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Farewell Speech 7 February 2003

FAREWELL CEREMONY

SUPREME COURT – 7 FEBRUARY 2003

Chief Justice, ladies and gentlemen:

In February the weather is steamy and enervating. There is a great temptation to go out as little as possible. That so many of you have undergone the ordeal of a journey to this Court on this occasion – having accomplished two trips already this week – is something for which I am deeply grateful. I particularly welcome retired judges from this Court, and judges of the Federal Court.

Dr Johnson said that in lapidary inscriptions a man is not on oath. It is fortunate for the consciences of those who have spoken in such extravagant terms this morning that they have sworn to nothing. It is also fortunate for them that they are not subject to cross-examination on what they have said, and fortunate for me that there is no devil's advocate to advance a contrary point of view. Such an advocate would have a very strong hand of cards to play. But I am grateful for the one side of the story which has been told.

On Tuesday the Attorney-General remarked in passing – but not merely perfunctorily – that this Court was among the finest in the common law world. That is an important truth which, obsessed as we tend to be by small failings or difficulties, and faithful as we are to our national characteristic of self-deprecation, tends to be forgotten by members of the court, the profession and the public. When you, Chief Justice, were sworn in in 1998, you remarked, with typical confidence and panache, that the court was in good shape. It has, I think, got into even better shape since then. And three or four – perhaps more – of its members would stand out in and adorn any tribunal in the world, no matter how illustrious.

I once saw Andre Previn on television attempting to demonstrate the vital role of an orchestral conductor. He said: "When I stop conducting, they will stop playing". He did stop conducting, but they kept on playing in perfect harmony for a considerable time. A court, too, could operate for quite some time without leadership, but eventually it must be supplied. It need not, however, be blatant. You, Chief Justice, constantly take many steps, usually not widely known, to ensure the health of this Court. You have ensured the happy co-existence of personalities with diverse and sometimes conflicting traits and you have sought to ease their problems. I am particularly grateful for many personal kindnesses and clandestine acts of assistance of which I am not supposed to know, and I suspect there have been others of which I do not know. I must also thank the President of the Court of Appeal, Justice Mason – and I think other members of the Court will join me warmly in this - for the almost infinite pains he takes, over many hours per week, to ensure that the Court of Appeal moves as smoothly as possible through its large workload no matter what last minute crises spring up.

To any experienced barrister who is offered appointment to this Court, but is hesitating, I would urge acceptance. The work can be hard and can be tiring – but it is pleasantly hard and pleasantly tiring. The people are most agreeable. In three years I have scarcely heard a cross word spoken. To come here can make a happy change when the storm and struggle of the Bar ceases to hold its ancient charm.

To move, as I did, from a relatively narrow area of the Bar to a court with as wide and varied a jurisdiction as this Court has, affords the opportunity to make interesting comparisons of forensic style. The two main new styles I encountered were those of the personal injuries Bar, and the criminal law Bar. The common lawyers offer a sharp contrast to the apologetic, hesitant techniques of their Chancery colleagues. The latter habitually whisper and mutter and ramble their way through sentences of which Henry James in his last novels would have been proud. With the common lawyers there is no wavering. There is no doubt whom they are appearing for. The big guns roar loudly, and with very considerable muzzle velocity. They eloquently and emotionally implore the court for justice. They have plenty of that admirable quality known in Wales as hwyl. Their splendid qualities are

captured by the story of the lift journey which Mr R P Meagher QC and Mr Linton Morris QC took in Selborne Chambers at a time when the adjoining premises of the Law Society were undergoing building works. As the lift descended, there was an enormous crash, and the whole lift shook. Morris said: "What on earth was that?" Meagher pondered the problem and said: "I think it was a common lawyer having a thought."

The criminal Bar is different again. In the nature of things those appearing for appellants who have been convicted by a jury must not linger too long on the sordid factual circumstances which generated the prosecution. Rather, it is best for them to concentrate with precision and brevity on one or two technical deficiencies in the trial. I have seen this technique deployed deftly by some very capable and often young barristers, and one very capable solicitor. Their names are not widely known but they posses the greatest skill.

In general, then, the barristers of this State, and the specialist litigation solicitors who brief them, serve the public with great dedication and great ability. If I could voice one criticism it is this. Often advocacy in New South Wales proceeds with powerful statements on each side of the question. But sometimes the statements, powerful though they are, do not grapple with the best points in the competing argument. There is a higher form of advocacy associated with the 8th Duke of Devonshire. So far as he is known now at all, he is best known as the Marquis of Hartington, under which name he sat in the House of Commons for 37 years until 1893. He had the unique distinction of being offered the Prime Ministership on three occasions, in 1880, 1886 and 1887, and each time refusing. The announcement in 1886 of Gladstone's plans to give home rule to Ireland caused the Duke to detach the Whigs from the right wing of the Liberal Party while Joseph Chamberlain led out the Unionist radicals from the left wing. As a much younger man he had been the model for the leading character in Trollope's political novels, Plantagenet Palliser, Duke of Omnium. On 24 March 1908, he died with the words: "Well, the game is over, and I am not sorry." When the news reached the House of Commons that afternoon, the Prime Minister, Sir Henry Campbell- Bannerman, was ill and absent. He was a doomed man; he resigned ten years later; and within a month he too died. The duty of announcing the news of the Duke's death thus fell to Mr H H Asquith – then the Chancellor of the Exchequer, but known to contract lawyers as counsel for the losing party at trial in the Carbolic Smoke Ball case. Mr Asquith paid an elegant tribute to the man whose fragmentation of the Liberal Party had kept it out of office for most of the previous twenty years – and a handsome one. He said that the Duke was "almost the last survivor of our heroic age". The Leader of the Opposition, Mr A J Balfour, attempted to explain the source of his greatness, in a speech which was in its day famous:

> "I think of all the great statesmen I have known the Duke of Devonshire was the most persuasive speaker; and he was persuasive because he never attempted to conceal the strength of the case against him. … [He] brought before the public in absolutely clear, transparent, and unmistakable terms the very arguments he had been going through patiently and honestly before he arrived at his conclusions. He had seen all the difficulties which he ultimately had to pursue. … What made the Duke of Devonshire persuasive to friends and foes alike was that when he came before the House of Commons or any other Assembly, he told them the processes through which his own mind had gone in arriving at the conclusion at which he ultimately had arrived. Every man felt that this was no rhetorical device, but that he had shown in clear and unmistakable terms the very intimate processes by which he had arrived at the conclusion which he then honestly supported without fear or favour, without dread of criticism, without hope of applause. He had that quality in a far greater measure than any man I have every known; and it gave him a dominant position in any Assembly. In the Cabinet, in the House of Commons, in the House of Lords, on the public platform, wherever it was, every man said, 'Here is one addressing us who has done his best to master every aspect of this question, who has been driven by logic to arrive at certain conclusions, and who is disguising from us no argument on either side which either weighed with him or moved him to come to the conclusion at which he has arrived. How can we hope to have a more clear-sighted or honest guide in the course we ought to pursue?' That was the secret of his great strength as an orator."

Now court advocates are different from statesmen. Advocates offer no warranty of the soundness of their arguments. Advocates merely present a reasonably arguable point of

view. But to expose and deal with the difficulties in one's case before the other side has raised them can be a passport to decisive success, and may be a technique which merits wider consideration.

I turn to a different matter – one of considerable importance to the Court, and to all New South Wales lawyers.

Lawyers of my generation will remember the condition of the Supreme Court Library when it was housed in the old Supreme Court building. It was jumbled and it was a fire hazard, but it was a good working library. When in 1977 the Federal Court was created and housed together with the Supreme Court in this building, a merged library on the 15th floor was created. To the Supreme Court holdings were added materials from other State libraries and from a variety of Commonwealth Courts. The library became a valuable national institution - an important and effective intellectual resource. Since the early 1980's, users will have noticed a steady decline. The price of books, journals and reports has risen. The long-term devaluation of the Australian dollar has accentuated that rise. The resulting problems caused distress to Sir Anthony Mason. In 1993 he spoke publicly about it. He was speaking after 21 years service on the High Court of Australia and 6 years as Chief Justice of Australia. He was ideally equipped to speak on the subject. On 30 September 1993, in his address on "The State of the Judicature" to the 28th Australian Legal Convention at Hobart ((1994) 68 ALJ 125 at 130-131), he noted that in the year ending 30 June 1993, the Joint Law Courts Library cancelled approximately 300 subscriptions to serial publications, including some law reports; a significant proportion of the serial publications cancelled comprised overseas journals. He said of these journals:

> "They play an important part in judicial education, enabling judges to keep up with and take advantage of the latest developments and academic writings. To some extent it is possible to minimise the loss by borrowings from other libraries but that is achieved with a loss of judicial time and efficiency and at some expense."

He then uttered these four very important sentences:

> "The high reputation which Australian superior courts enjoy overseas is due in no small measure to the legal knowledge and scholarship of Australian judges. Legal knowledge and scholarship depend on the provision of good library facilities. Yet law libraries, not only in the courts but in the universities, are being forced to cut back very significantly. What is happening represents a trend which, if it continues, has the potential adversely to affect legal education and the quality of judicial work done by the courts."

The quality of judicial work done by the Courts does not depend only, or even largely, on the unaided researches of the judges. In this respect as in many others, the Courts depend heavily on counsel, and on the work of solicitors who instruct counsel, to refer them to materials which might support new solutions to particular problems. The Joint Law Courts Library is a primary resource not only for the judges but also for the profession. Reductions in its holdings and its efficiency by reason of financial constraints are gravely injurious to the work not only of the bench but of the profession as a whole.

Two methods of palliating the malaise have been employed. First, savings generated by not filling staff vacancies have been used to slow the fall in acquisitions. The second lies in the skill of the staff. Without their dedication – which has gone far beyond the call of duty – and their capacity to co-operate with other stricken libraries in universities and elsewhere, services would have fallen to disastrous levels. But the two panaceas cut against each other. Staff cuts cannot proceed indefinitely. There comes a time when staff morale is gravely threatened. And the malaise is growing worse. The number of judicial users is much greater now than when the Joint Law Courts Library was created. In 1977 there were 33 Supreme Court judges. Now there are 47. In 1977 there were 7 Federal Court Judges in Sydney. Now there are 18. Some of the specialised fields of federal jurisdiction entrusted to the Federal Court make it essential to have high quality overseas publications in those fields. There are also 2 federal magistrates sitting in this building. Since 1989 there have been four High Court judges based in Sydney, and since 1998 five. There are also many State, federal and university institutions to which

the library has rendered and ought to render ongoing assistance.

Some observe the changed condition of the library with pleasure. They think the library has too many books. They view a library which has inadequate books with the same joy as that with which the late Sir Humphrey Appleby greeted a fully staffed hospital which had no patients. Some of them think that computer-accessed materials produce a superior system. This is quite wrong. Much of what is in book form is not available on computer, and never will be. But even if it were, the use of computers to access legal information must be complementary to, and not a substitute for, traditional methods.

A library represents the learning of past generations assembled and preserved not only for the benefit of those responsible but as a trust for generations yet unborn. That benefit can be lost and that trust can be breached in several ways. Libraries can be destroyed by physical annihilation. They can be destroyed by being pillaged. And they can be destroyed by an indifferent and neglectful failure to provide adequate resources. The odium which future generations will heap on this generation, if we fail to maintain and improve what past generations gave us, will be just as great whatever means of destruction we permit.

The library is fundamental to the role of the Courts which use this building in maintaining ordered liberty in our society. At present the problems of the library have been presented to governments for attention. I would urge the professional bodies to interest themselves in the problems of the library and to seek to persuade all relevant persons of their significance.

I turn to an even more doleful subject – the future after next Tuesday. My beloved family are displaying their customary stoicism about the impending misfortunes of others. There is only one hopeful sign. My admirable Associate, Barbara Price, is coming to the High Court after 16 years here. In all other respects the black tableau of the future looms up menacingly. I regard it with fear and trembling.

Like most people, my life has involved a succession of fresh starts. I attended seven schools in four countries spread over three continents, and one of those schools was a boarding school. I studied at two universities in two continents. I have been associated with law teaching in four universities in four continents. I spent twenty years with the Hibernian tribesmen of the 8th Floor, Selborne chambers, and three years with the more soigné types on the Court of Appeal. In each place the members formed themselves into different coteries, clans, sets, groups, clubs, circles, and cliques. In each the members had different rules, customs, traditions, conventions and usages. In each new mysteries had to be solved and new secrets revealed. But these were nothing to what lies ahead. When the journalists asked Harry Truman how he felt on succeeding to the Presidency after President Roosevelt's sudden death, he said: "Boys, I feel like the sun, the moon and all the stars fell down on me. I don't know if newspaper men pray, but boys, if you do, pray for me now." Now I have to deal with a unique institution, peopled with formidable and inscrutable characters. I have to walk up to the sphinx, enter the most arcane of coteries, and try to survive. Just ahead lie the greatest and most mysterious riddles this side of eternity. I share none of President Truman's virtues, but I do most intensely share his feelings.

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Address on the Occasion of the Retirement of the Honourable Justice J D Heydon

ADDRESS ON THE OCCASION OF THE RETIREMENT OF
THE HONOURABLE JUSTICE J D HEYDON
AS A JUDGE OF THE COURT
BANCO COURT, SUPREME COURT OF NEW SOUTH WALES
SYDNEY
7 February 2003

The purpose of this ceremonial sitting of the Court is to mark the retirement of the Honourable Justice J D Heydon as a judge of the Court, prior to his appointment to the High Court of Australia. The usual occasion for an event of this character is the resignation of a judge prior to entering into retirement. Resignation for the purpose of elevation to a court which hears appeals from this Court creates, of course, an entirely different dynamic. What may appear to be an expression of honest belief in the qualities of the judge on the first kind of occasion, will carry the odour of rank obsequiousness on the second. Justice Meagher tells me that the only way to avoid the inevitable pitfalls is to be prepared to tell a few fibs. I am not sure that will be necessary.

Your Honour has been a Judge of Appeal of this Court for almost exactly three years. This is not the occasion on which to recite your Honour's personal history. That was done at your a swearing-in and will, no doubt, be repeated next week in Canberra. It is, however, appropriate to mark the contribution your Honour has made to Australian jurisprudence in your two years in this Court and also to express on behalf of all of the members of the Court the pleasure and pride we all feel at having had you as a colleague.

Working with you in the Court evoked in all a mixture of wonder and admiration at the scope and depth of the legal knowledge on which you were able to draw, often without need for research, encompassing recollection not only of decided cases but also of allusions and doubts recorded in obscure places or in dissenting judgments. We all appreciated that your confidence in your own ability was such that it was unnecessary for you to go out of your way to demonstrate it.

Your judgments in this Court manifest your command of the history of the law, setting out, as many do, the path of legal decision-making and academic writing by which particular legal principles emerged.

In *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705 your Honour brought together a wide range of authorities to provide practitioners with a comprehensive overview of the duties and responsibilities of expert witnesses.

In *Damberg v Damberg* (2001) 52 NSWLR 492 where, in the immediate wake of the demise of the cross-vesting scheme, this Court, unusually, sat on appeal from a single judge of the Family Court, your Honour set out authorities from numerous jurisdictions on whether, in a case in which a foreign law was not proved as a fact, the Court was obliged to assume that it was the same as Australian law and, that proposition having been common ground at first instance, your Honour identified how, within the confines of an adversary system, such common ground may not bind the Court.

In *State of New South Wales v Moss* (2000) 54 NSWLR 536 your Honour brought together numerous authorities establishing the necessity for a court to undertake the task of assessing damages for loss of earning capacity, even where such was difficult to assess and little precise evidence were tendered.

In *Union Shipping New Zealand Limited v Morgan* (2002) 54 NSWLR 690 the determination of whether the law applicable to an action for personal injuries by a seaman was that of New South Wales or New Zealand, the latter being distinctly less attractive from the point of view of the plaintiff, included an encyclopaedic review of the authorities on choice of law and the relevant legal texts and academic writings, extending to an analysis of pertinent changes in each of the editions of *Cheshire's Private International Law,* between the first and thirteenth edition and of *Dicey's Conflicts of Laws*

between the sixth and thirteenth editions.

In *R v GPP* [2001] NSWCCA 493 your Honour traced the tortured history of the case law about when delay in complaint of a sexual assault requires a *Longman* warning.

Many other such judgments could be mentioned.

As is the lot of any judge of an intermediate court of appeal, most of your judgments were not concerned with issues of high legal principle. Most cases tend to turn on facts, of great significance to the parties but of little significance to historians of the law. Your Honour's prodigious energy and inexhaustible relish for work was applied to all these cases. That your capacity to cram more into a day than anyone had a right to expect, extended to cases which may have been banal from the perspective of high doctrine, was much appreciated by all who appeared before you.

I am reminded of the speech made by Oliver Wendell Holmes Jnr, towards the end of his period on the Supreme Court of Judicature of Massachusetts, to a dinner of the Bar Association of Boston where, after eighteen years on that Court he told the practitioners:

> "I look into my book in which I keep a docket of the decisions of the Full Court which fall to me to write, and I find about a thousand cases. A thousand cases, many of them upon trifling or transitory matters, to represent nearly half a lifetime! A thousand cases, one would have liked to study to the bottom and to say his say on every question which the law ever has presented, and then to go on and invent new problems which should be the test of doctrine, and then to generalise it all and write it in continuous, logical, philosophic exposition, setting forth the whole corpus with its roots in history and its justifications of expedience real or supposed!" [1]

Shortly after this speech, Holmes was elevated to the Supreme Court of the United States, where he would serve for thirty years. President Theodore Roosevelt had been attracted to Holmes by reason of some militaristic speeches that Holmes, a civil war veteran, had delivered. Roosevelt would come to regret his choice.

Each of your Honour's judgments are expressed in a vivid prose style and are characterised by systematic arrangement and presentation and a completeness of dealing with all of the issues raised in submissions. No corners were cut. No issues were dodged.

There are, as one would expect, quotable quotes which will stand the test of time. My favourite is:

> "[A]cademic literature is, like Anglo-Saxon literature, largely a literature of lamentation and complaint. The laments and complaints can be heard even when academic wishes are acceded to." [2]

Your hand is plainly discernible in a joint judgment of the Court of Criminal Appeal on disparity in sentences of co-offenders:

> "To adapt an ancient aphorism, it is not better that this Court should be perpetually wrong than that it should be sometimes right." [3]

Inevitably, your judgments reveal something of your personality including your quiet, maudlin sense of humour and your underlying compassion. No doubt it was the latter that caused your Honour to allow the appeal from a sentence for contempt of a litigant who had thrown paint at an acting judge, so as to reduce his sentence to time actually served until the date of judgment. This is probably one of the matters that Justice Meagher had in mind when he publicly excoriated your Honour for your left-wing tendencies.

The experience of working with your Honour was never unpleasant. You were always a wellspring of enthusiasm. Issues which arose for consideration were always debated with, on your part, an air of sharing, absent any sense of delivery from a height. The sense of collegiality was enhanced by your Honour's personal warmth and notable personal loyalty, never better displayed than in the moving tribute you paid to the late John Lehane at St Paul's College.

From a personal point of view I will particularly miss the wisdom of your Honour's advice on a range of subjects, but most particularly your perceptive assessment of the strengths and weaknesses of lawyers present and past, whose words, written and oral, and deeds, form part of our daily stock in trade. Perhaps most acutely I will feel the absence of your Honour's unrestrained commentary on the idiosyncrasies and inadequacies of members of the High Court. I will not be alone in this. You will be much missed.

For all of us with an intellectual interest in the law, your career in the High Court will be a matter of abiding interest although, inevitably, on occasions a painful one. I have no doubt, however, that your Honour is a much more imaginative and subtle judicial thinker than you sometimes portray yourself to be. This will be displayed to better effect in a final court of appeal.

Your recent address on judicial activism at the Quadrant Dinner nailed your forensic flag to the mast of Sir Owen Dixon's 1955 address at Yale "Concerning Judicial Method", propounding the common law tradition of "strict logic and high technique". Your Honour noted that the traditional method of the common law was capable of permitting growth and development.

Little emphasis has traditionally been given to the second half of Sir Owen Dixon's address at Yale which emphasised the flexibility of the law.

I do not know what Sir Owen Dixon's Yale audience thought and felt as they sat through a half hour dissertation as to the various ways in which an Australian judge could legitimately avoid the common law rule that payment of a smaller sum accepted in satisfaction of a larger is not a good discharge of a debt. Sir Owen's subtle reasoning rejected, as his Honour put it, the crude proposition that:

> "The technique of the common law cannot meet the demands which changing conceptions of justice and convenience make."

He went on to say, in words of which I have no doubt your Honour would approve:

> "The demands made in the name of justice must not be arbitrary or fanciful. They must proceed, not from political or sociological propensities, but from deeper, more ordered, more philosophical and perhaps more enduring conceptions of justice." [4]

Your Honour has already manifest this approach in your judgments in this Court. We expect to see more in the years ahead. I am sure I speak for all the members of the Court when I say, we have enjoyed our dialogue with you as equals. We now look forward to the continuation of that dialogue at different levels of the judicial hierarchy.

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1 See Sheldon N Novick (ed) *The Collected Works of Justice Holmes: Complete Public Writings and Selected Judicial Opinions of Oliver Wendell Holmes* (Vol 3) University of Chicago Press, 1995, p498.

2 *Union Shipping New Zealand Ltd v Morgan* (2002) 54 NSWLR 690 at [98].

3 *R v Ismunandar and Siegar* [2002] NSWCCA 477 at [38].

4 Sir Owen Dixon *Jesting Pilate* Law Book Co, Australia, 1965, p 165.

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J R F Lehane

J R F LEHANE
24 September 2002

Warden, ladies and gentlemen:

The most striking point about John Lehane was that though he was born with numerous gifts, and later came to enjoy further advantages, he selflessly returned them many times over to other people all his life.

His father was a gentleman of the utmost courtesy and geniality. His mother was a gracious and kind woman. They were able to provide a comfortable, happy and civilised home for him and his brother. His family brought him, a future lawyer, one other great advantage. Seven years before he was born, one of the sisters of his mother had married a barrister – nearly briefless, as all barristers were during the depression, but a man of immense learning and intense patriotism. In the months before John's birth he commanded a battalion at the siege of Tobruk, and in the year after his birth he commanded a brigade in the El Alamein battles. He became in due course a Major General and a High Court judge, and fulfilled many other public duties. He is coming to be seen as, without question, one of the greatest Australians who ever lived. His nephew was profoundly influenced by his characteristics – his rock-like integrity, his scholarship, his disinterested public service and his mastery of English prose. Indeed, the particular combination of his uncle's qualities was unique, the nephew developed similar qualities in a special conjunction of his own.

At the age of 18 John came to these beautiful buildings to spend four years pursuing an Honours Degree in Latin. He wrote a thesis on Lactantius, the man who gave the Emperor Diocletian a verbal battering from which that grim ruler's reputation has never recovered. He must have been for a time, and perhaps for a long time, the leading Australian authority on Lactantius. He held various offices as an undergraduate, following them in later years with service as Senior Tutor, Fellow of the Council and Chairman of the Council.

After a year abroad, he graduated in law with the University Medal, and began speedily to obtain the reputation for skilful legal analysis which spread steadily and widely through his life.

At this point fortune gave him her finest gift – 30 years of marriage to Rosalind and an intensely happy family life with their four children.

Apart from his labours for this College, on the Council of Pymble Ladies College, and in many professional activities above and beyond the call of

duty within and outside his firm, he taught equity part-time at the University of Sydney Law School for 28 years. No-one who has not done it can fully understand the dedication called for in carrying out little recognised and scarcely remunerated work of this type for 3 or 4 hours per week – whatever the weather, whatever his health, whatever the clamant needs of his clients, whatever the intense pressure of other demands on his time and energy.

Throughout his professional career he earned a national reputation in numerous fields of commercial law, particularly banking law. One source of this reputation was his extraordinary skill in lucidly and dispassionately setting out the elements of a problem and going to its core in such a way as to point ineluctably towards its solution. While normally even the hardest of questions yielded to this process, in the case of the few which did not, he never fell below the level of the crisis. If a problem was in truth, and not just in appearance, complex and subtle, he dealt with it on its own terms and brought complexity and subtlety to its solution.

There was one episode late in his career as a solicitor which deeply troubled him. All present know of the difficulties caused to his firm by an errant partner. He and others worked indefatigably to overcome the damage caused. He did not shirk that task. He did not begrudge what had to be sacrificed in fulfilling it. But the behaviour of the Law Society of New South Wales, both towards the firm as a whole when the trouble first came to light, and towards him and a few others personally at later times, did hurt him deeply, and perhaps mortally. To attend on him personally late on Christmas Eve without prior warning in order to announce an intention to apply to have a receiver appointed to the firm by the Supreme Court before New Year's Day would to many minds appear tasteless, unnecessary, cruel and oppressive. Inevitably, to the Law Society of New South Wales, it seemed a marvellous idea. Its later behaviour was worse. It hurt him because partners of his firm had served the Law Society well over many decades in its highest offices, he had brought lustre to the whole profession by his efforts, his personal integrity was beyond question – yet smaller men questioned it.

In those circumstances his appointment to the Federal Court of Australia may have come as some relief. It was certainly a conspicuous success from the start.

In court John had to deal with a new environment. He had to handle the bare knuckle men of the common law bar, hard men who constantly stood astounded at their own moderation. He also had to receive the whispering over-refinements offered by Chancery barristers whose approach to advocacy turned on the perception that audibility was an affectation. He had to deal with counsel who, when in difficulty, adopted the cuttlefish strategy of darkening the waters. These techniques caused him no problems. He had an instinctive dislike of all brawling and vulgarity and

obscurantism. There was no noisy blustering which could prevail before that classical intellect and that calm manner. There was no pedantry, no murkiness, no side issue which could cause trouble once he had moved with his habitual sureness of touch to the heart of the matter. In court or on paper, his manner of expression – moderate, shy but authoritative -, his penetration and his learning ensured that he soon became, and was seen to be, one of the ablest judges on any court in this country. His judgments did not over-enthusiastically hound down the losing party. They did not needlessly savage the unsatisfactory witness. They did not drive the argument to rhetorical levels of exaggeration. In them there were no merely mechanical applications of formulae. He did not cite authority with such indiscriminate relentlessness that the reasoning became only a thin trickle oozing almost invisibly through a marshy and slimy morass of case-names. His judgments revealed throughout his serene, impassive and cool intelligence. In a few more years he would have risen to a very high pinnacle of achievement and reputation.

There is one other significant achievement which will not soon fade: his participation in the first three editions of Meagher Gummow and Lehane: *Equity: Doctrines and Remedies.* The publication of the first edition of that great work in 1975 was an outstandingly important intellectual event. He was then aged only 34. Despite his youth, he brought to the work, apart from all his other qualities, an intense experience and understanding of the instruments used in and the customs of modern commerce on which equitable doctrine had come to play. Now is not the time to describe or explain the extraordinary impact which that work has had all over the common law world, or the sources of its power. It is enough to point to the chapters drafted by him in his own distinctive style. Take just one instance. Has there ever been a better account of equitable assignments than that which appears in chapter 6, even including his uncle's judicial masterpiece in *Norman's* case?

He was preparing the drafts of chapter 6 for the fourth edition right up to the days just before his death. It is a sad but ennobling experience to examine them. There is the enjoyment of seeing his mind working as powerfully as ever in the early parts of the chapter. Then the reader turns to admiration of his heroic courage as, towards the end, he attempted to overcome gradually increasing difficulties caused by the recurrence of his illness.

One can recall settings in which John appeared most completely himself – settings first to be seen here 43 years ago, but often repeated in other places since. It might be a group taking refreshing beverages after a tiring day, or a legal conference, or some informal lunch or some formal dinner. As usual he is twisted into a fantastic shape, with arms and legs entangled, urbanely smiling at the comedy and folly of the human scene. About him there surge the clash and din of talk. His resonant voice joins in from time to time to offer penetrating comments, followed by his characteristic half-

chuckle, half-laugh. He surveys the scene as if from an eminence, beyond the reach of care or the impulse of competitive rivalry – invulnerable and tranquil, yet critical and appraising. From him there radiates an almost visible glow of well-being, of warmth, of geniality, of tolerance, of appreciation, of amusement, and of goodwill.

When we tell people in future that we knew John Lehane, they will say "You were very fortunate", and they will be right.

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Commentary on Justice Einstein's Paper

Commentary on Justice Einstein's Paper

I wish to deal with only three aspects of Justice Einstein's valuable analysis. Two can be examined briefly but one is in my opinion of considerable importance and should be examined at length.

The Character of the Statutory Discretions
It is useful to compare the general character of s 135 with s 137 and s 138.

First, s 135 confers on the court a "discretion" in a strong sense of that word ("may refuse to admit evidence"). Section 137 involves a discretion in a much weaker sense ("must refuse to admit evidence … if its probative value is outweighed by the danger of unfair prejudice …"). In *R v Blick* (2000) 111 A Crim R 326 at 332-3 (NSW CCA) Sheller JA said:
"When an application is made by a defendant pursuant to s 137 to exclude evidence, the first thing the judge must undertake is the balancing process of its probative value against the danger of unfair prejudice to the defendant. It is probably correct to say that the product of that process is a judgment of the sort which, in terms of appellate review, is analogous to the exercise of a judicial discretion … [I] n *Miller v Jennings* (1954) 92 CLR 190 at 197 … Dixon CJ and Kitto J, in an appeal against damages awarded by the trial judge, said of the sum awarded that it was 'reached after a very full and careful examination of the facts of the case and it represents an informed judgment upon a matter which must largely be one of opinion and must be governed to a not inconsiderable degree by an estimate formed of the witnesses and in particular the appellant'. Translated to the task set by s 137, a trial judge's estimate of how the probative value should be weighed against the danger of unfair prejudice will be one of opinion based on a variety of circumstances, the evidence, the particulars of the case and the judge's own trial experience. In that sense, the result can be described as analogous to a discretionary judgment …

Even so, and with due respect, there seems to me to be a risk of error if a judge proceeds on the basis that he or she is being asked to exercise a discretion about whether or not otherwise admissible evidence should be rejected because of unfair prejudice to the defendant. The correct approach is to perform the weighing exercise mandated. If the probative value of the evidence adduced by the prosecutor is outweighed by the danger of unfair prejudice to the defendant, there is no residual discretion. The evidence must be rejected."

Secondly, s 135 rests on a discretion to exclude otherwise admissible evidence. Whether or not there was any equivalent in civil cases at common law is a controversial question: if there is any such discretion in civil cases, it is a relatively narrow one. Section 138, unlike the common law discretions and s 135, rests on a discretion to admit otherwise inadmissible evidence. There was no equivalent to this in any field at common law: *R v Coulstock* (1998) 99 A Crim R 143 at 146-7 (NSW CCA) per Hunt CJ at CL.

Thirdly, the common law equivalent to s 138 was a discretion to exclude admissible evidence on the ground that it had been illegally or improperly obtained. Whether or not the common law equivalent applied to civil cases,
s 138 certainly does.

Meaning of "Fresh"
In *Graham v R* (1998) 195 CLR 606 at 608 Gaudron, Gummow and Hayne JJ said "fresh" in s 66 of the *Evidence Act* meant "recent" or "immediate", and "the temporal relationship required will very likely be measured in hours or days". Callinan J (Gleeson CJ concurring) said evidence of an event "relatively remote in time" could be admissible, but such cases "will necessarily be rare and requiring of some special circumstance or feature".

In contrast to these statements, in *R v Adam* (1999) 47 NSWLR 267 at 282 the Court of Criminal Appeal (Spigelman CJ, James and Bell JJ) referred approvingly to an unreported judgment of Wood CJ at CL. After commenting on the relevant passages in *Graham v R*, he said:

"In my view the judgment of Gaudron J, Gummow J and Hayne J was not intended to confine the expression 'freshness' strictly or exhaustively in terms of mere hours or days. As the Law Reform Commission Report underlined, a measure of flexibility is appropriate. The question is, as their Honours point out, one of fact and degree.

In my view a statement made seven weeks after an event is not one which should be regarded as being outside the period of fresh memory. It is in fact a relatively short period after events of the kind here involved. Having regard to normal expectation and experience of life, I would regard a statement made at that point of time as still being fresh in the memory of a relevant witness."

The Court of Criminal Appeal said that that view had "much to commend it".

The expression "fresh" appears not only in s 66, but also in s 32(2)(b)(i) in relation to refreshment of memory in court, and in s 64(3) in relation to hearsay statements by available persons. A related but not identical question arises under s 72, which turns on the idea of "a contemporaneous representation". The analysis of these expressions must be conducted on a case by case basis. In *Graham v R* all that the High Court had to do was decide whether a complaint made after six years was "fresh in the memory" of the representor. In that context, statements to the effect that those words refer to the passage of hours or days and no more are only dicta, in no way binding on later courts, however weighty those dicta may be. A true construction of expressions which are as general as expressions like "fresh" or "contemporaneous" can be evaluated only after the passing of a significant period of time and the decision of many cases which collectively throw up a wide range of potential problems and circumstances. The proffering of general statements unrelated to the particular conundrum calling for solution may sometimes amount to useful future guidance, but if it is not useful in a particular subsequent case it should not be treated as a source of difficulty.

Expert Evidence

The provisions in the *Evidence Act* on expert evidence illustrate how closely related to the former law the *Evidence Act* is, and yet how differences can emerge. The close relationship between the *Evidence Act* and the former law emerges partly from the use by the courts of common law principles to give flesh to the spare words of the sections and partly from the use by the courts of common law cases to illustrate them.

The paper, in discussing *HG v R* (1999) 197 CLR 414, gives an important reminder of Gleeson CJ's stress on compliance with formal requirements in the presentation of opinion evidence. The same stress emerges from the reasons for judgment of Mason P in the Court of Criminal Appeal in that case: *R v G* (1997) 42 NSWLR 451 at 459. These two judgments set or allude to most of these formal requirements.

The relevant requirements can be summarised under seven heads.
1. There must be a field of specialised knowledge and the witness must identify it.
2. The witness must have expertise in an aspect of that field, and must identify it
3. The opinion proffered must be substantially based on the expertise of the witness and the witness must identify it.
4. Any factual assumptions underlying the witness's opinion must be clearly identified and articulated.
5. Any factual observations made by the witness which underly the witness's opinion must be clearly identified and articulated, and the observations must have been sufficiently detailed to form a satisfactory basis for the opinion.
6. If the witness relies on a combination of factual assumptions and factual observations, they must be identified.
7. The witness must explain how the knowledge on which the witness is an expert applies to the facts assumed or observations made so as to produce the opinion propounded.

The short point is that not only must the essential requirements for admissibility be satisfied, but they must be proved to have been satisfied. Whether they exist cannot be left to speculation.

1. Field of "Specialised Knowledge"

There must be a field of "specialised knowledge": s 79 of the *Evidence Act*. According to Gaudron J, who was in dissent on the opinion evidence point, but not in this respect, that field must involve: "matters about which ordinary persons are unable 'to form a sound judgment … without the assistance of [those] possessing special knowledge or experience … which is sufficiently organised or recognised to be accepted as a reliable body of knowledge or experience'."

That was the common law test, and the test under s 79 is not "narrower or more restrictive": at 432. Gleeson CJ said that it was not in dispute that psychology was a field of specialised knowledge, referring to *Murphy v R* (1989) 167 CLR 94 (para [40]), but plainly if it were in dispute, the witness would have had to have given evidence to that effect. Gaudron J said: "it may fairly be assumed" that the witness "would have given evidence" to the effect that "there is a recognised field of expertise with respect to the behavioural patterns of children who have been the victims of trauma" (at para [65]).

2. Expertise of Witness in Field of "Specialised Knowledge"

There must be an aspect of that field in which the witness is expert, by reason of training, study or experience, and which the witness identifies: see s 79 and *Murphy v R* (1989) 167 CLR 94 at 111. What must be evidenced is the training, the study or the experience, and how it has made the witness an expert in some aspect of the field of "specialised knowledge". The reasons for judgment of Mason P said that witnesses must identify their expertise "with precision".

3. Opinion "Wholly or Substantially Based" on Expert Knowledge

The opinion proffered must be "wholly or substantially based on that knowledge": s 79. Gleeson CJ said of the witness in question "as *Clark v Ryan* (1960) 103 CLR 486 illustrates, his opinion had to be related to his expertise". It would seem incumbent on the witness also to identify how the opinion proffered relates to the field of specialised knowledge in which he is an expert. In *HG v R* in the Court of Criminal Appeal, Mason P doubted that the witness's general expertise and experience established that his opinion was based on "specialised knowledge" (*R v G* (1997) 42 NSWLR 451 at 459). That is, the opinion "lacked the requisite scientific rigour".

4. Factual Assumptions to be Identified

What the expert gives is an opinion based on facts. So far as they are facts observed by the expert and reported by him to the court, they must be identified (see Gleeson CJ's use of the word "observed" in para [39]). This type of expert evidence will be considered in paragraph 5 below. So far as the facts on which the opinion is based are facts which the expert does not observe, but which are "assumed" or "accepted", they must be identified. For this proposition Gleeson CJ cited two important pre-*Evidence Act* authorities, *Ramsey v Watson* (1961) 108 CLR 642 and *Arnotts Ltd v TPC* (1990) 24 FCR 313 at 347-8.

Ramsey v Watson does not illustrate a practice of identifying "assumed" or "accepted" facts so much as permitting the narration by a doctor of the history obtained from a patient admissible as part of the foundation of the doctor's opinion on the patient's health, although the narration is not admissible to prove the facts of the history unless some exception to the hearsay rule is satisfied. In the type of case of which *Ramsey v Watson* is an example, the ultimate opinion of the doctor will usually be based in part on his personal observations of the patient and in part on what the patient tells the doctor. *Ramsey v Watson* also contains the opinion of Dixon CJ, McTiernan, Kitto, Taylor and Windeyer JJ that if the history is not supported by admissible evidence, then the opinion "may have little or no value, for part of the basis of it is gone". In the liberty which this dictum gives for some non-correspondence between assumed fact and proven fact, it has been repeatedly followed later. Thus in *Paric v John Holland Constructions Pty Ltd* [1984] 2 NSWLR 505 at 509-510 Samuels JA approved the language adopted in old American cases quoted in Wigmore, 3rd edition, para 680 note 2. One formulation turned on whether the facts established were:
"so proved as to resemble as near as may be the case under consideration; the jury can judge whether the case supposed is so far like the one they are considering as that the opinion of the expert on the supposed case is any guide to them."

Another was:

"From our analysis of the record it appears to us that there was some evidence to support every hypothetical question to which objection was made. Such evidence was not always complete, was sometimes hazy as to time, distance and other vital words, but in general, furnished a fair climate for the consideration of the views of the expert witnesses."

Samuels JA said:
"It is a question of whether the hypothetical material put to the expert witnesses represents a fair climate for the opinions they expressed. I do not think there is any requirement that the matter put is precisely consonant with the material provided …".

In the High Court, *Paric v John Holland Constructions Pty Ltd* (1985) 59 ALJR 844 at 846 Mason CJ, Wilson, Brennan, Deane and Dawson JJ said that it was not necessary for the proven facts to correspond with the assumed facts "with complete precision". They said: "it is a question of fact

whether the case supposed is sufficiently like the one under consideration to render the opinion of the expert of any value …".

However, *Ramsey v Watson* shows that too extreme a disparity will make the opinion evidence not merely of "little or no value", but inadmissible. The plaintiff sued for damages based on an allegation that Bright's disease, from which he suffered, had been caused by lead poisoning incurred in his employment in the Government Printing Office. The defendant proved that 29 other employees had worked at the Government Printing Office, and a government medical officer testified that they did not have symptoms of lead poisoning. Counsel for the defendant attempted to elicit further evidence from the medical officer concerning what each employee told him of his past state of health. He made it clear that he did not intend to call the 29 men as witnesses. The questions were disallowed. The High Court held that the ruling was proper, "it having been apparent that the men would not be called". Underlying the High Court's conclusion must be the proposition that so massive a disconformity between the facts to be assumed on the basis of the 29 histories and the total failure to seek to prove them justified total rejection of the evidence. That may be an illustration of a principle identified by McHugh J in *Palmer v R* (1998) 193 CLR 1 at 24 in the following terms:
"In general, evidence of a relevant fact is excluded only when it infringes some policy of the law, one of which (even in civil cases) is that evidence of the relevant fact is not admissible if the probative value of that fact is so low that it cannot justify the time, convenience and cost of litigating its proof."

In a case decided under the *Evidence Act*, a different approach was taken. The exclusion of a bare opinion, i.e. one based on unproved assumptions, was said to be inadmissible because it was incapable of rationally affecting the assessment of the probability of a fact in issue within the meaning of s 55(1) and was therefore inadmissible, being irrelevant, pursuant to s 56(2): *Quick v Stoland Pty Ltd* (1998) 87 FCR 371 at 374 per Branson J.

The other case to which Gleeson CJ referred was *Arnotts Ltd v Trade Practices Commission* (1990) 24 FCR 313 at 347-8. There Lockhart, Wilcox and Gummow JJ supported the need "for identification of the facts assumed by the witness". They referred to *R v Fowler* (1985) 39 SASR 440 to support the proposition that it was impermissible to elicit an opinion based on the whole of the evidence given. Before asserting that proposition at 443, at 442 King CJ distinguished between the case of a medical witness who had examined a person and an expert who had not examined a person. In the former case, he said that the fact that the patient gave a particular history and the actual history given were as much part of the material on which the opinion was formed as the physical examination, and could be given by the medical witness. In the latter case, at least in trials by jury, the witness should give the opinion upon an assumed state of facts postulated to the witness for that purpose.

In the *Arnotts* case, Beaumont J at trial propounded a stricter approach, not limited to jury trials. The only exception to the rule he propounded was "in a straight-forward, uncomplicated case, where the facts are admitted and readily identified". Apart from those cases, he said the common law rule was: "that the premises considered by the expert should be expressly stated rather than left to speculation. It is preferable that these matters be clarified when the witness is examined in chief rather than leave room for argument later as to exactly what matters the expert had in his mind when expressing his conclusions" (at 348).

The Full Federal Court appeared to support Beaumont J's approach, for apart from rejecting the relevant ground of appeal, they spoke of "the importance of the principle that an expert witness must identify the facts assumed in his or her opinion" (at 349).

The Full Federal Court advanced several reasons why that principle was important.

One was that if it is ignored, the expert tends to drift into giving an opinion on the legal or general merits of the case.

A second was that if the witness deals with the evidence which, according to the witness's perception, has actually been given, as distinct from dealing with assumptions framed in conformity with the findings which it was hoped the court would make, the witness tends to drift into observations about the truth of the testimony of other witnesses.

A third reason why the principle under discussion was seen as important is that if the witness is asked for an opinion based on the whole or a large part of the evidence, it can be difficult to know which parts the witness thinks important and what weight particular parts play in the conclusion expressed.

Fourthly, if the assumptions are not identified and articulated, the opinions of the expert may be based on undetectable unstated assumptions as to disputed facts or as to disputed propositions of law. Despite the enactment of s 80(a) of the *Evidence Act*, it is beyond the province of an expert to state propositions of law or to apply propositions of law to the facts: *All State Life Insurance Co v Australia and New Zealand Banking Group Ltd (No 6)* (1996) 64 FCR 79 at 83-85. It is also beyond the province of an expert otherwise to intrude on the judicial function by asserting conclusions of fact and law which are in truth only to be decided by the court after applying legal standards: *O'Brien v Gillespie* (1997) 41 NSWLR 549 at 558. And if there are undetectable assumptions of fact, it is difficult to follow the reasoning of the expert and difficult for the court to apply it to the facts which the court in due course finds.

Fifthly, a failure to identify and articulate the factual assumptions from which the expert is working encourages the expert to exercise an illegitimate role as advocate. The Full Federal Court quoted Sir Richard Eggleston's *Evidence, Proof and Probability* (2nd ed.) page 154 to the following effect: "the expert has a legitimate role of advocacy in that, having expounded to the tribunal the rules applicable to the case …, his evidence may then consist of argument as to the conclusions that should be drawn from the facts, interpreted by those rules. The difficulty arises because the expert often finds it difficult to distinguish between argument on the assumption that the 'facts' put forward by his side are the correct ones, and telling the judge or jury which facts they should accept as true. If he makes his assumptions clear, there is no objection to his arguing what the consequences of accepting those assumptions should be; but he is not to do the jury's fact-finding for it, where this depends on accepting one or the other set of contradictory witnesses."

(It may be that the legitimate role for expert advocacy has now been reduced since Sir Richard Eggleston's time. Practice Note 104 in the Supreme Court of New South Wales, para 2, provides: "An expert witness's paramount duty is to assist the court impartially. That duty overrides the expert witness's obligation to the engaging party. An expert witness is not an advocate for a party."

A similar provision applies in the Guidelines set out in the relevant Federal Court Practice Direction. The source of these provisions is paragraph 2 of the statement of duties and responsibilities of experts enunciated by Cresswell J in *National Justice Compania Naviera SA v Prudential Assurance Co Ltd (The 'Ikarian Reefer')* [1993] 2 Lloyd's Rep 68 at 81-2. However, there is advocacy and advocacy. It is one thing to be partisan, in the way a barrister is. It is another thing to put to the court, as clearly and vividly as possible, what the expert's objective opinion, formed without reference to the interests of the party calling that expert, is. Truth is best uncovered by powerful statements on both sides of the question, and the modern expert codes do not inhibit a lucid and vigorous exposition of an expert's sincere and objective view.)

A sixth reason which justifies the principle that the factual assumptions on which an expert is working should be identified is that a failure to identify and articulate those assumptions will cause the expert witness to move towards the role of filter in which, having heard or read all or much of the evidence, the expert expresses factual conclusions of his own.

Gleeson CJ in *HG v R* at 428 summarised the point of these arguments in saying that the rule applied to that case "would have required identification of the facts [the witness] was assuming to be true, so that they could be measured against the evidence". The less the assumed facts are measurable against the evidence, the more the opinion based on them is open to criticism.

5. Facts Observed Must Form a Proper Foundation for the Opinion

It is not every case where an expert must link the opinion proffered to hypothetical assumptions. A doctor can state an opinion as to the cause of death by examining the deceased and without considering any other matter. A doctor may be able to give an opinion on whether a wound was self-inflicted or caused by another person (assuming that there is a relevant field of specialised knowledge, that the doctor is expert in it, and that the doctor's opinion is based on the expertise) merely by examination of the wound - but not if the doctor's actual examination of the wound was too brief or carried out for a purpose unconnected with the formation of the opinion (e.g. attending to the welfare of the wounded person), or is otherwise too ill-considered: *R v Anderson* (2000) 111 A Crim R 19 at 44-45 (Vic CCA). A handwriting expert may give an opinion on the similarity between a particular signature and a set of standard signatures: in general whether there is a sufficiently large number of standard signatures to form the basis of a sound opinion is a question of weight, not admissibility, but once the number of standard signatures falls below a certain level, the question may become one of admissibility: *R v Bonython* (1983) 38 SASR 45 at 48. Thus an opinion based on observation may be inadmissible if the observation affords inadequate foundation for it, or if the evidence does not

establish that the observation affords adequate foundation for it.

6. Absence of Assumed Facts and Observed Facts Considered in Combination

A failure by a witness to make or identify sufficient factual assumptions to form a rational basis for the opinion given may render it inadmissible, or of so little weight that it should not be left for the consideration of the trier of fact. The same is true if a witness fails to make sufficient factual observations to support the opinion. And the same is also true of that class of case where the witness's opinion can only validly rest on a combination of observations and assumptions. An example is the witness in *Bugg v Day* (1949) 79 CLR 442 at 456-7 who was experienced in preparing damaged motor vehicles and after inspecting a motor cycle damaged in a collision with a taxi cab, opined that the latter must have been travelling at 40 miles per hour. Latham CJ said that the jury should have been warned that the opinion had little or no weight in view of the fact that the witness had known and assumed nothing about such matters as the weight of the taxi cab or the distances of the vehicles from the point of impact.

7. Demonstration of Scientific Basis of Conclusions

The opinion of an expert requires demonstration or examination of the scientific or other intellectual basis of the conclusions reached: that is, the expert's evidence must explain how the field of "specialised knowledge" in which the witness is expert by reason of "training, study or experience", and on which the opinion is "wholly or substantially based", applies to the facts assumed or observed so as to produce the opinion propounded. If all these matters are not made explicit, it is not possible to be sure whether the opinion is based wholly or substantially on the expert's specialised knowledge. If one cannot be sure of that, the evidence is not admissible. And an attempt to make the basis of the opinion explicit may reveal that it is not based on specialised expert knowledge, but, to use Gleeson CJ's characterisation of the evidence in *HG v R*, on "a combination of speculation, inference, personal and second-hand views as to the credibility of the complainant, and a process of reasoning which went well beyond the field of expertise of a psychologist" (at para [41]). The point is exemplified by Gleeson CJ's treatment of the expert in that case. The issue was whether the accused had interfered with the daughter of his de facto wife in 1992-3. Gleeson CJ said that the witness might have been able to say that the complainant's behaviour appeared to be inconsistent with her having been abused at that time. But the defence wished to call the evidence to say that the complainant had been abused - but in 1987 rather than in 1992-3, and by her natural father rather than the accused, 1987 being a time when she was in the custody of her natural father. Gleeson CJ said (at para [42]):
"Logically, there were a number of competing possibilities. The complainant may have been sexually abused by nobody; she may have been abused as she claimed, by the appellant; she may have been abused by her father; she may have been abused by both her father and the appellant; she may have been abused by some person or persons unknown. It was not demonstrated, and it is unlikely, that it is within the field of expertise of a psychologist to form and express an opinion as to which of those alternatives was to be preferred."

The process of making the reasoning explicit enables the court to see whether the evidence is admissible expert evidence, or whether it is instead nothing more than "putting from the witness box the inferences and hypotheses on which" the party calling the witness wishes to rely (*HG v R* at para [43]). The vital importance of compliance with the requirement of s 79 that opinions of expert witnesses be confined to opinions based wholly or substantially on their specialised knowledge was stressed by Gleeson CJ for the following reason: "Experts who venture 'opinions' (sometimes merely their own inference of fact), outside their field of specialised knowledge may invest those opinions with a spurious appearance of authority, and legitimate processes of fact-finding may be subverted". But the rendering explicit of what experts say not only aids the court in the determination of admissibility; it aids the court in fact finding at the end of the trial by making plain what the process of reasoning is. This is important, because it is not the role of the finder of fact merely to accept the opinions given to it, or select one opinion which seems more plausible than another. According to Lord President Cooper in *Davie v Edinburgh Magistrates* 1953 SC 34 at 40, experts must "furnish the Judge or jury with the necessary scientific criteria for testing the accuracy of their conclusions so as to enable the Judge or jury to form their own independent judgment by the application of these criteria to the facts proved in evidence". It follows that an expert witness must explain what Fullagar J called "the basis of theory or experience" on which the opinion of the witness has applied to the dispute in question rests: *R v Jenkins; ex parte Morrison* [1949] VLR 277 at 303.

Returning to the subject discussed in paragraph 4 above, compliance with the formal requirement to state the witness's assumptions explicitly has a particular significance under the *Evidence Act*. If that course is not taken, and the factual material in the expert's evidence was not observed by the expert but rests on representations to the expert, the effect of s 60 is that the representations are admissible

notwithstanding their hearsay character. Section 60 provides:
"The hearsay rule does not apply to evidence of a previous representation that is admitted because it is relevant for a purpose other than proof of the fact intended to be asserted by the representation."

See *R v Welsh* (1996) 90 A Crim R 364.

The effect of this is that it abolishes the distinction drawn in *Ramsey v Watson* between a history given by a patient to a doctor being admissible as a foundation for the doctor's opinion, but not as evidence of the facts asserted, and a history which is admissible because it falls within a hearsay exception (e.g. those relating to res gestae or omissions). Under s 60, the history is admissible whether or not it falls within s 63(1) (unavailable witnesses),
s 64(2) (available witnesses), s 72 (contemporaneous statements about health) or s 81 (admissions).

It is open, however, to the party against whom the history is tendered to seek an order under s 136 limiting the use of the evidence to use as a basis for the opinion but not evidence of the facts, if the latter use might be unfairly prejudicial to a party or be misleading or confusing. Finkelstein J said in *Quick v Stoland Pty Ltd* (1998) 87 FCR 371 at 382 that it could be proper to use s 136 to limit the "extraordinary effect" of s 60 where inferences arise because the hearsay representation "involves 'facts' that are in conflict or 'facts' that are unreliable". He also said that the problem could be overcome in the case of experts by requiring them to express an "opinion in answer to a hypothetical question leaving it to the party calling the expert to prove the facts upon which the opinion is based". That is judicial recognition of the fact that s 60 can have no role to play if the evidence is expressed in the form of assumptions and not representations. A representation is a statement made by a representor (usually to a representee, but note paragraph (c) of the definition of "representation" in the Dictionary, Part 1) which affirms, denies or describes a matter of fact. An assumption does not affirm, deny or describe a matter of fact: it merely postulates it. On the other hand, in the same case Branson J said at 378 that if a different result flowed from casting the evidence in the form of assumptions rather than representations - that is, if
"s 60 of the Act does operate to give mere form significance in this way, the result cannot be regarded as entirely satisfactory". It is questionable, however, whether the difference between a representation and an assumption is a matter of mere form. But the expert could not, without committing perjury, state, as representations from a person with knowledge of the primary facts, what were only assumptions put to the expert, in an attempt to gain an advantage from s 60.

J D Heydon
14 November 2000

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Swearing In of The Honourable Justice Dyson Heydon QC

THE SUPREME COURT
OF NEW SOUTH WALES
BANCO COURT

SPIGELMAN CJ
AND JUDGES OF THE SUPREME COURT

Monday 14 February 2000

SWEARING IN CEREMONY OF
THE HONOURABLE JOHN DYSON HEYDON QC
AS A JUDGE OF THE SUPREME COURT OF NEW SOUTH WALES
AND COURT OF APPEAL OF NEW SOUTH WALES

1 **HEYDON JA:** Chief Justice, I have the honour to announce that I have been appointed a Judge of this Court and a Judge of the Court of Appeal. I present to you my Commission

2 **SPIGELMAN CJ:** Thank you, Justice Heydon. Please be seated whilst the Commissions are read. Principal Registrar, would you please read the Commissions.

(Commissions read)

3 Justice Heydon, I ask you to rise and to take the oaths of office, first the oath of allegiance and then the judicial oath.
(Oaths of Office taken)

4 Prothonotary, I hand to you the oaths to be placed amongst the Court's archives. Sheriff, I hand to you the Bible so that you may have the customary inscription inscribed in it in order that it may then be presented to his Honour as a memento of this occasion.

5 Justice Heydon, on behalf of the Court and on my own behalf I welcome you warmly as a Judge of this Court and a Judge of Appeal. Presently we will hear recited your Honour's prodigious contribution both in scope and depth of the intellectual development of the law, and I look forward to the continuation of that contribution in your new offices.

6 **MS RUTH McCOLL SC, PRESIDENT, NEW SOUTH WALES BAR ASSOCIATION:** It is my privilege to speak today on behalf of the New South Wales Bar to welcome and congratulate your Honour on your appointment to the Supreme Court and to the Court of Appeal.

7 You come to this position after a long and distinguished career characterised by dedication to the theoretical and practical exposition of the law. It is not possible in a speech constrained by the new time limits recently announced by the Chief Justice to detail all of your illustrious career. I will attempt to deal only with the real highlights.

8 Your first degree was from the University of Sydney where in 1964 you were awarded a Bachelor of Arts with First Class Honours and the University Medal in History.

9 In the same year, you were awarded a Rhodes Scholarship which took you to Oxford where you studied under-graduate Law. In 1966 you were awarded the Martin Wronker prize for the top first-class honours degree in law. You then undertook the BCL and in 1967 were awarded the Vinerian Scholarship for receiving the highest First Class Degree in that course.

10 You embarked immediately upon an academic career. You were a Fellow of, and Tutor at, Keble College at Oxford from 1967 to 1973. You lectured in evidence and trusts at the Inns of Court School in London from 1969 to 1972. You were a visiting lecturer at the University of Ghana in 1969.

11 As befits a Rhodes Scholar, you were an enthusiastic sportsman You played cricket in a team at Oxford rejoicing in the name of "The Barnacles". You were a very good batsman. You also played rugby. Stories about your games are legion. At one stage one young player, upon being urged to upbraid you for some rough stuff, plaintively responded, "I can't. He's my tutor." It was perhaps not surprising that as a rugby player you were awarded the sobriquet "Dirty Dyson", although some said this related more to your tendency to emerge from games covered from head to toe in mud.

12 Your Honour has been a prolific writer on diverse legal subjects. Your books are characterised by the surgical approach with which you first dissect then re-assemble your topic to provide a profound exposition of the area under review. Books with your name on the spine, whether alone or with other distinguished authors, can be found on the shelves of most lawyers in the common law world. It is clear that in order to achieve your tremendous output, you live by the principle that no time or resources should ever be wasted. That has clearly been a longtime characteristic.

13 Your first book, "The Restraint of Trade Doctrine" was published in 1971. In the Preface, among the list of acknowledgments, you recorded the unceasing, but clearly ignored warnings from a Mr Simpson "that the world could do without a work on restraint of trade for a few more weeks" and that there were other ways you could be spending your time. We are fortunate that you remained devoted to your academic endeavours.

14 In rapid succession you followed up your first book in 1973 with your work on "Economic Torts" which rapidly sold out - not surprising as it was the only work dealing solely with that topic. In your Preface to the second edition, published in 1978, you noted that comments on the first edition had included the proposition that "the treatment was difficult to understand". You responded tersely that "there cannot be any account of the economic tort which is comprehensible without effort".

15 You returned to Australia in 1973 as Professor of Law at Sydney University Law School. You lectured in Equity, Evidence, Commercial and Company Law and Restrictive Practices.

16 Lecturing in these subjects paralleled your continuing prolific production of books. In rapid succession you produced a **"**Casebook on Evidence" in 1975 as well as co-editing a work on **"**Cases and Materials on Equity" in 1975 with Messrs Gummow and Austin, as they then were. Somewhat disarmingly, you and your co-editors acknowledged in the Preface that you had collaborated in the work despite a third-hand hearsay story attributing to Sir George Jessel the view that "no one can be expected to understand equity until he is forty". You had written the book, you said, "in the at time faltering belief that the great judge had erred". I have to confess that having been lectured by at least both you and Justice Gummow at Sydney University Law School, "faltering belief" was not an obvious characteristic.

17 More books followed on Evidence, Equity and Trusts. Each went into several editions.

18 In 1978 you published, in collaboration with Mr Bruce Donald, your work on Trade Practices Law, which was described as an attempt to "meet the urgent need for a detailed and fundamental account of the problems raised by the 1974 Trade Practices Act". In its dealing with Part IV of the Act, it combined two of your earlier interests: Restraint of trade and economic torts. The work rapidly became an essential tool for any lawyer professing to advise in the area.

19 In 1978 you were appointed Dean at Sydney University Law School. You are the youngest person ever to hold such a position in Australia. At that time your co-author, Mr Gummow, then on the Eighth Floor Selborne Chambers, gave you two pieces of advice.

20 The first was to give up playing rugby. It was not a good thing, he said, for the Challis Professor of Law and Dean of the Law School to be seen kicking heads on Saturday afternoons. You accepted that advice. The second piece of advice, which you also accepted after some urging, was to go to the Bar. You commenced active practice at the New South Wales Bar in 1980. At the outset you retained your Chair at the Law School on what was described as a "fractional basis" and continued teaching

until December 1981 when you resigned from the Law School.

21 You joined the Eighth Floor Selborne Chambers. You had no difficulty settling in. Your rugby record overawed the substantial proportion of common lawyers on the Floor. Academically, you were already aligned with two of your new floor members, Meagher and Gummow. You must have further endeared yourself to Meagher, Justice Meagher as he now is, by emulating the appearance of his chambers in that you rapidly accumulated a large collection of paintings, most of which were stacked one against the other on the floor.

22 You rapidly acquired an extensive practice appearing regularly in the High, Federal and Supreme Courts in a wide range of area, including of course, your already developed specialities of Trace Practices, Company Law, Equity and Trusts.

23 Practice at the Bar could not exhaust you. In 1980 you began editing the Australian Law Reports. In 1981 you added the New South Wales Law Reports to your list. You continued to write and have had an extraordinary number of articles published in law journals throughout the common law world. It was undoubtedly not of these articles, let alone the vehicles in which they were published, of which you wrote when in 1985 you embarked upon the task of editing the new Australian Bar Review. You described its purpose in part as being to overcome the problem that "despite the occasional urgings of judges, counsel find little in modern law journals to which courts can be usefully referred." Like all your works, the Australian Bar Review has proved an invaluable aid to all members of the profession providing a practical perspective to many areas of the law. You found time to be a member of the Bar Council from 1982 to 1987, even after you ceased being a member of the Bar Council, you have given tremendously of yourself to the Bar. You have always been ready both to appear for and advise the Association. In the finest tradition of the Bar, you have provided those services without charge. We will sorely miss your generous and prompt assistance.

24 You took silk in 1987 after only seven years full-time practice, a speed which underlined your general precocity.

25 Your work habits are legendary. You arrive in chambers at about 5.00am and leave at 6.30 in the evening. During the Super League case, in which you were part of a team lead by Hughes, it is said you and he competed to see who arrived in chambers first. Hughes would ring you at about 4.00am to make sure you were in. Invariably you were.

26 In what little spare time you allow yourself, you are a voracious reader. You are still enthusiastic about history. You have a statue of the Duke of Wellington and a bust of Napoleon in your chambers. Your private library is said to contain some 20,000 well-thumbed books. You are fond of historical allusion. You once described a now retired judge as like the sun at the Battle of Austerlitz: "a bright object trying to shine through a very dense fog".

27 Just a quick search through the casebooks demonstrates that your Honour's influence on the law has already been profound. You have of course appeared as Counsel in many leading cases: Hospital Products and the Super League case, to mention but a few. Frequent reference can be found in judgments delivered at all levels of the judicial hierarchy throughout Australia and abroad to your numerous books and articles.

28 You have been a towering presence at the Bar. We are sorry to see you go. We rest confident that our loss is the Court and community's gain.

29 There are few who could join the Bench having already had such an extraordinary influence on the law. We know you will meet the demands of your new office with the distinction and with the same devotion to the principled development of the law which has long been your hallmark.

30 We wish you a happy and successful tenure as a Judge of this Court.

31 **MR J F S NORTH, PRESIDENT, LAW SOCIETY OF NEW SOUTH WALES:** May it please the Court. Your Honour, on behalf of the Law Society of New South Wales may I congratulate you on your

appointment to the Bench of the Supreme Court and as a Judge of Appeal. While the solicitors who brief you applaud your appointment, your loss to the Bar will leave a considerable void.

32 Your Honour was born on 1 March 1943 in Ottawa, Canada, when your father, Sir Peter Heydon, was secretary to the Australian Ambassador. You were then educated in London, Wellington and Rio de Janeiro before attending Shore School and St Paul's College at the University of Sydney.

33 As the President of the Bar has said, you were a keen and all-round sportsman. At St Paul's you were the captain of the cricket team and also played rugby. I understand your interest in many sports continues today.

34 Having completed a Bachelor of Arts and Master of Arts degrees at the University of Sydney, your Honour won a Rhodes Scholarship to study law at Oxford University in 1964. At Oxford, your Honour read for the Bachelor of Common Law degrees and subsequently became a Fellow and Tutor in law at Oxford. You were also a visiting lecturer at the University of Ghana in 1969. That must have been an interesting time.

35 Your Honour was admitted as a barrister-at-law at Gray's Inn in 1971 and in New South Wales in 1973.

36 Continuing your academic career in Australia, you were a professor of law at the University of Sydney Law School from 1973 to 1981. Indeed, it has been reported that your Honour was the youngest ever professor of law in the English speaking world. From 1978 to 1979 you were the Dean at the faculty of law and head of the Department of Law at the University. In 1978 your Honour was also a visiting scholar at Harvard Law School.

37 Your Honour is a prolific legal author and editor. Generations of Australian students have relied on your legal texts on evidence and trusts and equity, some of which you co-wrote with other eminent members of the profession. At times, your Honour's output of published works averaged two major texts each year.

38 Your Honour has also been the general editor of Halsbury's Laws of Australia since 1990 and editor of the New South Wales Law Reports and Australian Law Reports since 1981 and 1980, respectively.

39 It has been said of your Honour that any person not associated with you could not conceive of your enormous capacity for work. Some evidence of this can be found in your Honour's response, when very busy, to solicitors who request an urgent conference. You have been known to test their sincerity by offering to meet with them at 5.00am. It is a testament to your Honour's expertise, skill and reputation that almost invariably the solicitors agreed to meet with you at that time.

40 The former chairman of the Australian Law Reform Commission recounts a story about how he mentioned to your Honour the evening before you were about to leave for a trip overseas his desire for you to give some consideration to drafting a particular Act upon your return from your trip. He arrived at work the next morning to find your draft of the Act on his desk.

41 Your Honour is known as a brilliant lawyer with an astonishing knowledge of, in particular, equity, trade practices and evidence. Your Honour has handled many complex cases. These included the successful ASIC prosecution of Nomura International for its attempt to manipulate the Australian Stock Market, which had a potentially devastating consequence for the whole Australian economy.

42 Your Honour's knowledge and understanding of the law is legendary and universally acknowledged by the legal profession in this State as well as further afield. Your Honour is so well regarded by your colleagues in the profession that, for example, when the Bar Association arranged for you to give a talk on the new Evidence Act a few days after it came into operation, within a matter of days the venue was filled with a capacity audience of 800 of your peers, including Judges and eminent members of the profession. Many hundreds more were regrettably turned away.

43 Your Honour married Pamela in 1977 and together you have raised four children: Victoria,

Christina, Alexandra and Nicholas. I am sure your wife and children are all very proud of you today.

44 Your Honour is known as an entertaining after dinner speaker. I have it on good authority that your Honour is also a gifted mimic who can recount an amusing incident in a day's proceedings, accurately imitating all the parties involved to the great delight of those listening.

45 As is apparent to all present today, your Honour joins the Bench after already making an enormous contribution to the law. I have no doubt that your direct contributions to the Common Law of this country will be just as great.

46 Your Honour, on behalf of the Law Society of New South Wales, it is with great pleasure that I wish you many satisfying and happy years on the Bench. As the court pleases.

47 **HEYDON JA:** Chief Justice, your Honours, ladies and gentlemen. I must thank Miss McColl and Mr North for their kindly but exaggerated praise, and I must thank everyone present for taking the trouble to attend.

48 I am deeply conscious of the honour of having been appointed to so famous a court, whose decisions on any difficult point of general law are closely examined by interested persons all over the world.

49 This has been so of the Court of Appeal in particular from its earliest years. Initially the Court possessed the profound and formidable mind of Sir Cyril Walsh. Moving to later times, on any day from the early 1970s to the middle of the 1980s a Bench of the Court might be composed of Justices Hope, Glass and Hutley. Lawyers still read their judgments often, and they will continue to do so for many decades. They directed oral argument straight to the vital points. They left no hearer in doubt as to their position, but they always remained open to argument so long as it was put in a reasoned and direct way. Was there in those days any intermediate Appellate Court in the common law world who surpassed them or even equalled them? Indeed, was there a final Appellate Court of their calibre?

50 I have been fortunate in my professional career in many ways. First, the good judgment and self sacrifice of my parents made possible an education in which I have encountered many good teachers at all stages. Of these, the greatest was Leonard Hubert Hoffmann at University College Oxford. Whatever impact the tactics of General Pinochet's lawyers will have on Lord Hoffmann's reputation, my recollection of his supreme powers of lucid analysis will remain fresh and clear.

51 Next, when I began to practice at the Bar, I was lucky to join the Eighth Floor of Selborne Chambers. Amongst its members, or ex-members who were still closely associated with it were a number of barristers who were extremely capable in diverse ways. Others have said that the floor was the best in Phillip Street, which is a mundane proposition I have never heard disputed. I think that one can go further than that. Kenny, Glass, Kearney, Reynolds, Gummow, McInerney and Meagher - the great tradition of the Australian Bar lies there.

52 I owe a great debt to the staff of the floor, particularly my successive clerks Mr Bill McMahon and Mrs Dianne Strathdee, and my successive secretaries, Mrs Geraldine Clayton and Mrs Sally Flynn. It is thanks to them that my chambers were maintained in a state of tidiness which has become proverbial in Phillip Street.

53 Next, I was fortunate in being able to work, particularly in earlier years, with some exceptionally able counsel. The bar is not an easy institution for outsiders to understand. Barristers have no perpetual clients, no perpetual friends and no perpetual enemies. They have only obligations to the client of the moment, to the Court, to witnesses, to opposing parties and to professional rivals. The world has little understanding of the duty of the Bar to represent the unpopular, the unpleasant and the unfashionable. Litigation necessarily involves intense conflicts - tempered by professional courtesy, but hard and bitter struggles, nonetheless. Agonising decisions have to be faced, the strain on barristers affects not only them but their families. To my own family, I must express regret for the impact that my practice has had on them.

54 But the predicament of counsel accords one type of intense pleasure. There can be pleasure when silk and juniors seek to resolve the problems of the current day in debate how an argument is best to be put; which witnesses should be called; what line of cross-examination should be taken. The pleasure was greatest when the case was difficult, and there was no risk of sentimental distraction by the presence of any moral merit in the client, either in general or in the particular case. The commercial scene is such that we in New South Wales have been extraordinarily blessed in this respect.

55 I experienced the pleasure I have been describing in the company at various times of Mr Justice Hely, Chief Justice Gleeson, Mr Justice Meagher and the Hon T E F Hughes QC. While they are rich in differences, they did share a sure sense of judgment in selecting the issues on which to fight and clear headedness in fighting them. They were simple, compact and trenchant in style. You could never misunderstand them.

56 I read with Peter Hely. At the time he was the colossus of the junior bar with no time to see the many nervous silks who depended on him and little time to see readers. But later I saw his powers in the thorough preparation of complex litigation. There was a striking contrast between the serene elegance of his presentation and the prodigious labour beforehand which made it possible.

57 Murray Gleeson's most striking characteristic was that while in consultation with counsel he was extraordinarily genial and affable, once solicitors and clients entered the room, he took on a dreadful remoteness and a truly Gladstonian terribilita.

58 Rod Meagher was in my judgment the great master of the type of cross-examination which while it does not aggressively confront the witness elicits many damning admissions favourable to his own client's case. He did this with a series of extremely short, courteous and friendly inquiries to which assent was almost invariably given.

59 Those three counsel have left the bar. Tom Hughes alone remains. For 51 years he has shown the heart and mind of a great fighter. He has been the exemplar of presence and of dominance and lack of fear in the courtroom. It is heartening that he can continue, apparently indefinitely, to assist new generations of juniors. I hope that those juniors will be as lucky as I have been in the professional contacts that I have made.