

**ADDRESS ON THE RETIREMENT OF
THE HONOURABLE DAVID HODGSON AO
BY THE HONOURABLE T F BATHURST
CHIEF JUSTICE OF NEW SOUTH WALES
BANCO COURT, 9 AUGUST 2011**

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 you have made to this Court over your time as a judge, the Chief Judge in Equity and most recently as a judge of the Court of Appeal.

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 had such a significant impact 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 pay tribute to your contribution as a judge.

You became a judge in 1983. It is with no disrespect that I note that this was two years before 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.

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.

Your collegiality did not come at the cost of efficiency. You pride yourself on always being up-to-date with judgment writing. *Macquarie International Health Clinic Pty Ltd v Sydney South West Area Health Service* [2010] NSWCA 268 represents one of your most recent judgments. 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.

During your time in the Equity Division you became known for the kindness and respect that you afforded to counsel and 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. In *Bowden v Lo and Ors Matter No 3188/95* [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 he had, perhaps for the first time, struck upon a relevant point.

You also turned your judicial skills to a number of high profile cases which have allowed you to leave your mark on the Sydney cityscape. As a single judge in equity you adjudicated three separate disputes centred upon Sydney's Luna Park. More recently, you wrote the lead 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 of your judgments. A High Court appeal was allowed and then briskly dismissed in *Westfield Management Limited v Perpetual Trustee Company Limited* [2007] HCA 45. In that decision, the High Court summarised your findings and concluded simply, and repeatedly: "We agree."

You also made notable contributions in the area of Corporate 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 the takeover. The senior counsel involved in that case, the late Justices Meagher and Healy and the late D A Staff QC, spoke as I recall it with admiration at the way you conducted the trial and reached a result which 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 you raised.

In your work in 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* [2008] 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 if the litigation fails". This statement has been cited favourably across Australian jurisdictions including the High Court,¹ and has been the subject of articles and texts on costs.² 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*.

¹ See *Jeffery & Katauskas Pty Ltd v SST Consulting Pty Ltd* [2009] HCA 43.

² See, eg, Dal Pont, *Law of Costs* (2nd Ed, 2008).

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 to change their ways. In *Braithwaite v Regina* [2005] NSWCCA 451 you supported the view that youth and immaturity lessen a person's culpability and reduce the role of general deterrence in sentencing exercises. In *Regina v Kwok, Ong, Tan and Yoe* (2005) 64 NSWLR 335 you confronted the issue of suppressing the identity of complainants. In a typical example of your regard for the social consequences 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 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.

One of your most valuable personal 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 effectively. 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.

You have dedicated your life 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* ascribed 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 support 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 previously mentioned will attest, your belief in free will does not come at the expense of compassion for others, and sits comfortably with your belief in rehabilitation.

A review of your work *The Mind Matters* described it in terms that are equally applicable to your judgments:

“It is balanced, extraordinarily thorough and scrupulously fair minded and it is written in clear, straightforward, accessible prose.”

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 were 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 accurate, than any barrister's ability to do the same sums on a calculator.

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 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 countless later decisions of the Supreme and Appeal Court in NSW, including *Burger King v Hungry Jacks* [2001] NSWCA 187, *Morley v ASIC* [2010] NSWCA 331, *ASIC v Rich* [2009] NSWSC 1229, *Seltsam Pty Ltd v McGuinness* (2000) 49 NSWLR 262, and also in the Western Australian Supreme Court, ACT Supreme Court, Victorian Supreme Court and Federal Court.

Despite your obvious brilliance in intellectual pursuits of a wide variety, you remain extraordinarily humble. Your humility has prevented you from publishing the many writings and speeches you delivered over the course of your time on this Court on the Supreme Court website. You might have thought that this meant that the promises and goals 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 in the lives of the people involved. I will strive to properly discharge that responsibility.' While you might have thought at that time that you were stating the obvious, in fact you were 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.

In the short time that I have been on this Court I have had the pleasure to work with you on a few cases. I hope that we might have the opportunity to sit together more often in 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 corridors of St James – 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 this Court, in the near future.