

Lieutenant Edwin Mayhew Brissenden – Remembrance Day 2018

(Slide 1) Chief Justice, judges, and all of you here today to honour those from our profession among all who have served in war.

We all carry an image of what it is to be a hero. The stories of Major Stephen and Major McManamey, who died in war, fit those images well. But heroism comes in many forms.

Edwin Mayhew Brissenden survived the war. His heroism was of a different kind; it fits no easy conventions. But that was his character. He served in Headquarters, not the front line. When he enlisted in 1916 he put his age down from 53 to 43. After 29 years at the Bar, he joined the AIF as a private soldier, not as an officer. He returned to Australia only in mid-1919.

As you will shortly hear, until 1915 James McManamey shared much of Brissenden's story. They practised closely together in Phillip Street and knew each other well. But after seeing McManamey's selfless example in leaving his practice behind for war, Brissenden began to think about what he too could do. Just how he responded is a remarkable story, and one that it is my honour to tell you now.

I have been much assisted by a grant of access to his personal papers by his grandniece, Mrs Helen Jeffery, and her son Richard who I am pleased to say are both present here today. Brissenden chose to keep many mementoes of his war service and career. Much can be inferred from the particular items that he kept and treasured.

Edwin Mayhew Brissenden was born in November 1862 on Queensland's Darling Downs. After completing his secondary education in New Zealand and in Melbourne, the University of Melbourne conferred four degrees on him: first in 1885 in Arts, majoring in classics, history and science and in Law; then a Master of Laws in 1888; and finally a Doctorate in Laws in 1893.

His doctorate analysed the absorption of ancient Teutonic law into later Roman law. He was often referred to later in law reports as "Dr Brissenden." It can be said with a high degree of confidence that he was the only Australian soldier on the Western Front with an LL.D.

Brissenden was admitted to the Melbourne Bar in 1886, and to the Sydney Bar the following year. In the way of the Bar, no one actually called him by his first name, Edwin. Rather he was known as "Mayhew", or more often just as "Briss", and then after the war as "Old Briss".

In a Phillip Street that looked like this **(Slide 2)**, his pre-war practice was extensive. His success as one of the "go to" juniors of the day is readily measured. He had an extensive trial and appellate practice. From 1900 until his 1916 enlistment, he appears seven times in the State Reports and 10 times in the Commonwealth Law Reports. He was sought after in contract and commercial matters, in taxation cases, in industrial accidents, and in constitutional matters. He was a specialist in maritime cases and anything that involved science or machinery. His charm, easy humour and calm disposition were renowned among his colleagues.

Brissenden married Amelia Jane Knight Nicol in Melbourne in November 1886, his year of admission to the Melbourne Bar. Among his papers **(Slide 3)** is her small photograph fastened onto cardboard backing. Elegantly pictured in

Edwardian dress, her photo was his desktop companion throughout the war. When he left Sydney on war service in May 1916, they had been married almost 30 years.

Enlistment - Early 1916

On 7 February 1916 Brissenden abandoned his practice and enlisted as a private soldier, as a sapper in the Engineering Corps, specialising in signals. His choice of corps is explained by his pre-war hobbies.

Brissenden was an outdoorsman. He loved walking, fishing, boating and had a penchant for science. He and the famous Australian architect and musician Charles (later Major General) Rosenthal sent experimental heliograph signals (using the sun's rays) to each other across Sydney. Brissenden even invented an improvement to the heliograph, a signaling lamp and a rotary pulverizing machine. In the early days of wireless telegraphy, he built a private wireless transmitter near his home in the Sydney suburb of Mosman.

Why did Brissenden enlist: in February 1916; as a private soldier; and at the age of 53? As to the timing (**Slide 4**), a compelling inference arises from Brissenden's chambers building in Phillip Street, known as "Wentworth Court". In 1915 this building was situated opposite what is now Wentworth Chambers. Wentworth Court featured a common internal staircase leading to three floors of barristers chambers. Brissenden shared Wentworth Court with two of the several barristers killed at Gallipoli: Colonel Normand MacLaurin, in April, 1915 and Major James McManamey in September the same year. As he went to court each day, their absence and then their deaths on active service must have been ever-present to his mind, particularly McManamey's, who was Brissenden's junior by a bare two years.

And why a private? The Army rank of private is appropriate for 18 to 24 year olds, needing clear direction, not for a barrister of 29 years standing holding an LLD. When he left Signals School he explained in a local newspaper interview why he had enlisted as a private soldier. His aim he said was to avoid officers' school, so he could "get to the front without delay". He elaborated: "the war will not be won in the instruction schools but in the trenches".

The same interview reveals why he enlisted at 53. Brissenden believed that even more barristers should have enlisted than had done by then. His logic was that if someone of his age led by example, then more and younger barristers would enlist. He would not have had to understate his age had he joined as an officer. But that he succeeded is partly a tribute to his fitness.

Brissenden never expected to use his legal skills at war. But even so, his AIF rise was meteoric. Everyone realised he was not a typical private soldier. He was promoted corporal on Anzac Day 1916 and posted to a cyclist company.

Brissenden sailed to Europe on HMAT *Demosthenes* in May 1916. When he arrived in Britain on 20 July 1916 he had a debilitating fever and was hospitalised. He soon recovered and was promoted acting sergeant in mid-August 1916 just as news of the terrible losses at the Battle of Pozieres was coming in. But his war was not destined to be one of the routines of a cyclist sergeant.

After only three weeks in Britain his legal skill was noticed. A keen-eyed Brigadier John Monash, hungry for talent at Third Division HQ, and prompted in part by a letter from Mr Justice Keith Ferguson of this Court, discovered Brissenden and sought him out. They had much in common: Monash was well

known as an engineer but like Brissenden, Monash had a bachelor's degree in law from Melbourne University. They both had reasonable French. On 4 August 1916 Monash summoned Brissenden to attend Third Division HQ. Monash wanted this Sydney barrister at his HQ. Brissenden's diary shows that Monash held out no great hopes for his promotion at HQ but said that Brissenden, "would be more useful as a court-martial clerk, than with a cyclist company and that it was my duty to come to HQ".

Brissenden complied of course: although he was not exactly overjoyed at leaving his mates and not being near the front, as a letter he wrote the next day reveals, "I shall go over to France with the Division, but shall of course never get near the front. It is quite humorous to think of coming 16,000 miles in considerable discomfort to be put to do legal work for 9/6 per day. I shall not see my crowd again, and feel as miserable as a bandicoot on crutches".

On 25 November 1916 he proceeded to France. For the rest of the war he was attached to Third Division HQ staff as part of 34 Battalion, as this **(Slide 5)** AWM photograph shows with Monash in the center of the front row and Brissenden the middle row on the far left. Brissenden's independent character shines through even here: he is the only officer proudly shunning a cap and wearing a distinctly Australian slouch hat, the hat worn today by all Australian Army officers.

On 20 December 1916 he was promoted Second Lieutenant and appointed 3 Division's Claims Officer. But that same month, December 2016, the world back in Phillip Street suddenly gained his attention. He received a telegram offering him a District Court appointment. But he was exactly where he wanted to be. You can guess his answer. I doubt that any judicial appointment has ever been turned down in such emphatic terms. Charles Bean's history

famously records he telegraphed his answer back to Sydney with words, “Not on your life. I have just been appointed a 2nd lieutenant in the AIF.”

Monash had selected well. From December 1916 Brissenden embarked on a wide range of legal work for Third Division HQ. **(Slide 6)** He settled in quickly as this AWM photograph of him (on the right) with a Third Division HQ intelligence officer taken that month shows. Brissenden’s title of Claims Officer understated his real duties. His advice on the conduct of courts martial was invaluable; he had more courtroom experience than any of the other junior HQ officers, who were already conducting up to 20 trials a day.

Since the beginning of warfare, keeping the local population sympathetic to occupying troops has been a core task of armies. Monash was sensitive to this and appointed a few, what were called “claims officers” to immediately settle claims for the incidental damage done by AIF troops to French agriculture and buildings. War damage of course was a different matter.

So from December 1916 Monash used his versatile and intelligent French speaking lawyer, Brissenden, to criss-cross the countryside, often on a bicycle **(Slide 7)**. These days the roles of loss assessor, mediator and diplomat would perhaps describe the full skill set he deployed. To increase his authority he was promoted First Lieutenant on 16 March 1917. But Monash’s prediction at their first meeting was right: this was the highest rank he ever attained in HQ during the war.

What he did in 1917

His was not an office job. Brissenden was constantly moving through danger. He was issued a pass **(Slide 8)** to take him wherever he had to go behind the

lines. His diary records many, many examples of near misses with shells and then his attending to civilian and military casualties. Let me cite just one example from June 1917 **(Slide 9)** of his accommodation being hit by shell which “exploded...coming through the roof and two floors before bursting killing three men and one woman outright and mortally wounded a woman, who I picked up and put on the table. My door blown in and room filled with debris.” As we know, many casualties in the Australian medical and nursing core were suffered behind the lines.

(Slide 10) Local Mayors wrote to him as Monsieur Le Claims Officer, Third Division. His correspondence **(Slide 11)** dealt with damaged buildings and churches and he often apologised for delays in payment, **(Slide 12)**. He mediated and resolved a dispute about how and when crops could be harvested in July 1917, between advancing armies.

He did general legal work to assist the Division’s logistics **(Slide 13)**. Here he drafts a lease in French and English, so Third Division’s trucks could have access by the hour to be repaired at a local engineering workshop.

He became very close to the French population, it was reported in a service newspaper that he was so popular he could have been elected mayor of any of the villages on the Somme after the war.

But life in Sydney continued. As a very senior junior counsel, Bar tradition then required those who were junior to Brissenden to seek his blessing before applying for silk. Richard Windeyer **(Slide 14)** did this by telegram, declaring “applying silk deferred pending information whether you applying – also greetings. Windeyer”. Brissenden responded to Windeyer telling him that he did not wish his absence on military service to stand in the way of any of those

with whom he had worked for so long who might to desire to apply for silk. Windeyer applied. And the Bar's policy was that active service would not disadvantage a barrister's seniority. When Brissenden eventually took silk his seniority was backdated ahead of Windeyer; he ranked in precedence immediately after Reginald Heath Long Innes, who had taken silk in March 1916.

Late 1917

One can measure Brissenden's effectiveness in the field by how quickly his work came to Ministerial attention in France. After only 11 months at the front, his diary for 6 October 1917 (**Slide 15**) records, "notified that I had been granted the *Ordre of Merite Agricole*".

Brissenden's first reaction to this was predictable. His natural humility is reflected in his diary for 8 October, which says that he wrote refusing the honour. But General Monash intervened. By then Monash was one of the busiest Generals on the Western Front yet his attention to HQ detail was magisterial. Monash thought Lieutenant Brissenden's refusal of this significant honour might appear ungracious to French allies. He insisted Brissenden accept the honour, which he did.

What is the French the *Ordre of Merite Agricole* (**Slide 16**)? The Order was created in 1883 for special distinction in services to agriculture. Louis Pasteur is a famous past recipient. Last year, for example, Prince Charles was awarded the rank of commander in this Order for his work to advance modern agriculture.

1918

Brissenden's work continued throughout 1918. He recorded several near misses by shells that year. **(Slide 17)** It is perhaps not surprising that he came into contact with another former Sydney barrister, Charles Bean, who describes Brissenden as "a brilliant and distinguished barrister". Bean expressly attributes to Brissenden the idea of taking photographs of soldiers relaxing behind the lines, including this iconic War Memorial photograph taken at Querrieu in May 1918.

The Armistice

As we now look back one hundred years, Brissenden's 11 November 1918 diary only flatly records "Armistice signed" **(Slide 18)**. Curiously the diary gives more attention to the 8,000 members of 3 Division who entered the Melbourne Cup sweep five days earlier. But "old Briss", was still busy. Some of his most important legal work commenced at this time.

He was fully employed in France until 26 April 1919. The priority was to get the troops back. Senior officers with administrative work to do remained in France and Britain. Brissenden did not leave France until 26 April 1919. General Monash himself did not return to Australia until early 1920.

Brissenden's papers **(Slide 19)** contain two remarkable pieces of Australian history, which he undoubtedly kept because his assistance in their drafting was important to him. Australia's war histories record that in 1916 and 1917 scores of Australian soldiers were condemned to death by court-martial but none of those court-martial sentences was carried out. Their death sentences were commuted to a terms of imprisonment, often of 10 years.

But what was to be done now with the Armistice? Monash did not want returning soldiers to be imprisoned on their arrival back in Australia. For soldiers who had fought right through until the Armistice Monash instigated pardons and the remission of these imprisonment terms. Brissenden drafted many of these pardons, so these men could go straight back their families upon return. He kept two of his drafts, signed by General Monash himself.

In June 1919 Brissenden embarked for Sydney from London on the Rio Padroes arriving on 28 July 1919. Found among his papers **(Slide 20)** is this treasured departure note from Buckingham Palace, given to all soldiers returning home to their Dominions.

Just before he left he was appointed a Member (in the Military Division) in the Order of the British Empire ‘for valuable services rendered in connexion with military operations in France’.

He did not find out until after he returned that he had also been mentioned in a Dispatch of Field Marshal Sir Douglas Haig on 8 November 1918 **(Slide 21)**. He kept his original March 1919 certificate, which is signed personally by Winston Churchill, then the Secretary of State for War.

He was discharged on 16 October 1919. On 1 July 1920 then Honorary Captain Brissenden was granted the substantive rank of Captain. This rank and the title of Vice President he appears on Mosman Rowing Club’s 1914-1918 Roll of Honour.

The Return to Practice

In January 1919, when he was still in France, Brissenden was again offered a District Court appointment, which he accepted from France. But he resigned the appointment in September 1919. **(Slide 22)** His papers reveal fairly clearly why he resigned. Among them on High Court letterhead is a letter from Sir Frank Gavan Duffy, which, after congratulating him says, “If I may express an opinion I think that the country has got the better of the deal. In my opinion you should be on the Supreme Court Bench if you leave the bar. But...perhaps you prefer what you have got and a man must satisfy himself, not his neighbours.”

Old Briss returned to practice at Denman Chambers in Phillip Street. In the 1920s he developed one of the leading appellate practices before the High Court in the 1920s, appearing in the Commonwealth Law Reports some 33 times between 1920 and 1930.

Brissenden remained in his uniform a little longer **(Slide 23)** as a reservist. On 1 October 1921 Brissenden was appointed part time as Deputy Judge Advocate General and promoted to Lieutenant Colonel, his final rank. He assisted the then Judge Advocate General, Victor Le Gay Brereton, and became the first member of the new Australian Army Legal Department. He authored several court martial handbooks.

His four-year term as Deputy Judge Advocate General expired in September 1925. But age precluded his reappointment. To the express disappointment of the Adjutant General, and the Judge Advocate General, he had to be transferred to the Reserve List.

Amy died on 6 November 1927. In June 1928 he remarried his cousin, Ida Janette Moreton.

But Sir Frank Gavan Duffy's judgment about him was ultimately vindicated. Despite his earlier District Court resignation, finally in 1929, at the age of 67, Brissenden was offered a Supreme Court appointment. But it was too late. He declined because of his age.

He died at his Woolwich home on 31 October 1930. Ida died in April 1970.

In Conclusion

In 2018, Mayhew Brissenden's life sets a standard that still both inspires and measures us. We continue to remember him and all those in the NSW legal profession who went to war. Like Stephen and McManamey, so many of them never returned.

LEST WE FORGET (Slide 24)