Journey's End

Bar News reproduces Mr. Justice McHugh's speech delivered at his swearing-in on 14 February 1989.

Mr. Attorney-General for the Commonwealth, Mr. Handley, Mr. Byrne, I thank you for the generosity of your remarks and the goodwill which is inherent in them. They will remain a continuing source of support for me in discharging the high responsibility which acceptance of the office of a Justice of this Court imposes.

The presence of this gathering and the congratulatory communications which I have received from those who are unable to be present today will also serve as a source of support for me in carrying out the arduous work of the Court. Many of those present are personal friends. Many, indeed most of those present, have travelled considerable distances to be here. I thank you for the respect which you show for this Court and for the honour you do me by your attendance.

I am especially honoured by the presence on this Bench of one of its former members, His Excellency the Governor-General, Sir Ninian Stephen.

I am also honoured by the presence on this Bench of the Chief Justices of most of the States and Territories including the Chief Justice of the State of New South Wales. It is not without regret that I leave his Court so soon after his appointment to that high office.

I record my gratitude that also present are the President and Judges of the Court of Appeal of New South Wales on which I served for over four years, Judges of the Federal Court of Australia and the Supreme Court of the Australian Capital Territory, my former Chief Justice, Sir Laurence Street, the Solicitors-General and the Presidents and representatives of the professional organisations of the States and Territories.

Last, but certainly not least, I am grateful for the presence of the former Prime Minister of Australia, Mr. E.G. Whitlam, QC, and Mrs. Margaret Whitlam.

Twenty-seven years have now elapsed since I left Newcastle, the city of my birth, to become admitted to the Bar of New South Wales. For me, the journey which began in Newcastle in 1961 and brings me to this Court today has been an immensely satisfying one, and rewarding beyond my wildest anticipations. But that journey was only possible with the support and encouragement - and in some cases the love and devotion - of many people. On the occasion of my swearing-in as a Judge of the Court of Appeal in 1984, I expressed my gratitude to all those persons who have given me support and encouragement over the years. Many of them are present today. Without naming them, I again express my gratitude. Each of them will know to whom I speak and as to how grateful I am for his or her support and encouragement.

There are, however, two persons who were present in 1984 who are not present today. One is the Honourable Harold Glass, QC, my former colleague on the Court of Appeal, whose unfortunate illness prevents him being present this morning. For more than twenty-five years he gave me great support and encouragement and the benefit of his monumental legal skills. I will be ever grateful to him. The other person who was present in 1984 but who is not present today is my father who unfortunately died in 1987. It is a matter of immense regret to me that he did not live to see this day.

As you know, I come to the High Court after four years as a Judge on the New South Wales Court of Appeal. The litigious spirit of the people of New South Wales, the aggressive nature and the wealth of much of the commerce of that State, and the skill and ingenuity of the New South Wales legal profession result in the regular presentation of many complex and important legal issues before the Court of Appeal. The high quality of my judicial colleagues and predecessors on that Court has given it a reputation throughout the common law world as an outstanding intermediate appellate court. I learned much about the nature of the judicial process as a member of that Court and I know that my experience there will be invaluable to me in discharging my duties on this Court.

Nevertheless, I am deeply conscious that the role of this Court is very different from the role of any other court in Australia including the intermediate courts of appeal and that experience in the discharge of the duties of other courts does not necessarily fit one for the unique responsibilities of this Court.

> ***"... experience in the discharge of the duties of other courts does not necessarily fit one for the unique responsibilities of this Court."***

It goes without saying that this Court's role as ultimate interpreter of the Constitution places a burden of responsibility on its members which cannot be shared by the members of other courts. The oppression of that burden is increased by my belief that, from time to time in important constitutional cases, competing views concerning the resolution of issues cannot be characterized as simply right or wrong. In the resolution of difficult constitutional questions, sometimes all that a judge can do in the end is to select the solution which seems constitutionally preferable to other possible solutions. Although the proper exercise of the judicial function requires that the choice of the preferred solution be justified by a reasoned decision based on considerations external to the judge's own set of values and not by reference to what Mr. Justice Jacobs once called "individual predilections ungoverned by authority", reason and logic are not always conclusive. As closely split decisions of this Court demonstrate, opposite conclusions are reached because the individual judgments, although logically impeccable, commence with different premises based on different constitutional values, none of which is logically irrelevant or inappropriate to the resolution of the question to be decided.

Outside the field of constitutional law, the role of this Court also differs from that of an intermediate appellate court and other courts although the difference is not always perceived even by members of the profession. The principal function of an ultimate appellate court, such as the High Court, is to evolve and settle the law for the benefit of the nation and not to right errors which may have occurred in the course of trials or in the intermediate appellate courts.

When this Court grants special leave to appeal, ordinarily it does not do so on the ground that the rights of a litigant may have been infringed. It does so because in addition to that factor the case raises a question of great general importance.

This means that, unlike the position which existed before the amendments to the Judiciary Act in 1984, almost every private law decision made by this Court has great significance for the people in Australia. Moreover, since this Court is not bound by its own or other courts' decisions, it can and must examine the functional operation of legal rules and questions of policy to an extent denied to intermediate appellate and trial courts.

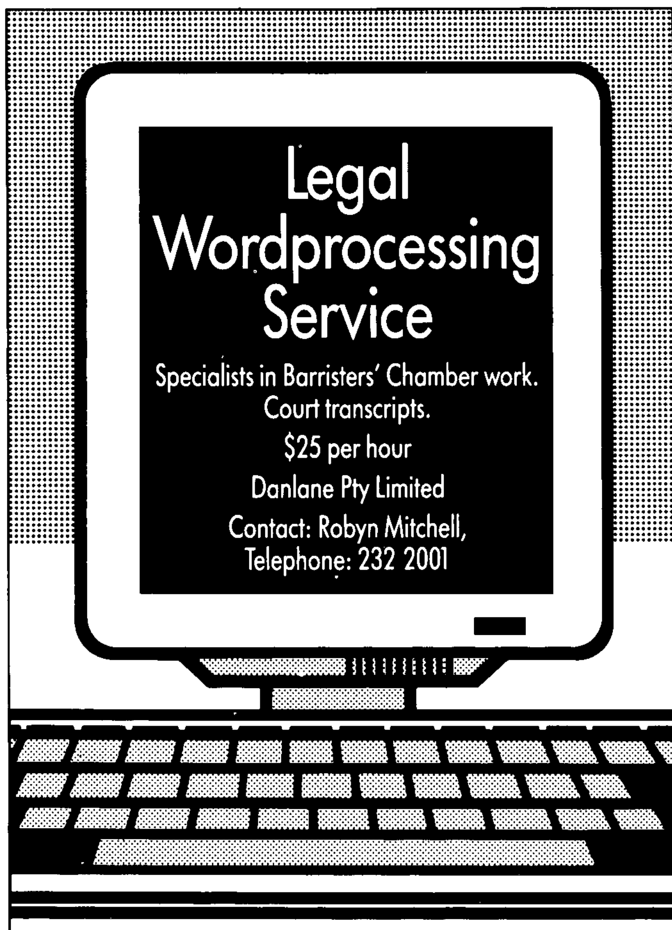
Against that background, it is inevitable that, no matter what legal experience a person has had, reflection on the nature of this Court's role must induce a measure of anxiety as to his or her capacity to discharge the responsibilities of a Justice of this Court. I am no exception. My anxiety is not lessened by the knowledge that my appointment follows the retirement of that much loved and highly respected judge, Sir Ronald Wilson, and that the Court to which I now come consists of outstanding lawyers of immense capacity and reputation.

Although I am only too well aware of the difficulties involved in discharging the duties of a Justice of this Court, nevertheless, I remain confident that, with your goodwill, the co-operation and assistance of the legal profession and my fellow judges, and my own determination and experience, I will discharge my duties to your satisfaction. ❑

Shrinking Jurisdiction

"Powell J. (talking about Protective Business) "I'm the only Judge mad enough to take this work"

Nelson: "I appreciate that your Honour". ❑



Interviewing Witnesses - A Reminder about Rules 37 and 38

A ruling was recently sought from the Bar Council relating to the propriety of counsel for the plaintiff in a motor vehicle accident case interviewing the owner or driver of the vehicle on whose behalf the Government Insurance Office is the party on the record. The Bar Council adopted the view that the matter was sufficiently clear from the provisions of Rule 37 and Rule 38. The owner or driver in such case, not being the party on the record, are merely witnesses in whom there is no property and that prior to conferring with the owner or driver the Counsel or representative appearing on behalf of the GIO should be notified and given the opportunity of advising the owner or driver following which conferring may take place subject to counsel then advising the owner or driver of any possible adverse consequences either to his indemnity or insurance policy or under Section 14, paragraph 20(1)(d) of the Motor Vehicles (Third Party Insurance) Act.

Counsel on behalf of the GIO in the above instance as with any other witness may not seek to prevent or discourage a witness from being interviewed by opposing counsel.

Insofar as there are any judicial determinations criticising or prohibiting counsel in a personal injury case from conferring with owners or drivers on whose behalf the Government Insurance Office is the party on the record, such decisions cannot be supported on ethical grounds where the steps referred to above have been taken.

The interesting question as to what evidentiary use an admission of liability may be put after the introduction of paragraph 20 (1)(d) to Section 14 of the Motor Vehicles (Third Party Insurance) Act is open to debate. On one view the admission of liability may have no effect against the Government Insurance Office except for the purpose of cross examination of the owner or driver as to credit. On the other hand the admission of liability may do no more than expose the owner or driver to a penal liability and has no impact upon the evidentiary use of an admission of liability. It is however common ground that the mere giving of a version of the facts which may establish negligence does not constitute an "admission of liability" within the statutory provision. ❑

Brysonalia

(1) "A person who reckons his future in months or years and not decades may reasonably have a different attitude to preserving and disposing of property and a different attitude to people generally. A character in Lawrence Durrell's Alexandrine Quartet said that when one is dying, one finds oneself in funds."

(2) "There would be few debates in which the defendant would prevail and few minds which he could ever overbear or persuade."

(Moon v. James, Bryson J., unreported, 24 November 1988)