence which supports it. But if the opportunity is not taken, the judge is not bound to set out in a search for supportive evidence to support a claim which the party has failed to articulate intelligibly.

This leads to my second point based upon the language of s73(4)(c). Please note that it speaks of taking reasonably practicable measures to ensure that parties have “the fullest **opportunity practicable**” to be heard or otherwise have their submissions considered in the proceedings. The principles of natural justice are concerned with giving litigants a fair opportunity to make their case. The judicial officer or tribunal does not have an obligation to ensure that such opportunity is availed of to the nth degree. Very recently Kirby J, who is well known for his robust defence of the principles of natural justice, said: ***Allesch v Maunz*** (2000) 74 ALJR 1206 at 1213.

Sometimes, through stubbornness, confusion, mis-understanding, fear or other emotions, a party may not take advantage of the opportunity to be heard, although such opportunity is provided. Affording the opportunity is all that the law and principle require.

Earlier, in **Sullivan's Case**, Deane J said that: (1978) 20 ALR 323 at 342. See also **Adams v Wendt** (1993) 30 ALD 877.

*... it is important to remember that the relevant duty of the Tribunal is to ensure that a party is given a reasonable **opportunity** to present his case. Neither the Act nor the common law imposes upon the Tribunal the impossible task of ensuring that a party takes the best advantage of the opportunity to which he is entitled.*

I understand that you are frequently presented with unrepresented litigants, often lined up against a well-represented governmental party. This almost invariably increases the difficulties and complexities of ensuring the right balance of fairness and passivity that is essential to natural justice. Section 73(4) (b) does not mean that the duty to explain matters is only enlivened by a request. Sometimes this will be necessary because the unrepresented party doesn't even know what help to ask. For an excellent discussion of the general issues in this regard, you should consult the recent Full Federal Court decision in **Minogue v HREOC** (1999) 84 FCR 438 at 445-6.. The Court endorsed the following observation by Mahoney JA in an unreported decision:

Where a party appears in person, he will ordinarily be at a disadvantage. That does not mean that the court will give to the other party less than he is entitled to. Nor will it confer upon the party in person advantages which, if he were represented, he would not have. But the court will, I think, be careful to examine what is put to it by a party in person to ensure that he has not, because of the lack of legal skill, failed to claim rights or to put forward arguments which otherwise he might have done.

Limited application of the rules of evidence

Subsection (2) provides:

The Tribunal is not bound by the rules of evidence and may inquire into and inform itself on any matter in such manner as it thinks fit, subject to the rules of natural justice.

The law of evidence started off as judicial common sense practised in context. But by the mid-twentieth century it had hardened and atrophied. Its rules had become traps for the unwary rather than guideposts to facilitate the orderly gathering and testing of relevant information.

The **Evidence Act 1995** is a much more flexible and task-oriented tool than the corpus of black and white technical rules to be found in **Phipson's Law of Evidence**. That is not to say that the **Evidence Act** is free from complexity and arcana. Nevertheless, it came too late on the scene to stem a major shift from courts to tribunals. There are many good and understandable reasons why this shift has occurred. However, one of them was that the courts were too slow in adapting the rules formulated for criminal trial by jury to the quite different context of civil disputes tried by judge alone.

Section 73(2) has many counterparts in other jurisdictions and there is a body of jurisprudence that discusses its scope and limits. I would commend Professor Enid Campbell's article on "Principles of Evidence and Administrative Tribunals" Campbell and Waller eds, **Well and Truly Tried** 1982 p36. for a general exposition.

Section 73(2) has the effect that, except in proceedings involving legal professional misconduct in the Legal Services Division, **Legal Profession Act 1987**, s168. the Tribunal is entitled to have regard to sworn and unsworn evidence as well as information as to fact or opinion to be found in reports or published works. I repeat that all this is subject to the principles of natural justice. But within those limits, in the words of Hill J, the provision: **Casey v Repatriation Commission** (1995) 60 FCR 510 at 514 per Hill J. See also **Barbaro v Minister for Immigration and Ethnic Affairs** (1982) 44 ALR 690 at 694, **Shulver v Sherry** (1992) 28 ALD 5707.

means what it says. The fact that material may be inadmissible in accordance with the law of evidence does not mean that it cannot be admitted into evidence by the Tribunal or taken into account by it. The criterion for admissibility of material in the Tribunal is not to be found within the interstices of the rules of evidence but within the limits of relevance.

There are however, some fundamental principles of law which masquerade as rules of judicial evidence but which cannot be overreached by a tribunal in the absence of the clearest statutory authority. These would include client-legal privilege, public interest immunity and the privilege against self-incrimination. Indeed s83(3) goes further in stipulating that the Tribunal's powers in relation to witnesses do not enable it to compel a witness to answer a question if the witness has a "reasonable excuse for refusing". A reasonable excuse is broader than a lawful excuse. **Ganin v New South Wales Crime Commission** (1993) 32 NSWLR 423.

Nor does s73 excuse the Tribunal from the obligation to ensure that its findings and ultimate conclusions rest upon material having "rational probative force". This qualification is explained with magisterial clarity by Brennan J in **Pochi v Minister for Immigration and Ethnic Affairs**. (1979) 36 FLR 482 at 492-3.

Finally, I would remind you that s73(2) does not stipulate that the Tribunal must **ignore** the rules of evidence. Within those rules there may be principles reflecting the wisdom of the ages which, thought not necessarily forming part of the concept of natural justice, are designed to aid the Tribunal in its endeavour to administer "substantial justice". See the discussion in **Kevin v Minister for The Capital Territory** (1979) 37 FLR 1. One such principle, now written into the **Evidence Act** and is worthy to be borne in mind, is found within s135 of that Act:

135. *The court may refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might:*

- (a) *be unfairly prejudicial to a party, or*
- (b) *be misleading or confusing, or*
- (c) *cause or result in undue waste of time.*

In essence, you will often have a choice with respect to material that you are convinced is really marginal. You may decline to admit it, so long as you are not thereby refusing a fair opportunity to present a case. Or you may admit it, making it plain from the outset that its weight is slight because better evidence is available. Recently the Administrative Decisions Tribunal Appeal Panel approved the following remarks of Davies J when he was President of the Administrative Appeals Tribunal: **Re Saviero Barbaro and Minister for Immigration and Ethnic Affairs** (1980) 3 ALD 1 at 5, approved in **United Bond Fabrics Pty Ltd v Roseman** [2000] NSWADTAP 13 at [27].

In informing itself on any matter in such manner as it thinks appropriate, the Tribunal endeavours to be fair to the parties. It endeavours not to put the parties to unnecessary expense and may admit into evidence evidentiary material of a logically probative nature notwithstanding that that material is not the best evidence of the matter which it tends to prove. But the Tribunal does not lightly receive into evidence challenged evidentiary material concerning a matter of importance of which there is or should be better evidence. And the requirement of a hearing and the provision of a right to appear and be represented carries with it an implication that, so far as is possible and consistent with the function of the Tribunal, a party should be given the opportunity of testing prejudicial evidentiary material tendered against him. It is generally appropriate that a party should have an opportunity to do more than give evidence to the contrary of the evidence adduced on behalf of the other party. He should be given an opportunity to test the evidence tendered against him provided that the testing of the evidence seems appropriate in the circumstances and does not conflict with the obligation laid upon the Tribunal to proceed with as little formality and technicality and with as much expedition as the matter before the Tribunal permits.

Another principle of evidence apt to be borne in mind are the rules in relation to opinion evidence. They reflect good sense and sound principle in excluding information that carries no probative weight. In this regard they may also save time and expense. See **Kevin** at 3-4.

The doctrine of "official notice" means that a tribunal may draw upon the expertise and experience of its specialist members, as well as upon its accumulated institutional wisdom. The controlling factor remains that of procedural fairness. I agree with the following comment of Professor Smillie J A Smillie, "The Problem of Official Notice" [1975] PL 64 at 67 (emphasis added). See also TJH Jackson "Administrative Tribunals and the Doctrine of Official Notice: 'Wrestling with the Angel'" in

Harris and Wayne eds, **Australian Studies in Administrative Law** (1991) p120. See also **R v Milk Board; ex parte Tomkins** [1944] VLR 187 at 197, **R v Deputy Industrial Injuries Commissioner, ex parte Moore** [1965] 1 QB 456, **Boral Besser Masonry Ltd v Jabarkhill** [1999] NSWCA 476.

*It is necessary to ensure that the parties to an administrative proceeding are given a fair opportunity to address submissions to all the crucial issues, and to produce all relevant material within their possession. The obvious solution is to permit administrative tribunals to rely for any purpose upon relevant material of any kind within the personal knowledge of their members **provided any such material which will play an important part in the final decision is disclosed to the parties in advance and they are given a fair opportunity for discussion and rebuttal.***

A tribunal is not restricted to acting only on expert opinion given on oath by a live witness. It may have regard to reports published by research bodies, subject always to procedural fairness.

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EPLA Conference : Recent Appellate Cases in Environmental Law

EPLA

Conference:

Friday 13 October 2000.

Cockle Bay Wharf

RECENT APPELLATE CASES IN ENVIRONMENTAL LAW

**Justice Keith Mason
President
New South Wales Court of Appeal**



RECENT APPELLATE CASES IN ENVIRONMENTAL LAW

SCOPE OF JURISDICTION IN CLASS 4 MATTERS

Concerned with legal error not merits review:

Ryde City Council v Echt (2000) 107 LGERA 317 at 322

Review of Council decisions based upon characterisation:

Londish v Knox Grammar School (1997) 97 LGERA 1 at

at 7-8 (educational establishment)

Timbarra Protection Coalition Inc v Ross Mining NL (1999) 46 NSWLR 55 at 62-3; 102 LGERA 52 at 59-60

Mittagong Mushrooms Pty Ltd v Narrambulla Action Group Inc (1998) 97 LGERA 333 (processing primary products)

Macquarie International Health Clinic Pty Limited v The University of Sydney (1998) 98 LGERA 218

- alternative/secondary/ancillary uses
("education", "hospital" - teaching hospital)

Subjective characterisation criteria ("if X is of in the opinion/belief /satisfied that Y exists")

Timbarra at 64 (NSWLR), 61 (LGERA)

Woollahra Municipal Council v Andriotakis (1998) 101 LGERA 194 at 221-4 (s161(2) EPA Act: "if council is of the opinion that the amendments [to a draft local policy] are not substantial")

Jurisdictional facts and challenges to them in the Court

Timbarra

Permissible and impermissible considerations:

Noroton Holdings Pty Ltd v Friends of Katoomba Falls Creek

Valley Inc (1998) 98 LGERA 335 (threat of litigation)

Currey v Sutherland Shire Council (1998) 100 LGERA 365

Where unfettered discretion conferred, alleged relevant factor overlooked or irrelevant factor taken into account must be one which decision maker is required to take into account /ignore.

Council of the City of Gosford v Cunningham & Seeto (1997) 29.4.97

Noroton Holdings

Privative provisions:

Londish v Knox Grammar School (1997) 97 LGERA 1 at 6

(s 104A: 3 months to challenge validity of notified consent)

- Hickman test applies

- quaere situation if denial of procedural fairness

Sericott Pty Ltd v Snowy River Shire Council (1999) 108

LGERA 66 (s.104A)

Vanmeld Pty Ltd v Fairfield City Council (1999) 46 NSWLR 78;
101 LGERA 297 (s 35)

Costs (Oshlack)

Seaton v Mosman Municipal Council (1998) 98 LGERA 81 at 98

METHODS OF PROOF

Onus of proof in judicial review:

Council of the City of Gosford v Cunningham & Seeto

CA 29/4/97 at p. 3 (Mason P)

Onus of establishing allegation that the development is prohibited:

Penrith Waste Services Pty Ltd v Penrith City Council (1998) 101 LGERA
98

[Baiada v Waste Recycling & Processing Service of NSW \[1999\]
NSWCA 139](#) at [54]ff (scintilla principle)

Role of the presumption of regularity?

Franklins Ltd v Penrith City Council [1999] NSWCA 134 at [28]
(presumption has no role in reviewing a decision based on

satisfaction operating as a jurisdictional fact.)

Baiada at [60]

Use of dictionaries:

House of Peace Pty Ltd v Bankstown City Council (2000) 48

NSWLR 498 at 506; 106 LGERA 440 at 449

When can you infer that councillors know the details of planning instruments?

Currey v Sutherland Shire Council (1998) 100 LGERA 365 at 375 (passing
reference in officer's report insufficient basis to infer council satisfaction)
[Franklins Ltd v Penrith City Council and Campbells Cash and Carry Pty Ltd
\[1999\] NSWCA 134](#)

GENERAL

"Community Land"

Seaton v Mosman Municipal Council (1998) 98 LGERA 81

Hornsby Shire Council v RTA (1998) 100 LGERA 105

North Cronulla Precinct Committee v Sutherland Shire Council (1998) 98 LGERA 299

Plans of management:

Seaton (challenging validity)

Transport Action Group against Motorways Inc. v RTA

(1999) 46 NSWLR 598; 46 NSWLR 598 (function)

Public reserves, council's control in nature of public trust:

Hornsby Shire Council v RTA (1997) 41 NSWLR 151

CONTEMPT

L&E Court's jurisdiction:

Hawkesbury City Council v Foster (1997) 97 LGERA 12

DEVELOPMENT CONSENTS AND PLANNING PROCESS

Development consents granted under repealed legislation:

Auburn Council v Nehme (1999) 106 LGERA 19

House of Peace Pty Ltd v Bankstown City Council (2000) 48

NSWLR 498 at 506; 106 LGERA 440 at 449.

Accrued rights under former zoning:

Byron Shire Council v Greenfields Mountains Pty Ltd (1999) 105 LGERA 445.

Construing development consents

House of Peace

Sericott at 74

Procedural fairness in planning decisions:

Vanmeld Pty Ltd

Transport Action Group against Motorways Inc. v RTA
(1999) 46 NSWLR 598 at 622-5 (Mason P) at 647
(Sheller JA) and 657 (Fitzgerald JA), 104 LGERA 133

Modifications:

North Sydney Council v Michael Standley & Associates Pty Ltd
(1998) 43 NSWLR 468, 99 LGERA 433. (leave to reargue correctness
refused in Coalcliff Community Association Inc v Minister for Urban Affairs
& Planning (1999) 106 LGERA 243)

Transport Action Group against Motorways Inc. v RTA (1999) 104 LGERA
133; 46 NSWLR 598
House of Peace Pty Ltd v Bankstown City Council (2000) 48
NSWLR 498 at 506; 106 LGERA 440 at 449.

Finality and specificity

Transport Action Group at 628-34 (NSWLR) (Mison distinguished)

Lapse of consent:

Coalcliff Community Association Inc v Minister for Urban

Affairs and Planning 106 LGERA 243 at 257 (work done unlawfully under
consent cannot count as commencement)

SEPP1

Fast Buck\$ v Byron Shire Council (1999) 103 LGERA 94.

Whether power to grant development consent can be used to validate prior unlawful erection of
structure:

Tynan v Meharg (1998) 102 LGERA 119 (Handley JA)

CRIMINAL MATTERS

Nature of appeal by way of rehearing (s 5AA of the Criminal Appeal Act)

Cooper v Coffs Harbour Council (1997) 97 LGERA 125, 98
A Crim R 340

Histollo Pty Ltd v Director General of National Parks and

Wildlife Service (1998) 45 NSWLR 661, 103 LGERA 355
Environmental and Earth Sciences Pty Ltd v EPA (1999) 103 LGERA 434
(CCA)

Particulars:

EPA v CSR Ltd (1998) 101 LGERA 109 (CCA)

[Taylor v EPA \[2000\] NSWCCA 71](#) at [20] ff.

Stated cases frowned upon

[EPA v Daracon Engineering Pty Ltd \(1998\) 97 LGERA 415](#)

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Sunrise or Sunset? Reinventing Administrative Law for the New Millennium

SUNRISE OR SUNSET? REINVENTING ADMINISTRATIVE LAW FOR THE NEW MILLENNIUM

Justice Keith Mason
Keynote Address
2000 Administrative Law Forum
15 June 2000
Adelaide

The variety of topics which you will address at this Forum bears witness to the scope of administrative law at the turn of the millennium.

The second half of the twentieth century saw a phenomenal outburst of creativity in this field by judges and legal academics. Judicial lions came out from under the throne. Scholars on and off the bench forged conceptual unity from a wilderness of single instances. A disparate bundle of remedies was blended into an integrated system of judicial review. Unrelated trickles merged into a mainstream that became so orthodox that the Executive through Parliament embraced it by passing laws such as the **Administrative Decisions (Judicial Review) Act 1977**. Parliament further expanded the scope and effectiveness of judicial review, by arming would-be litigants with advance information through freedom of information laws and by requiring reasons to be given for many administrative decisions.

With these internal and external encouragements, judicial review has thrived. Pockets of resistance were overcome, such as the immunity of functions vested in the Crown representative and of prerogative powers, justiciable or not. Public sector employment moved from being "at pleasure" to being subject to administrative law principles, as demonstrated in the recent Federal Court decisions in **Barratt v Howard** (1999) 165 ALR 605 (Hely J), (2000) 170 ALR 529 (Full Court).. The right to make a collateral attack upon an administrative decision while advancing or defending an ordinary civil or criminal claim (absent legislative proscription) is now firmly established, if it ever was in doubt. **Ousley v The Queen** (1997) 192 CLR 69, **Attorney General (Cth) v Breckler** (1999) 197 CLR 83.

This is not to deny the significance of the High Court's repeated interventions to remind our intermediate courts of appeal about the limitations of judicial review. This re-education has extended to affirming that a distinction exists between jurisdictional and non-jurisdictional error, that privative clauses remain entitled to respect according to the **Hickman** principles, that **Wednesbury** unreasonableness is not to be lightly found, and that legitimate expectations cannot generate rights to substantive outcomes. The constitutional limitations of judicial review were expounded profoundly by Brennan J in **Quin's Case. Attorney-General (NSW) v Quin** (1990) 170 CLR 1 at 35-38.

The consolidation of judicial review was probably the most significant legal development of the second half of the twentieth century. The Executive has not taken all of this lying down. Through Parliament, it has fought back, especially in areas where it perceives public disquiet about the costs of accountability or the overreaching of the judicial arm. Thus, the Federal Court has had its immigration wings clipped - although it took an appeal to the High Court in **Eshetu Minister for Immigration and Ethnic Affairs v Eshetu** (1999) 73 ALJR 746. to bring this home. The result has been that the High Court has been flooded with claims in its original jurisdiction. See McHugh J's plaintive call in **Re Minister; Ex parte Durairajasingham** (2000) 74 ALJR 405.. And increasingly one finds the exercise of public power being conditioned upon an official **believing** that a state of affairs exists or being **satisfied** of the same, thereby reducing dramatically the scope of judicial review. My favourite recent attempt by Parliament to exclude judicial review is found in the **State Owned Corporations Act 1989 (NSW)** which empowers the Governor to remove a director from office "at any time for any or no reason and without notice". Schedule 8, cl 7(2).

Those who have planned this Forum have charged you, the gathered body of experts, with the weighty

task of reinventing administrative law. Why reinvention? It is suggested in the brochure that the law has to move to catch up with what is described as *“a re-invented and contractualised method of governance, seemingly less amenable to the established modes of accountability. Governments are also adopting a range of strategies to quarantine areas of administration from the full range of review mechanisms. At the same time, public faith in the institutions of governance appears diminished.”*

This is a call to arms to meet a traditional enemy that has re-entered the fray wearing new armour.

Before we confront that enemy we should of course warn ourselves against complacency. No system of law is perfect. Because administrative law touches vital and contentious issues such as the environment, the criminal law and immigration policy it is hardly surprising that it is the field of major battles. Feelings run deep, even in the judiciary, about key policies that are reviewed or applied in the cases coming before courts and tribunals. In any event it is appropriate to remind ourselves of Archbishop Thomas Cranmer’s words Written in 1549, now found in **The Book of Common Prayer Concerning the Service of the Church**. that:
There was never anything by the wit of man so well devised, or so sure established, which in continuance of time hath not been corrupted.

The law of judicial review may be running well, but it is not beyond a periodical check-up.

Inventors and reinventors need a basic understanding of the status quo. A combination of hard work and genius is then required to come up with a product that meets new needs or better serves old needs.

But inventors also need to be set goals. What are the goals of administrative law? Uncertainty and disagreement about them are major contributors to the indeterminacy of modern administrative law. For some people, administrative law relates to the control of government power with the main object being to protect individual rights. Others place greater emphasis upon rules designed to ensure that administrators effectively perform their tasks. Others see accountability as the principal objective of administrative law and a sufficient end in itself. For many who hold the latter view, a key subgoal is to foster participation by interested parties in the decision-making process. From my experience, resort to administrative law (especially by groups of citizens) may be as much a form of public protest as a means of obtaining redress. This is not a criticism because I agree with Geoffrey Robertson who, in his book **The Justice Game** said:

“The most fundamental right of all is the right to challenge the State, under a legal system which allows the possibility, occasionally, of winning.”

Inventors and reinventors must also grasp the practicalities and economics of their endeavours. In the field of administrative law, two practicalities largely overlooked are the unrecouped costs and the hidden cost of judicial review. Our open standing rules have allowed many speculative and expensive challenges to be launched by impecunious persons or hollow associations, deliberately chosen as the front-runners for larger groups in an attempt to make costs orders futile. These litigants may press for full discovery, which is very expensive - sometimes with the aim of checking the accuracy of earlier FOI access. **Oshlack’s Case** acknowledges the debate about whether access to justice should be facilitated through special costs rules for “public interest” litigation without offering very clear guidance on the subject. **Oshlack v Richmond River Council** (1998) 193 CLR 72.

More significant than costs is the largely hidden cost of judicial review. The inconvenience which judicial vigilance can cause for administrative activity was justified by Wilcox and French JJ as *“a small price to pay to maintain the primacy that the liberty of the individual should have in our legal system”* **Schlieske v Minister for Immigration and Ethnic Affairs** (1988) 84 ALR 719 at 730.. Stated in such absolute terms the proposition is hard to refute, especially in its extradition context. But judicial review is invoked in aid of interests less valued than personal liberty. Sentiments such as those expressed by their Honours should not deter us from trying to count the true overhead costs of judicial review so that they can be weighed in the balance and so that fine tuning improvements can at least be considered. There have been recent attempts to gather empirical data about the influence of judicial review on bureaucratic decision-making. For a recent study, see Halliday, “The Influence of Judicial Review on Bureaucratic Decision-Making: [2000] **PL** 110. Hopefully more work will be done.

We should never forget that modern administrative law extends well beyond judicial review.

Administrative tribunals are gathering their own jurisprudence. Auditors-General are gathering more teeth thanks to the voting power of independent members in closely divided parliaments. Bodies such as the Independent Commission Against Corruption in New South Wales and the Criminal Justice Commission in Queensland are gathering some important scalps while performing more significant deterrent and educative roles. And Ombudsmen are gathering impressive records of largely quiet achievement.

Discussion about public law is often discussion about the nature of our society as it is or as we would like it to be. That is one reason why administrative law may be quite different between one country and the next. To illustrate the latter proposition, compare the broad parameters of judicial review in this country with the position in the United Kingdom. It is my perception that we in Australia are much less hung up about restricting judicial review through leave requirements, rigid limitation-periods, precluding discovery of documents and *locus standi* than our English counterparts. I like to think that this reflects our more open society and our commitment to the idea that accountability is a reflection of the representative nature of government.

This said, our common inherited principles of judicial review are based largely upon Dicey's conception of constitutional law. Dicey's misunderstanding and dislike of administrative law are readily apparent in his **Law of the Constitution**. But his ideas about the nature of a unitary democracy provided the unchallenged framework for administrative law until quite recently. The traditional model conceived of Parliament as an omniscient monopolist. All public power resided in and stemmed from the sovereign Parliament. The subject's right was the purely negative one of occasionally escaping the grip of the Executive's power.

The ultra vires principle became the tool for policing the boundaries set by Parliament. Who would wield that tool? The judges of course. Invoking a motley variety of remedies, the judges set about ensuring that agencies professing to exercise public power did so in accordance with Parliament's expressed, inferred or presumed wishes.

The notion that the courts are the ultimate keepers of the ring is inherent in the idea of law itself - see **Marbury v Madison** 1 Cranch (5 US) 137 (1803).. But in the second half of the twentieth century judges grew in boldness as they convinced themselves (with good reason) that Parliament was too busy to police the Executive in matters of detail or unwilling to do so in favour of unpopular causes.

The substantive principles may not have changed much since the 1940s. But to test how far things have really moved, ask yourselves what a modern court would have done with the facts of **Water Conservation and Irrigation Commission (NSW) v Browning** (1947) 74 CLR 492. decided in 1947. The Commission had power to grant or withhold consent to the transfer of irrigation-farm leases, such power being expressed as "entirely in the discretion of the Commission". Although the statute contemplated that naturalised aliens might acquire leases, consent was refused to an Italian who had been naturalised in 1934. Racially discriminatory criteria used by the Commission, such as that leases "should be kept for Australians", passed muster in the High Court. This occurred despite the proposition that "as a general rule Italians are not good farmers" being described by McTiernan J as one "likely to be received with incredulity by the uninitiated" and despite Rich J's wry reference to Virgil's **Georgics** as evidence that Italians might have some farming experience. Even though the general principles in **Browning's Case** are still widely cited, the particular result would be unthinkable in a modern court in Australia, and not merely because of the impact of the **Racial Discrimination Act 1975**.

In truth, courts in the late twentieth century were moving away from Dicey's grundnorm. Some who realised that this was happening were troubled about the legitimacy of the new administrative law. Others were not.

Canny observers and/or apologists for activist judges also recognised that the traditional ultra vires model of administrative law was flawed because it proceeded from false premises about the way in which democratic society operated. With some notable exceptions, the legislature does not in fact control the Executive, but vice versa. Furthermore, there is increasing realisation that Parliament does not in fact wield all public power, and that many institutions outside Parliament and not directly accountable to Parliament exercise species of public authority similar in nature to that attracting traditional judicial review.

Other forces came into play in the last quarter of the twentieth century and have helped shape modern administrative law. International norms pressed for acceptance or at least integration into administrative law. And when the High Court told practitioners to look beyond England for persuasive

precedents, thereby ushering in an era of comparative law in appellate advocacy, it is hardly surprising that even Continental ideas like proportionality came knocking at the door.

Most importantly, public law has come to be viewed as a facilitator of positive human rights. In Australia this drift received a fillip during the years when Sir Anthony Mason was Chief Justice of the High Court, the years in which Sir William Deane's heresy about ultimate sovereign authority being vested in "the people" of Australia became orthodoxy. The key steps are traced in my paper "Citizenship" in Cheryl Saunders ed, **Courts of Final Jurisdiction: The Mason Court in Australia** (1996) pp36-38. It is hardly surprising that Kirby J has expressed reservations: see **Levy v Victoria** (1997) 189 CLR 579 at 634. If Parliamentary sovereignty could not override certain fundamental popular rights, then it was a small step for such considerations to be invoked to limit Executive power.

Dicey's top-down reasoning fostered the idea that public law is principally concerned with the limitation of state power. A plaintiff reached for administrative law to stop government institutions doing things he or she did not like. State coercion was conceived as an evil, to be tolerated only when necessary and clearly justified.

But law may be facultative as well, and public law is no exception. All of us believe that there are things the state can and should be doing, and this provides the justification for creating and retaining state institutions and allocating power to them. Those who overlook this in framing the goals of administrative law are, as Professor Sandford points out, as silly as those who would say that the essence of a motor car is its brakes. C Sandford, "Law, Institutions and the Public/Private Divide" (1991) 20 **Fed LR** 185 at p203. Seeing the goal of administrative law as keeping the brakes on administrators, without reference to the values of state power and cooperative endeavour, has the capacity to produce a commonwealth where the commoners wield little power and suffer in consequence. Thus, to take another example of Professor Sandford, excessive judicial clipping of the wings of the Australian Broadcasting Authority would be welcomed by those who control the media, but the rest of us might be concerned unless we were the most die-hard economic rationalists. It is therefore hardly surprising these days that many administrative law cases (especially relating to environmental law) involve citizens trying to coerce one arm of the State to move against another arm or against some powerful vested interest.

My point is a simple one: the control of public power is not an end in itself, even though much of administrative law proceeds as if it is.

A further stimulus to rethinking the traditional model comes from the material highlighted in the brochure for this Forum. The Executive itself is adopting a range of strategies to quarantine areas of administration from the full range of review mechanisms. The administrative lawyer's first reaction is to bristle at this attempt to cut down the effectiveness of judicial review. But once again the inventor first needs to understand what is driving this response from the Executive.

Contracting-out of services performed by government is the latest response of the Executive to being harried in the courts by litigants who may be directly, indirectly or only remotely affected by government action. Paradoxically, outsourcing is an attempt to draw the conduct of public affairs back into the realm of the private. This phenomenon takes one of the central precepts of administrative law (namely, that the Executive is subject to the general law where it exercises non-prerogative powers) and seeks to turn it from a sword into a shield. If a political justification were offered, it would claim that contracting-out may deliver greater efficiency and more effective service-provision. Doubtless such goals are achieved sometimes, at least in the short term. But usually there is a political cost, due to perceived loosening of well-accepted values such as neutrality, accountability and freedom of information. The attempt to limit information accountability by resort to "commercial-in-confidence" claims is also being challenged strongly by Auditors-General and by Upper Houses whose enormous investigative power over the Executive of the day was affirmed by the decision in **Egan v Willis**. (1998) 195 CLR 424.

If a theoretical justification for contracting-out were offered, it would suggest that, since the Executive needs no statutory power to contract, then in a level playing field, there is no reason why it may not behave secretively, selfishly, greedily or unreasonably like other contracting parties. I am not suggesting any view on this big issue.

Contracting-out is by no means peculiar to the public sector. Many private corporations are seeking to lessen accountability and maximise financial returns by shifting their workforce from employees to independent contractors. This causes pain to employees (witness the Patricks Stevedoring brawl of 1998) and disruption to customers who prefer one-shop corporate accountability. It can also leave third

parties without effective legal redress, because vicarious liability in tort starts to break down. This happened to the unsuccessful plaintiff in a recent decision in the Court of Appeal of New South Wales who was knocked down by an unidentified bicycle courier wearing the livery of "Crisis Couriers", but held to be operating as an independent contractor for whom the umbrella organisation had no legal authority. ***Hollis v Vabu Pty Ltd (T/as Crisis Couriers)*** (1999) Aust Torts R 81-535. I mention these matters to put what is happening with Government in a wider perspective.

I have touched very lightly upon some of the themes we will be addressing in this Forum. Australian administrative law is a unique amalgam. Its several stakeholders here represented are engaged in an exciting endeavour. I wish you well and thank the organisers of this excellent Forum.

Fault, Causation and Responsibility: Is Tort Law Just an Instrument of Corrective Justice?

(Revised and published (2000) 19 Australian Bar Review 201)

FAULT, CAUSATION AND RESPONSIBILITY: IS TORT LAW JUST AN INSTRUMENT OF CORRECTIVE JUSTICE?

You look at where you're going and where you are and it never makes sense, but then you look back to where you've been and a pattern seems to emerge. And if you project forward from that pattern, then sometimes you can come up with something. Pirsig, **Zen and the Art of Motor Cycle Maintenance** (1983) p162.

Like the Irish jury that were unanimous that they could not agree, the High Court of Australia laboured mightily in **Perre v Apand Pty Ltd** [1999] HCA 36, 73 ALJR 1190, 164 ALR 606. before recognising lack of consensus or even a majority position about the essentials of the action in negligence for pure economic loss. Only Kirby J saw merit in the three stage framework favoured in England. Their Honours agreed that the animal exists. But proximity was rejected as a useful taxonomic guide. General reliance is no longer generally relied on by the hunters. The creature could not be identified by its foreseeability spots, but its known vulnerability was proposed as a working hypothesis. Support for this factor has firmed in **Crimmins v Stevedoring Industry Finance Committee** (1999) 167 ALR 1 at [3] per Gleeson CJ (agreeing with McHugh J), [43] per Gaudron J, [100], [104] per McHugh J, [233] per Kirby J.

The lack of agreement is hardly surprising. The framework of modern tort law is elusive, perhaps inherently protean. Maybe Cooke P was correct in his gloomy prognostication that: *Ultimately the exercise can only be a balancing one and the important object is that all relevant factors be weighed. There is no escape from the truth that, whatever formula be used, the outcome in a grey area case has to be determined by judicial judgment. Formulae can help to organise thinking but they cannot provide answers.* **South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd** [1992] 2 NZLR 282 at 294. See also Jane Stapleton, "Duty of Care Factors: a Selection from the Judicial Menu" in Cane and Stapleton eds, **The Law of Obligations: Essays in Celebration of John Fleming** (1998).

Whether a new age of certainty will dawn in the High Court is unknown. In the meantime, the decision to proceed slowly and see what turns up was inevitable. It is hardly unprecedented. Even Sir Owen Dixon once confided to Chief Justice Latham: Letter dated 1 June 1937 quoted by Bennett, **Keystone of the Federal Arch**, p 67.

In [s92] cases relating to transport ... I think it is almost clear that we must proceed by arbitrary methods. No doubt there will be limits but political and economic considerations will guide the instinct of the Court chiefly. In time the thing will work back to some principle or doctrine.

Perhaps Sir Owen had tongue in cheek, recognising the need for himself to mark time to allow his arbitrary brethren time to fall into line with his own clear logic. This, of course, happened. The new age of certainty dawned in **Hughes & Vale Pty Ltd v New South Wales** [1955] AC 241. It was to flourish for a time, before a new dark age, followed by a new age of certainty was to reappear (**Cole v Whitfield** (1988) 165 CLR 360) briefly (cf **Bath v Alston Holdings Pty Ltd** (1988) 165 CLR 411).

Very recently, in **Crimmins v Stevedoring Industry Finance Committee**, [1999] HCA 59 at [73]-[78]. McHugh J warned that incremental development by analogy must be rooted in principle and

policy. Frank discussion about policy factors must not abandon the search for a linking chain of reasoning. His Honour stressed the merits of predictability and sought to confine the uncertainties of **Perre** to cases of pure economic loss. It may not be reading too much into his judgment to see it as a plea to his brethren not to revisit well-established areas of tort law in the quest to find and apply principles of general application. Kirby J spoke to same effect at [226] n262.

The concepts of “fault” and “responsibility” are part of the landscape of modern tort law, but they usually lie hidden. “Responsibility” covers a wide spectrum. It does not necessarily import legal liability or moral blame, although it is a condition of both. As Professor Honoré points out, human responsibility may relate to (a) our own conduct, (b) the responsibility that we choose to take on for other people, things and events; and (c) the responsibility that society thrusts upon us. See Honoré, **Responsibility and Fault** (1999) pp125-129. This book republishes essays written during the last decade, with an introduction drawing together the various strands. I shall confine myself to the field of **legal** responsibility as reflected in the law of **tort**, principally the expanding field of negligence. That area is more than large enough. Professor Honoré’s three aspects of responsibility are still relevant. They remind that liability may stem from omissions as well as acts, including the acts or omissions of a third party. And they show the fallacy of limiting duty of care to “assumption” of an obligation to control a person or situation.

The general rule is that a plaintiff bears the onus of proof on all matters. A number of ostensibly procedural rules assist plaintiffs in their quest to prove a tort case against chosen defendants (see nn41, 42 below). Proving liability is one thing, getting all of the damages claimed is another. Academic lawyers tend to concentrate on the former. Practitioners and judges spend most of their time dealing with the latter. Many injured plaintiffs come with a history of other problems or acquire one after the tortious injury and before trial. The task of segregating the loss actually stemming from the tort may be complex and problematic. It is generally true that the tortfeasor takes the victim as found, but it is certainly not the corollary that the court ignores the victim’s antecedent incapacities or potential disabilities and illnesses when assessing damages. **Wilson v Peisley** (1975) 7 ALR 571, 50 ALJR 207. Nor does the victim get reparation for every loss stemming however remotely from the wrongdoer’s fault. Many factual and legal issues require unravelling.

In **Perre**, McHugh J propounded the theses that tort law is “*an instrument of corrective justice*”; **Perre** at [103], [151]. See also **Esanda Finance Corporation Ltd v Peat Marwick Hungerfords** (1997) 188 CLR 241 at 284, 289. and that “*negligence at common law is still a fault-based system*”. **Perre** at [131]. See also Gummow J at [171].

McHugh J’s references to the law of tort being an instrument of corrective justice draw attention to a sophisticated debate occurring in North America. See, eg Ernest J Weinrib, “The Special Morality of Tort Law” (1989) 34 **McGill Law Rev** 403; Richard W Wright, “Substantive Corrective Justice” (1992) 77 **Iowa Law Rev** 625; Honoré, **op cit** pp73-6. At the broadest level, this theory sees tort law as grounded upon “correlativity”, requiring those who have harmed others without justification to put the matter right by reparation (damages), specific relief (eg return of a detained chattel) or other means (eg an apology). It requires proof of harm done to the plaintiff for which the defendant bears some causal responsibility.

But the wrongdoer may be impossible to identify or not worth suing. Exclusive adherence to corrective justice principles is not good enough for plaintiffs who go in search of “peripheral” parties. See Stapleton, “Duty of Care: Peripheral Parties and Alternative Opportunities for Deterrence” (1995) 111 **LQR** 301; **Crimmins** at [306] (Hayne J). An American newspaper headline summed it up:

Can’t sue the person who hurt you? Don’t sulk. Hire a personal-injury lawyer and sue someone else.

Corrective justice does not fully explain the rules of tort. See generally Peter Cane, “Corrective Justice and Correlativity in Private Law” (1996) 16 **Ox Jo LS** 471; Honoré, **op cit** pp80-87. Even within negligence, the silent but insistent demands of distributive justice may enlarge liability, for example by imposing strict or near strict liability upon classes of persons involved in risky undertakings or by favouring liability against insured defendants. At present the availability of

insurance is, in theory, an irrelevant factor: see **Kars v Kars** (1996) 187 CLR 354 at 378-9; **Esanda** at 302-3. Conversely, they may restrict liability, for example by control devices in the field of nervous shock that are difficult to justify in principle. See Jane Stapleton, "In Restraint of Tort" in Peter Birks (ed), **The Frontiers of Liability** (1994) vol 2 p95. The highway non-feasance rule cannot be explained except according to principles of distributive justice.

Recently the House of Lords has given explicit recognition to distributive justice principles as reasons for limiting tort liability. **Frost v Chief Constable of South Yorkshire** [1999] 2 AC 455. involved claims by police officers with respect to psychiatric injury suffered after helping victims at the Hillsborough disaster where 96 spectators were crushed to death at a soccer match. The negligence of the officers' employer was held insufficient to ground recovery for pure psychiatric injury. Whether this represents the Australian law is unclear. Cf **Mount Isa Mines Ltd v Pusey** (1970) 125 CLR 383. Their Lordships expressed concern about the impact of a litigation explosion in this area, including concern about the burden of damages and the impact upon crowded court lists. It is also clear that they recognised the difficulty of justifying how it would be fair to award compensation to police officers when it had already been refused to family members of those killed or maimed at the disaster. **Alcock v Chief Constable of South Yorkshire Police** [1992] 1 AC 310. Lord Hoffmann referred to competing proposals to scrap all "control mechanisms" in relation to psychiatric damage or alternatively to abolish recovery for psychiatric injury altogether. He continued: At 503. *The appeal of these two opposing proposals rather depends upon where one starts from. If one starts from the proposition that in principle the law of torts is there to give legal force to an Aristotelian system of corrective justice, then there is obviously no valid distinction to be drawn between physical and psychiatric injury. On this view, the control mechanisms merely reflect a vulgar scepticism about the reality of psychiatric injury or a belief that it is less worthy of compensation than physical injury: therein the patient must minister to himself. On the other hand, if one starts from the imperfect reality of the way the law of torts actually works, in which the vast majority of cases of injury and disability, both physical and psychiatric, go uncompensated because the persons (if any) who caused the damage were not negligent (a question which often involves very fine distinctions), or because the plaintiff lacks the evidence or the resources to prove to a court that they were negligent, or because the potential defendants happen to have no money, then questions of distributive justice tend to intrude themselves. Why should X receive generous compensation for his injury when Y receives nothing? Is the administration of so arbitrary and imperfect a system of compensation worth the very considerable cost? On this view, a uniform refusal to provide compensation for psychiatric injury adds little to the existing stock of anomaly in the law of torts and at least provides a rule which is easy to understand and cheap to administer.*

In **McFarlane v Tayside Health Board** [1999] 3 WLR 1301. the House of Lords held that damages were not recoverable for the maintenance of a healthy child born following a negligently performed vasectomy operation on her father. The child's mother was allowed general damages for the pain, suffering and inconvenience of childbirth. But the parents were refused their claim for the costs of maintaining and educating their healthy "unplanned" child. Lord Steyn said: At 1318.

*It is possible to view the case simply from the perspective of corrective justice. It requires somebody who has harmed another without justification to indemnify the other. On this approach the parents' claim for the cost of bringing up Catherine must succeed. But one may also approach the case from the vantage point of distributive justice. It requires a focus on the just distribution of burdens and losses among members of a society. If the matter is approached in this way, it may become relevant to ask of the commuters on the Underground the following question: "Should the parents of an unwanted but healthy child be able to sue the doctor or hospital for compensation equivalent to the cost of bringing up the child for the years of his or her minority, ie until about 18 years?" My Lords, I have not consulted my fellow travellers on the London Underground but I am firmly of the view that an overwhelming number of ordinary men and women would answer the question with an emphatic "No". And the reason for such a response would be an inarticulate premise as to what is morally acceptable and what is not. Like Ognall J in **Jones v Berkshire Area Health Authority**, 2 July 1986, they will have in mind that many couples cannot have children and others have the sorrow and burden of looking after a disabled child. The realisation that compensation for financial loss in respect of the upbringing of a child would necessarily have to discriminate between rich and poor would, surely appear unseemly to them. It would also worry them that parents may be put in a position of arguing in court that the unwanted child, which they accepted and care for, is more trouble than it is worth. Instinctively, the traveller on the Underground would consider that the law of tort has no business to provide legal remedies consequent upon the birth of a healthy child, which all of us regard as a valuable and good thing.*

It is interesting that in **Esanda Finance Corporation Ltd v Peat Marwick Hungerfords** (1997) 188 CLR 241 at 284. McHugh J effectively recognised that distributive justice could temper even "the most insistent demands of corrective justice". He saw the extension of auditor's liability to cover cases

like **Esanda** as:

... likely to mean that courts and judges hearing such cases will be tied up for many months - sometimes for more than a year - to the detriment of other litigants. Only the most insistent demands of corrective justice should induce the common law courts to mould legal rules to cover cases that bring about this consequence in an era when court resources are already stretched to breaking point and courts are forced to send many cases out to private arbitrators for determination.

It is too early to declare corrective justice as the victor in the field. But it remains a predominating force.

Cutting across this corrective-distributive justice debate, but mainly within the corrective justice framework, lies the question of the role of fault.

Occasionally judges acknowledge the impact of fault and the way that moral responsibility is relevant in a marginal case. See, eg **McLoughlin v O'Brian** [1983] AC 410 at 441 (Lord Bridge). In **Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad"**, (1976) 136 CLR 529 at 575. The passage is cited by Gummow J in **Perre** at [171]. Stephen J was quoting from Lord Atkin's speech in **Donoghue v Stevenson** [1932] AC 562 at 580. Stephen J referred to "a general public sentiment of moral wrongdoing for which the offender must pay" as a broad principle underlying liability in negligence.

Sir John Salmond denied the existence of a single law of tort. At the same time, he argued that a condition usually demanded for liability in an action of tort was either wrongful intention or culpable negligence on the part of the defendant. For him, there was no reason why a loss should be shifted from one person's shoulders to another's except, in general, to punish or deter wrongful intent or negligence. **Salmond on Torts**, 6th ed (1924) pp12-13. See discussion in **Salmond and Heuston on the Law of Torts**, 21st ed (1996) pp21-25. Salmond was logically compelled to say of the decision in **Rylands v Fletcher**, (1866) LR 1 Ex 265, (1868) LR 3 HL 330. which is founded upon a theory of strict liability: **Salmond on Torts**, 6th ed at viii. *No decision in the law of torts has done more to prevent the establishment of a simple, uniform, and intelligible system of civil responsibility.*

The High Court took note in **Burnie Port Authority v General Jones Pty Ltd**. (1994) 179 CLR 520. McHugh J's protest that "*the common law holds no prejudice against strict liability*" At 593. Only Brennan J joined him in dissent. did not sway the majority.

The overruling of **Beaudesert Shire Council v Smith** (1966) 120 CLR 145. in **Northern Territory of Australia v Mengel** (1995) 185 CLR 307. points in a similar direction. There have also been recent stern reminders that the action for breach of statutory duty does not exist in the absence of clearly expressed legislative intent to confer a personal right. **Id** at 343-4; **Byrne v Australian Airlines Ltd** (1995) 185 CLR 410 at 458-9; **Crimmins** at [157]-[158] (Gummow J). Other pockets of residual strict liability are being identified and exterminated in the "staggering march of negligence". See Tony Weir, "The staggering march of negligence" in Cane and Stapleton, **op cit**, n4. Professor Weir instances developments in relation to nuisance, trespass, defamation and other areas where there are intrusions of negligence's concepts of reasonableness, foreseeability, proximity, remoteness etc.

But the trend is not all one-way. The desire to find identifiable and deep-pocketed defendants has pushed the boundaries of vicarious liability and non-delegable duties of care. Indeed, there are strong hints by McHugh J and Kirby J in **Northern Sandblasting Pty Ltd v Harris** (1997) 188 CLR 313 at 366, 392. For recent cases illustrating difficulties with the existing law, see **Newcastle Entertainment Security Pty Ltd v Simpson** [1999] NSWCA 351, **Hollis v Vabu Pty Ltd (T/as Crisis Couriers)** [1999] NSWCA 334. that the time is ripe for the High Court to consider adopting a principle of vicarious liability for the acts and omissions of independent contractors. It is impossible to fit these development within the correlative framework of the corrective justice model.

"*It's your fault, you should pay for it*" represents the response of a primary school child whose treasured toy is broken by a playmate. Childish insights to ethical issues are not necessarily deficient. But complexities enter as the child matures, especially if he or she stands in the wrongdoer's shoes.

The childish response occurs where causation in fact is clear, at least to the child. There is a single wrongdoer whose responsibility stems directly from smashing the toy. To the naïve victim, the wrongdoer's capacity for self-discipline doesn't enter into the equation, nor the unexpected extent of the loss, nor its lack of proportion to the fault of the wrongdoer, nor the wrongdoer's capacity to pay. These things only occur as the growing child starts to perceive that standards set for others may be applied in reverse. Later comes the idea that it is more useful to lay the problem at the feet of the wrongdoer's parents.

Similar developments affect the mature common law as it is asked to make someone pay for every conceivable species of harm. Let me illustrate. P suffers blood poisoning in hospital where he is a temporary patient following a minor road accident. The simple example may throw up a plethora of issues:

- Which individuals are liable: the doctor, the nurses, the driver?
- Which organisations are liable because of vicarious liability or a non-delegable duty: the hospital, the driver's employer, the car owner, the highway authority?
- What damages are payable by each defendant? Does every person liable pay for both the bruising and the damage stemming from the blood poisoning?
- Are damages reduced for contributory negligence?
- Can the defendants share the loss amongst themselves?

Several doctrines aid injured plaintiffs in their quest to find someone "to pay" and pay in full. These include substantive rules like the "egg shell skull" rule. There are also rules of procedure which aid plaintiffs uncertain whom to sue. See ***Bendix Mintex Pty Ltd v Barnes*** (1997) 42 NSWLR 307 at 317. or which allow (but do not compel) inferences of causation to be drawn against persons whose negligence is followed by an accident of the kind within the scope of the relevant duty. See ***Betts v Whittingslowe*** (1945) 71 CLR 637 at 649; ***Chappel v Hart*** (1998) 195 CLR 232 at 238-9, 247-8, 257, 273-4; ***Naxakis v Western General Hospital*** [1999] HCA 22 at [31], [76], [127]. Indeed there is a current debate about whether persons who create or increase a risk of injury should (without proof on the probabilities that the risk came home) bear legal responsibility if the risk comes home. The debate centres on the interpretation or re-interpretation of Lord Wilberforce's speech in ***McGhee v National Coal Board*** [1973] 1 WLR 1 at 6-7. Some propose effective reversal of onus of proof as distinct from the reasoning process referred to the authorities cited in the previous footnote. Cf ***Bennett v Minister for Community Welfare*** (1992) 176 CLR 408 at 420-1, esp fn (23) (Gaudron J); ***Chappel*** at 273-4 (Kirby J); Jane Stapleton, "The Gist of Negligence" (1988) 104 LQR 389 at 401-7. Within New South Wales much of the debate is focussed on the correctness or otherwise of my reasons in ***Bendix Mintex*** in their application to mesothelioma cases. The plaintiff's task is eased by the need to show only that the injuries were "caused or materially contributed to" by the wrongful conduct of the chosen defendant or defendants, ***March v E & MH Stramare Pty Ltd*** (1991) 171 CLR 506 at 514. and by the law's adherence to the concept of solidary liability. This enables the plaintiff to take action against one of many defendants and to receive full compensation from that defendant, leaving it to the defendant to seek to recover a share of the damages from any other liable defendant. See generally New South Wales Law Reform Commission ***Contribution Between Persons Liable for the Same Damages*** (1999) R99.

The fault notion may act as a control device. It is seen as unfair to place the burden of loss upon the shoulders of a tortfeasor whose fault is disproportionate to the loss claimed by one or many plaintiffs. To the extent that fault and degrees of fault influence findings as to liability or the extent of liability, there is a tempering of corrective justice in deference to a retribution principle in which there is proportionality between the gravity of the defendant's conduct and the extent of reparation. See Honoré, *op cit* pp85-87.

(Sometimes legislatures intervene to close floodgates. Occasionally defendants are given statutory immunity, which the courts construe narrowly. See, eg ***Puntoriero v Water Administration Ministerial Corporation*** (1999) 165 ALR 337, (1999) 73 ALJR 1359. More common are legislative caps which preclude certain heads of damages or limit their extent.)

Causation is a “central organizing concept”, Weinrib, **op cit**, p404. usually a control device, in tort law’s quest to keep law (liability) and morality (fault) in step. Causation reasoning is often used to expand or to stem liability for particular losses flowing from an act of negligence.

Tracing tort law’s use and abuse of causation discloses major developments in the quest to recognise fault but to stem its disproportionate outcome. Many hard issues have been hidden beneath the beguiling veneer of causation. In his introduction to **Responsibility and Fault**, Professor Honoré states **Op cit**, at p7. that “*people are never legally liable merely because they have caused someone harm*”.

It may be possible to see four stages in the use and abuse of causation.

Like the child whose toy is broken, the ancient common law usually treated legal responsibility as a self-evident consequence of causation of damage, regardless of fault. This is hardly surprising since concern was focussed on physical injury and since the action for trespass dealt with direct and intentional acts. Even the action on the case refused until the nineteenth century to recognise openly that absence of fault was an excuse. **Alford v Magee** (1952) 85 CLR 437 at 453. Generally, see C Peck, “Negligence and Liability Without Fault in Tort Law” (1971) 46 **Washington L Rev** 225 at 225-7. So mechanistic was the early common law that it compensated for death by confiscation of the offending animal or object or requiring the owner to pay its value. In this institution of deodand, blame or fault was usually irrelevant, but juries sometimes imposed nominal deodands if fault was absent. See Teresa Sutton, “The Deodand and Responsibility for Death” (1997) 18 **Legal History** 44.

By the nineteenth century a tort of negligence had emerged, but **Rylands v Fletcher** illustrates that strict liability remained well entrenched. **Re Polemis and Furness, Withy & Co Ltd** [1921] 3 KB 560. epitomises the second stage of the role of causation in tort damages. Liability now depends, in the main, upon proof of lack of due care (fault) in established duty categories. But responsibility in damages (still almost invariably for physical loss and damage) extends to all of the direct consequences of a negligent act. On the plaintiff’s side of the equation, contributory negligence is a complete defence.

Ostensibly, causation reasoning provided answers for plaintiffs and defendants in this era. To limit liability for negligent defendants and to permit recovery by negligent plaintiffs judges developed metaphysical causation principles, using them like circuit breakers. Concepts such as *novus actus interveniens* were introduced as control devices to block Cardozo CJ’s hideous spectre of liability “*in an indeterminate amount for an indeterminate time to an indeterminate class*”. **Ultramares Corp v Touche** 174 NE 441 at 444 (1931). In many cases, the judges were driven “*to take refuge in metaphor or Latin*”. **Environment Agency v Empress Car Co (Abertillery) Limited** [1999] 2 AC 22 at 29 per Lord Hoffmann. Refinements such as *causa causans*, effective cause, proximate or legal cause and *novus actus interveniens* were introduced to reflect degrees of fault and to deal with difficulties presented by the distinction between acts and omissions and where the acts of third persons or natural forces are concerned. Negligent plaintiffs sometimes succeeded by showing that the defendant had the “last opportunity” to avoid an accident, and until at least the 1950s “last opportunity” was viewed in terms of breaking a chain of causation stemming from the plaintiff’s own negligence. In **Alford v Magee** (1952) 85 CLR 437 the High Court exploded this view. But the proposition that the last opportunity rule was not a test of causation had to be reiterated in **Chapman v Hearse** (1961) 106 CLR 112 at 123-4. See also **March** at 511-514.

Wagon Mound (No 1) gave greater emphasis to the fault concept by overruling **Re Polemis** and offering foreseeability of damage as a control device. **Overseas Tankership (UK) Ltd v Mort’s Dock & Engineering Co Ltd (“The Wagon Mound”)** [1961] AC 388. However, Viscount Simond’s test was really “*a flexible concept deprive[d] ... of any fettering rigidity*”. Sir Robin Cooke, “Remoteness of Damages and Judicial Discretion” [1978] **Cam LJ** 501 at 537. In **March** (at 510), Mason CJ explained that reasonable foresight was later to be rejected as a test of causation (in **Chapman v Hearse**) and as an exclusive criteria of responsibility (in **McKew v Holland & Hannen & Cubitts** [1970] SC (HL) 20 and **Mahoney v J Kruschich (Demolitions) Pty Ltd** (1985) 156 CLR 522). It warned not to take causation too far, but it did not change much. **Re Polemis** would probably be decided the same

today. **Wagon Mound** has spawned its own complex distinctions between foreseeability as to kinds of damage and foreseeability as to the manner in which damage might occur. **Chapman** at 120-121; **Hughes v Lord Advocate** [1963] AC 837; **Commonwealth v McLean** (1996) 41 NSWLR 389 at 402-407.

Around the 1960s and 1970s there was a determined effort by appellate judges to expel metaphysical theory with its attendant metaphors and latinisms. Windeyer J once joked that: *those who would explain common law principles by exotic Latin maxims ought surely to remember that these are to be understood secundum subjectam materiam.* **Smith v Jenkins** (1970) 119 CLR 397 at 410.

What were we offered in its place? Enter the third phase. "Causation" was still seen as central, because reasonable foreseeability only "*mark[ed] the limits beyond which a wrongdoer will not be held responsible for damage resulting from his wrongful act*". **Chapman** at 122 per curiam. However, we were assured that causation problems could be solved by the robust application of "common sense". Thus, in **Alphacell Ltd v Woodward** [1972] AC 824 at 847. Lord Hoffmann describes this as being "*in the best tradition of English anti-intellectualism*" **Common Sense and Causing Loss**, lecture to the Chancery Bar Association, 15 June 1999, p2. See also **Clay v A J Crump & Sons Ltd** [1964] 1 QB 533 at 568-9 per Upjohn LJ ("*... causation is almost entirely a question of fact in each case*"). Lord Salmon said that:

... what or who has caused a certain event to occur is essentially a practical question of fact which can best be answered by ordinary common sense rather than by abstract metaphysical theory.

This robust approach was particularly suitable in the era when juries decided liability and damages. See **Fitzgerald v Penn** (1954) 91 CLR 268.

March v E & MH Stramare Pty Ltd (1991) 171 CLR 506. is the Australian authority still often cited for the glib submission that causation is a question of fact and a matter of common sense. It is frequently invoked in a context suggesting that hard questions of responsibility for fault can be solved once the causation issue is properly addressed. In fact, **March** is the modern turning point and the start of a fourth era in which causation reasoning becomes increasingly unfashionable. The CLR headnote reiterates the mantra that causation is essentially a question of fact to be answered by reference to common sense and experience. But this misrepresents **March**, which substantially qualifies or undermines this proposition by going on to emphasise that questions of policy and value judgments necessarily affect legal responsibility, measure of damages, contributory negligence and apportionment. The judgments in **March** acknowledge that the attribution of responsibility is a value-laden exercise even if the language of causation is used. Mason CJ was even critical of the view that value judgment has no part to play even in resolving causation as an issue of fact. At 515-517. See also Deane J at 523-4.

Building on **March**, there has been a further retreat in the last decade from the misplaced and misleading confidence that causation can be reduced to an opaque jury instruction about using common sense. Lord Hoffmann's speech in **Environment Agency v Empress Car Co (Abertillery) Ltd** [1999] 2 AC 22. is a milestone. His Lordship put the matter bluntly in a recent paper: See footnote 58.

The reason why courts get the wrong answer on questions of causation is not usually because they have misunderstood the facts or lack common sense but because they have got the law wrong.

We are now urged to ask necessary causation questions in their particular factual and legal context and, in the case of tort, from the point of view of the injured plaintiff and the wrong sued upon. Professor Stapleton helpfully describes this as the perspective through which the objective phenomenon of causation is judged. Jane Stapleton, "Perspectives on Causation" in

Oxford Essays in Jurisprudence (4th series) (Oxford University Press, 1999). Thus, in *Chappel*, Gaudron J said: (1998) 195 CLR 232 at 238.

Questions of causation are not answered in a legal vacuum. Rather, they are answered in the legal framework in which they arise. For present purposes, that framework is the law of negligence. And in that framework, it is important to bear in mind that that body of law operates, if it operates at all, to assign a duty to take reasonable steps to prevent a foreseeable risk of harm of the kind in issue.

Cases such as *Medlin v State Government Insurance Commission* (1995) 182 CLR 1. In so doing, the Court effectively applied what Mason CJ and McHugh J had said about *novus actus interveniens* in *March*. See *Kavanagh v Akhtar* (1998) 45 NSWLR at 597-9. applied this approach to mitigation issues. The last of the metaphysical latinisms using the language of causation (*novus actus interveniens*) was shown the door, without actually being booted out. The High Court there emphasised that the reasonableness of the plaintiff's conduct was to be judged, as between the plaintiff and the defendant, and from the perspective of the plaintiff's injured condition.

Appeals to common sense should nevertheless serve to remind us that the exercise is one in which judges and juries should have confidence in their personal sense of wisdom and reasonableness. But the task remains normative, because in the final analysis the various tests "*allow the tribunal of fact to determine legal liability on broad grounds of moral responsibility for the damage which has occurred*". *March* at 531 per McHugh J.

In *March*, the High Court exposed the presence of policy values sheltering behind the glib language of causation. In later cases, that Court has commenced to articulate those values. The guidance from the recent cases is that ultimate questions such as "was there breach?", "did it affect the plaintiff's conduct?" and "did it cause the damage claimed?" must be asked in the context of the defendant's legal responsibility to the particular plaintiff. This may involve considering the scope of the risk in contemplation of the legal duty.

A cynical response to the title of my paper would be to propound the thesis that if a judge is moved by fault then he or she will find legal responsibility. But the books are full of cases "*which show how shadowy is the line between culpability and compensation*". *Wagon Mound (No 1)* at 418 per Viscount Simonds. Recent decisions and recent academic writing have cast much light on the subject. The shadows remain, but the focus is clearer.

What Use Are Laws (in Securing Their Own Effectiveness)?

Justice Keith Mason
President, NSW Court of Appeal
Opening address at
3rd Annual Conference of
**Association for Compliance
Professionals of Australia Inc**
23 September 1999

The rule of law is part of the bedrock of a true democracy. But we do not need to look far beyond our shores to realise that laws are nothing without effective compliance mechanisms.

What use are laws in this very process?

A charming member of the Bar, who recently retired, once concluded her submissions to a judge by asking for "the usual orders". "Why?" responded the judge gruffly. With a smile, she replied: "For the usual reasons".

When I practised at the private bar, I was involved in training young lawyers. I always urged them to find out the exact legal basis for everything they were doing, at least on the first time they did it. It may well be that "the usual orders" are made for "the usual reasons". But behind nearly every step of practice or procedure lies a legislative rule or case law precedent. If the rule or precedent cannot be found, then common practice may be common error. I urged the young barristers to do this exercise so as to check that what they thought was good practice was in truth good practice, and so that they could arm themselves with a shield in the event that an opponent or judge queried them. I used to tell them that they may not need that shield in the case they were preparing for, but it would probably turn out to be useful in a later case.

Of course, it would be intolerable if the citizen or the lawyer were asking about the legal basis for conduct every step of the way. We would quickly go crazy if constantly asking ourselves whether everything we did was legal or obligatory. A famous American academic, Grant Gilmore once said:

In Heaven, there will be no law, and the lion will lie down with the lamb. In Hell, there will be nothing but law, and due process will be meticulously observed.

Are laws any more than props for those involved in the enforcing or defending legal rights? Does law itself provides its own compliance mechanisms? How do they work?

The making and enforcement of law are not ends in themselves, although they keep many of us in gainful employment. However, the effective rule of law ensures that the whole of society give effect to important values which are part of our heritage or which our elected representatives determine are appropriate. This includes law-makers, judges and law-enforcers themselves.

Most people in Australia drive on the left hand side of the road without thinking of it as a legal obligation. This might change if they were stopped by a police officer for overtaking across the centre line on a country road. They might then wish to consult the motor traffic regulations to see the exact content of the prohibition or at least to check the maximum fine. And if they were involved in an accident, then they (or more likely, their insurer's lawyers) might want to check the text of the regulation if an award of damages for negligence were likely to be affected by its detail.

The law about keeping to the left of the road in this State is to be found in regulation 65 of the *Motor Traffic Regulations* which provides:

Subject to these Regulations, the driver of a motor vehicle upon a road or road related area shall keep the vehicle as close as practicable to the left boundary of the carriageway, except:

- (a) where there are two or more lanes marked on the carriageway available exclusively for traffic travelling the direction in which the driver is travelling; or
- (b) where the vehicle is being driven upon a shared traffic zone.

This legislative rule serves a number of functions. Read literally, it states a duty. Another regulation imposes a penalty for breach. But regulation 65 goes much further than creating a criminal offence. It is part of a complex framework of detailed rules of the road which enable people to go about their affairs effectively and safely. That is because people who drive on a public street are enabled and encouraged to drive at speeds that would be quite dangerous were it not for the fact that the vast majority of other drivers will also act in accordance with the letter and the spirit of regulation 65. If drivers think about it, they will comply for a number of reasons: self interest, moral duty, custom and fear of punishment.

As a small contributor to a complex system of social management, regulation 65 really tells the drivers of New South Wales that if they want to drive on the road, this is how they should go about it. Some laws do this without imposing criminal sanctions. Thus, the *Wills Act* describes how a person wishing to make a valid will should go about the task. Failure to comply does not result in a fine, but intestacy. However, most laws contain an express sanction in the form of a penalty and/or a liability to pay damages for breach.

Some laws are concerned with compliance itself. Indeed, questions of compliance are as old law itself. "Who judges the judges?" asked ancient Juvenal. A Judge of Appeal is really part of an in-built system of self-regulation for the judicial arm of government, a compliance monitor if you like.

The way in which a society deals with the execution of its laws, including its use of army and police, is of the essence of the way we perceive that society itself. Recent events to our north prove this truth. As I indicated at the start of my remarks, good laws without good compliance serve little or no purpose. Indeed, the distance between precept and practice brings the whole system into disrepute.

But exactly how does regulation 65 of the *Motor Traffic Regulations* contribute to safe and efficient driving by keeping people on the left hand side of the road? What are its compliance mechanisms?

It really depends on the way law in practice responds to the exceptional situation where the regulation is breached.

Everyone drives over the unbroken centre line of a road on occasions. Society as a whole is prepared to ignore most infractions. We could have police lined along the side of every street. We could install cameras everywhere. We could open thousands of extra courts. We choose not to resort to these extreme measures for obvious reasons. We are generally content to sanction breaches of this particular law by leaving it up to the chance that a police officer will pick up occasional infringers. In the main, nothing is done unless there is an accident. Then, and usually only then, the regulation will be invoked with the issue of a penalty notice or relied upon as proof of negligence in a damages claim.

Compliance with many laws is achieved in a similar haphazard fashion. The individual citizen almost certainly does not know of regulation 65. The remote prospect of a small fine plays only a subliminal role in the way we drive. And the sanction of a damages claim is a very weak one because drivers are covered by third party insurance and because the premiums for such insurance do not vary for a driver with a bad claims record. Of course, everything would change if an accident caused a fatality: so the fear of prison for causing death by dangerous driving will hopefully prove a significant and reasonably effective deterrent of gross infringements of the regulation.

It is somewhat different with factory safety regulations, because although insurance for work injuries is compulsory, the premium level varies from industry to industry depending upon the risk. It is different again in areas where insurance is optional and where premiums rise with an individual's poor claims record. Here we see the risk of tort liability starting to put the bite on the insured. The threat of damages starts to perform a compliance function through deterrence. But it is fairly inefficient in this role. In a recent decision of the Court of Appeal (*Kinzett v McCourt* (1999) 46 NSWLR 32 at 53), I said this:

Tort liability remains much more than an unintended burden upon an activity

superimposed upon an order for compensation. It may be appropriate for types of risk-taking (like speeding on the roads) to be discouraged. Tort law plays its part, along with ethical, criminal and commercial sanctions. Of course, many risky ventures have social utility, and we judges need to remind ourselves of this when pressed by plaintiffs to expand existing bounds of liability, for example, in the field of professional malpractice and in relation to novel duties to control the conduct of others.

With this little excursion into tort law, I return to driving on the left hand side of the road.

A general perception that deliberately driving on the right hand side is wrong, dangerous and potentially risky to personal liberty is therefore a partially effective compliance mechanism for the individual citizen. But government and business organisations will have additional reasons to be concerned with compliance with such laws. Accidents have direct and indirect costs which can quickly mount up for such organisations. The goal of good corporate citizenship is valued for a variety of reasons and this adds a further incentive. It is therefore hardly surprising that many enterprises put signs on the back of their vehicles inviting motorists to telephone in to report infractions by the driver. This is a voluntary compliance mechanism. A compulsory mechanism, that is one imposed by law itself, is the requirement that certain vehicles display their own maximum speed limit. This is another example of law seeking to achieve its own compliance.

A cynical definition of law might be something designed to provide work for a compliance professional, or something for a corporation's compliance watchdog to get his or her teeth into. But law is ubiquitous. It needs no explanation. Law surrounds us at our every step. It regulates the air we breathe. It controls human relationships from prior to conception until after death. Whether we like it or not, it makes insistent demands for compliance. Ensuring compliance is nothing less than proper submission to its demand for obedience, with all of the reasons (positive and negative) for obedience.

Delegates at this conference will be exploring the means to ensure greater compliance with laws, including what may be termed private laws such as the self-imposed goals of a particular organisation. You will be studying in detail Australian Standard 3806 - 1998, *Compliance Programs*.

The Federal Court of Australia determines cases arising under the *Trade Practices Act*. The Court may order a corporation that has infringed the anti-trust or consumer protection provisions of the Act to stop doing it and to engage in corrective conduct in the future. Within the last couple of years, that court has recognised Australian Standard 3806 - 1998 *Compliance Programs*. In *WD & HO Wills (Australia) Ltd v Philip Morris Ltd* (1998) ATPR ¶41-606, Von Doussa J sanctioned a consent injunction in which the offending party agreed to have a compliance program set up in accordance with the Standard.

When looking at mitigation of penalty, courts look to see whether the offender is committed in the resolve not to offend again. It is part of the way of deciding the extent of genuine remorse for the past and genuine commitment to improvement in the future. For a corporation, courts look for signs of a culture of compliance. In *Australian Competition & Consumer Commission v Australian Safeway Stores Pty Ltd* (1997) ATPR ¶41-562, Goldberg J said that a compliance program had to be substantial and had to be successfully implemented before penalties would be reduced.

When a media corporation commits a contempt of court through a publication which interferes with the course of justice (for example, by revealing the prior criminal history of an accused person on the eve of his or her trial) the offence is one of strict liability. Ignorance of the potential impact of the publication is no excuse. Repeat offenders are punished seriously. And, in determining an appropriate level of punishment, the court will pay particular regard to the system for compliance within the media organisation. Courts recognise that slip ups occur. But risks can be lessened by systems of staff education and efficient monitoring mechanisms. The presence of such systems will mitigate penalty.

It is likely that Courts will look increasingly to Australian Standard 3806-1998 for guidance as to what constitutes a substantial compliance program for the purpose of mitigation of penalty.

I have given some examples of the way in which law itself plays a role in its own compliance.

Unfortunately, law sometimes shoots itself in the foot. A silly or obsolete rule may bring the law into disrepute. Remember Mr Bumble in *Oliver Twist*: "If the law supposes that ... the law is a ass - a idiot". He was speaking of the old presumption that a wife acted under the direction of her husband when

she did something wrong.

Sometimes a new law is a smokescreen, a politician's attempt to be seen to do something. Sometimes public education is more effective than legal prohibition.

The passing of more and more laws does not guarantee that human behaviour will change, even if those laws are effectively enforced. Our company laws have grown mightily in size between the *Companies Act* of 1899 (which contained a mere 284 sections) and the *Corporations Law* of 1989 (which contains 1,465 sections). With greater regulation, the cost of compliance has risen. But it is less clear that we have made great inroads upon essential problems of good faith and prudential corporate management.

The *Income Tax Assessment Act* expands to meet every new tax avoidance scheme. Unfortunately, like many detailed laws, it sometimes sets the outer limits of compliance by sending a message that "beyond here anything goes". This until very recently was the fate of American laws requiring the cigarette manufacturers to print health warnings. Until very recently, American juries seemed reluctant to find that manufacturers had breached broader duties of care.

I hope that I have been able to show that laws and lawyers have a commitment to the success of their enterprise. Many rules and practices aim to ensure greater compliance with substantive laws and their underlying social goals. But much more can be done.

I congratulate Bill Tearle for organising this splendid Conference which I am pleased to declare open. Your work as compliance professionals is very significant and we all have much to learn from you and the good practices that you develop through the Association for Compliance Professionals of Australia.

Changing Attitudes in the Common Law's Response to International Commercial Arbitration

Keynote Address at International Conference on International Commercial Arbitration

Justice Keith Mason
President, New South Wales Court of Appeal
9 March 1999
Swiss-Grand Hotel, Bondi Beach

1998 was a vintage year for international arbitration. It was the 75th Anniversary of the International Court of Arbitration and it saw the promulgation of the 1998 ICC Rules of Arbitration. The new Rules reflect the dramatic changes in the practice of international commercial arbitration that have occurred since the early days after the Court was established in 1923. In the beginning, most users requested conciliation under the ICC Rules, and lawyers did not participate either as arbitrators or as counsel. With the growing sophistication of business and international law, preference shifted towards arbitration and the involvement of lawyers.

Not everyone would regard greater involvement of lawyers as an unmitigated blessing. For certain types of dispute resolution, lawyers can be counter-productive unless they have had intensive re-education. However, the significance and complexity of issues thrown up by international commercial disputes mean that the presence of lawyers is as inevitable as it is beneficial.

The 1998 ICC Rules of Arbitration are the product of a felicitous collaboration between the International Court of Arbitration and the Commission on International Arbitration. This guaranteed input from practitioners in the field and from the members of a Court who are responsible for applying the Rules. The Rules have been well received by the community of those involved with international commercial arbitration. I hope to explain why they are also of great interest to the community of those involved in more traditional forms of litigation.

Those of us with a common law background are the inheritors of a long tradition of distrust of arbitration, both national and international. Sometimes this distrust stemmed from perceived deficiencies of the arbitral process, such as its expense, lack of finality, and difficulties of enforcement of awards. Sometimes there was resentment about aspects of arbitration which (to some at least) are its beneficial hallmarks. For example, arbitral procedures offer flexibility and confidentiality. Antagonism also stemmed from the would-be monopolists' desire for exclusive control of a particular field. Arbitration threatened the barrister's exclusive right of audience. It questioned the relevance of many of the common law's technical mysteries. It disputed the common law's fixation with the administration of justice in public.

Now the common law was always prepared to debate the advantages of these points of distinction. But winning an argument on the topic would not guarantee keeping the work. The users were and are capable of making their own judgment in the field of commercial disputes.

The law's opposition to arbitration also stemmed from less worthy perspectives. The desire for exclusive control will often have an economic motive not far below the surface. With arbitration, it was not just the barristers whose livelihood was threatened. In the famous case of *Scott v Avery*, the British House of Lords settled the validity of arbitration agreements that made an award a condition precedent to any right of action under a contract. This decision, announced in 1856, ended much judicial conflict and judicial opposition that was shrouded in technicality and arcane learning. However, the canny Scot Lord Campbell lifted the curtain on judicial opposition:

"My Lords, I know that there has been a very great inclination in the courts for a good many years to throw obstacles in the way of arbitration. Now, I wish to speak with great respect of my predecessors the judges; but I must just let your Lordships into the secret of that tendency. My Lords, there is no disguising the fact, that as formerly the emoluments of the judges depended

mainly or almost entirely upon fees, and they had no fixed salary, there was great competition to get as much as possible of litigation into Westminster Hall, and a great scramble in Westminster Hall for the division of the spoil,.... Therefore, they said that the courts ought not to be ousted of their jurisdiction, and that it was contrary to the policy of the law."

This frank self-revelation must have caused quite a stir, which is probably the reason why it does not appear in later, revised reports of the decision.i

In the case of international commercial arbitration, opposition from common lawyers sometimes also stemmed from ignorance of legal systems outside our own ken (especially civilian systems). Fear of the unknown will often produce distrust and opposition.

Across the world there has in the last two decades been a major shift towards acceptance of international arbitration. Distrust has shifted to understanding and support. This shift is a response to improvements in the regime of international commercial arbitration. The finality of awards in international arbitration has been enhanced. And effective mechanisms have been devised for worldwide enforcement. The trend has been greatly assisted by the growth and sophistication of arbitration institutions across the world. A critical turning point was the New York Convention of 1958 which has done much to make arbitral awards in international commercial arbitration "readily transportable" in the sense of being enforceable in every Convention State. It has truly been recognised that: Enforcement of arbitral awards is the justification of all international commercial arbitration: and the role of international conventions is directed to this end. The heart of the [1958 New York] Convention is the specification of limited grounds on which recognition and enforcement of an award may be refused. That the arbitrator has misinterpreted facts or law is not a defence to enforcement. The Court's scrutiny is strictly limited to ascertaining whether the award gives rise to a possible refusal of enforcement on one of the narrow grounds mentioned in Art V, and the process of scrutiny does not involve an evaluation of the arbitrator's findings.ii

A simple statistic demonstrates the growing popularity of international arbitration. In 1990 the ICC case load passed the 7000 mark. Of this total, it took 55 years for the first 3500 cases to be filed, but only 12 years in regard to the second 3,500 cases to be registered.iii

A historical breakthrough in ICC arbitrations occurred in 1996. In that year, for the first time in the Court's existence, the number of parties from western Europe represented less than 50% of those involved in ICC arbitrations. The published statistics for that and the following year confirm a very significant increase in the participation of parties from southern and eastern Asia in international commercial arbitration.

This international conference in Sydney reflects the significance of international commercial arbitration in southern and eastern Asia and Australasia. I understand that there are delegates here from the Peoples Republic of China (including Hong Kong), India, Malaysia, New Zealand, the Philippines and Singapore as well as of course, many Australian delegates. And we are truly honoured to have the attendance of Dr Robert Briner the Chairman of the ICC Court of Arbitration, and Mr Paul Gelinas Chairman of the International Arbitration Commission.

Parallel developments showing greater acceptance of arbitration have occurred within national judicial systems. It is no longer self-evident that arbitration is more expensive than litigation, at least in a jurisdiction such as New South Wales where many commercial and non-commercial disputes are referred out by courts to processes of compulsory inquiry by referees and arbitrators. This involves considerably greater cost to the parties. The very fact that these methods of inquiry do not produce the finality of an arbitral award stemming from a voluntary submission to arbitration only serves to emphasise why consensual arbitration is worth a second look in modern times.

The courts too have softened their hostility to arbitration. Within Australia, the Commercial Arbitration Acts of the States and Territories have emphasised the finality of awards. And judges have been faithful to the spirit of their reforms by sympathetic interpretation of the requirement that a challenger must demonstrate:

- (i) a manifest error of law on the face of the award; or
- (ii) strong evidence that the arbitrator or umpire made an error of law and that the determination of the question may add, or may be likely to add, substantially to the certainty of commercial

law.iv

A leading exponent of this new respect for arbitral awards was the former Chief Judge of the Commercial Division of the Supreme Court of New South Wales, now the Honourable Andrew Rogers QC one of the speakers at this forum and a well-known international arbitrator. It is interesting to note that the leading case in which this view was expounded by his Honour and the New South Wales Court of Appeal was an unsuccessful challenge to an arbitral award made by the Honourable Sir Lawrence Street, who likewise would need no introduction in an assembly like this.v

I have touched on the reasons why it is obvious that professional and judicial attitudes to arbitration locally have influenced attitudes to international commercial arbitration. The converse is also true. These attitudes of mutual recognition and respect have seen increased borrowing by one system of the advantages perceived in the other. Thus we have two living organisms, themselves related symbiotically.

This conference offers a wealth of speakers and opportunities for delegates to explore the opportunities and problem-areas of international commercial arbitration. I would like to stay with my theme of the common law's responses to arbitration and how, in modern times, the two systems feed each other.

Reading the 1998 ICC Rules of Arbitration it struck me that there are areas where the judges might borrow from ICC initiatives.

Article 24 fixes a six months time limit for the Arbitral Tribunal to render its award, unless the Court extends the limit pursuant to a "reasoned request" from the Tribunal or on its own initiative. The critical point is that the time runs from the settling of the Terms of Reference - not from the hearing date, or the date when the proceedings are closed. This holistic approach reflects good sense and the influence of civilian systems which are not fixated with the common law's idea that proceedings start on the day of trial and finish when the last submission of counsel is made. The adversary system further contributes to a division of responsibility for the ongoing progress of a case. Now attitudes have changed in recent times, with judicial case management and the like, but we have a long way to go. As you will all be aware, delay in the delivery of civil and criminal justice is a topic of intense public debate.

Many reforms address the central problem of justice delayed, justice denied. Yet all of these measures attack delay at specific stages of the litigious process, or target specific players, including the judges themselves. What is refreshing about Article 24 is its recognition that the litigants are only concerned with what I can call "start to finish" delay. They don't care whether the fault lies with the lawyer, the judge or the system as a whole. Indeed, the litigant probably suspects, with good reason, that shifting blame from one player to another assists all to slip through the net. Article 24 places responsibility collectively on all players to ensure that the case moves to its conclusion within a controlled time limit. And it focuses on the end-product.

My second point of interest is Article 32. A recurring theme of conferences and literature in recent years has been the excessive duration of conventional arbitration proceedings. This has led to growing interest in the means of conducting ICC arbitrations on an expedited, or "fast-track" basis. The 1998 Rules do not contain any provisions on this subject, partly because they already contain relatively stringent time limits. It was also the view of most of the members of the Working Party and most of the ICC National Committees, that parties wishing to conduct arbitrations on an even more accelerated basis than that provided for in the Rules should fashion procedures appropriate for each individual case. Thus, the Rules include a new provision (Article 32) intended to make it clear that the parties may agree to shorten the various time limits in the Rules. I am aware of a recent international arbitration in Vancouver involving Australian interests that was conducted on a "stop watch" basis. A fixed hearing time was divided between the parties leaving each free to use its share as it wished. The time could be allocated among the examination or cross-examination of witnesses and in opening and closing addresses, as the party chose. But when the time was up, it was up.

It is the bane of modern commercial litigation that the parties often lose control of the case. The hearing stretches out endlessly and time and cost budgets get constantly revised upwards. Massive pressure descends upon a litigant to abandon or compromise its perceived rights. Exhaustion or fear of bankruptcy drive litigants to mediation, rather than a genuine desire to seek reconciliation. To my

experience there have been shocking cases where the costs generated in litigation exceeded the amount in issue by a large factor. This is absurd and intolerable.

Why can't our judicial system take a leaf out of the ICC's book? Why shouldn't we offer litigants the option of something equivalent to a stop watch trial coupled with a commitment by the Court to deliver judgment within a fixed time? If that commitment led to restricting the right to challenge the judgment, as presently exists with an arbitral award, then so be it. This is not the rationing of justice, because the parties would choose to conduct their cases according to this fast track system.

One of the options presented by arbitration is that of having a person who is not a legal expert participate in decision-making. Sometimes it is the advantage of allowing a legal expert to function with more flexibility and despatch than a judge. As with a jury, no one would expect that arbitrator to bring the strait-jackets of legal reasoning to the task. But as with a jury, experience teaches that substantial justice can be delivered by means other than the exquisite intricacies of a stately litigious saraband. As with a jury, a decision may come more quickly.

Lying behind the lawyers' reluctance to contemplate such a radical break with the past is the belief that meticulous attention to procedure and the discipline of producing a closely reasoned judgment is the surest way to approximate the unattainable goal of perfect justice. This is almost an article of faith. Now please don't get me wrong. I am not urging the abandonment of fair procedure, logical rigour and reasoned and reasonable decision-making. And reasons (or at least one set of reasons) are necessary for appellate courts whose function includes exposition of legal principle. But I venture to suggest that the jury is still out in determining whether prolonged cogitation and lengthy exposition of reasons makes for a more accurate verdict on a yes-no issue by a judge at first instance. The main impetus for requiring reasons is the existence of a right of appeal on factual and legal grounds. Without reasons this right would be rendered largely nugatory. But where no such appeal exists - as with a jury's verdict - then we should at the very least count the cost of the delay inherent in the giving of detailed reasons. Justice Michael Kirby has recently spoken on the topic of "Judging: Reflections on the Moment of Decision".^{vi} He notes that it is surprising that so little has been written about the moment of judicial decision, especially at the trial level.

Psychiatrists and legal realists would probably offer a different analysis to that of defenders of the judicial system who believe in its capacity for sustained analytical and logical thought in matters touching the credibility of witnesses or choices between the testimony of technical experts. But I venture to think that all would agree that delay can harm sound decision-making, and that many cases are truly decided by reference to the heart, which according to Pascal has its reasons that reason does not know.

In the recent summer vacation I was able to watch Judge Judy on television. For those of you unfamiliar with this engaging programme, its star is a savvy and opinionated lady who is a retired judge. She conducts a hearing of sorts in relation to disputes that have a personal interest slant. Although masquerading as judicial proceedings, what really takes place is a public arbitration in which the litigants have apparently signed away many of their rights, including the right to counsel and the right to complain of gratuitous defamation of character. The hearing is brief, the dull parts are edited out, and there are convenient breaks to allow the running of advertisements.

I am not suggesting that this is a forecast of the court or arbitration of the future. But there is one aspect of Judge Judy's technique that fascinates me. Her catch phrase is "I have heard enough". With this imperious statement all further evidence and argument is cut short and the case moves to finality. If judges and arbitrators were completely honest, and if litigants and lawyers were completely percipient and trusting, they would acknowledge that there comes a time in many proceedings where it would be wonderful to have the power to bring down the curtain in this manner. Lord Campbell, of whom I have already spoken, tried to do this once. In some personal reminiscences, Sergeant Ballantine described how, wearied out by the prolixity of an eminent and imperturbable counsel, and having exhausted his usual phrases of disgust, he got up from his seat and marched up and down the Bench, casting at intervals the most furious glances at the offender. At last "folding his arms across his face, he leant, as if in absolute despair, against the wall, presenting a not inconsiderable amount of back surface to the audience".^{vii}

Perhaps the next draft of the ICC Rules might include a provision which allows the totally frustrated arbitrator some capacity to vent spleen in a formal demonstrative act such as adopted by Lord Campbell. Perhaps too there should be a Judge Judy clause, enabling the arbitrator to say "I have heard enough". But with or without such changes, the common law will continue to borrow gratefully from those involved in international commercial arbitration.

Footnotes

i Contrast 28 LT 207 at 211 and 5 HLC 811 at 853 where the passage has been replaced with "It probably originated in the contests of the different courts in ancient times for extent of jurisdiction, all of them being opposed to anything that would altogether deprive every one of them of jurisdiction".

ii Fali S Nariman, President ICCA in Preface to Yearbook - Commercial Arbitration vol XXII - 1997 pp xxi-xxii.

iii See (1990) 5 Mealey's International Arbitration Reports 15.

iv See, eg Commercial Arbitration Act 1984 (NSW) s38(5).

v See Promenade Investments Pty Ltd v State of New South Wales (1991) 26 NSWLR 184 and, on appeal, 26 NSWLR 203.

vi Paper given at Charles Sturt University, Fifth National Conference on Reasoning and Decision-Making, 4 December 1998.

vii Quoted in Atlay, The Victorian Chancellors vol II p201.