Workers' Compensation

An abridged version of a speech delivered on 13 March 2008 by The Hon Justice Michael Kirby AC CMG to celebrate the Compensation Court of New South Wales.

A sentimental journey

I began this day in my Sydney chambers working on a taxation case concerned with the concept of 'sham' in Australian revenue law. Believe it or not, it was hard to drag myself away from a subject of such fascination. Especially so when reading the contrast between the majority approach to the concept of 'sham' and the minority approach espoused by Justice Lionel Murphy in *Federal Commissioner of Taxation v Westraders Pty Ltd.*[1] Perhaps Lionel Murphy expressed his different, robust and forthright approach because he too had received his early training as a legal practitioner, appearing before the Workers' Compensation Commission. On the whole, it is an experience that tended to bring even the most erudite and brilliant lawyer down to earth.

My first visit to the Compensation Commission was on the day that I began my articles with Ray Burke. At the age of 19, I could not believe my good fortune to have a job that took me every day into the drama of contested litigation. In my very first case, there were two insurers. Each, alas, had films that piled ascending disaster on my client.

One insurer was represented by Adrian Cook (later a judge of the Family Court of Australia); the other by Gordon Samuels (later my colleague in the Court of Appeal and later still, the governor of the state). Samuels had a singularly irritating habit of rattling the coins and keys in his pocket as he mercilessly cross-examined the applicant. For me, it was a baptism of fire. What a way to begin a life in the courts. Charity forbids me to mention the unfortunate barrister who that day carried the brief for the worker.

Every now and again the big guns were wheeled out. Greg Sullivan QC (later solicitor-general), Cedric Cahill QC, Clive Evatt QC, Jim Staunton QC, Tony Larkins QC, with monocle at the ready, Marcel Pile QC, Mick Boulter QC, who wrote the textbook, and the biggest gun of all, Eric Miller QC.

That case was heard before Judge Rainbow. He was a clever, quick and commonsensical man. But he was bored with the law. Judge Conybeare, as Chairman, was meticulous, punctilious and dutiful. Early in my career, he paid me a tribute which I have always remembered. He said that Hal Sperling (later a Supreme Court judge) and I were the most promising juniors he had seen for a long time. He himself had enjoyed a good practice at the Bar. He was, I believe, Frank Kitto KC's

L to R: the Hon Justice Michael Kirby AC CMG, Anna Katzmann SC, James Poulos QC, his Honour Judge JL O'Meally AM RFD

junior in the Joshua Smith case before Justice David Roper. He set high standards. Pity help the lawyer who did not attain them.

Judge Dignam, although always personally kind to me, annoyed many by his one line rejections of claims for compensation. Later, in the Court of Appeal, I was to join in many decisions insisting that proper reasons should always be given for important judicial determinations[2].

The fourth judge in 1959 was Colman Wall. He had one of the best judicial temperaments I have ever seen. I can still recall him sitting in the dining room of a hotel in Broken Hill with his staff and a court reporter on circuit. In those days, judges were remote, revered figures. Judge Wall was one who deserved that respect. He was a sensible and compassionate judge. That is, unless an applicant was caught out in a lie – after which the case was doomed.

The big players at the Bar when I arrived were Frank McAlary, Horace Millar, Tony Harrington, Neville Wran, Barrie Thorley, Reg Downing, Jim Baldock, Tony Collins, Jack Slattery, John Cummins and Les Downs. Later players included Hal Sperling, Alan Abadee, Marcus Einfeld, Cal Calaway, Peter McInerney, Peter Newman, John Brownie and Tim Studdert. A suave and brilliant advocate was Noel Westcott, later a judge. All of these were talented, hard working, efficient.

The solicitors and clerks were also memorable. George Bang, Joan Mulligan, Jean Agnew, Roy Turner, Frank White, Pat Moran (later a judge), Tim Kelly, Muriel Batten, Kerri Nicholson, Ron Jones, Charles Vandervoord, Leigh Virtue, John Bell, Alan Bishop (also later a judge), Doug Hawke.

The insurers were active players around the place. Jack Perram was always there with fat files and the prospects of slimmer settlements. So was Max Hungerford, arguing the cases for the GIO.

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David and Michael Kirby (as they then were) on the steps of the old Banco Court, circa 1973.

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For those who practised in the commission and the court every one of these names will conjure up a host of memories and stories. All of them were respected colleagues. Sadly, few are still in practice. Many have passed over.

The bench of the commission in its last year in 1984 comprised Frank McGrath who was appointed the first chief judge as from 3 December 1984. The others who came from the commission to the court were (in order of seniority) John Williams QC, Bill Gibson, Noel Westcott, Michael Campbell QC, Kevin Coleman, John O'Meally, Brian Moroney, David Freeman, Geoff Herkes, William Thompson, Bob Mancer and Ray Burke. Of these, only John O'Meally is still on the bench, performing outstanding judicial service.

The Compensation Court had come about as a result of the decision of the state government and parliament to separate the administrative and insurance responsibilities that had been discharged by the members of the commission and to create a state compensation board to perform the latter functions. This was the beginning of the end of compensation entitlements as they had been known during the fifty-nine years that the original Workers' Compensation Commission existed. During that time, the members of the commission were encouraged by their administrative responsibilities to see rights to compensation as part of the overall economic cost of industry. The insurance rates were fixed with this in mind.

The separation of the judicial and administrative functions reflected good reasons of principle that were explained by the minister[3]. However, the removal of the premium responsibility from the judges ended an era that had worked pretty well. Soon after the creation of the Compensation Court, a comprehensive new statute was passed by the state parliament. The *Workers Compensation Act 1989* (NSW) came into force. The 1926 Act was full of idealism.[4] However, the 1987 legislation was the product of costs and politics. Mr Pat Hills, the minister for industrial relations and minister for employment, justifying the new law, explained that it was necessary to reduce the litigious nature of dispute settlement in workers' compensation cases. It was to this that he ascribed 'the cost escalation that payments increased from $349 million to $838 million in the period 1980-85, an increase of 140 per cent with similar increases predicted over succeeding years so as to almost double in four years'[5]. Interstate competitiveness and electoral imperatives propelled the state Labor government into action.

The saga did not finish there. In 1998 a later Labor government introduced what became the *Workplace Injury Management and Workers Compensation Act 1998* (NSW).[6] This aimed at promoting fresh attention to accident prevention. Once again, a Workers' Compensation Commission emerged. The right to a full hearing of cases before a specialised court of compensation judges came gradually to a close. Justice Sheahan was appointed the president of the new commission and his successor, appointed in December 2007, was Judge Greg Keating.

It became necessary once again to re-deploy the judges of the workers' compensation tribunal in New South Wales. Guaranteed constitutional protection of their offices, those who wished to do so were transferred, with full seniority, to serve in the District Court of New South Wales. The judges of the Compensation Court at the end of its operations were the Hon Michael Campbell QC, John O'Meally, Margaret O'Toole, Peter Johns, Brian Duck, Chris Geraghty, Brian Maguire QC, Alan Bishop, Dianne Truss, Garry Neilson, Christopher Armitage, James Curtis, Anne Quirk, the Hon Frank Walker QC, Linda Ashford and Allan Hughes. There were four acting judges at the time, John Bagnall, Ray Burke, Lorna McFee and Michael McGrowdie. Michael Campbell returned in due course to the Supreme Court. The treatment of John Bagnall, an

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old colleague of mine from Hickson, Lakeman and Holcombe, was less than edifying. Sadly, it is a story that brings little credit on successive ministries of the state. It shows one of the dangers that lurk in court systems dependent on acting judges[7].

Of the sixteen permanent judges of the Compensation Court of New South Wales at the end half elected to become judges of the District Court. Many of those are still in harness.

Things in common

What is it that has bound together the practitioners, young and old, who have joined in this celebration? Is it purely nostalgia – the remembrance of times past? Is it a shared resentment at the termination of independent courts? Is it anger at the end of a fruitful source of income for lawyers that lasted seventy years? I suggest that it is more than these considerations, though doubtless they are feelings shared by some participants.

Something else has brought us to this occasion to remember the past, including its good features. No doubt there were wrongs and inefficiencies. But there were also strengths in a community of lawyers who worked before the independent commission and court that administered workers' compensation law in New South Wales. We can remember those strengths. They are as important for the legal profession today as they were in the heyday of the Compensation Commission and the court.

1. Honesty and fidelity

First, there was a bond of honesty and fidelity. We knew each other. We knew that, given the word of another, it would be kept, without question. Very few would ever break their word or act discreditably. This is a feature of small group guilds. If anyone broke the rules of integrity and honesty in dealings, it would never be forgotten, or forgiven. In my experience it happened once. I still remember. It was very rare. Many dealings were purely by word of mouth. Promises were faithfully kept. Perhaps this cannot be guaranteed where a group expands in size into anonymity. But it was constantly a feature of the old days that we knew. It was, in short, a precious feature of professionalism, operating at its best. Trust. Fidelity. Mutuality.

2. Attention to detail

Secondly, we all quickly learned that most cases are won on the facts. Not, for the most part, esoteric law. The evidence. Getting on top of the facts was our most pressing daily duty. Mastering the file and the brief was our invariable challenge. Those who always knew the detail sometimes won the unwinnable.

Absorbing the detail was a great training that a practice in workers' compensation cases gave to its participants. I always thought that one of the reasons why Neville Wran and Lionel Murphy were such highly successful politicians was that they were both masters of the brief. As a young barrister, my duty with a junior brief was to arrive at 4.30 a.m.

Commonly, the cases of ordinary citizens meant the difference between a decent life of self-respect and a life with crippling physical and financial burdens.

and to make tea for Neville Wran. He always wanted to get on top of the file. Later, this was to serve him well in parliament and as premier of New South Wales. It meant that he could never be 'snowed'. Throughout my life, it has been a lesson I have applied to every case. Perhaps it is why, when I am asked to identify my most interesting case, it is usually the most recent one.

3. Skill with statutes

Thirdly, we learned, before most other Australian legal practitioners, the importance of statutory interpretation as the central function of the modern lawyer's craft. For the past decade, the High Court has been telling the lawyers of Australia that, where statute has entered a field of law, it is the duty of lawyers to begin their lawyering with the text of the enactment. Not past enactments. Not judicial dicta. The legislative words[8]. Harvard Law School, which, in the nineteenth century pioneered the case book method of instruction (involving close attention to judicial expositions of law), has lately replaced this with courses in statutory interpretation. Australian law schools must do likewise.

We were there first. We learned the importance of unravelling the words of the 1926 (and later 1987) Acts. Even well-worn words could sometimes yield new and surprising meanings. Occasionally, we had to admit, it was useful for outsiders to look at the statutory text, so as to disclose fresh insights[9]. Living with statutory law comes naturally to those raised in the field of workers' compensation law.

4. Orality

A fourth lesson we learned was the importance of orality. We now live in an age in which an increasing proportion of persuasion has switched to written submissions. But in the commission, and later the court, we had to express our arguments orally. Every day. Spoken words. Oral persuasion.

Within days of beginning as a young articled clerk at 26 O'Connell Street, I was on my feet seeking leave to mention matters; to adjourn hearings; to secure orders by consent. Nothing like that training in oral advocacy. A strength of the old tribunals was their adherence to the open public oral trial, which is the high tradition of the common law. This mode of legal procedure placed discipline on all of its

participants, including the judges. It was a protection that encouraged the attainment of manifest justice.

Now, young advocates must learn the skills of written persuasion. But oral argument remains at the heart's core of an advocate's talent. That core will never leave those who were trained in the oral traditions of workers' compensation hearings.

5. Efficiency

Fifthly, we learned efficiency. I have often said that I could not think of a better preparation for judicial duties on special leave days in the High Court of Australia than a typical day when I began my appearances in the Workers' Compensation Commission. It was not uncommon to be required to hold four or five or six cases in one's head – their different and sometimes similar features competing for recollection, presentation and analysis.

On a special leave day I must now commonly carry six or seven or up to twelve cases, neatly assembled for examination and decision. We learned efficiency in the despatch of many hearings. Juggling cases (and also witnesses, opponents and courts) is a talent essential to the life of busy advocates and judges.

It is true that, sometimes, lawyers were known to take on more briefs or files than they could perform properly. But I suggest that this was much less common than some critics contend. Judges showed stern disapproval if lawyers were under-prepared or absent when the case was called.

Highly expert practitioners could perform their cases with great efficiency. Moreover, they soon acquired a sure knowledge of the settlement value of claims, without which court litigation would break down or be forced to hearing procedures in other places – outside the independent courts. Looking back, it is amazing how smoothly and efficiently most of the cases were handled. Time management is one of the most important lessons that any legal practitioner can learn. The Compensation Commission and court were jurisdictions in which such talents were always at a premium.

6. Friendships

Sixthly, we learned the value of friendships in our profession. Strangely enough, such friendships were often with opponents rather than with those who typically appeared on the same side. It was opponents with whom we had to deal and whom we came to know and trust. The surest evidence of abiding friendships can be seen in the large attendance at this occasion – so many years on and where it is only the thread of friendship that holds most of us in connection.

I applaud the fact that this reunion is being filmed, so as to capture the images of this microcosm of the legal profession in Sydney. I have tried to persuade Chief Justice Spigelman, who has introduced an annual dinner for the judges of the Supreme Court of New South Wales, to film the occasion. Those who do not preserve the history of institutions pay the price that the history is soon erased. It is good to record the names and memories and now the faces of those who sharpened their legal skills in the high volume world of compensation litigation. But for the impetus of shared friendships, we would not be at this reunion. In life's journey, trusted friends are precious.

The organised legal profession seems sometimes to have its priorities wrong. Many attach great importance to commercial litigation, much of which is, in truth, nothing but elaborate debt recovery. In the estimate of ordinary citizens, the most important area of the law is, and always will be, criminal law. Citizens are not wrong. They know intuitively that criminal law defines the character of the society in which it operates.

7. Human respect

There is a seventh consideration. It was mentioned by Judge O'Meally in his remarks. Of their nature, compensation claims take their practitioners close to the human condition. On whichever side of the record, the lawyer is dealing with human beings, not merely impersonal corporations or governments. In acting for a worker applicant (or the worker's dependants) the lawyer would soon learn the vital importance of the case to the lives and future happiness of those clients. Their cases are never calculated purely as investments or risks, as much commercial or public litigation is. Commonly, the cases of ordinary citizens meant the difference between a decent life of self-respect and a life with crippling physical and financial burdens.

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But so too do family law, industrial law and compensation law. These are 'people' areas of the law, affecting the lives of ordinary citizens. Those

who learn their law in such fields can never look on law with quite the same cool indifference as others in the 'whispering' classifications may do. Their players can barely establish the same bond of robust empathy that links the lawyers who have worked in 'people' law. If we have a slightly different attitude to law – one that is more practical, feet-on-the-ground and less desiccated – it is perhaps because we have had to learn our vocation looking across the desk at ordinary folks, whether claimants, witnesses, accusers, union officials or family members in conflict. In that kind of legal practice, one rarely enjoys the same luxury of mind games. Too many real people stand at risk of being hurt and damaged. In most instances, such games would never be tried, let alone accomplished.

8. Adaptability

There is one final quality that legal work in these areas has taught legal practitioners. It is adaptability. Optimism. Being able to adjust to new laws and new challenges. 'People' law is much more likely to shift with social, political and other moves than the fields of trusts and wills and bills of sale and transfers of property.

There is no point yearning for a return of the 'good old days' of workers' compensation law. The old commission and the old court will not return. Those who are truthful will concede that there was room for improvement. Whether that improvement could have been achieved without abolition of entitlements to comprehensive recompense for wrongs, is a moot question. In so far as entitlement to recovery of compensation for employment and motor vehicle injuries shifted in the direction of caps and limits and restrictions and exclusions, the economic burden of injuries was altered. Now it often falls, in part at least, on the most vulnerable class – those who are injured and their families. To the extent that this has occurred it shifts somewhat the economic incentives for accident prevention. Now many injured people bear a significant proportion of one of the economic costs of conducting corporate enterprises – the risks of injuries. In the political discourse of recent times the injured and the vulnerable and their supporters have sadly proved ineffective lobbyists.

No one whom I know now expects a return to the 'good old days'. So lawyers in 'people's law' have to be resilient and to move with changing legislation. In the past, they have proved capable of doing so. I do not doubt that it will be the same in the future. The world owes no one a living, least of all a lawyer and certainly not a lawyer in the field of injury compensation. Such lawyers should continue to speak up for the rights on the injured because many think that the shifts in recent years have gone too far. But as for lawyers themselves, Lionel Murphy's truth remains true. When one door of the legal profession closes, another invariably opens. New opportunities beckon. Adjustment can be painful, particularly in middle years. But somehow the trained professional usually survives. There are new worlds to conquer. The lawyering skills learned in workers' compensation cases will stand most lawyers in good stead all their lives as they move on to other things. That has been my own experience. It has been the experience of many.

This is why I am glad to be one of those who shared the comradeship of litigation in workers' compensation cases. I honour the independent judges who taught me the importance of impartial, reasoned, transparent, accurate decision-making. I honour fellow practitioners who taught me professionalism, efficiency, fidelity and dedication to clients. I remember the litigants who demanded respect and devotion to their causes. Above all, I cherish the friendships that are such a precious memory of my years in the community of lawyers engaged in a practice of law as it affects fellow citizens.

We honour the shades of the past. But we also honour ourselves by joining together in this celebration. It was not a waste of time; still less a dishonoured time. It was the time that taught us to be independent lawyers. We can be proud to have been part of it.

Endnotes

1. *Commissioner of Taxation v Westraders Pty Ltd* (1980) 144 CLR 55 at 79.
2. e.g., *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247; *Apps v Pilet* (1987) 11 NSWLR 350; *Palmer v Clarke* (1989) 19 NSWLR 158; *Yates Property Pty Ltd v Darling Harbour Authority* (1992) 24 NSWLR 156.
3. New South Wales Parliamentary Debates (Legislative Assembly), 2 May 1984, 82 (Debate on *Compensation Court Bill [No 2], 1984*) (NSW).
4. New South Wales Parliamentary Debates (Legislative Assembly) November 1925, 2431. (Debate on *Workers' Compensation Bill, 1925* (NSW)). See ibid., 3905.
5. New South Wales Parliamentary Debates (Legislative Assembly) 14 May 1987, 12205.
6. New South Wales Parliamentary Debates, (Legislative Council), 26 June 1998, 6706 (Debate on *Workplace Injury Management and Workers Compensation Bill 1998* (NSW)).
7. *Australian Securities and Investments Commission v Forge* (2006) 228 CLR 45 at 116 [177].
8. *Central Bayside Medical Practice v State Revenue* (Vic) (2006) 228 CLR 168 at 197-198 [81]-[84], fn [86].
9. *Scobie v KD Welding Co Pty Ltd* (1959) 103 CLR 314 is a good example.