

Tom Hughes AO QC¹

On Friday, 18 March 2005 the Bar Association was presented with a portrait of the Hon Tom Hughes AO QC, by artist Jiawei Shen, a 2004 Archibald Prize finalist. It was presented to the Bar Association on behalf of a number of senior members of the New South Wales Bar. The Hon Justice Michael McHugh AC spoke about Hughes QC and his career, while Edmund Capon AM OBE, Director of the Art Gallery of NSW, spoke about the work and the artist. The following speech was delivered by Justice McHugh.

Thank you for inviting me to speak about Tom Hughes and his career. It gives me great pleasure to do so because Tom and I have stood in this room together on many occasions for over 40 years and, in the 23 years I was at the Bar, we had many hard-fought cases against each other. I am not sure I am happy to be described as one of his contemporaries, but we do go back a long way.

In many respects, the general public knows much less about barristers today than it once did. No doubt, as the result of adverse publicity by journalists who do not appear to understand what would be involved in a negligence action against advocates², however, even the casual reader of this week's newspapers would know that barristers still have their ancient immunity from being sued for negligence. According to one newspaper correspondent, that was only because last week's High Court decision to that effect was given by six aged men, out of touch with the community. I suppose it follows that Justice Kirby, who dissented, must neither be aged nor out of touch with the community, despite the fact that he turned 66 today.

For better or worse, barristers as a class are no longer the recognisable, public personalities, they once were. Television and the growth of the local film industry put an end to the barrister as a public personality. The barrister cannot compete with the publicity machines that surround Nicole, Cate and Kylie or Geoffrey, Mel and Eric, the chief justice's son-in-law. And the demise of the afternoon newspapers with their six editions, reporting verbatim the evidence in every significant civil and criminal trial, took away a major source of free publicity for the barrister. Gone are the days when members of the public would buy two or three editions of the afternoon papers to find out the latest details of an interesting civil or criminal trial.

But there is one barrister today who is, and has been for 40 years, a public personality. That is the Honourable Thomas Eyre Forrest Hughes AO QC. There cannot be any intelligent person in this country over the age of 25 who takes an interest in public affairs who does not know who Tom Hughes is. He is a legendary figure who embodies the public's perception of the great advocate: dashing, dominating, charismatic, patrician and handsome - equally at home cross-examining a cowering witness or addressing a jury or the Judicial Committee of the Privy Council. By any reckoning, he ranks as one of the greatest

barristers the Australian legal profession has produced.

Not least among the many astonishing aspects of his career has been the longevity of his fame and success. The demand for the services of barristers, like the demand for the services of actors, begins to decline after they pass middle age. Only the exceptionally able can overcome this iron law of professional life. That Tom Hughes was still the one that solicitors wanted to brief even when he was in his seventies and early eighties is the most convincing evidence of his greatness as an advocate.

So what do we know about this remarkable man?

We know that he was born in Sydney on 26 November 1923, that he was educated at Riverview and that he graduated with a law degree from the University of Sydney.

What is less well known are the details of his war service. In May 1942, at the age of 18, he showed the courage that has marked his career as an advocate and joined the Royal Australian Air Force. He was posted to Britain in April 1943 and to the RAAF's 10th Squadron at Plymouth in December of that year, where he flew Short Sunderland flying boats. During his service with the 10th Squadron he achieved the rank of flight lieutenant. At the age of 20, he was with the 10th Squadron during the D-Day invasion of Normandy, flying over the English Channel looking for German U-boats³. For his service in World War II and in recognition of the role Australia played in the liberation of France, earlier this year the French minister for veterans' affairs awarded Tom the Legion of Honour, France's highest decoration.

Following his war service Tom returned to Australia and was called to the New South Wales Bar in February 1949. Initially, he practised from the old Selborne Chambers, a three storey building whose site was the bottom half of this room. According to Derek Cassidy in the *Sydney Morning Herald*, last Monday, when he practised from Selborne it had two floors of barristers and a top floor that was a brothel. Derek must be much older than I thought because my understanding was that the prostitutes were cleared out of Selborne Chambers by the 1930s.

Tom was appointed queen's counsel in 1962. In his first year as a silk, he had a notable victory when he persuaded the Privy Council to reverse the decision of the full court of this State in *Jones v Skelton*⁴, which quickly became and remains one of the leading cases in the law of defamation.

In the same year as his great victory in *Jones v Skelton*, he entered federal parliament as the member for Parkes. Later he became the member for Berowra and remained there until he retired from federal parliament in December 1972. His successful campaign for the Parkes seat was run by a young member of the Liberal Party, none other than John Winston Howard, who no doubt acquired much of his own formidable campaigning skills by watching Tom in action. From November 1969 until March 1971, Tom served as the federal attorney-general in the government of his great friend, John Gorton.

His time as attorney-general was not without controversy. He was required to deal with many issues arising from Australia's involvement in the Vietnam War, such as prosecutions for breaches of the *National Service Act 1951-1964*. On one famous occasion, he had to make use of a cricket bat to defend his home against a group demonstrating against the war.

In my view, his greatest achievement as attorney-general was the *Concrete Pipes case*⁵ when he persuaded the High Court to overrule the 60 year old decision in *Huddart Parker* and give a far reaching interpretation to the corporations power in the Constitution. That interpretation has permitted the Commonwealth to control and regulate most of the business and economic life and much of the social life of Australia. Its effect continues and will be the mainstay of the Commonwealth's intention to reform the law of defamation and take over the whole area of industrial relations later this year. Those who think that barristers leave no legal legacy should remember that case.

After leaving politics, Tom Hughes returned to the Bar, which is his natural home. He was president of the New South Wales Bar Association between 1973 and 1975 and was appointed a life member in 1996. Over the years, I had many cases against him and three with him. Appearing against him was a continuing forensic education. Whatever the cause of action and whoever heard it, Tom Hughes was always in complete control of his case and well aware of the weaknesses in your case. He gave no quarter and asked for none. But never in all the cases I had against him did he ever engage in any sly or underhand conduct. He knew the rules that governed the behaviour of counsel and never infringed them.

As an advocate, he has always been recognised as a leader in the areas of constitutional, commercial and defamation law, but, in the modern age of specialisation, he is set apart by the breadth of his practice. This is demonstrated by his entry in the *NSW barristers directory* under areas of practice: 'common law – general; equity – general; appellate – general'⁶. He has appeared as counsel in many significant and famous cases. They include the *Concrete Pipes case*⁷, *Nationwide News Pty Ltd v Wills*⁸, one of the seminal cases in establishing a right to freedom of communication on government and political matters under the Constitution and the *Super League case*⁹. He has become widely known to the general public from his appearances in many high-profile cases through his representation of clients such as the South Sydney Rabbitohs,

Andrew Ettinghausen, Clive Lloyd, Jeff Thompson, Rene Rivkin, and various media organisations.

Throughout his career, Tom Hughes has held numerous other positions, including being a member of the Council of the Australian National University (1972-1975) and the principal member of the NSW Thoroughbred Racing Board Appeal Panel (1998-2003).

For his services to Australian society as a parliamentarian and barrister, Tom has been awarded numerous accolades. They include being made an Officer of the Order of Australia in 1988 and being a recipient of the Centenary Medal in 2003.

For more than 20 years, his wife, Chrissie, has supported his remarkable career. He has two sons, one of whom is at this Bar and one daughter, Lucy, who is arguably even more famous than her father. They are here tonight, as are his brother Geoffrey and other relatives.

All of us are grateful to the 46 silks who contributed to the purchase of this painting of Tom. I will leave it to Edmund Capon to extol its virtues. If the gift of the silks had been a racehorse, I would not have hesitated to express an opinion on its qualities. But expert fields are generally best left to experts. So I will leave it to Edmund, a recognised expert in the world of art, to extol the aesthetic and other virtues of this painting.

¹ For further details on the career of Tom Hughes, see:

1. Attorney-General's Department, *100 years: achieving a just and secure society* (2001).
2. I. Barker, '150 not out: speeches from the tribute dinner for Chester Porter QC, Frank McAlary QC and Tom Hughes QC' (Spring 1999) *Bar News* at 15-27.
3. Department of Veterans Affairs, Legion of Honour 2005: The Hon TEF Hughes AO QC (accessed at http://www.dva.gov.au/commem/loh2005/bio/tef_hughes.htm).
4. S. Hall, 'Master class: the law and life of Tom Hughes', *The Australian magazine*, 10-11 July 1993: 8-12, 14.
5. M. McKew, 'Tom Hughes, Queen's Counsel', *The Bulletin*, 22 August 2000: 40-49.
- 2 They do not appear to appreciate, for example, that in a civil action against the barrister all issues would have to be re-litigated whether or not the plaintiff had succeeded in an appeal. Imagine the outcry if a person convicted of rape sued his barrister claiming that he was convicted only because of the barrister's negligence and the complainant in the rape case had to go through the ordeal once again of giving evidence against the plaintiff. They do not appear to appreciate the incongruity of the barrister who had a duty to argue that his client was not guilty of the crime being forced to argue that on the balance of probabilities his or her client was guilty and therefore suffered no damage for the purpose of negligence law.
- 3 ABC Online. PM – *Australian vets honoured with French Legion of Honour* (Reporter: Kim Landers; 22 February 2005; Accessed at: www.abc.net.au).
- 4 (1963) 63 SR (NSW) 644.
- 5 *Strickland v Rocla Concrete Pipes* (1971) 124 CLR 468
- 6 Justin Gleeson SC, 'The role of the Bar Association' (Summer 2002/03) *Bar News* at 1.
- 7 *Strickland v Rocla Concrete Pipes* (1971) 124 CLR 468
- 8 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1.
- 9 *News Ltd v Australian Rugby Football League Ltd* (1996) 64 FCR 410.