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The Intricacies of Dicta and Dissent. By Neil Duxbury [Cambridge University Press, 2021. xxv + 260 pp. Softback £29.99 ISBN 978-1-108-79488-6.]

“My wished-for audience – the courtroom participants who produce and utilize *obiter dicta* and dissenting opinions – will surely never turn up, or certainly not in large numbers”(p ix). The author's sanguine pessimism is well-founded, if only because advocates and judges constitute a small minority of the legal profession. But they and others will be rewarded by reading this attractive, succinct monograph, which is an exemplary and insightful study into under-appreciated aspects of the craft of judgment writing and legal argument.

Neil Duxbury's latest book adheres to the pleasing standards of his earlier work (notably, *Elements of Legislation* (2012) and *The Nature and Authority of Precedent* (2008)) – a sound grasp of history, with a focus on nineteenth and twentieth century developments and personalities and a readable, richly footnoted, text with an easily followed narrative. The book comprises, in Duxbury's self-deprecatory words, “two long labyrinthine essays” (p xxi) addressing two types of judicial pronouncements: *obiter dicta* and judicial dissent. Each essay is a well laid out 120 pages of clearly subdivided sections. The (unicursal) labyrinth is a fitting metaphor – each essay presents a roughly chronological account, but twists and turns and builds upon itself with the reader gaining a much richer understanding of the subtleties in modes of judicial writing.

Most readers would emerge wiser from the exposition of *obiter dicta* in civilian legal systems and in the early common law; I certainly did. But most of the essay is directed to the nineteenth and twentieth centuries, and thus deals with the change from oral *ex tempore* judgments to reserved, written judgments following trials without juries, a change which corresponds with the rise of “judicial dicta” throughout the twentieth century. Of course, these are the decisions which are constantly deployed in 21st century advocacy and judgment writing, and it is surprisingly insightful to re-read familiar authorities with the changing contemporary attitudes in mind.

Duxbury charts the growing acceptance of the idea that carefully formulated judicial analyses carried weight as a source of law, even if they were *obiter dicta*, in the absence of a precedent. He observes that “Not until some time after 1900 do English judges start seriously to entertain the possibility that particular *obiter* observations might bind as a precedent would bind” (p 110). There is a careful account of the development of a new term “judicial *dicta*”, deployed so it seems in

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order to fend off submissions that such passages were “mere” “obiter” *dicta*. The apogee (or nadir, depending on one's perspective) were the “fifty pages of *dicta*’ to the effect that the House ‘would have found the defendants liable *if* they had not been bankers, *if* they had been negligent, and *if* they had not disclaimed responsibility” in *Hedley Byrne v Heller & Partners Ltd* [1964] A.C. 465, surely as emphatic an example as any of obiter dicta announcing the arrival of damages for pure economic loss for negligent misrepresentation and the demise of *Candler v Crane, Christmas & Co* [1951] 2 K.B. 164. Duxbury explains how Balcombe L.J. and Woolf L.J. in *Re Norway's Application* [1990] 1 A.C. 723 rejected the proposition that considered appellate dicta should be followed in the absence of compelling reasons to the contrary. This had been championed by Sir Robert Megarry, who in a series of decisions in the late 1960s and early 1970s sought to elevate the precedential weight of those portions of judgments which, while *obiter* in that they did not contribute to the result, represented “considered judgment[s] on a point fully argued”: *Brunner v Greenslade* [1971] Ch 993 at 1002-3, and see also *West v Dick* [1969] 2 Ch 424 at 431-2 and *Royal Bank of Canada v IRC* [1972] Ch 665 at 682-4. A cognate and controversial principle in Australian law dealing with the construction of federal statutes and the formulation of “the common law of Australia” is noted at p 102. Duxbury's account gives a richer understanding of the context in which the Australian High Court conferred an elevated status upon so-called “seriously considered *dicta*”, a term only introduced into Australian jurisprudence 2007: see B Chen, “Seriously Considering ‘Seriously Considered Dicta’: Precedent after *Farah Constructions*” (2021) 95 *ALJ* 186.

The essay concludes with 21st century developments: the altering of the precedential effect of decisions of the Judicial Committee of the Privy Council in *Willers v Joyce (No 2)* [2016] UKSC 44; [2016] 3 W.L.R. 534 and the overturning of the test for dishonesty in *R v Ghosh* by *obiter dicta* in *Ivey v Genting Casinos (UK) Ltd* [2017] UKSC 67; [2018] A.C. 391, as confirmed in the opening paragraph of *R v Barton* [2020] EWCA Crim 575; [2021] Q.B. 685.

In *Barton* the Court of Appeal was constituted by an enlarged bench of five including some of the most senior judges in the country. Notwithstanding the importance of the issue, there was a single judgment. There is good reason in such a case for a court to speak with a single voice. However, the Court of Appeal had no choice in the matter. Section 59 of the *Senior Courts Act 1981* (UK) to this day provides that no separate judgment of a court of the Criminal Division of the Court of Appeal shall be published unless the presiding judge is of the opinion that there is a question of law on which separate judgments should be pronounced. In his second essay, on dissent, Duxbury

explain that this reflects an amendment introduced during the passage of the Criminal Appeal Bill in 1907 lest the impression be created that the court was divided (p 247). It may be doubted whether the statute achieves its own purpose, at least to any person aware of the provision, for it may create the lingering doubt *in every case* that the seeming unanimity is the result of the statutory silencing of the dissident's reasons. In Australia, where the giving of reasons by courts has a constitutional status (*Wainohu v New South Wales* [2011] HCA 24; (2011) 243 C.L.R. 181) it may be doubted that such a law would be valid. A review of the 100 most recent decisions of the New South Wales Court of Criminal Appeal ([2021] NSWCCA 176 – 275) identified five divided decisions in sentence appeals (207, 228, 250, 268 and 269) and two divided decisions in appeals against conviction (227 and 256). A small minority of dissent in criminal appeals does not seem to have undermined public confidence in the system. Moreover, the High Court of Australia, in allowing the appeal and quashing the convictions of Cardinal Pell (*Pell v The Queen* [2020] HCA 12; (2020) 268 C.L.R. 123) placed weight on the dissent of Weinberg JA in the Victorian Court of Appeal. Of course a further appeal may be available to the United Kingdom Supreme Court, in which dissent is permissible. That said, Duxbury gives a stimulating account on the mediaeval corporate character of courts, developing Maitland's observation that “Our habit of treating the voice of a majority as equivalent to the voice of an all is so deeply ingrained that we hardly think that it has a history. But a history it has ...” (p 189). Once again, it is difficult to imagine readers who would not emerge wiser from reading the account of the changing attitudes to majority decisions of multi-member courts.

It is commonplace to think of dissents as “appeal[ing] to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed”. Readers will learn of Cardozo's less familiar metaphor that the opinion that voices a dissent is that of “the gladiator making a last stand against the lions” (p 173). There is a widespread recognition that today's dissent may, just perhaps, be the future of the law. The heroic dissent of Evatt J in *Chester v Waverley Corporation* (1939) 62 C.L.R. 1, proposing that a plaintiff could in some circumstances recover for what was then styled “pure nervous shock”, quite speedily caused legislative change in New South Wales and anticipated a change in the common law four decades later (p 158), leading to a body of literature in its own right (most recently, G Haigh, *The Brilliant Boy: Doc Evatt and the Great Australian Dissent* (Simon and Schuster, 2021)). Duxbury reveals that an even more famous dissent of around the same period, Lord Atkin's speech in *Liversidge v Anderson* [1942] A.C. 206, attracted rare praise from Cyril Radcliffe (then working in the Ministry of Information) whose note of 19 November

1941 is reproduced at p 160:

“I only wanted to say how entirely I agreed with every line of your judgment and what a very valuable thing it was that you were there to deliver it. I know how widely the general public responded to the view you took, and I do privately hope that it is the one that will somehow prevail before things go much further.”

This is stirring stuff, not least for its being written after Crete had fallen and with Leningrad besieged and prior to Pearl Harbour, when it must have seemed likely that there would be more setbacks “before things go much further”. Of course, Lord Atkin's dissent has prevailed, and the phenomenon of a court reversing a rule and upholding what had once been a dissent is familiar in many areas of the law, and justly celebrated. But it represents a miniscule minority of dissents – perhaps comparable to the tiny minority of gladiators who lived long enough to buy their own freedom. Most dissenting views never gain favour. For most dissents turn on facts, at least in those jurisdictions where there is an appeal by way of rehearing, where most appeals are about facts or the application of settled law to the facts. And even where a dissent is on a point of law, it is mostly never again invoked and shortly forgotten. One's personal impression is borne out by quantitative analysis: one study of 24 years of constitutional cases in the High Court of Australia, where the court divided a little over half the time, showed an extremely low rate of subsequent vindication: A Lynch, “‘The Intelligence of a Future Day’: The Vindication of Constitutional Dissent in the High Court Australia – 1981-2003” (2007) 29(2) *Syd L Rev* 195. The position is surely no different in private law, and Duxbury is very insightful on the limitations of generalisations such as dissent being more common in constitutional cases, or in constitutional courts (pp 181-185). That does not mean that the dissent does not operate in other, subtler ways less familiar to the undergraduate curriculum, and this work explores some of them.

Duxbury makes the important point, not always grasped when attention is given to dissents which ultimately do change a proposition of law, that what motivates dissentients tends merely to be that the majority's view of the facts and the law does not accord with the dissenting judge's notion of what the legally correct outcome should be. He touches on the phenomenon in the United States of the “judicial whistle-blower” – a dissent which is directed to placing pressure on those whose judgment will ultimately decide the case (in that court, or on further appeal) (p 178) but seems to accept, consistently with this reviewer's experience, that it plays at most a small role in the Anglo-Australian tradition. That accords with an interesting comparison between the United Kingdom and

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the United States. Duxbury records that Holmes J produced more dissents of note than all of the Lords of Appeal put together, and that, *Liversidge v Anderson* aside, most non-lawyers could not be expected to confess any sort of familiarity with any dissenting British judgment (p 219). The contrast is marked, and Duxbury explores why that is so.

The second essay concludes, like the first, with the 21st century, with a personal communication from Lord Leggatt, from August 2020, explaining the current practice of the Supreme Court's post-hearing meeting in which all judges give their provisional view (the fourth volume of Lord Hope's diaries reveals how nerve-wracking the post-hearings were, at least to him), before the presiding judge allocates the writing of the first draft, choosing a judge likely to achieve broad support. The former practice (not unknown in Australia) whereby a judge tries to shape the court's opinion by distributing a draft early is said now to have been superseded.

I warmly recommend this *lepidum novum libellum*. Its charm is different from that of Catullus, but it is immensely readable, and readers will be richly rewarded.

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