

**IN THE SUPREME COURT  
OF NEW SOUTH WALES  
BANCO COURT**

**BATHURST CJ  
AND THE JUDGES OF THE  
SUPREME COURT**

**Tuesday 9 August 2011**

**FAREWELL CEREMONY FOR  
THE HONOURABLE JUSTICE DAVID HODGSON AO  
UPON THE OCCASION OF HIS RETIREMENT AS A JUDGE  
OF THE SUPREME COURT OF NEW SOUTH WALES**

- 1 **BATHURST CJ:** This ceremony commemorates almost three decades of Justice Hodgson's time as a judge of this Court. Though you will continue to serve this Court as an Acting Judge, we wish today to show our gratitude for the enormous contribution his Honour has made to this Court over his time as a judge, the Chief Judge in Equity and most recently as a judge of the Court of Appeal.
  
- 2 In my first farewell ceremony as Chief Justice of this Court, it is a privilege and an honour to have the opportunity to speak about Justice Hodgson. There are few who have made such a significant on the law, and on the culture of this Court as has Justice Hodgson. Others will no doubt speak about your early life; your achievements at Sydney Grammar School and then at the University of Sydney; your selection as a Rhodes Scholar; your accomplishments at Oxford University; your time at the bar; and your writings in philosophy. The focus of my remarks will be to pay tribute to your contribution as a judge.
  
- 3 You became a judge in 1983. Since then, excluding myself, there have been three Chief Justices of this Court, two of whom I am glad to see here today. It is with no disrespect that I note that this was two years earlier when your current tipstaff was born. Over the past 27 years, 9 months

and 9 days, you have served this Court tirelessly. Your experience manifests itself in the wisdom with which you conduct cases, interact with counsel, consider the merits of each argument and work with your colleagues to bring each dispute to a just resolution. Your judgments are crafted with concise summaries of the facts and flawless logic applied to complex legal arguments.

- 4 You were Chief Judge in Equity from 1997 to 2001. During this time you led the Equity Division of the Court with distinction, serving not only as a leader in your knowledge of the law but also as a colleague who always made time to discuss difficult legal issues with others and to assist and counsel them in coping with the various stresses that accompany judicial office. You continued to offer such support and assistance in your time as a judge of appeal.
- 5 Your collegiality did not come at the cost of efficiency. You pride yourself on always being up-to-date with your judgments. *Macquarie International Health Clinic v Sydney South West Area Health Service* [2010] NSWCA 268 represents one of your most recent judgements. I am informed that in this case you produced a several-hundred-page draft judgment in five days, with perfect grammar. Both the outcome and the grammar were left untouched by the High Court.
- 6 During your time in the Equity Division, you became known for the kindness and respect that you afforded to counsel and to the litigants in person. You adopted in this regard, the standard set by Justices Needham and Kearney, who are two of the finest and most courteous judges ever to sit in the Equity Division of this Court. In *Bowden v Lo and Ors Matter No 3199/95* [1998] NSWSC 216 (19 May 1998) a tenant and landlord both appeared in person seeking resolution of the dispute between them. Your staff at the time commented on your great patience and courtesy as you heard the case and directed the emotionally charged parties to the legal issues involved. When cross-examining the plaintiff, the defendant left the bar table and danced

around the entire courtroom, waving his arms dramatically. You allowed him to continue because, perhaps for the first time, he had fastened onto a relevant point.

- 7 You also turned your judicial skills to a number of high profile cases which have allowed you to leave your mark on the Sydney city-landscape. As a single judge in equity, you adjudicated three separate disputes centred upon Sydney's Luna Park. More recently, you wrote the leading judgment of the Court of Appeal in *Perpetual Trustee Co Ltd v Westfield Management Ltd* [2006] NSWCA 337. This case concerned the construction of easements between the Glasshouse, Skygarden, Imperial Arcade and Centrepoint in Sydney's Pitt Street Mall. The judgment you delivered in this case exemplifies the logic and thoroughness that characterise all your judgments. Leave to appeal to the High Court was allowed but the appeal was briskly dismissed. In *Westfield Management Limited v Perpetual Trustee Company Limited* [2007] HCA 45, the High Court simply summarised your findings and concluded, "We agree".
- 8 You also made notable contributions to the area of Corporations Law. In *Darvall v North Sydney Brick and Tile* (1987) 16 NSWLR 212, you grappled with the difficult issue of the extent of directors' powers when confronted with a takeover offer to enter into a transaction which would effectively defeat or derail the takeover. The senior counsel involved in that case were the late Justices Meagher and Healy and the late D A Staff QC. All of them, as I recall it, spoke with admiration at the way you conducted the trial and reached a result which hardly unsurprisingly was affirmed by the Court of Appeal. In *Standard Chartered Bank of Australia Ltd v Antico* (1995) 38 NSWLR 290, in a seminal judgment, you dealt with all aspects of insolvent trading legislation as it stood prior to the 1993 amendments which attempted with varying degrees of success, to deal with some of the problems which you raised.
- 9 In your work with the Court of Appeal, your judgments covered all aspects of the Court's jurisdiction. Your concern with the proper purpose of

litigation was shown in judgments of great importance which you gave on the question of costs. In *Green (as liquidator of Arimco Mining Pty Ltd) v CGU Insurance Ltd* [2006] NSWCA 148, which concerned security for costs in relation to litigation funders, you said, “the court system is primarily there to enable rights to be vindicated rather than commercial profits to be made”, and, “courts should be particularly concerned that persons whose involvement in litigation is purely for commercial profit should not avoid responsibility for costs in litigation if the litigation fails”. This statement has been statement favourably across Australian jurisdictions including the High Court, and has been the subject of articles and texts on costs. Your influence in the area of costs is not limited to Australian case law. Your judgment in the liens case of *Vered v Inscorp Holdings Ltd* (1993) 31 NSWLR 290 is cited not only in Australian texts on costs, but also in *Halsbury’s Laws of England*.

- 10 You also dedicated yourself to criminal work in the Court of Criminal Appeal, where your concern for the impact of your decisions on society was most evident. In *Brown v Regina; Reid v Regina* [2006] NSWCCA 144, you emphasised the importance of sentencing judges taking an offender’s completion of psychological and educational courses into account so as to provide all offenders with an incentive to undertake training which might help them change their ways. In *Braithwaite v Regina* [2005] NSWCCA 451, you supported the view that youth and immaturity lessened a person’s culpability and reduced the rate of general deterrence in sentencing exercises. In *Regina v Kwok, Ong, Tan and Yoe* (2005) 64 NSWLR 335, you confronted the issue of suppressing of the identity of complainants. In a typical example of your regard for the social consequence of the law, you found that while the principle of open justice is important to public confidence in law, it is not absolute. In that case, the Court determined that the identity of the complainants who had reported that they were victims of sexual servitude could be suppressed in order to enable victims of sexual crimes to come forward without fear of shame or stigmatisation. Most recently, your concern for the fairness of our justice system was evidenced in *Collier v DPP* [2001] NSWCA 202

where you went to great lengths to determine the necessary elements of a valid guilty plea in an effort to avoid the courts blindly accepting guilty pleas from ill-informed individuals.

- 11 One of your most valuable characteristics, one which has been evinced throughout your legal career, is your dedication to law reform. You have always displayed an awareness for areas of the law that are not operating efficiently. You served as a part-time Commissioner of the New South Wales Law Reform Commission while dealing with your heavy caseload, evidently so that you could focus both on what the law is, as well as what the law should be. The legal profession and the broader community are thankful for your efforts.
  
- 12 You have dedicated yourself to law but not only to law. Your writings in philosophy are internationally regarded and have resulted in a number of esteemed publications. Justice Heydon who has asked me to convey his apologies and sincere regrets for not being able to attend this ceremony, told me that the late Professor H L A Hart said to him, on a number of occasions, that you were the ablest Doctor of Philosophy student he had ever had. That was affirmed in Nicola Lacey's work on the life of H L A Hart. The late Professor Hayek, in his work, *Law, Legislation and Liberty*, described your work *Consequences of Utilitarianism* as a book of considerable importance which should have brought a debate as to certain contradictions in Benthamite thinking to a close. Your philosophical studies and writings have undoubtedly influenced your dispensation of justice. At the very least, they have contributed to the flawless logic inherent in your judgments. You steadfastly supported the belief that we have free will and can ultimately be held accountable for our actions. However, as the Court of Criminal Appeal cases that I have previously mentioned will attest, your belief in free will does not come at the expense of compensation for others and sits comfortably with your own belief in rehabilitation.

- 13 A review of your work *The Mind Matters* described it in terms which apply equally to your judgments: “It is balanced, extraordinarily thorough and scrupulously fair minded and is written in a clear, straightforward, accessible prose”.
- 14 Your mathematical brain has also been an incredible judicial asset. In *Council of the City of Liverpool v Turano* [2008] NSWCA 270 the probable radius of tree roots was discerned by Pythagoras’ theorem, and in *Hawthorne v Hillcoat* [2008] NSWCA 340, expert evidence was scrutinised in light of Newton’s third law. Counsel was always well advised to triple check any calculations relevant to matters in dispute before appearing in your Court because your ability to perform calculations in your head has always been much faster and more accurately than any barrister’s ability to do the same thing on a calculator, however sophisticated.
- 15 Your article “Probability and Proof in Legal Fact Reasoning” (1995) 69 *ALJ* 731, points “to the need for adequate material on which to base probabilities and to the limited role of mathematics in most fact-finding”. It goes on to discuss “some of the areas in which mathematical probabilities may be important”. This thesis on the role of probability and proof in legal reasoning has been relied upon in numerous later decisions of the Supreme Court and the Court of Appeal in this State, including *Burger King v Hungry Jacks* [2001] NSWCA 187, *Morley v ASIC* [2010] NSWCA 331, *Seltsam v McGuinness* (2000) 49 *NSWLR* 262, and also in the Western Australian Supreme Court, Australian Capital Territory Supreme Court, Victorian Supreme Court and Federal Court.
- 16 Despite your obvious brilliance in intellectual pursuits of a wide variety, you have remained extraordinarily humble. Your humility has prevented you from publishing the many writings and speeches you delivered in the course of your time in this Court on the Supreme Court website. You might have thought that this meant that the promises and goals that you made in your swearing-in speech would not be brought back to haunt you.

You may be alarmed to learn that I did in fact find the remarks you made at your swearing-in ceremony, marked 31 October 1983, in original typewriter text, stored in a filing cabinet in my Chambers. Rest assured that the challenges you set for yourself at that time have been more than met. You stated: “I am conscious of the responsibilities I am undertaking, and I am thinking particularly - and perhaps I am stating the obvious here - that I will be presiding over hearings and making decisions which will be of great importance to the lives of the people involved. I will strive to proper discharge that responsibility”.

17 While you might have thought at the time you were stating the obvious, in fact you are articulating an important philosophy that seems to have guided you in all you have done as a judge. You never lost sight of the impact the decisions you made would have on the individuals involved in each case and on society at large. Your dedication to the law has always been accompanied by a dedication to those affected by the law.

18 In the short time I have been on the Court, I have had the pleasure to sit with you on a few cases. I hope we might have the opportunity to sit together more in the future. Your experience, your wisdom, your sharp intellect and your strong values will be ongoing assets for this Court, ones that we value very highly. Your jazz and classical music wafting down the corridor of St James annexure and this building, is widely appreciated. Your booming laughter cannot be replaced. We look forward to continuing to benefit from your exceptional contribution to the law, and to the Court, in the near future.

19 **Mr P BOULTEN SC SENIOR VICE PRESIDENT NEW SOUTH WALES BAR ASSOCIATION:** May it please the Court.

20 When I accepted the invitation to speak on behalf of the Bar at this morning’s ceremony, my intention was to open with a few customary remarks - that it’s a privilege to be here and to convey the gratitude and

best wishes of the President, Bernard Coles QC, who unfortunately cannot be here.

- 21 But that was before I immersed myself briefly in your Honour's published philosophical works. As I read about consciousness and "feature-rich gestalts", about free will and determinism, about the non-Humean notion of myself, and about "non-Cartesian dualism", naturally I became concerned - actually alarmed. Did I volunteer to speak or was my free will precluded by the theory of relativity's "block universe"? Am I really here at all?
- 22 The objectivity of this morning's ceremony was further muddled when I tried to construe retirement as an act of free will. Unfortunately, the *Judges Retirement Act 1918* provided for a compulsory retirement age of 70, which was raised to 72 by the *Judicial Officers Legislation (Amendment) Act 1990*. That, it would seem, is the objective reality. And yet, in this parallel universe that we call New South Wales, I understand that your Honour has been appointed as an Acting Judge and Judge of Appeal, commencing tomorrow.
- 23 I digress. It is actually a great privilege to address the Court on this occasion. There is no judge of this Court who has earned more respect than you. This morning's gathering is a clear indication that the Court and the profession regard your Honour's service as being quite exceptional.
- 24 Your Honour's achievements in academia have taken you far beyond the range of other lawyers, although in the words of one former judge, they remain, "formidably obscure", to those occupying the Bench. It has been said, although I cannot confirm this, that a former Chief Justice couldn't get past the halfway mark in one of your books.
- 25 Your Honour was awarded a Rhodes Scholarship in 1962 and you completed a doctorate in philosophy at Oxford University under H L A Hart. Your thesis was published in 1967 as, "Consequences of Utilitarianism", which analysed the ideas of Jeremy Bentham. Thereafter



came a hiatus in your publishing, before your interest was aroused by the work on consciousness by an author with an Eastern European surname that even Google couldn't find. The fruit of that endeavour, *The Mind Matters: Consciousness and Choice in a Quantum World*, was published in 1991 to critical acclaim. Your next major publication, *Rationality + Consciousness = Free Will*, is due for publication in November this year. Your Honour even has a website, something which is rare for a Court of Appeal judge, though perhaps not one for a High Court judge. I understand that your Honour's entry in the *Dictionary of Philosophers* is immediately between Hegel and Hume.

- 26 All your publications have been well-reviewed, although one English reviewer expressed some surprise that such erudite work was written by a judge, let alone an Australian.
- 27 It seems that the dilemmas of equity law are relatively mundane for your Honour. Mathematics and extraordinary philosophical problems, even speculation on "what zombies can't do", have all been the object of analysis for your relentlessly enquiring mind - or should I say brain, your Honour?
- 28 Not even quantum mechanics which baffles most of us, has escaped your intellectual grasp. To emphasise this point, as it were needed, your Honour learned it all during the morning and evening commute as a guest of City Rail although it's improbable that such an accomplishment would be possible on more efficient rail networks elsewhere.
- 29 So quantum physics, neuroscience, "qualia", and the features of consciousness, all of this presents a criminal barrister like me with more than the usual challenge.
- 30 Fortunately, the strands of your enquiry have coalesced around a prolonged and extremely thoughtful analysis of Free Will, neuroscience and responsibility under criminal law. As research increasingly pushes

back the frontiers of our understanding about the way our brains operate or malfunction, the dilemmas of how the justice system should balance punishment and therapy become increasingly complex. Your Honour's writings in this field are timely and pertinent. It is to be hoped that they will feature more prominently in this debate, especially if Parliament is to get the balance correct.

- 31 Your Honour graduated from the Sydney Law School with first class honours in 1962, the same class as Murray Gleeson and Michael Kirby. Your Honour served as an associate to Sir Victor Windeyer.
- 32 Immediately upon your return from England, you commenced practice at the Bar in 1965. You found a room in the original Forbes Chambers, which was then located at 127 Phillip Street. You read with Philip Powell, as he then was; you built a solid practice in Petty Sessions and District Court cases; you later moved to Frederick Jordan Chambers.
- 33 You often appeared, instructed by the Public Solicitor, for protected tenants, the brief marked at \$21 a day plus a Second Class rail ticket. One of your former judicial colleagues described your success in the High Court when, appearing as a junior to a very senior counsel indeed, you took to your feet after your leader had apparently closed the argument, reargued the case and duly won it.
- 34 In 1969 you became assistant editor of the *Australian Law Journal*, a role you held until 1976. You were elected to the Bar Council in the years 1977 through to 1979. You took silk in 1979, still aged only 40 and only four years later, you were appointed as a judge of the Supreme Court. Your Honour was appointed to the Equity Division in 1984 and became the Chief Judge in Equity in 1997.
- 35 In October 1998, your Honour became a part-time Commissioner with the New South Wales Law Reform Commission and in 2001, you were appointed as a Judge of Appeal.

- 36 Your Honour has served almost 28 years on the Bench. I think, the longest serving of the present judges. Among those I have contacted in preparation for this speech, consensus view is that your Honour is confident, careful and efficient. There is unanimous praise for your genuine humility, unfailing courtesy and unassailable integrity.
- 37 Your Honour's work is highly valued for being sustained, meticulous and complete, as well as learned and compassionate. Your reasons for decision are construed, "unconsciously and without strain, with meticulous care" and it's also to be said that there are no incautious overstatements in your Honour's judgments.
- 38 In the case of *Dwyer v Kaljo* in 1987, your Honour dealt with an application under the *De Facto Relations Act*, specifically construing s 20. The case went to appeal to the Court of Appeal. Your decision was overturned. There was an application for special leave to the High Court which was refused and the matter was left to be decided at an intermediate appellant court level. Then, in *Evans v Marmont*, a five-member panel of the Court of Appeal sat to resolve the matter and by a 3-2 majority, it was held that your Honour's construction was correct and the leading judgment expressly adopted your view.
- 39 Other notable cases included *Habib v Nationwide News*, *Stewart v Ronalds*, *Fostif v Campbell's Cash and Carry*. In *Minister for Planning v Walker*, your Honour presided in one of the first cases considering developments that should be environmentally sustainable.
- 40 One senior counsel commented that when appearing before your Honour, there was no point in trying to put any "spin" on a point because your Honour has an immediate grasp of the relative importance of propositions and a clear perception of the logic or absence thereof in a proposition.

41 Your judicial approach was always marked by compassion and kindness. Fittingly, your Honour was awarded an AO in 2009 for service to the judiciary and the law.

42 Justice Hodgson, you have excelled in widely differing, professional and academic endeavours. The Bar congratulates you. Although we can expect to see you on the Bench in Queens Square, intermittently for the next couple of years, I and all the members of the New South Wales Bar, extend you the warmest best wishes and hope that you continue to pursue your customarily diverse and fascinating intellectual pursuits.

43 **MR S WESTGARTH, PRESIDENT LAW SOCIETY OF NEW SOUTH WALES:** May it please the Court.

44 In the 2001 edition of this country's pre-eminent legal journal, the *Australian Law Journal*, former High Court Justice, The Honourable Michael Kirby AC CMG, made the following observation on the occasion of your Honour's appointment to this Court. He said:

"Justice Hodgson is a person who mixes gently one of the sharpest intellects in the service of the courts in Australia with a genuine humility and approachableness. He will be an ornament to the Court of Appeal."

Michael Kirby, along with the former Chief Justice Murray Gleeson, as we've heard, graduated from Sydney University's Law School in 1962, the same year as your Honour. So his statement reflects the benefit of some 40 years' knowledge and experience of your Honour's character, skills and personal attributes.

45 "Ornament", has several meanings; a decoration or a musical flourish, for example. While your Honour is no doubt an "adornment" to the Bench, I am confident that "ornament", used in this context, was to highlight that your appointment would prove to be a credit and a source of pride for the Court of Appeal in this State.

- 46 Indeed, it has and on behalf of the solicitors of New South Wales, I am pleased to add my valedictory remarks on the occasion of your Honour's retirement. I understand that your Honour is the current longest serving judge, as we've heard, sitting on the Supreme Court Bench, having been appointed in 1983; a truly significant contribution to the administration of law and of justice in this State.
- 47 It would be fair to say that your Honour has been a source of pride and a credit throughout your life. I am sure your late parents, Frederick and Dorothy thought so, along with your brother, Roger and sister, Dianna.
- 48 Certainly, your wife, Raewyn, sons Michael and Phil, and daughter Susan, would agree as no doubt would your colleagues on the Bench; solicitors who briefed your Honour in the early years and more recently appeared before you in the Court, as well as your friends and fellow philosophers here and abroad.
- 49 Sydney Grammar School which you attended from 1950 to 1955, described your Honour as a "renaissance man", given your all-round abilities - both cerebral and sporting. A distinguished academic career saw your Honour, not only Dux of the school in 1955, but records indicate that your Honour topped the State in Maths 1 & 2, and came third in the State overall. That's aside from numerous prizes awarded over the years for Maths, Latin, Modern History, and Scholarships awarded by the University of Sydney and the Commonwealth. In addition, your Honour still found time to participate in cadets and rugby. Your Honour was also a chess player of some note, coming runner-up in the under 18 New South Wales Chess competition, as well as being a highly skilled tennis player. Some 46 years later, the Honourable Michael Kirby made mention in the Australian Law Journal in 2001, that your Honour, "still plays lethally", he said. The status quo remains.

- 50 At university, your Honour proved a scholar of considerable note, when you graduated with First Class Honours as a Bachelor of Laws in 1962. As a Rhodes Scholar, your Honour completed a Doctorate of Philosophy under the tutelage of Professor Herbert Hart at Oxford. Your thesis, “Consequences of Utilitarianism”, a study in normative ethics and legal theory, was later published to critical acclaim.
- 51 Your Honour boasts an extended family of legal eagles although your sister, Dianna, managed to break the mould by becoming a science teacher. Your father, Frederick Arthur, with whom you were articled, served more than 50 years as a solicitor at Teece Hodgson and Ward and your brother, Roger, is a consultant with Teece Hodgson and Ward, and also has been in practice for more than 50 years. Roger’s son, Colin, is a barrister.
- 52 Your Honour’s son, Michael, is a solicitor at Dibbs Barker and your other son, Phil, is a Doctor of Chemical Engineering and CEO, Executive Director of Jat-energy Limited. Daughter, Susan, has set up her own business as a chartered accountant in the Arts field and obviously shares your Honour’s affinity with numbers. With seven grandchildren, perhaps there are more lawyers to come.
- 53 Your Honour was admitted to the bar in 1965; appointed Queen’s Counsel in 1979; a judge of this Court in 1983; Chief Judge in Equity in 1997 and a Judge of the Court of Appeal in 2001, and as we’ve heard, your Honour served as a Commissioner of the New South Wales Law Reform Commission part-time, a part-time lecturer in Commercial Law at Sydney University’s Law School and a member of the Bar Council and assistant editor of the *Australian Law Journal* from 1969-1976.
- 54 Much has changed since your Honour first entered the legal profession in 1962. In those days, the Court of Appeal did not exist. It was established in 1966. There were then 24 Supreme Court judges - none of them women. Indeed, it was not until four years after your Honour was

appointed to the judiciary in 1983, that the Honourable Jane Mathews AO, became the first woman to sit on the Supreme Court Bench. Today, the number of Supreme Court judges has almost doubled. Likewise the number of solicitors in NSW has trebled since your Honour's appointment to the judiciary, from 7,800 then to 24,000 now – some of them have become judges.

- 55 Your Honour has served under four Chief Justices - Sir Laurence Street AC KCMG, the Honourable Murray Gleeson AC, the Honourable James Spigelman AC and now, the Honourable Tom Bathurst.
- 56 Your Honour's first judgment in the Court of Appeal was delivered on 26 April 2001, three days after your swearing in ceremony, in which you dismissed the claimant's appeal against a District Court decision in relation to a wardship case: *Druett v Director-General of Community Services* [2001] NSWCA 126. In subsequent years, your Honour has presided over many decisions of note, many of which we've already heard reference today.
- 57 Your colleagues have described your Honour as possessing an incisive mind that goes straight to the heart of the problem; who proceeds quickly in a careful and orderly manner; and whose mathematical genius really comes to the fore when calculations are involved. This incisiveness is evident in your Honour's philosophical works, particularly with regard to notions of free will and responsibility and its application to the criminal justice system, where increasingly, a therapeutic approach to criminal conduct is being argued as opposed to punishment.
- 58 While your Honour accepts that genetic, social and environmental factors influence a person's actions and can be mitigating factors in reducing that person's responsibility, your view is that these factors should not override commonsense notion of responsibility or, "the moral considerations that underpin the law".

59 In an article published in the *Australian Law Journal*, in October 2000, your Honour stated this:

“If the notions of free will and responsibility are discredited, human rights are prejudiced; there will appear to be no rational basis for saying that it is fair; to curtail the freedom of a person who acts in breach of the law, yet unfair to curtail the freedom of a person regarded by the government as a danger to society.”

60 These views were explored more fully in your Honour’s second book, *The Mind Matters: Consciousness and Choice in a Quantum World*, published in 1991. I understand that much of this work was drafted during your train journeys to and from work. While these views may not be shared by all scientists and scientifically-oriented philosophers, the reviews and commentaries have hailed the publication as an excellent contribution to the literature, well written and argued, authoritative, provocative and wonderfully wide-ranging. We eagerly await the publication of your Honour’s forthcoming publication, *Rationality + Consciousness = Free Will*, in November this year, which further builds on these theories and concerns the contribution of conscious experiences to decision-making.

61 Your Honour is a man of many talents. Your Honour virtually designed your first house on a battleaxe block in Beecroft. Not content with that, you purchased the block next door, demolishing the existing residence and designed your current house. For relaxation and leisure, your Honour enjoys both classical and jazz music, cryptic crosswords and giant puzzles, gardening, walking and running - the latter including six marathons and several City to Surf events as well as your daily sprint to Beecroft train station to pick up the morning paper.

62 A devoted family man; your devotion even extended to a stray german shepherd who followed the children home one day and stayed for 12 years. He was named, “Spike”. Unlike his name’s sake, Spike Milligan, who once said, “policemen are numbered so they don’t get lost”,



this intrepid traveller had no number but he certainly had your Honour's (number).

63 In recent years, your Honour has shown no signs of slowing down and indeed, had the mandatory age of retirement not been imposed, you would perhaps have continued to serve on the Bench in a full time capacity. However, we are grateful to retain your Honour in an acting capacity, sharing rooms with your former colleague, the Honourable Murray Tobias, and continuing your stellar contribution to the administration of justice as a much admired and respected, "ornament" to the Court.

64 As the Court pleases.

65 **HODGSON JA:** Chief Justice, Justice Allsop, colleagues, members of the legal profession, ladies and gentlemen. Thank you all for doing me the honour of coming here this morning.

66 Thank you especially Chief Justice, Mr Boulten and Mr Westgarth, for your very kind words; some of which painted a picture of myself that I could just about recognise, and all of which were very generous indeed.

67 I feel very privileged to have this occasion when I can hear and be gratified by eulogies, and can even reply to them. For many people, there are eulogies like these only on an occasion in which unfortunately they can no longer participate, and are certainly not in any position to reply.

68 I do however recall a Woody Allen movie in which the deceased did play an active role in his own funeral. The 1996 film, *Everyone Says I Love You*, has a funeral parlour scene in which the ghost of the very elderly deceased person climbs from his coffin and addresses the mourners. Then other ghosts emerge from their coffins, and they all join in a lively song and dance number entitled "Enjoy Yourself, It's Later Than You Think", which does sound like pretty good advice for someone in my time of life.

- 69 Now I'm not expecting anything like this to happen today; and while I agree with the good advice contained in that song title, I actually have no regrets about having stayed with the Court until the age of statutory senility. Indeed, as has been mentioned, for a year or two after my demise today as the judge of the Court, I may from time to time be back to haunt the Court as an acting judge – because I have found my time as a judge most rewarding and satisfying.
- 70 Some reasons are that I felt my work was serving an important and useful function in our society, I found the work itself interesting and challenging, and I've so much enjoyed the cooperation and the friendship of the people I've worked with.
- 71 I recently read about a World Bank study, carried out by economists in 2005, which found that what constituted the largest proportion of wealth, in virtually all countries - an average of 80% in the case of rich countries - was what the study called "intangible capital". This consisted of such things as trust among people in society, lack of corruption, an efficient judicial system, effective property rights and effective government, and in the study these things were together incorporated into what the study called a "rule of law index" for the country, from which the country's intangible capital could be worked out. It was only when this intangible capital was added to the value of a country's natural resources, and its produced or built capital, thereby apparently increasing its wealth about fivefold, that one could account for the country's level of income.
- 72 This is an economic take on something lawyers strongly believe in, namely, the central significance of the rule of law for the welfare of our society. If my work as a judge has had a useful function, as I think it has, it is as a contribution to the system that promotes and gives effect to the rule of law. The system isn't perfect. Two deficiencies that strike me particularly are the difficulty of understanding some areas of law, due to their complexity, and the inaccessibility of legal services and particularly

the courts, due to the cost of legal services. I don't think there's any easy answer to either of these problems, but I do think that lawyers should continually strive to keep them in check; and despite these deficiencies, I think our system does a very creditable job in maintaining the intangible capital that is so important for our society.

- 73 I don't see my own contribution to this system as having been that I've decided particularly important cases, or brought about any particularly significant innovations in the law. What I've tried to do, both as a first instance judge and as appeal judge, is to give the parties in each case a fair and efficient hearing, and then to give a decision within a reasonable time that plainly sets out the issue of fact and/or law that have to be decided, decides these issues in conformity with statute law and case law, gives clear reasons for the decisions, and arrives at a result that is as close as I can come, applying proper judicial methods, to what I see as a just result in the case. In that way, I have hoped to promote clarity and consistency in the law and also its just application.
- 74 The intellectual satisfaction of this work has not been unduly dampened by the times when I have needed to be corrected, and have been corrected, ever so gently, by the Court of Appeal in my earlier years and more recently, by the High Court.
- 75 As I have suggested, another factor that I've highly valued during my time in the Court is the cooperation and friendship of the people I've worked with. I have served under four Chief Justices, Sir Laurence Street, Murray Gleeson, Jim Spigelman and Tom Bathurst, in the case of the last for just two months; but I'm confident he will be an outstanding Chief Justice, as his predecessors have been. I have served under several heads of jurisdiction, Colin Begg, Michael Helsham, Tom Waddell, Malcolm McLelland, Keith Mason and James Allsop. Colin Begg passed away many years ago; Michael Helsham, more recently. Murray Gleeson and Tom Waddell have sent their apologies. Murray is exploring the Kimberleys, and Tom is, he tells me, floating on the Murray River. The

other persons I have mentioned are here today. All of these people have been fine leaders and valued colleagues, and all of them have promoted the collegiality of the Court, which has been one of the most appealing features of my time as a judge. Both as a first instance judge and in the Court of Appeal, I have been most fortunate in the judicial colleagues with whom I have worked and shared friendships, and fortunate too in the friendship and cooperation of their staff.

76 Mention has been made of my philosophical interests, and one of the true things that was said about me was that I've pursued these interests during my train journeys. I think a great advantage in living in an outer suburb, on a train line, is the 40 minutes I've had, twice each day, when I've been able, with a clear conscience, to devote attention to things other than reserved judgments.

77 One of my childhood memories is of asking how we can see, and being told that our eyes are like cameras. And I recall thinking, well, that would mean there are pictures inside our heads, but how then does this enable us to see? Are there more cameras that take pictures of the pictures, and if so, what then? So from an early age, I have been intrigued by the question of what it is about this thing inside our heads that gives us conscious experiences, thoughts and feelings; and in the 1980's, I pursued this in my train journeys, and eventually found I'd written a book about consciousness - rather a long book, I'm afraid, and while I thought it made out a pretty good case that our brains are not just elaborate computers, it still did not really come close to giving a full answer to my childhood question. No one has yet done that.

78 In recent times, I have focused more on the related question of how we, as products of nature and nurture, can have free will and responsibility for what we do. As Jim Spigelman has remarked, I am one of few people writing philosophically about free will who actually believe it exists and brings about real changes to what happens in the world. To see how I reconcile this to the apparent inexorability of physical brain processes

driven by laws of nature, you'll have to read my new book. The publisher tells me it will come out in November, in time for Christmas. Although I suppose that to think a book entitled *Rationality + Consciousness Equals Free Will* may find its way into many Christmas stockings, is perhaps being a little unrealistic.

79 I believe it is very important for the law to maintain the idea that generally human beings are truly responsible for their actions, while at the same time recognising that degrees of responsibility are greatly affected by our different genetic and environmental advantages and disadvantages. This is a view that may in the future increasingly face challenges with the advance of neuroscience. The law should, I think, continue to seek a reasonable balance among the currently recognised objectives of criminal punishment, including just retribution, as well as deterrence, rehabilitation and confinement of dangerous people. The law should resist both populist calls for vengeance on the one hand, and philosophical arguments for discounting or even abandoning considerations of just retribution, on the other. There is justice, I believe, in punishment that is reasonably proportionate to moral culpability, as best that can be assessed; but I don't think justice lies in eye for an eye vengeance, as is sometimes suggested in the popular media.

80 It remains for me to acknowledge some of the people who have supported and helped me over the last 28 years. I have already mentioned my judicial colleagues in the Court and their staff, and I should also acknowledge the contribution made by the court staff in the registry, the library, the IT department and elsewhere, to the efficient working of the Court, and to my own performance of my role.

81 The courts could not function as they do without the assistance of the legal profession, both solicitors and barristers. My own work has been helped enormously by the competent and conscientious work done by the legal practitioners involved in the cases I've heard.

- 82 I have been very fortunate over the last 16 years to have assistance from tipstaves/researchers who have been recent graduates, usually for one year at a time, who've been of great help to me in writing my judgments; discussing the cases, proof reading the judgments, and at times making substantive contributions to them. Many of them are here today. One of the nicest things that has happened to me recently, has been the surprise gift to me of a small book produced by this year's tipstaff, Julia Roy, containing reminiscences by many of my tipstaves of their time with me, and accounts of their later careers.
- 83 I have had the support of two loyal and highly efficient associates. Judith Lord became my associate when I was first appointed, and stayed with me for well over 20 years, looking after me very well indeed. She is now personal assistant to my old university friend, Michael Kirby. It is good to see them both here today. Since Judith left me, I have been most fortunate to have as my associate, Dorothy Laidler, who previously worked for many years for the late and much missed, Kim Santow. She too has been an invaluable support to me, and a pleasure to work with.
- 84 Then there is my family. Our children, Michael, Philip and Sue, in my early years as a judge, were an effective antidote against taking myself too seriously, and they've grown into adults of whom we are very proud. They are happily married, so our family now includes children in-law Susan, Ingrid and Todd, and seven grandchildren, Emma, Rachel, Nikki, Katie, Georgia, Sam and Olivia, who give us the great pleasure that children give, with little of the responsibility.
- 85 Some of you may have heard the story about how I first met my wife, Raewyn, at the age of three and a half. In my first year at pre-school in 1943, one day my shoelaces came undone, and I went to one of the Misses Thompson who ran the school and asked if she could please tie them for me. She directed a little girl with the distinctive name of Raewyn to do this. I have quite a clear recollection of this, probably because of the severe emotional trauma of humiliation at being totally incapable of doing

something which this little girl did so competently. Raewyn has no memory of this incident itself, but since she was told about it by my mother, I think in about 1960, it's become a story that she does, with every good intention, remind me about from time to time.

86 To the best of my recollection, Raewyn has not, on any other occasion, during the ensuing 68 years, ever tied my shoelaces again, but she has, over about the last 50 of those years, in innumerable ways, been a wonderful support for me in everything I have done and everything I have tried to do.

87 Thank you all for attending and making this a memorable occasion for me - maybe even as memorable as having my shoelaces tied - although, I'm afraid, I can't expect to have another 68 years over which the memory of this occasion can persist.

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