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the Hon. J J Spigelman, AC, Chief Justice of NSW in 2003**

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Address at the Closing Ceremony of the Compensation Court of New South Wales

ADDRESS AT THE CLOSING CEREMONY OF THE COMPENSATION COURT OF NEW SOUTH WALES

BY THE HONOURABLE J J SPIGELMAN AC
CHIEF JUSTICE OF NEW SOUTH WALES
19 DECEMBER 2003

I participate in this ceremony to acknowledge on behalf of all of the judges of the State the contribution that has been made by the current and previous judges of this Court to the performance of their duties and thereby the administration of justice by all judges in this State. There is a sense of collegiality amongst all judges in this State and indeed over recent years there has emerged a significant sense of collegiality amongst judges throughout Australia and to some degree internationally. That collegiality is based on a common sense of contribution and an understanding of the significance of fidelity to the law in the performance of our duties and fidelity to the judicial oath. Such fidelity, as Chief Justice Gleeson has noted in an address last year, is the foundation of judicial legitimacy in our society. That judicial legitimacy plays a role in our economic welfare and our social stability, of a character that is envied by many nations in the world.

The judges of this Court have, in my experience and in my understanding of the history, throughout their terms of office performed their functions and duties with fidelity, both to the judicial oath and to the law. Insofar as they perform their functions without affection or ill will, I understand it is not always extended from the parties to the Court of Appeal but, however that may be, that is not part of the judicial oath.

The system, as has been acknowledged, goes back to 1926—it was, with child endowment and widows' pensions, one of the extraordinary innovations of the first Lang administration. A radical measure at the time, it went well beyond what was then the role model, namely the English system of workers compensation. There were a number of respects in which that was so, not least the creation of an independent tribunal, but also in matters such as dropping the words "by accident" from the then traditional formulation, "injury by accident arising out of and in the course of employment". Overall it was a significant innovation. The English model was universally accepted until that time. Before that, I believe, the first such system was introduced by Bismarck in Germany, recognising the significance of maintaining social stability through compensating injured workers. Bismarck had something to say to all of us judicial officers, and those parties and practitioners who appear before judges, about the process of judging. He once compared making law to the making of sausages and said; "*in both cases you are much better off if you do not know too much about the detail of how it is done*".

In the course of the history, to which I have referred, the contribution of this Court has been of the highest order, and particularly so through the special role of a judicial decision-making process. It is not the only means of settling social disputes, as we know. However, there is a special quality about judicial decision making that is significant to all of us who participate in such a process. The perceived sense of fairness of the processes involved and also the independent cast of mind that judicial officers bring to the process enhances the acceptance of what, to many people, must be unsatisfactory outcomes. There is just no way in which any system of deciding disputes of the character with which this Court has had to deal will lead to universal acceptance by all parties. What one does need, however, is an acceptance of the process and of the outcome. That has been delivered over the course of some 77 years by the present and former judges of this Court in a manner of which all of those who have participated in the process can be very proud.

The occasion also marks the retirement from full-time judicial office of Justice Campbell as a judge of this Court (and its predecessor Commission) and of the Supreme Court. He has served the State to a degree that few will ever match and have ever matched. I myself have had my primary dealings with him over the last five and a half years since my appointment. I wish to join the other comments that have been made today, and particularly those of Judge O'Meally, and add this of my own. In that five and a half years, I have come to appreciate your wisdom and your counsel in the full range of activities involving the administration of justice in this State, most particularly in the context of the Judicial Commission on which we both serve, but beyond that, in terms of discussions about other matters of policy that regularly arise and that go beyond the activities of the Compensation Court. Throughout that

period your counsel has been of the highest order. Your knowledge and understanding of the processes of the law has been drawn on by me on numerous occasions. I wish to say that, personally, our relationship has been as good as I could imagine, but, professionally, what I have been able to draw from you has been of the greatest significance to me in the performance of my tasks.

I am sure I speak on behalf of all of the judges of this Court when I wish you well in your retirement. To those of your colleagues who are retiring I wish them well, and those who are going to the District Court, I am afraid the Court of Appeal is still there. I look forward to our continued interaction in the future.

Open Justice and the Internet - The Law via the Internet 2003 Conference

**OPEN JUSTICE AND THE INTERNET
ADDRESS BY THE HONOURABLE J J SPIGELMAN AC
CHIEF JUSTICE OF NEW SOUTH WALES
THE LAW VIA THE INTERNET 2003 CONFERENCE
SYDNEY 28 NOVEMBER 2003**

The accessibility of legal information on-line is the most dramatic technical improvement in my legal lifetime. It has, as I am sure everyone at this conference would readily accept, transformed the way legal work, particularly legal research, is conducted.

Many of the people attending this conference have made major contributions to this development although, of course, I am most familiar with the contribution of those associated with AustLII, a service that has within a very short space of time moved from being regarded as a miracle to being taken for granted. In Australia we are very good at taking things for granted. We simply assume that when we turn a tap, clean water will come out of it and when we flick a light switch, electricity will be instantly available. The extraordinary amount of skill and embedded knowledge that lie behind those simple actions is not often acknowledged. I wish to acknowledge here, the role that AustLII and those associated with it have played in ensuring the legal information in Australia and, more recently in other jurisdictions, is publicly and readily available

Conferences such as this highlight both the significance of past achievements and the importance of a lack of complacency. The scope and range of subjects that you have been discussing at this conference indicate that there is no complacency. Notwithstanding the extraordinary new tools that you and your associates have provided for we toilers in the garden of the administration of justice, the search for improvement is ongoing.

This process is of great and abiding significance for all of us involved in the administration of justice. It is all too easy to get locked into a technological solution which proves, over time, not to have been the best option. There is, for example, a considerable literature about the inefficiencies of the QWERTY keyboard. Perhaps I can commence these remarks, however, with a more long term example of our technological dependence.

The booster rockets on the side of the United States space shuttle must be shipped by train from the factory to the launch site. Those booster rockets cannot be made any bigger because they have to fit through a single track railway tunnel in the Rocky Mountains.

The United States railway gauge, which is 4 feet 8 1/2 inches, or 1.435 metres, was adopted because that was the gauge in the pioneer industrial economy, namely England. The first railway lines in England had been built by the same engineers who had built the pre-railway tramways and that was the gauge they had used. The reason they adopted that gauge was because they used the same jigs, tools and equipment that had long been used to build wagons and carriages, drawn by horses. The wagons and carriages were built with 4 feet 8 1/2 inches between the wheels because that was the space between the ruts in the road for many of the long distance roads in England. By continuing use over the centuries those ruts had become fixed by the passage of countless wagons and carriages. Many of the long distance roads in England had been laid down by the Romans and the ruts commenced to be formed during the period of Roman occupation of England, by the wheels of Roman chariots. All chariots throughout the Roman Empire were built with a distance between the wheels of 4 feet 8 1/2 inches, in the interests of standardisation. That distance was originally chosen because it was the approximate width of the backside of two horses.

Accordingly, the reason why the space shuttle is, and will remain, of limited capacity is because its booster rockets cannot be much bigger than the width of two horses behinds.

We in Australia engage in the particular delights of a federal system, which has an even worse technological fix in our early history. The colonies, in their rivalry over trade, deliberately built railway lines of different gauges in order to impede the possibility of product in the outlying areas of one colony being shipped to the nearest port, when it happened to be in another colony. It took the best

part of a century to overcome the economic dislocation of those decisions.

The necessary standardisation involved in electronic applications are, perhaps because of this past experience, proceeding on a more rational national basis. With respect to the accessibility and retrieval of judgments and legislation, AustLII led the way in this, as in so many other relevant respects.

Besides this little diversion on the problems of federalism, the story of the international railway gauges, like the story of the QWERTY keyboard, manifests the significance of conferences such as this to ensure uniformity in standards in such matters. These issues arise in many different contexts, such as the adoption of legal XML and, at least within specific jurisdictions where there is a hierarchy of courts, the adoption of uniform and integrated case management systems. Only through the process of communication which is possible at conferences such as this can these objectives be attained.

The principal characteristic of electronic access to legal information is, of course, ease of accessibility. Accessibility is one of the most fundamental requirements of the rule of law. Laws must be both public and ascertainable or knowable. It may be that their interpretation requires the assistance of a lawyer, but without ready accessibility nothing that one can call the rule of law is able to exist. That is why legislation in all advanced legal systems is required to be public. It is also why many people advocate that laws should be drafted in non-technical language or, as it is put in the legal tradition in which Australia is placed, laws should be written in "plain English".

It was the obscurity of much judge-made law in the inadequate form of court reporting that existed until the mid 19th century that prompted critics such as Jeremy Bentham to attack the entire system of judicial decision as an authoritative source of law. At the time Bentham had a point. As one legal historian has noted:

"Only blind faith could persuade anyone who has tried to read the year books that the mediaeval common law was somehow derived from their contents. Trying to glean law from the year books is like trying to learn the rules of chess or cricket merely by watching video-recorded highlights of matches. The reader soon senses that contemporaries must have known something he does not, some common understandings to enable them to appreciate the moves." [1]

Insofar as the complexity of our society and its laws can permit practical accessibility, that position has long since changed both with respect to legislation and judicial decisions. The transformation of practical accessibility by on-line access is a fundamental contribution to the efficacy of the rule of law.

I remember a case in the Court of Criminal Appeal where a litigant appeared in person. She had been denied legal aid on the basis that her appeal had no prospects of success. She handed up to the court an electronic version of a precedent, to which she had access in the library at the gaol, no doubt with the assistance of the coterie of bush lawyers who inhabit that library. She said: "I think in my case, I have one of the points that succeeded here". And she was right. That observation should not be regarded as a case for dispensing with legal representation, but it does indicate the manner in which accessibility transforms the practical operation of the rule of law.

One of the basic principles of our legal system is the principle of open justice, as it is put: justice should not only be done but should manifestly be seen to be done. [2] This principle, together with the right of appeal, constitutes the basic mechanism for accountability of the judiciary. The Privy Council once put it in these words:

"Publicity is the authentic hallmark of judicial as distinct from administrative procedure" [3].

Furthermore, as Jeremy Bentham said:

"Publicity is the very soul of justice. It is the keennest spirit to exertion and the surest of all guards against improbity. It keeps the judge, while trying, under trial." [4]

For that reason judgments have always been published, not simply made available to the parties. That is also why, save in the most exceptional of circumstances, legal proceedings are conducted in open court, to which both the public and the press have access.

As the former Chief Justice of the United States, Warren Burger, once said:

"People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing. When a criminal trial is conducted in the open, there is at least an opportunity both for understanding the system in general and its workings in a particular case." [5]

The opportunity of access by the general public has been transformed by electronic access. In this respect I refer not only to the possibility of access to final judgments, including criminal sentences. I also refer to the possibility of access to the process of a trial, even on a real time basis, and the possibility of access to court files, which will increasingly be in electronic form, even prior to a trial. Indeed the very idea of a "trial" in common law systems may be transformed.

In many respects our procedure has been determined by our past and, in particular, by the prevalence of juries. That form of trial is no longer as significant as it once was, both in the civil context and in the criminal context, with the expansion of summary jurisdiction. It was the jury more than anything else that determined our idea that a trial should occur over a discreet period of time, to be completed without interruption. The investigatory process of civil law systems, conducted by judges alone, involves the gathering of evidence, which in our system would all occur at the trial, over a period of time, culminating in a trial. It may very well be that the process of convergence between common law and civil law systems, that has been at the forefront of recent comparative law jurisprudence, will occur in this regard also.

In my court, as in many other courts, we are grappling with the question of access to court files in a system where those files will inevitably be electronic. Important issues arise about access to evidence prior to a trial and access to affidavits, even after a trial, which were not relied at trial or, as occurs in most cases, in proceedings which have been settled.

Ready access to legal information is, of course, of the greatest significance to those professionally involved in the administration of justice. We are all better lawyers, whether as practitioners, academics or as judges, by reason of the ease and the speed with which we now have access to the expressed wisdom of others. The multi-faceted process known as globalisation is inevitably reflected in legal practice. We have become used to ease of access of a character which we would have regarded only a few years ago as miraculous.

Most significantly, the internet opens up a new range of possible influences and source of ideas on an international basis. As the Chief Justice of Australia, the Honourable A M Gleeson AC once put it:

"There is a growing awareness, within the Australian profession, of the importance of looking beyond our own statutes and precedents, and our traditional sources, in formulating answers to legal problems. Our law is increasingly aware of, and responsive to, the guidance we can receive from civil law countries. Ultimately, the issues that arise, and the problems that require solution, are in many respects the same throughout large parts of the world. The forces of globalisation tend to standardise the questions to which a legal system must respond. It is only to be expected that there will be an increase in standardisation of the answers." [6]

Another major contribution that electronic access makes to our society is the opportunity it gives us to improve workplace flexibility. This is of greatest significance for the enhancement of the ability of women to participate fully in the legal profession. Although there is evidence that men are availing themselves of flexible working arrangements, and that some men are assuming greater responsibility for child rearing, it remains the fact that, for the foreseeable future, women in our society will continue to bear a disproportionate burden in this regard. Not even men who describe themselves as feminists can do much about the particular burdens of pregnancy.

Electronic communication can lead to the dematerialisation of the workplace and also to the dematerialisation of court processes. Anything that reduces the importance of physical presence and continuous availability - such as video conferencing, electronic communications, internet data bases - undermines the prejudice and disadvantage associated with a legal representative operating at home and the necessity for legal tasks to be performed in an uninterrupted way.

We are well advanced down the path to shifting the paradigm of what is "normal" from work practices which revolve solely around presence at an office and physical attendance by lawyers at court, to more flexible arrangements which are capable of ensuring that women can fully participate in legal practice without having to make unreasonable compromises.

On the other hand, new technology has side effects. Difficulties of application inevitably arise. The application of electronic access to the administration of justice is not exempt from this universal rule.

The principle of open justice is an important principle. However, like all good things, open justice can operate unfairly in some specific circumstances. Certain exceptions to the right of access to legal information have long been acknowledged. Legislative intervention has established further exceptions to the principle of open justice.

The reluctance of rape victims to come forward, by reason of the publicity that used to attend rape trials when complainants were named, led to legislative restriction on the ability to identify victims. Similarly, the particular need for rehabilitation of young criminal offenders has long since led to legislation prohibiting the naming of juveniles who are accused of criminal offences. The need for rehabilitation have also led to the creation of a special regime for spent convictions removing the ability after ten years to identify a person who was sentenced to a short period of imprisonment.

In all these, as in many other respects, the principle of open justice has operated in a system which, although access was in theory available to all, there was a high level of what has been called "practical obscurity". The identification of a person's criminal past or involvement in litigation of any character was not readily ascertainable. It is now.

Sometimes publicity will interfere with the right to a fair trial. The legal system is used to making decisions by balancing two matters of value against each other in the circumstances of a particular case and deciding which ought, perhaps temporarily, prevail. Developments in technology pose new challenges to the ability to ensure a fair trial.

By reason of on-line access and the efficiency of contemporary search engines, access to prior convictions and other information about the conduct of individual accuseds or witnesses has been transformed. The assumption that adverse pre-trial publicity will lose its impact on a jury with the passage of time, may no longer be valid. Changes of venue may no longer work in the way they once did. In a number of proceedings, which will only grow, the ease of access to adverse information has arisen in applications for the discharge of a jury or in the context of an appeal against conviction and also in contempt proceedings. [7]

When these issues began to arise in an acute form about two years ago, there were a number of judicial observations that emphasised a degree of difficulty in gaining access to on-line information, perhaps not as great as looking up the archives of newspapers in the public library, but nevertheless sufficient to detract all but the most determined inquirer. Even in the space of less than two years, the emergence to dominance of Google as a search engine may need even those recent remarks to be qualified.

In Queensland, by s69A of the Jury Act 1995, a juror commits an offence if he or she makes inquiries about the defendant in the trial. The word "inquiry" is specifically defined to include searching an electronic data base. The New South Wales Law Reform Commission has recently decided that it is too early to conclude that the new communications technology is such as to render the sub judice rule unworkable. [8] Developments in this area are rapid. Legislation along the lines that now exists in Queensland would seem to be desirable.

This is not only a problem for the media, who have to tread a delicate path through the law of contempt and the possible application of that law to access to archives not involving any contemporaneous decision about publication. It is also a problem for the courts in what courts now, almost automatically, publish on their own websites or through services such as AustLII. In one recent case the issue arose because a jury could, theoretically, access rulings made by the court, and posted on the court website, during the course of a first trial. These rulings remained accessible by jurors sitting in the second trial. [9]

We are only now beginning to adapt to the loss of that practical obscurity which past methods of information retrieval conferred on court proceedings. The demands of open justice require that adequate reasons are provided for judicial decisions. The reasons for judgment perform a number of different functions for the parties and for the public processes of the law. Nevertheless, the kind of detailed personal information about parties and witnesses, which judges have become used to including in reasons for judgment, may not all be necessary to serve those functions. The identification of persons by name, in a way which permits the compilation of information about individuals, is not

always necessary.

There may be technological solutions to some of these issues, to inhibit access in some manner, e.g. by the use of abbreviations or pseudonyms for a certain period of time, to allow time for appeal. There may be an electronic equivalent to the spent convictions regime, so that records of conviction are no longer accessible electronically after a certain period of time has elapsed.

The progress we have already made is astounding. The difficulties are still emerging as we learn more about how the electronic technologies operate in practice.

Those who attend this conference are playing, and will continue to play, important roles in ensuring that the new technologies are applied to the maximum effect and in such a way as not to infringe the achievement of other values such as fair trial, privacy or rehabilitation.

May I conclude by urging you to continue on this creative path and to recall that these are not simply technical matters with which we are dealing, but are food for the soul. Those of us who operate with Windows, do not need to be submitted to the impersonal, harshness of Microsoft error messages which tell us that we have "performed an illegal operation" or that a previous page has "expired". Let me commend to you those who have suggested a series of alternative error messages, in the form of a Japanese haiku poem such as:

 "Yesterday it worked
 Today it is not working
 Windows is like that.
 First snow, then silence.
This thousand dollar screen dies
 So beautifully.
 You step in the stream
 But the water has moved on
 Page not found.
 Chaos reigns within.
 Stop, reflect and reboot.
 Order shall return.

 The Tao that is seen
 Is not the true Tao
 Until you bring fresh toner.

 You seek a website
 It cannot be located.
 Countless more exist.

 Serious error.
 All shortcuts have disappeared.
 Screen. Mind. Both are blank."

1 J H Baker "Why the history of the English Common Law has not been finished" [Inaugural Lecture as Downing Professor of the Laws of England, 14 October (2000) 59 *Cambridge Law Journal* 62 at 79-80.

2 I have discussed the principle in "Seen To Be Done: The Principle of Open Justice" (2000) 74 ALJ 290, 378.

3 *McPherson v McPherson* (1936) AC 177.

4 Quoted by G Netheim "The Principle of Open Justice" (1986) *UuTasLR* 28 at 28.

5 *Richmond Newspapers Inc v Virginia* 448 US 555 at 572 (1980).

6 Murray Gleeson "Global Influences of the Australian Judiciary" (2002) 22 *AusBarRev* 184 at 188.

7 See e.g. *H M Advocate v Beggs (No 2)* (2002) SLT 39 (High Court of Justiciary, Scotland); *DPP v Weiss* [2002] VSC 153; *R v McLachlan* [2000] VSC 215; *R v Long* [2003] QCA 77 esp at [38]-[39]; *R v Cogley* [2000] VSCA 231 at [10]-[18].

8 See New South Wales Law Reform Commission Report *Contempt by Publication* 2003 at 2.67.

9 See *DPP v Weiss* supra.

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Reasons for Judgment and the Rule of Law - The National Judicial College, Beijing and The Judges' Training Institute, Shanghai

**REASONS FOR JUDGMENT AND THE RULE OF LAW
THE NATIONAL JUDICIAL COLLEGE, BEIJING
10 NOVEMBER 2003
AND
THE JUDGES' TRAINING INSTITUTE, SHANGHAI
17 NOVEMBER 2003
THE HONOURABLE J J SPIGELMAN AC
CHIEF JUSTICE OF NEW SOUTH WALES**

A phrase which has come to be used frequently to describe the process of reform in China over recent decades by the application of international standards to Chinese practice is *yu guo ji jie gui* which literally means "making (the railroad) tracks consistent with the international gauge"[1] See Chris X Lin "A Quiet Revolution: An Overview of China's Judicial Reform" (2003) 4 *Asian Pacific Law and Policy Journal* 255 at 256.. I commence my remarks with some observations about the international gauge for railways.

The booster rockets on the side of the United States space shuttle must be shipped by train from the factory to the launch site. Those booster rockets cannot be made any bigger because they have to fit through a single track railway tunnel in the mountains.

The United States railway gauge, which is 4 feet 8½ inches or 1.435 metres was adopted from that which existed in the pioneer industrial economy, namely England. The first railway lines in England had been built by the same engineers who had built the pre-railway tramways and that was the gauge they used. The reason they adopted that gauge was because they used the same jigs and other tools and equipment that had long been used to build wagons and carriages, drawn by horses. The wagons and carriages were built with that space between the wheels because that was the space between the ruts in the road for many of the long distance roads in England. By continuing use over the centuries those ruts had become fixed by the passage of countless wagons and carriages. Many of the long distance roads in England had been laid down by the Romans and the ruts commenced to be formed during the period of Roman occupation of England by the wheels of Roman chariots. All chariots throughout the Roman Empire were built with a distance between the wheels of 4 feet 8½ inches, which was the approximate width of the backsides of two horses.

Accordingly, the reason why the space shuttle booster rockets are limited in size is because they can only be slightly larger than the width of two horses behinds.

The message of this long story is twofold. First, the international gauge is not always the most efficient or appropriate measure for contemporary requirements. Secondly, the international gauge has a long history. It has been developed, relevantly in the case of the common law legal system, over a period of over 900 years. We in Australia have inherited that long process of development of the common law in England and have ourselves a long history of its application in our particular circumstances. The Supreme Court of New South Wales is almost 180 years old. The High Court of Australia this year celebrated its centenary. The longevity of these institutions is of significance for understanding our system of judicial decision-making and the particular role of reasons for judgment in that system.

The rule of law requires that laws are administered fairly, rationally, predictably, consistently and impartially. Collectively these values are fundamental to the administration of justice.

- Fairness requires a reasonable and observable, indeed manifest, process of consideration of the rights and duties asserted.
- Rationality requires a reasoned relationship between the rights and duties of the participants and the ultimate outcome.
- Predictability requires a process by which the outcome is, and is clearly seen to be, related to the original rights and duties.
- Consistency requires that similar cases lead to similar results.
- Impartiality requires that the judicial decision-maker be indifferent to the ultimate outcome.

These objectives can be distorted in many and varied ways. They are distorted by incompetence or inefficiency on the part of judicial officers. They are also distorted by judicial misconduct of any character and, perhaps most significantly, by misconduct that takes the form of corruption.

The training course in which I and other members of the Australian delegation are participating is focused on the significance of reasons for judgment in the administration of justice in Australia. There are, of course, significant differences between the structure of the Australian judiciary and those of China. However, the general objectives to which I have referred are, as I understand the position, shared between our two systems. The publication of formal reasons for decision plays a critical role in the achievement of these objectives.

In the Australian system reasons for judgment do not play the same role in all courts. First, there is a significant area of the law in which reasons are not given as of course. Major crimes and disputes in some areas of civil law are determined by juries. Juries are composed of lay persons, generally twelve in the case of crime and four in the case of civil actions. In certain specific areas, such as defamation law, juries answer particular questions formulated for them by the judge. Usually, however, the jury verdict is a general conclusive verdict. The jury finds a person guilty or not guilty of a crime. The jury finds that a person does or does not owe another person a certain amount of money, which the jury quantifies. Juries do not give reasons for their decisions.

The trend is that a smaller and smaller proportion of the case load in Australia is determined by juries.

From time to time juries have been abolished in different kinds of civil cases. Once abolished they have not been reinstated. Some states in Australia have gone further in this process than others. The same process has occurred in England, but not the United States of America where juries are still of great significance.

In the area of crime, our legal system has always distinguished between indictable and summary offences. The latter are tried without a jury. Most summary offences are tried at the lowest level of courts in the judicial hierarchy, the local courts, presided over by judicial officers called magistrates. Some summary offences are tried in higher courts. There is a clear drift in the direction of expanding the jurisdiction of local courts over many kinds of crime. This includes significant areas of the criminal law such as assaults and robberies and other property offences. It does not include, however, major crimes such as murder and rape. Nevertheless the drift is clearly in the direction of expanding the number and proportion of cases which are decided by judicial officers who are obliged to give reasons for decisions.

I do not wish to suggest that this drift is determined by this consideration. Indeed, the reason for the reduction in the areas in which the jury system operates is a belief that the jury system is an expensive and lengthy mode of decision-making which has come to be regarded as disproportionately costly to more and more matters, both civil and criminal.

The role and significance of reasons for judgment is also affected by the level in the hierarchy of courts which is making the decision. Australia like China has, in most areas of the country, four levels of courts together with an overlay of national courts. The basic structure in each state is that there is a local court with a civil and criminal jurisdiction dealing with smaller and less significant matters, but whose jurisdiction has tended to increase. There is an intermediate court, known either as a district or a county court, which also deals with both civil and criminal matters. There is a third level of court, called the Supreme Court, dealing with more significant criminal trials and civil matters. The Supreme Court in each state also serves as a court of appeal, often with a separate group of appellate judges, who determine appeals not only from Supreme Court judges but also from district and county court judges and specialist courts. In each state there are specialist courts in jurisdictions such as industrial law, land and environment law or workers compensation.

There are three federal trial courts. The Federal Court of Australia has a broad jurisdiction based on national laws particularly concerning government administration and also a range of commercial matters. It does not have a criminal jurisdiction. Criminal cases under national laws are dealt with by state courts. All family disputes are dealt with by a Family Court which is a collaborative scheme between the national and state governments. These courts have the same status as the State Supreme Courts. Recently there has been created a Federal Magistrates Court which deals with less significant matters previously handled either by the Federal Court or the Family Court.

Overseeing the entire system is the ultimate court of appeal for Australia known as the High Court. It is the fourth level in our judicial hierarchy.

The purpose of this identification of the hierarchy of courts is that the role performed by reasons for judgment differs depending on where in the hierarchy the matter is being decided. A judgment is not only a decision. It is also a means of communication. A judge communicates the decision and the reasons for that decision to the parties. However, some judgments are of broader significance. The audience for judgments always includes the parties to a case and their lawyers. Often, particularly for judgments of courts high in the hierarchy, the relevant audience includes other legal practitioners. Sometimes, the audience is the whole community. It is appropriate for judges to identify the audience to whom they are communicating when composing a judgment.

The degree of detail in and, generally, the length of judgments will differ depending on where one is in the hierarchy. In general terms the lower in the hierarchy a decision is made, for example in a local court or a district court, the persons primarily concerned with the reasons for judgment are the immediate parties to the proceedings. The higher in the hierarchy, the more the significant judgment is for broader purposes, including for the general community but, particularly, for the community of lawyers.

The independent legal profession must follow developments in the law in order to advise clients, who are not parties to particular proceedings, about the implications that the law, so declared may have upon them in their present and future activities. This last function is related to the significance of the system of precedent in our system of law to which I will refer further below.

The overwhelming majority of judgments, particularly those issued by lower courts, are never read by anyone other than the parties. The higher one goes in the judicial hierarchy the more significant the published judgment is to a broader community. Judgments of intermediate courts of appeal such as those of the state Supreme Courts and the Federal and Family Court are often of broader significance to the practitioners in those courts. Judgments of the High Court are almost always of such significance.

The first function performed by reasons of judgment to which attention should be given in this paper is the significance of published reasons for the quality of judicial decisions. This operates in two distinct ways. First, it is my experience and I believe it be the universal experience of the Australian judiciary, that the need to write down in a systematic format the true reasons why a judge has reached a particular conclusion, means that that conclusion is more likely to be the correct conclusion. It is, for example, more likely to serve the objective of rationality to which I have referred, i.e. a reasoned relationship between the rights and duties in dispute in a particular proceeding and the ultimate outcome of those proceedings.

Reasons for judgment usually contain five component parts. First, an outline of the facts of the particular case either as found by that judge or, on appeal, summarised for the purposes of the appeal; secondly, a statement of the relevant legal principles, whether they be a particular statute or, as in our system, a body of judicial made law from previous cases; thirdly, a statement of the issues to be determined; fourthly, the application of the relevant legal principles to the facts as found leading to the relevant conclusions and, finally, the orders made. At each of these steps an obligation to systematically set out the matters and the thought processes improves the ultimate outcome in terms of increasing the chances that it will be the correct outcome.

Many people are capable of reaching intuitive judgments which are correct. Even in such cases it is useful to have to write out the precise steps in the reasoning that lead from the law through the facts to a particular outcome. This is so even in the case of a judge of great experience, who will know what the outcome is likely to be when first appraised of the issue in the particular proceeding. There will always be cases in which even the most experienced judge will change his or her mind in the course of having to articulate precisely why a particular outcome is justified.

The second way in which the obligation to set out reasons serves the objective of improving the quality of the decision-making process is that it facilitates the appellate process. In our system, appeals are the major mechanism for ensuring the accountability of individual judges who conduct trials and for ensuring that the outcome of such trials is the correct outcome.

There are differences in the structure of the Australian judiciary and that of China which may be important in this regard. The principle of judicial independence which we apply does not simply relate

to the collective independence of the judiciary vis a vis other areas of government. Our idea of judicial independence incorporates a concept that individual judges are independent of each other. Judges higher in the hierarchy of a particular court, even a Chief Justice, cannot and do not tell individual judges how they should determine cases. Furthermore, judges who conduct trials in our system sit alone. It is only on appeals that there is a court containing more than one judge, usually three and sometimes five.

There is no system in Australia of a character which I understand to exist in your system by which a senior judge in the court can advise judges hearing cases about how the matter should be determined. Nor is there a system in which judges hearing a case can seek such intervention or even assistance. Individual judges hearing trials will from time to time seek informal assistance from other judges, particularly in areas in which they may not have as much experience as those other judges in the same court. However this is an informal system and does not in any way involve a restriction on the discretion of the trial judge to determine the matter as he or she thinks fit.

In our system, therefore, the absence of a formal process of consultation of any character before a decision is made means that the only way in which a judge communicates what he has done to an appellate court is through the reasons for judgment. No other formal means of communication is permissible. That increases the significance in our system of the statement of facts and relevant legal principles and the process of reasoning as set out in the judgment of the trial judge for purposes of ensuring the quality of decision-making.

I turn next to the objective of fairness. The principle of a fair trial is one of the most important principles in the Australian legal system. It influences and energises numerous specific rules, practices, procedures and even the substantive law. I am here concerned with one particular aspect of fairness and that is the role performed in achieving that objective by the reasons for judgment. The publication of reasons is concerned not with the actual fairness of the outcome, but with the appearance of fairness both to the parties and also to the broader public.

We have a saying. 'It is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done'. This is called the principle of open justice. It influences many areas of our practice and procedure, including the obligation to give reasons.

It is sometimes said that the most important person in a courtroom is the person who is going to lose. Reasons for decision are of greater significance to that person than the litigant who wins. The litigant who wins has, usually, a strong conviction in the correctness of his or her position. When the judge agrees, the judge is not telling that litigant anything he or she doesn't know. It is the person who loses who will be anxious to know why he or she has lost.

The sense of fairness of the judicial process, from the point of view of the losing party, will be determined by the fairness of the procedures that have been undertaken and by an understanding of why it is that the other party was preferred. That does not mean that the losing party will always accept why he or she has lost, particularly when it turns, as it often does, on a judge not believing what that person has said in evidence. Nevertheless, the sense of fairness and rationality of the process as a whole is substantially enhanced by properly articulated reasons, available to the losing party and which explain why he or she lost. This is because a proper judgment should state *what* a judge has decided and *why*.

It is, however, important to recognise that the principle that we apply in Australia is not merely that reasons should be supplied to the parties. The principle of open justice requires that reasons must be published in the sense that they are available to the public at large.

Public confidence in the administration of justice is of fundamental significance. Without such public confidence the basic functions performed by the judiciary will not be able to be performed effectively. Judicial decisions will come to be ignored and the judiciary treated with disrespect, unless such public confidence is maintained at a high level. It is the publication of reasons which constitutes the basic mechanism by which each judge is held accountable to the public for the decisions he or she has made. Although, in many cases, such reasons may need explication and consideration by lawyers, they are available to all and are often the subject of comment, not only by lawyers but by others.

It should be recognised that publication of reasons is one of the most distinctive characteristics of the judicial process considered as an arm of government in our system. Other governmental decision-makers are not subject to an express obligation to explain their reasons for making decisions as a

matter of routine and to do so in public. There can be no doubt that performance of this obligation in a systematic and faithful manner enhances public confidence in the administration of justice.

I give one example of the broader public significance of published reasons for decisions, in an area which I am sure causes as much concern in your nation as in ours. The operation of the criminal justice system is of particular significance to the victims of crime and to the family and friends of such victims. If we are to live in a stable and ordered society, criminal laws cannot be enforced by victims. Nevertheless, the natural yearning for revenge by victims must be accommodated in some manner. Such persons who have a particular interest in the outcome of a criminal trial will rarely be satisfied merely by a result in the sense of a sentence imposed. The conduct of a criminal trial in public enables such persons to witness the entire process. It creates the opportunity that they will come to understand why the system worked in a particular way in their case.

In our system, in a jury trial, there will be no reasons for judgment. However, even in the case of a jury trial it is the judge and not the jury who determines the sentence. The judge must give proper reasons for decision when handing down a sentence. In this way, the victims of a crime and their families will know, even in the case of a jury trial, why a particular sentence was imposed.

I turn now to the objective of impartiality. Impartiality has often been described as the supreme judicial virtue. However, impartiality must not only exist as a matter of fact, it is also important that it be manifest so that it is understood to exist by the parties and the public at large.

Impartiality is displayed during the course of the trial by the way a judge conducts the trial. The principle of open justice ensures that such conduct occurs in public and is able, therefore, at least in theory, to be subject to public comment. In the nature of things, however, only a few trials attract public attention. Reasons for judgment which are publicly available, serve a similar function. A rational statement of why a decision was made should reveal, in most circumstances, the impartiality of the judge. Of course, it is possible that a biased judge will be able to conceal his or her bias by giving reasons for decision that are not in truth the real reasons. Nevertheless, there are limits to the ability to get away with such conduct where reasons for decision are in fact comprehensive and subject to scrutiny by others.

The objectives of predictability and consistency are significantly enhanced by the availability of reasons for the decision to lawyers and to other judges who subsequently become involved in or have to consider and decide similar cases. It is only if a lawyer is able to identify the facts of a previous case that he or she will be able to decide whether that case is truly similar to the case that he or she has to decide.

In our system, judges who are members of courts lower in the hierarchy are obliged, as a matter of law, to apply the law as determined by courts higher in the hierarchy. Decisions of superior courts, which determine legal principles, are identified in the statement of reasons or decision of cases of those courts. Furthermore, it is a fundamental rule of our legal system that a court should generally follow, as a precedent, earlier decisions by other judges of the same court, or of courts of the same level, where the reasons in those earlier cases are applicable to the facts of the subsequent case. It is in this way that the objectives of predictability and consistency are served in our system.

Obviously the facts of two cases are never the same. The issue for a judge determining a case, in the light of reasons for decision given in earlier cases, is to identify whether or not any of the factual differences are relevant to the application of the legal principles. From time to time differences emerge amongst judges at the same level which must in some way be resolved. The force, clarity and persuasiveness of the reasoning applied by a particular judge in reasons for judgment are likely to be of great significance to another judge, when deciding whether or not that, or some other, reasoning should be adopted.

In Australia we follow the common law system, which originated in England, in which judicial decision-making determines the applicable rules in significant areas of the law. In such a system the articulation of reasons for decision is of greater significance than in other systems. Such judgments are a primary source of the law itself.

The common law system is often contrasted with the civil law systems that emerged on the continent of Europe. The Chinese legal system has borrowed significant elements from the civil law system. In particular, as I understand your practice, the primary source of rules of law is the legislative codes. This legislation must be authoritatively interpreted and accurately applied by judges by a system of

deductive logic. The law must be applied to the facts of a case before the court. This is the basic model of most civil law systems.

In contrast, a common law system develops legal propositions by a process of inductive reasoning from case to case. The basic idea of case law development of legal principle is that a judge, these days almost exclusively appellate judges, states a legal proposition sufficient to decide the case before the court in accordance with the facts of that case. Over a period of time, after many cases have been decided in a particular field, it may be possible for a court to infer, by induction, a general principle. Once such a principle is authoritatively stated, it may be applied in future cases as if it were a rule set out in a statute and applied by deduction.

Comments in judgments on matters which are not necessary to be decided for the case at hand are not treated as binding on judges who have to determine subsequent cases, even in a court lower in the hierarchy. Only the legal reasons necessary for disposing of the case have a binding effect on subsequent cases, even on judges lower in the hierarchy. However, needless to say, judges of superior courts are often followed even if they express an opinion which is not formally binding.

The difference between the common law and civil law systems can be exaggerated. One of the most important themes of recent decades in both of the systems is what has come to be called "convergence", that is a process by which the two systems are becoming more like each other. On the part of the civil law system there seems to be a greater recognition that the practices and procedures of the common law trial are fairer than the investigatory procedures traditionally adopted by civil law courts. On the side of the common law two particular developments are of significance. First, judges play a much more direct role in the conduct of cases. They no longer sit back and allow the parties to determine what happens in the preparation of a case for trial or in the conduct of a trial. Secondly, and perhaps more significantly, is the expansion of statute law.

There are very few areas of the law in Australia, or in other common law countries, which are now exclusively judge made. In some areas, the law operates as a legislative code much in the way that the continental and Chinese codes have been developed. More significantly, there is virtually no area of the law which has not been modified in some manner or another by a statute. There are very few cases in which judges can develop the law on the basis of judicial precedent without turning their minds to a statute which impinges on this process in some way or another. This is true not only of the substantive law but also of procedural law.

For example, in major parts of Australia the law of evidence has now been stated as a code. All the rules about what is or is not admissible in evidence and many aspects of the procedure of dealing with evidence are now set out, in full, in a single statute. The content of that statute draws to a very large extent on the development of the law of evidence over the centuries, by judges. In some specific respects that law was seen to be in need of reform and change. In other respects, the law, as developed by judges, has been written down in a statute and will be applied as such in the future.

The increased importance of statutes in common law systems, means that written judgments in such nations involve the same kind of task as has been performed by judges in civil law systems.

The law of statutory interpretation is itself of great significance in determining how it is that the words enacted by a legislative body will operate in practice. With respect to the application of statutes in either the common law system or in the civil law system, the words do not automatically apply to the facts. No statute can allow for all contingencies. There remains a great deal of flexibility in the actual practical application of a form of words to particular situations. Indeed, in many cases the legislature deliberately uses general or vague words. I am not sure how these words will translate into Chinese, but in Australia the Parliament has enacted important rules expressed in words like "the public interest", "unconscionable", "false and misleading", "the best interests of the child". Whenever a legislature uses words like that, it is deliberately leaving the decision of actual cases to the judiciary.

The creative process involved in the application of the general words of a statute is an inevitable aspect of judicial decision-making. One cannot, as a judge in a common law system, even when applying a statute, avoid the fact that there are choices to be made in deciding what the words of the statute actually mean. I can only speak of the English language but I am sure the following is true of other languages. Words rarely have a single meaning. Words are often capable of being used at different levels of generality. Deciding what level of generality was intended by the legislative body is a matter about which reasonable minds may differ. Words must be interpreted in their entire context. The context will often determine the meaning that the legislature intended. How it is that a judge comes to decide what meaning the legislature intended is a matter of significance for the particular

case and also for judges who subsequently have to determine similar cases.

It is inevitable that judges will often have a choice when determining the application of the words of a statute. That does not mean that such choices exist in all cases. In many cases the application of the words is perfectly clear. There are, however, a wide range of cases in which what it was that the legislature in fact intended is not so clear.

There is a growing recognition of the actual flexibility involved in applying codes for judicial decisions in civil law countries. To some degree judge made law is inevitable even in a civil law system, whenever a legislative scheme uses general words and makes provision for factual situations in a general way. This is often, perhaps usually, the case. General words in a statute must be applied to each factual situation that arises, but that application requires a process of judicial reasoning. It is the articulation of that reasoning in reasons for judgment which will prove influential, not only in the determination of the case, but also in terms of the influence that that judgment may have, whether through a formal process of precedent or not, on subsequent judicial decisions.

The role and status of judges differs from one nation to another. In a nation with a common law tradition, it is more acceptable that judges give reasons in a manner which openly accepts the range of choice that the legislature has, sometimes quite intentionally, left to the judiciary. In other nations, and China may be one of them, it may not be so acceptable for judges to openly acknowledge that the words of the legislature do not automatically dictate a particular result. This will inevitably lead to a difference in style of published reasons for decision. But that difference does not undermine the significance of honest and complete reasons for decision, to serve the various purposes to which I have referred.

A recognition that judges often have choices when deciding how a particular legislative provision should be applied may determine the way in which reasons for judgment are expressed. I have limited experience of reading judgments from a civil law country. However, my understanding is that there is a significant difference between, for example, French reasons for judgment and German reasons for judgment, in this regard. French judges are much more likely to write a judgment of a brief character which gives the impression that the result in some way automatically follows from the words of the legislative command. That form of judgment writing frequently conceals the difficulty the judge had in actually making a decision about what it was that the legislature meant to say and how it was that those words, so understood, applied to the factual situation in the case to be decided. German judges, on the other hand, have a tendency to write longer judgments and to explain their reasoning process in a manner which does not give the impression that somehow the decision was virtually automatic. Their judgments are more like judgments of a common law judge.

Although civil law systems do not have a formal doctrine of precedent, it would be quite wrong to conclude that judicial decisions in such systems do not influence, and frequently determine, future decisions. The objectives of predictability and consistency have to be served in all advanced legal systems.

No legal system can operate if all disputes have to be resolved by courts. Citizens who become embroiled in disputes have to know, or be able to discover, what the law is, so that they can adjust their behaviour or, if disputes arise, resolve them by negotiation. Most disputes are resolved before they get to court. It would be economically impractical to have any other situation, no matter how wealthy the nation may be. Where, as is often the case, the text of the law when set out in a code or statute, does not provide a simple, clear answer, parties to such disputes have to be able to predict what will happen if they go before the court. The best way of making such a prediction is to know how judges of that court have interpreted and applied the same law in the past. That requires that reasons for judgment should be generally available.

Furthermore, citizens will lose faith in the administration of justice if the outcome of their disputes is seen to depend on the accident of which judge happens to be allocated to decide their case. Consistency in decision is required so that the justice system is seen to be fair. That is why judges should, and do, try to ensure that a decision is consistent with prior decisions. The availability of full reasons helps to ensure that this occurs.

Publication of judicial reasons for judgment has developed over the course of the centuries in our common law system. For many years publication was directed almost exclusively to the legal profession. The difficulty of physical access to the books was such as to restrict more general access. Furthermore, a substantial proportion of judgments was not accessible at all, in the sense that they were only published in a limited format and were not incorporated in the printed law reports.

Accessibility of legal decisions of the superior courts of Australia is now almost instantaneous. Immediately after the deliver of a judgment by a superior court it will appear in full on that court's website and also in a nationwide legal data base conducted by an organisation called the Australasian Legal Information Institute or AUSTLII. (See www.austlii.edu.au.) That organisation has applied its technology to establish similar broadly based legal data bases in the United Kingdom, Ireland, Canada, Hong Kong and the Pacific Islands. (See generally www.worldlii.org) or more specifically, www.bailii.org (for British and Irish reports), www.canlii.org (for Canadian reports), www.hklii.org (for Hong Kong reports) and www.pacli.org (for Pacific Island reports).) This ready availability of the decisions of superior courts on the internet enhances the ability of lawyers, and also of all other interested persons, whether politicians or administrators or journalists, to understand the reasons for decision and to criticise them and appraise them.

The second matter which has changed over recent years is the trend towards making judicial reasoning more publicly accessible by the content of judgments and by their structure. There is a tendency in Australia and in other advanced judicial systems, to provide summaries of reasons for decision, which are more readily understandable by non-lawyers than has traditionally been the case. Such practices, which are by no means universal, will help the parties to particular proceedings, but they will often be able to have the judgment more fully explained to them by their own lawyers. These developments are of particular significance for the broader community, including the intermediate role performed by journalists who are not often legally trained.

The enhanced accessibility of reasons for decision is one way in which the administration of justice has adapted to contemporary Australian expectations of accountability and transparency on the part of public decision-makers.

1 See Chris X Lin "A Quiet Revolution: An Overview of China's Judicial Reform" (2003) 4 Asian Pacific Law and Policy Journal 255 at 256.

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Commercial Causes Centenary Dinner

**COMMERCIAL CAUSES CENTENARY DINNER
ADDRESS BY THE HONOURABLE J J SPIGELMAN AC
CHIEF JUSTICE OF NEW SOUTH WALES
SYDNEY, 6 NOVEMBER 2003**

This story begins and ends in Sydney. It begins when a cargo of wool was loaded onto the ship, The Sir Walter Raleigh, bound for London. On 29 January 1889, The Sir Walter Raleigh came to grief on the French Coast at Cap Giz-Nez near Boulogne. The cargo was salvaged and eventually found its way, via Boulogne, to London. The subsequent proceedings in the Queens Bench Division of the High Court of Justice were so mishandled by the trial judge that years of criticism by the London commercial community of the judiciary was brought to a head, leading to the establishment of the Commercial Court[1].

Mr Justice Lawrance had been appointed by Lord Halsbury for his services to the Conservative Party, not for any legal skills. Lord Justice MacKinnon would later describe him:

"A stupid man, a very ill equipped lawyer, and a bad judge. He was not the worst judge I have ever appeared before: that distinction I would assign to Mr Justice Ridley; Ridley had much better brains than Lawrance, but he had a perverse instinct for unfairness that Lawrance could never approach."

Mr Justice Lawrance's only distinction was that he was the tallest man in the High Court and was familiarly known as "Long John Lawrance".

The dispute arose over how the rules for the salvage expenditure would be spread over the various owners of the cargo. Junior counsel for the Plaintiffs was the future Lord Justice Scrutton, already the author of the first edition of his work on Charterparties. He would later anoint Lawrance as the "only begetter" of the Commercial Court.

Having listened to argument of counsel highly experienced in the field, Lawrance reserved his judgment for a period of six months until he was reminded about the case. Accordingly, he returned to court and commenced to deliver an ex-tempore judgment in which he periodically stopped to ask counsel what the issues were, described the issue in terms which indicated he did not understand their replies and had to be reminded at the end that he had failed to deal with the more important issues in the case at all.

This was the last straw for the commercial community that had long been critical of the unnecessary delays, technicalities and the excessive costs of commercial litigation in the Queens Bench Division. In 1895 the Commercial Court was established.

Within a few years the English model was adopted in this State by the passage of the Commercial Causes Act 1903, the centenary of which we have gathered to commemorate today. It was on 1 October 2003 that the then Attorney General, Bernard Wise, one of the framers of the Constitution of the Commonwealth of Australia and a leader of the profession for many decades, introduced the Bill into the New South Wales Parliament. A month later, indeed, on this very day a century ago, 6 November 1903, Bernard Wise appeared in the High Court of Australia to argue on that day the very first reported case in the Court[2].

In his Second Reading Speech, Wise identified the considerations which have remained abiding concerns, over the course of the century, for the special handling of commercial causes.

The purpose of the Bill was to empower a judge to require the parties to identify the real issues in dispute at an early stage and then to dispense with the normal rules of practice and procedure, or of evidence, in order to ensure the speedy determination of those issues. In his Second Reading Speech Wise, true to his name, noted that delay was sometimes occasioned by litigants or their representatives. He said:

"There is unconscionable delay, and the litigant may either from his wealth or his poverty so protract the legal proceedings as to deprive his opponent of effective redress, and redress to be effective in litigation ought be speedy."[3]

The objectives have remained the same over the course of a century. Regrettably I cannot claim that the Court has always been able to ensure that commercial litigation has been conducted expeditiously and efficiently throughout that period. The organisational structure for commercial litigation has changed over that time from single judges administering an informal list, to a formal commercial list to a separate Commercial Division and now, in a commercial list again. However, it has been the drive and determination of the judges who have participated, rather than any formal structure, that has determined whether commercial litigation has been conducted in the manner in which we would all wish it to be conducted.

From time to time over the course of the century, the Court has not been able to meet the reasonable expectations of the commercial community. That cannot, however, be said of the last few decades.

As everyone in this room knows, quite often to their personal cost, the creator of contemporary commercial litigation practice in this State was Andrew Rogers. It was his insight, driving force and energy that systematically changed the practices of solicitors and barristers by pioneering techniques of judicial case management that have been imitated in many other spheres of litigation. I am pleased he has agreed to address this dinner this evening.

The legal historians amongst you will recollect that the early common law in medieval times had a technique for determining the process of litigation by what was called *peine forte et dure*. This was a mechanism by which a litigant would have stones heaped upon his or her body, until he or she either pleaded or died. This was an early form of case management, adopted by Andrew Rogers as his model.

We are entitled to look back on the century long history with an element of satisfaction. The one thing we can never do is rest on our oars. The pressures and requirements of commercial litigation are continually changing and we have to continually adapt our practices and procedures to meet those new challenges. I wish to refer to two.

Over the last two decades, driven by programmes of microeconomic reform and by technological change, the cost structure of most Australian commercial enterprises has been transformed. One of the few areas of business expenditure that has not notably diminished is the cost of dispute resolution. If that part of the legal profession involved in commercial disputes cannot deliver a more cost effective service it may very well find that it will be bypassed in the same way as some other sections of our profession have been bypassed, most notably, in recent times, those involved in personal injury litigation.

There are people in this room who used to get commercial briefs wrapped in red ribbon. By the time I began practice, briefs were delivered in a spring back folder or, in major cases, two spring back folders. Now cases are characterised as two or three trolley cases, or more. Controlling this process has always been difficult, not least because practitioners have no financial incentive to minimise the cost to their clients. Commercial clients have to depend, in large measure, on the professionalism of practitioners and others who charge hourly or daily rates for their income, such as referees or arbitrators. If that professionalism fails us, we will not long survive.

These issues are not new. In the days when legal fees and court fees, that were then kept by judges and court officers, were determined by the volume of documentation lodged with the court, prolixity became an art form. In response, there were rules of court which required a certain minimum number of words per sheet, in order to minimise the degree to which clients could be exploited by their lawyers. In the Court of Kings Bench every sheet had to have at least 72 words on it, in the Court of Exchequer, doing one better, at least 78 words were required and in Chancery, always more sensitive to matters of conscience, every sheet had to have 90 words on it.

Sometimes more dramatic measures were called for. In 1556 in a case when the plaintiffs replication had been stretched from an adequate sixteen pages to 120 pages, the law reports record:

"It is therefore ordered that the Warden of the Fleet shall take the said Richard Milward ... into his custody, and shall bring him unto Westminster Hall on Saturday next ... and there and then shall cut a hole in the midst of the same engrossed replication ... and put the said Richard's head through the

same hole, and so let the same reproduction hang about his shoulders with the written side outwards and then ... shall lead the same Richard, bare headed and bare faced, round about Westminster Hall, whilst the courts are sitting and shall show him at the bar of the three courts within the Hall."[4]

Milward, I hasten to add, was the plaintiff, not the lawyer.

In days gone by, interrogatories and, in the present day, affidavits and statements, could be subject to similar acts of public shaming. However, nothing that could conceivably adorn a person can be done with the contemporary 'agreed bundle of documents'. Perhaps we should order abusers of the system to be pushed around the court in a trolley. Alternatively we can revert to the technique of shaming pioneered by Andrew Rogers in the form of directions to legal practitioners, enforceable by contempt proceedings, to explain their default in writing to their clients, or to have the CEO present the next day so that he could explain it himself.

One thing is certain. The pressure to ensure the just, quick and cheap resolution of the issues genuinely in dispute between parties in commercial litigation will require the continued attention of all of us involved in the process of resolving such disputes.

The second challenge to which I wish to refer is an opportunity which will depend, to a significant degree, on the manner in which we handle the first. The opportunity arises from the multifaceted process known as globalisation, in which the commercial legal community is necessarily engaged. The century of experience we have had with the resolution of commercial disputes ought to enable us to play a substantial role in commercial dispute resolution throughout the Asia/Pacific region. The Commercial Court in England, and the legal and arbitral community that has grown up around it, represents a major export industry located in London. There is no reason why we cannot replicate a regional version of this based in Sydney. This will require the various components part of the community to work collaboratively together.

The experience, energy, expertise and professionalism of all those involved in commercial dispute resolution in this city - and I include in that not just legal practitioners and judges, but arbitrators, expert witnesses and the highly sophisticated clients with whom we deal, such as underwriters, bankers and stockbrokers - represent a centre of excellence which can be developed. We have very real skills here that are exportable. This was recognised during the International Bar Association's Arbitration Day, which was held in Sydney earlier this year. We have a lot to offer as a centre for dispute resolution.

If any place in Australia is to acquire the level of international recognition as such a centre, to a degree that becomes self-reinforcing, Sydney is the only location that can do so. If, as a result of political and commercial pressures, an attempt is made to spread the work around, no one will get anything. The legal profession in this city can, I am convinced, establish an international competitive centre here.

There is an old saying that if you want something done quickly, ask a busy person. Some of that seems to operate in the commercial litigation practice of this city. Trying to stay on top of the case load of the Supreme Court of New South Wales is like trying to drink from a fire hose.

I recently came across a report of a survey comparing New South Wales and Victorian cases that was done a century ago. The report recorded:

"... The judges of the Supreme Court of New South Wales caused to be made a careful comparison between the records of fifty typical Supreme Court cases in their own Court and fifty corresponding cases in the Victorian Court ... [I]t showed that the Victorian cases took a much longer time to come to trial and that the costs were much more than those in New South Wales. The judges of New South Wales were surprised at what appeared to them the inordinate number of interlocutory proceedings (interrogatories, etc.) in the Victorian cases, all of which led to delay and increase of costs."[5]

I emphasise that this was a century ago.

If we maintain our professionalism and continue to keep in mind the objective of minimising cost and delay to the commercial community, we will retain the basis for a broader regional role. Insofar as the judiciary can play a part to ensure that success I am sure it will do so.

In conclusion, I wish to acknowledge the presence of those who have served in the past as permanent judges in commercial causes. Their names appear on the back of the programme for this evening -

Sheppard, Samuels, Clarke, Foster, Rogers, Cole, Brownie, O'Keefe, Giles, Rolfe, Hunter, McClellan and the current judges who sit in the list. We are all indebted to you for services past. Some of you still serve in different ways. But it is your contribution to commercial causes litigation which I wish to acknowledge tonight.

Many of you have heard me emphasise - some more than once - the significance of the contribution that the longevity of our legal institutions makes to our social stability and economic prosperity. When we can celebrate centenaries such as this, the point is driven home. There is cause for satisfaction, but not for contentment. As I look around the room, I am quite confident that the commercial legal community will continue to serve the commercial community at the highest level.

1 The following is based on V.V. Veeder Mr Justice Lawrance: The 'True Begetter' of the English Commercial Court, (1994) 110 LQR 292. The appeal to the House of Lords in the case is reported: *Rose v The Bank of Australasia* (1894) AC 687.

2 See *Daljarno v Hannah* (1903) 1 CLR 1.

3 Hansard, NSW Legislative Council, 1 October 1903 at 2924.

4 *Milward v Weldon* (1566), quoted in 5 Holdsworth *A History of English Law*, 233, note 7.

5 See James A Harney *An Inquiry into the Procedure of the Supreme Court of New South Wales*, typescript held in the Law Courts Library, at pp157-158.

The Truth Can Cost Too Much: The Principle of a Fair Trial - The Fourth Gerard Brennan Lecture

THE TRUTH CAN COST TOO MUCH: THE PRINCIPLE OF A FAIR TRIAL

THE FOURTH GERARD BRENNAN LECTURE

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BOND UNIVERSITY, GOLD COAST, QUEENSLAND

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In 1846, in a judgment which Lord Chancellor Selborne would later describe as "one of the ablest judgments of one of the ablest judges who ever sat in this court"[1], Vice-Chancellor Knight Bruce said:

"The discovery and vindication and establishment of truth are main purposes certainly of the existence of Courts of Justice; still, for the obtaining of these objects, which, however valuable and important, cannot be usefully pursued without moderation, cannot be either usefully or creditably pursued unfairly or gained by unfair means, not every channel is or ought to be open to them. The practical inefficacy of torture is not, I suppose, the most weighty objection to that mode of examination ... Truth, like all other good things, may be loved unwisely - may be pursued too keenly - may cost too much."[2]

The Vice-Chancellor went on to refer to paying "too great a price ... for truth". This is a formulation which has subsequently been frequently invoked[3], including by Sir Gerard Brennan[4]. On another occasion, in a joint judgment of the High Court, a more expansive formulation of the proposition was advanced in the following terms:

"The evidence has been obtained at a price which is unacceptable having regard to prevailing community standards."[5]

Restraints on the processes for determining the truth are multi-faceted. They have emerged in numerous different ways, at different times and affect different areas of the conduct of legal proceedings. By the traditional common law method of induction there has emerged in our jurisprudence the principle of a fair trial. Oliver Wendell Holmes described the process:

"It is the merit of the common law that it decides the case first and determines the principle afterwards ... It is only after a series of determinations on the same subject-matter, that it becomes necessary to 'reconcile the cases', as it is called, that is, by a true induction to state the principle which has until then been obscurely felt. And this statement is often modified more than once by new decisions before the abstracted general rule takes its final shape. A well settled legal doctrine embodies the work of many minds, and has been tested in form as well as substance by trained critics whose practical interest is to resist it at every step."[6]

The principle of a fair trial now informs and energises many areas of the law. It is reflected in numerous rules and practices. It is continually adapted to new and changing circumstances.

As will presently appear, the principle of a fair trial manifests itself in virtually every aspect of our practice and procedure, including the laws of evidence. There is, however, an overriding and, perhaps, unifying principle. As Deane J put it:

"...it is desirable that the requirement of fairness be separately identified since it transcends the content of more particularized legal rules and principles and provides the ultimate rationale and

touchstone of the rules and practices which the common law requires to be observed in the administration of the substantive criminal law." [7]

As will appear from the cases to which I will refer, it is in the context of the criminal law that the principle receives its most complete exposition. However, the principle is, of course, equally applicable to civil proceedings.

Over the course of the last fifteen years or so the significance of the principle of a fair trial has been characterised in numerous High Court judgments in the most forceful of terms: as "the central thesis of the administration of criminal justice" [8]; as "the central prescript of our criminal law" [9]; as a "fundamental element" or a "fundamental prescript" [10]; and as an "overriding requirement" [11].

Some of the developments in the law by the High Court raised issues about the extent of judicial interference with executive functions. Consideration of this character led Sir Gerard to dissent in a number of the cases [12]. Differences of view on matters of this character are, of course, to be expected. Notwithstanding the significance of some of the development, the Parliaments have not intervened to overturn the effects of the decisions.

The High Court has, over about fifteen years, given the principle of a fair trial considerable emphasis and elaboration. It is not, however, a new principle. As Isaacs J put it in 1923, with reference to "the elementary right of every accused person to a fair and impartial trial":

"Every conviction set aside, every new criminal trial ordered, are mere exemplifications of this fundamental principle." [13]

It is not entirely accurate to refer to the principle in terms of a "right to a fair trial" [14]. Nevertheless it is convenient and "not unduly misleading" to do so [15].

There are numerous jurisdictions in which a right to a fair trial is enshrined, in those terms, either in a Constitution or in a statute of general, and often overriding, application. That is not the case in Australia. The terminology of "right" appears to be more appropriate in circumstances where something in the nature of a freestanding right is specifically enacted. I use the words "principle of a fair trial", rather than "right to a fair trial", in order to emphasise that what is involved in our jurisprudence is a standard of an inherently flexible character.

A principle, as Ronald Dworkin has identified:

"... states a reason that argues in one direction but does not necessitate a particular decision ... There may be other principles or policies arguing in the other direction ... If so, our principle may not prevail, but that does not mean that it is not a principle of our legal system, because in the next case, when these contravening considerations are absent or less weighty, the principle may be decisive." [16]

Although issues of balancing and reconciliation of conflicting or intersecting rights also arise in a rights based system, the terminology of "principle" rather than of "right" identifies that in our legal system the significance and weight to be given to fair trial considerations will vary from one set of circumstances to another, perhaps to a greater degree than in a rights based system.

"Rights" discourse is, of course, back in fashion in the common law world. Blackstone's Commentaries, the first great text synthesising the common law by the first occupant of a chair of English law, was structured by reference to a list of rights. It had a major influence on American law. However, the chaos of the French Revolution - with its express focus on the "Rights of Man" - and the emergence to dominance of utilitarianism - Jeremy Bentham denounced rights as "nonsense" and human rights as "nonsense on stilts" - made rights talk unseemly in England and, therefore, here, for almost two centuries. It is back now.

In Australian jurisprudence, the principle of a fair trial is based on the inherent power of a court to control its own processes and, particularly, on its power to prevent abuse of its processes. As the majority joint judgment said in *Walton v Gardiner* [17]:

"The inherent jurisdiction of a superior court to stay its proceedings on grounds of abuse of process extends to all those categories of cases in which the processes and procedures of the court, which exist to administer justice with fairness and impartiality, may be converted into instruments of injustice and unfairness."

A court may become an "instrument of injustice and unfairness" in ways other than by infringement of the principle of a fair trial. The institution of proceedings or the reliance by a party, particularly the prosecution, on certain evidence, may involve the court in prior illegality or improper conduct. The court cannot turn a blind eye to vexatious and oppressive conduct that has occurred in relation to proceedings, even if a fair trial is still possible. Such conduct could, if tolerated by the courts, undermine the standing of the judges as impartial and independent adjudicators.

In Jago, Mason CJ concluded that the power to prevent abuse of process extended to a power to prevent unfairness generally:

"The question is ... whether the court, whose function is to dispense justice with impartiality both to the parties and to the community which it serves, should permit its processes to be employed in a manner which give rises to unfairness." [18]

Courts have an overriding duty to maintain public confidence in the administration of justice which, as Justice Gummow has said, "in present times, is the meaning of the ancient phrase 'the majesty of the law'." [19] The case for this proposition was well put by Richardson J in the New Zealand Court of Appeal in a passage cited with approval in the High Court [20], when his Honour said:

"It is not the purpose of the criminal law to punish the guilty at all costs. It is not that that end may justify whatever means may have been adopted. There are two related aspects of the public interest which bear on this. The first is that the public interest in the due administration of justice necessarily extends to ensuring that the court's processes are used fairly by state and citizen alike. And the due administration of justice is a continuous process, not confined to the determination of the particular case. It follows that in exercising its inherent jurisdiction the court is protecting its ability to function as a court of law in the future as in the case before it. This leads on to the second aspect of the public interest which is in the maintenance of public confidence in the administration of justice. It is contrary to the public interest to allow that confidence to be eroded by a concern that the Court's processes may lend themselves to oppression and injustice." [21]

The court's power to prevent its processes being seen to tolerate illegal or improper conduct has been exercised in numerous ways over the years. The Judges Rules, adopted as a guide for proper police conduct in 1912, and for many years implemented by courts in Australia until, in large measure, being superseded by statutory provision, were based on this power. The detailed controls on confessional evidence which developed over a period of time were also, in large measure, based on these considerations as well as considerations involving the principle of a fair trial. Similarly, the emergence of the discretion to exclude evidence obtained by illegal or improper means was a manifestation of this approach. These are not matters with which I am primarily concerned in this address, although they do overlap with the principle of a fair trial.

Constitutional Significance

The focus of constitutional jurisprudence of the High Court over recent years has been on Chapter III. It seems quite likely that certain aspects of the principle of a fair trial will be found to have a measure of constitutional protection. As Brennan, Deane and Dawson JJ pointed out in *Chu Kheng Lim* [22], the legislative power of the Commonwealth does not extend:

"... to the making of a law which requires or authorizes the courts in which the judicial power of the Commonwealth is exclusively vested to exercise judicial power in a manner which is inconsistent with the essential character of a court or with the nature of judicial power."

There is now a significant body of observations by different judges of the High Court to similar effect [23]. Some identify particular matters as constituting essential characteristics of the judicial process which Parliament may not infringe [24]. One of the issues that has divided the Court in recent times, and which remains unresolved, is whether such constitutional protection as exists of the court's power to protect the integrity of its processes, extends to the court acting on the basis that it should maintain public confidence in the administration of justice [25].

The dominant view now appears to be that some form of protection of procedural rights is inherent in Chapter III, although there is no clear majority decision to that effect. As the joint judgment of Mason CJ, Dawson and McHugh JJ said in *Leeth* [26]:

"It may well be that any attempt on the part of the legislature to cause a court to act in a manner

contrary to natural justice would impose a non-judicial requirement inconsistent with the exercise of judicial power..."

Whatever the implications that may be found in Chapter III, it seems likely that the principle of a fair trial will be more readily discovered there than many others that have been suggested[27].

What, if any, implications this has for the administration of justice by State courts has yet to be determined. Until its recent application by the Queensland Court of Appeal, the High Court judgment in *Kable* was a very distinguished case[28]. The High Court will have an opportunity to clarify this matter in the not too distant future[29]. Whether or not there is any constitutional protection, there can be no doubt that the principle of a fair trial is a core value of the administration of justice throughout Australia.

The matters that are encompassed by this principle are an integral part of the legal protection of personal freedom and a manifestation of the significance our polity has traditionally ascribed to restraint upon the exercise of public power.

In the same way as has occurred with the principle of open justice[30], the principle of a fair trial has become so fundamental an axiom of Australian law as to be entitled to constitutional significance. The subject of constitutional law should not be limited solely to the exegesis of the terminology of a written document called "The Constitution". Our constitution, like the British constitution, includes a number of statutes and principles of the common law which are theoretically capable of amendment by Parliament. Nevertheless, the fundamental nature of these laws and principles, and the improbability of substantial modification by legislation, is such as to justify treating such laws and principles as part of our constitutional law in its broadest sense. This is so of the principle of a fair trial[31].

The Content of the Principle of a Fair Trial

It is not feasible to attempt to list exhaustively the attributes of a fair trial. The issue has arisen in seemingly infinite variety of actual situations in the course of determining whether something that was done or said either before or at the trial deprived the trial of the quality of fairness to a degree where a miscarriage of justice had occurred[32].

Over the course of the centuries certain identifiable issues have arisen on many occasions and led to similar judgments being made as to the effect on fairness of the proceedings. I will consider some of these examples, and will do so at some length, in order to indicate the fundamental nature of the principle. This is not, however, the occasion to consider the philosophy of the concept of fairness. As Deane J put it in *Jago*[33]:

"The general notion of fairness which has inspired much of the traditional criminal law of this country defies analytical definition. Nor is it possible to catalogue in the abstract the occurrences outside or within the actual trial which will or may affect the overall trial to an extent that it can no longer properly be regarded as a fair one. Putting to one side cases of actual or ostensible bias, the identification of what does and what does not remove the quality of fairness from an overall trial must proceed on a case by case basis and involve an undesirably, but unavoidably, large content of essentially intuitive judgment. The best that one can do is to formulate relevant general propositions and examples derived from past experience."

Should the Trial Proceed?

The first category of cases which manifests the principle of a fair trial are concerned with determining whether a trial should proceed

- * at that time, or
- * in that geographical location, or
- * before the particular judge, or
- * at all.

Adjournments or changes of venue occur frequently for a wide variety of reasons. A common situation is media reporting in a trial with a jury of a character that may compromise the fairness of a trial.

An adjournment to allow the effects of adverse publicity to dissipate is the normal course[34]. In recent years the courts have frequently affirmed their faith in the integrity of juries and the preparedness of juries to accept and implement directions they receive, particularly the direction to decide the case only on the evidence admitted in court[35].

A fair trial requires an independent and impartial tribunal. The structural insulation of the judicial arm of government is the key protection. Individual cases are determined by the stringent test of disqualification for even apparent bias[36]. In the usual course recusal occurs with little disruption.

A criminal trial will only be permanently stayed in an extreme case[37]. A court must form the view that no other means can cure the unfairness. Generally, there will be other means available. This may include a temporary conditional stay. For example, in the case of an ex officio indictment a stay may be appropriate until a committal hearing occurs[38], so long as a committal is necessary to ensure a fair trial[39]. Where the Crown produces a new witness after committal, a pre-trial hearing may be appropriate and sufficient[40]. In *Dietrich*, the High Court decided that, in the case of a serious offence, it would be appropriate to order a stay until legal representation is obtained. It may, of course, be that a conditional temporary stay will become permanent, but that is not likely. Where a serious offence is involved, the prosecution will attempt to satisfy the condition.

It is conceivable that media publicity may create a situation in which an accused will not be able to have a fair trial within a reasonable period, or at all. No such situation has yet arisen. Applications for a permanent stay have failed in the most sensational of cases: Anita Cobby, Ivan Milat, Phillip Bell, the Childers Backpacker Hostel fire[41]. The exceptional case has not yet arrived.

One of the exceptional cases in which a permanent stay was appropriate was *Ridgeway*, where the illegal conduct of the police warranted the exclusion of all evidence of the commission of the offence. The continuation of any prosecution without that evidence would have been an abuse[42].

In *Jago*, the majority in the High Court indicated that although Australian law did not recognise a right to a speedy trial, delay may justify a permanent stay, but only if a trial would necessarily be unfair or the proceedings were oppressive[43]. The court's other powers, it would be necessary to conclude, could not be deployed in such a way as to cure the unfairness.

Issues of fairness also arise when deciding whether civil proceedings should proceed. For example, the ability to ensure a fair trial is one of the factors to be considered when determining whether the Court should exercise its discretion to extend a limitation period[44].

Sometimes the issue arises in a court of criminal appeal which must decide whether or not to order a new trial after a successful appeal. If a new trial would not be fair, or would otherwise be oppressive, the court will often exercise its discretion to direct a verdict of acquittal. There are many situations in which a new trial would be unfair[45].

Wilson and Grimwade[46] is a good example. The events had occurred 14 years before, the two previous trials had involved 440 sitting days over 129 calendar weeks, during which one juror became pregnant and gave birth and the trial judge fell ill more than once, including for a period of one month. A third trial would, the court concluded, be "an affront to the administration of justice and an injustice to the accused"[47].

Trial Procedure

There is probably no aspect of preparation for trial or of trial procedure which is not touched, indeed often determined, by fair trial considerations. As Lord Devlin once put it:

"[N]early the whole of the English criminal law of procedure and evidence has been made by the exercise of the judges of their power to see that what was fair and just was done between prosecutors and accused." [48]

The obligation to obey the rules of natural justice, once referred to in terms of the duty to act judicially and now more frequently adverted to in terms of observing procedural fairness, applies with particular force to judicial proceedings.

All of the requirements of a fair hearing, including reasonable notice of the case a person has to meet and the provision of a reasonable opportunity of presenting his or her case, as reflected in a series of detailed rules and practices, are manifestations of the principle with which I am concerned in this address.

The basic building blocks of adversary proceedings in our legal system are similarly so informed. The imposition of an onus of proof and the differentiation of the standard of proof between civil and criminal proceedings, reflect an understanding of what fairness requires in the particular

circumstances, relevantly, if the particular stigma of a criminal conviction is to be attached to a citizen.

All of the detailed rules and practices with respect to when notice or disclosure is required, when an adjournment is appropriate and the order of proceedings, particularly the right of cross-examination, have as their source centuries of consideration by generations of judges of the interaction, sometimes synergistic, sometimes in conflict, between the search for truth and the requirements of a fair hearing.

In recent years the High Court has emphasised the accusatory nature of the criminal trial and given that characteristic a renewed structural significance[49]. Such a system has been said to be directed to achieving "procedural truth" rather than "fact"[50].

The broad distinction between adversarial and inquisitorial systems of law has never been entirely accurate. It has become less so over recent years as a process of convergence has occurred between the two systems. Nevertheless, the adversarial system has sometimes been contrasted, unfavourably, with the inquisitorial system on the basis that it is not, at least overtly, a search for truth. I am of a different view and believe that it is in substance a search for truth by the mechanism of the Socratic dialogue. However, that is a large topic for another day.

There is little doubt that the particular structure of a trial in the common law tradition, differing from that in the civil law tradition, has in large measure led to the qualifications upon the search for truth that have arisen over centuries of practical development of the principle of a fair trial in our adversarial system and which did not develop in inquisitorial systems. It is noteworthy that one of the forces in the convergence of systems is the adoption by civil systems of aspects of common law procedure determined by the principle of a fair trial.

The practical operation of the principle of a fair trial pervades our procedural law. It is sufficient to give a limited list of examples:

* The High Court in Dietrich[51] determined that the absence of legal representation for an accused charged with a serious offence will offend the principle of a fair trial. A court should order a stay pending provision of that representation, but there is no guarantee, and a trial may very well proceed in the absence of legal representation, subject to assessment as to whether or not a fair trial is possible[52].

* The fairness of a trial may be affected by incompetence of counsel. A person is bound by the way a trial is conducted and errors of judgment or mistakes will not suffice to render the trial unfair. However, a high order of incompetence, sometimes described as "flagrant", will require appellate intervention [53].

* The principle requires that an interpreter be available to an accused, when required, so that the accused can follow the proceedings[54].

* The determination of whether, in the case of multiple accused, there should be separate trials turns on the effect on the fairness of the trial of one accused of the admission of evidence in the trial of another accused[55]. Sometimes a direction to the jury will be sufficient to overcome the prejudice but, where that is not so, separate trials will be ordered[56]. I will return to the role of directions below.

* The requirements of particularity, so that a person knows the case he or she has to meet, require, in the criminal context, an absence of duplicity or latent ambiguity in a charge and the provision of sufficient particulars to ensure that a fair trial can occur[57].

* Judicial control of the size and content of an indictment is based on the principle of fairness[58].

* The right of an accused to fair and timely disclosure of the Crown case and to materials held by the Crown, so that all relevant evidence must either be led by the Crown or made available to the defence, is well established[59]. The position is now largely regulated by statutory provision and Prosecution Guidelines adopted by the respective Directors of Public Prosecution[60].

* The prosecution in a criminal trial is obliged to put its case fully and fairly. Failure to call a witness may constitute a breach of the principle of a fair trial[61]. If a decision is made, in the exercise of the prosecutorial discretion, not to call a witness, then the principle of fairness may require the witness to be called by the prosecution for the sole purpose of being cross-examined[62].

* An accused's right to know, in full, the case against him or her, including the way the case has developed during cross-examination of prosecution witnesses, before deciding to adduce evidence, is reflected in the rule that the prosecution must not split its case on any issue. The rule is also influenced by unfairness to a defendant in a criminal trial if the jury were to retire with the case for the prosecution "ringing in their ears"[63].

* The requirement of an impartial adjudicator may sometimes be breached by excessive intervention on the part of a trial judge. The judge, it is said, must not descend into the arena. It is the principle of a fair trial which determines whether or not a judge has passed the limits of permissible questioning or comment[64]. It is, of course, necessary to avoid being too precious about judicial intervention. As Mr Justice Meagher of the New South Wales Court of Appeal once put it, it is not a manifestation of relevant bias if all that happens is that "an exceptionally irritating witness had eventually succeeded in irritating the judge"[65].

* In the case of unrepresented litigants there is an obligation on the trial judge to give such assistance as will ensure that a fair trial occurs[66]. In the context of a criminal trial this principle has been superseded to some degree by the subsequent decision in Dietrich. However the issue may still arise. It is, of course, always possible that judicial assistance will be unfair to the represented party. It is usually the case that the judge may be able to assist an unrepresented litigant more skilfully than any legal representation that litigant was likely to obtain. The growing problem of unrepresented litigants in all of our courts is such as to warrant considerably greater reserve in this regard than may have been the case in the past. In appropriate cases we need to treat some litigants in person in the way Sir Thomas Beecham recommended a conductor should treat an orchestra: "Never smile encouragingly at the brass section".

Exclusion of Evidence

The common law of evidence, somewhat amended but generally reflected in the Evidence Acts 1995 of the Commonwealth and New South Wales, has numerous exclusionary rules. These rules apply to exclude evidence which is otherwise relevant. If the search for truth were the overriding consideration of a trial, there would be no such rule. Relevance would be the only criterion. Each such rule operates to exclude evidence which has utility for truth seeking purposes. The multiplicity of exclusionary rules is a manifestation of the way in which the principle of a fair trial pervades our trial procedure.

One of the most significant applications of the principle of a fair trial occurs when a trial judge is called upon to weigh the probative value of evidence against its prejudicial effect. This process is sometimes referred to as a discretion, because the ultimate decision to exclude evidence is, in a sense, discretionary. There is, however, an important difference between the making of a judgment and the exercise of a discretion[67].

Probative value and prejudicial effect are essentially incommensurable values. They are incapable of measurement on a common scale. When a trial judge comes to the conclusion that the probative value of evidence is outweighed by its prejudicial effect, this involves the making of a judgment rather than the exercise of a discretion. The judgment, once made in those terms, should lead to a decision to exclude. On one formulation it is presumptively unfair if probative value is outweighed by prejudicial effect[68]. When determining such issues, it is not prejudice as such which is of concern, but unfair prejudice[69]. As Gleeson CJ has pointed out, all evidence with probative value is "prejudicial", in a colloquial sense[70].

Under s135 of the Evidence Act 1995 a court may refuse to admit evidence if its probative value is substantially outweighed by the danger of unfair prejudice. In the case of a criminal proceeding, with respect to evidence adduced by the prosecutor, under s137 a court must refuse to admit such evidence if its probative value is outweighed by the danger of unfair prejudice, without requiring that comparative imbalance to be 'substantial'.

Beyond the principle of balancing probative value and prejudicial effect, the common law has acknowledged a further residual discretion to reject evidence, based on fairness per se. This is a clear application of the principle of a fair trial[71]. This general discretion is now partially reflected in s136 of the Evidence Act 1995, which empowers a court to limit the use of evidence that may be unfairly prejudicial.

The unfairness discretion arises most frequently in the case of confessional evidence where issues of voluntariness, and therefore of reliability, overlap with questions of fairness and, frequently, with the separate discretion to exclude illegally obtained evidence[72]. The discretion to exclude evidence illegally or improperly obtained serves public policy objectives other than the principle of a fair trial[73].

I note, however, that the development in Australia of a discretion to exclude evidence on the basis of illegal or improper conduct, now reflected in s138 of the Evidence Act 1995, was also described as a manifestation of the proposition that the truth can cost too much[74].

Over many years of experience, the common law has developed a keen appreciation of circumstances in which evidence may be unreliable. The circumstances are multifarious. Sometimes they lead to the exclusion of evidence. Sometimes they lead to directions to the jury. The focus is on whether evidence is reliable. However, the collective experience of trial judges is not infallible. For many decades judges treated complainants in sexual assault cases as so unreliable that there was a practice of directing the jury that it was unsafe to convict on the uncorroborated evidence of a complainant. If I may be permitted the sin of self-quotation:

"There is no doubt that the criminal courts do have a body of experience that is not shared by the ordinary juror. For many years it was thought that practice with respect to warnings about complainants in sexual assault cases reflected such superior experience. It is now clear that the practice in fact reflected the limitations on the experience of judges, who were almost invariably male."[75]

One area of unreliability, that characterises the common law in contrast with inquisitorial systems, is the complex body of doctrine associated with the hearsay rule. An out of court statement is not made under oath, not subject to cross-examination, nor is there an opportunity to assess the credibility of the maker of the statement. As with so many of the rules of evidence, the law with respect to hearsay evidence developed with particular regard to the exigencies of a jury trial. The risk that inappropriate weight will be given to potentially unreliable evidence is of particular significance in such a trial. It is by no means clear that all the exclusionary rules should operate in the same way, or indeed that they do, as a matter of practice, operate in the same way, in a trial by judge alone.

This is not the place to give a potted outline of the application of the hearsay rule and its numerous exceptions, including the new exceptions for those jurisdictions that have been adopted in the Evidence Act 1995. Suffice it to say that some of the exceptions are based on necessity, but almost all have an element of reliability. Reliability may be suggested by surrounding circumstances, e.g. statements against interest, statements made in the course of performing a public duty, statements made in expectation of death[76]. Where reliability can be otherwise assured, the principle of a fair trial is served, albeit in a second best manner.

Not all of the exceptions have been universally accepted as promoting reliability. As Lord Justice Hamilton once said about the admissibility of hearsay of a statement against pecuniary interests:

"The ground is that it is very unlikely that a man would say falsely something as to which he knows the truth, if his statement tends to his own pecuniary disadvantage. As a reason this seems sordid and unconvincing. Men lie for so many reasons and some for no reason at all; and some tell the truth without thinking or even in spite of thinking about their pockets, but it is too late to question this piece of eighteenth century philosophy."[77]

Potentially unreliable evidence is generally dealt with by means of warnings or directions, rather than by way of exclusion. I will consider this further below. There are, however, circumstances where the unreliable nature of the evidence is such as to require the exclusion of the evidence. This will normally occur in the exercise of the general discretions to which I have already referred[78].

One specific area of potentially relevant evidence which was excluded on the grounds of fairness was evidence of a general bad character of an accused[79]. Similar considerations underlie the exclusion, where a direction or warning would not be adequate, of similar fact evidence or propensity evidence, referred to as coincidence and tendency evidence under the Evidence Act 1995.[80] Such evidence may be given more weight than it is entitled to, particularly by a jury[81]. Such evidence is not admissible if it proves no more than an accused had a general disposition or propensity to commit crime or a particular kind of crime.

This is another example of the truth costing too much. As McHugh J pointed out in Pfennig:

"The character and tendencies of a person are relevant in determining whether that person has committed the crime with which he or she is charged. But as a matter of policy the law generally excludes evidence of other incidents that reveal the criminal or discreditable propensities of the accused. Various reasons have been put forward to justify this exclusion. One reason is that it creates

undue suspicion against the accused and undermines the presumption of innocence. Another is that tribunals of fact, particularly juries, tend to assume too readily that behavioural patterns are constant and that past behaviour is an accurate guide to contemporary conduct ... Another reason for excluding the evidence is that in many cases the facts of the other misconduct may cause a jury to be biased against the accused."[82].

Other reasons were given but the principle of a fair trial is the central consideration in the exclusion of such evidence.

The significance of the possible prejudice arising from the misuse of similar fact or propensity evidence by a jury has led the High Court to identify a high standard for admissibility, namely the application of the test that the jury must employ in dealing with circumstantial evidence, i.e. whether there was a rational view of the evidence inconsistent with the guilt of the accused[83]. This stringent test was chosen because of the presumed high level of prejudicial quality of all such evidence. An issue has arisen as to whether or not this test continues to apply under the Evidence Act 1995[84]. The common law position, as McHugh J pointed out in his dissent in Pfennig[85], involves no process of probative value outweighing prejudicial effect. The law has already done the weighing. This is a significant rule of exclusion based on the principle of a fair trial.

Directions and Warnings

In many situations the requirements of a fair trial may not lead to a rejection of evidence. The prejudice may be alleviated to a sufficient degree by the trial judge providing directions and even warnings to a jury. Where a warning is required, a trial judge sitting alone must also give himself or herself that warning so that an appellate court can be sure that the matter has been appropriately dealt with[86].

The obligations of a trial judge when directing a jury have been summarised in a recent majority joint judgment of the High Court in the following terms:

"The fundamental task of a trial judge is, of course, to ensure a fair trial of the accused. That will require the judge to instruct the jury about so much of the law as they need to know in order to dispose of the issues in the case. No doubt that will require instructions about the elements of the offence, the burden and standard of proof and the respective functions of judge and jury. Subject to any applicable statutory provisions it will require the judge to identify the issues in the case and to relate the law to those issues. It will require the judge to put fairly before the jury the case which the accused makes. In some cases it will require the judge to warn the jury about how they should not reason or about particular care that must be shown before accepting certain kinds of evidence."[87]

The general principle applicable to determining when a warning of some character is required was formulated by Sir Gerard Brennan, and adopted in the majority joint judgment in Longman, in the following terms:

"[T]he general law requires a warning to be given whenever a warning is necessary to avoid a perceptible risk of miscarriage of justice arising from the circumstances of the case."[88]

This is a clear statement of the principle of a fair trial[89]. What is required by way of a warning depends on the nature of the difficulty posed for the fairness of a trial by the kind of evidence in issue or by the circumstances of the particular case. As Sir Gerard put it in Bromley v The Queen:

"The possibility of a miscarriage of justice is both the occasion for the giving of a warning and the determinant of its content."[90]

The necessity for a warning may arise because of problems with the reliability of evidence or because of difficulties that the particular circumstances pose for an accused's ability to properly conduct a defence. In some cases the prejudice to the fairness of the process will be apparent to a jury. In many cases, however, that will not be so. The experience of the courts over the centuries has given judges a heightened and well informed awareness of the threat to a fair trial posed by particular kinds of evidence or recurring circumstances which pose such a threat. As Sir Gerard put it in Bromley:

"If the danger is equally obvious to the lay mind, a failure to warn of its existence is much less likely to result in a miscarriage of justice and thus much less likely to provide a ground for quashing a conviction than if the court has a special knowledge of the danger. If the danger is so obvious that the jury are fully alive to it without a warning, no warning may be given."[91]

There are circumstances which may require a judge to go beyond simply making a comment on the evidence to the jury and to formulate a warning about the use to which the jury may properly put the evidence. The nature of the contents of the warning will depend on the particular circumstances of the case. Sometimes it is appropriate to emphasise to the jury that they should "scrutinise the evidence with great care". On other occasions a warning in terms of it being "dangerous to convict" or "dangerous to convict without corroboration" is required[92].

There is no fixed catalogue of circumstances in which warnings are required. Nevertheless, a number of situations have been identified in which warnings are usually appropriate. Each of them is a manifestation of the principle of a fair trial.

The difficulties posed for the ability of the accused person to defend himself or herself when the prosecution substantially relies on a confessional statement made by the accused in police custody have long been appreciated. It was the statement of those difficulties by Deane J in Carr, expressed in terms of the principle of fairness[93], which led the High Court in McKinney to formulate a new rule of practice that in the case of a disputed confessional statement, which is not reliably corroborated, the jury should be warned of the danger of convicting on the basis of that evidence alone[94]. This decision, based in part on the then recent availability of audio-visual recording equipment, has led to the virtual disappearance from our criminal courts of confessional statements made in police custody other than in the form of a contemporaneous video recording. Although there may be different views about the judiciary forcing such practices on the executive, as with the Judges Rules of 1912, the results have been entirely salutary.

Another area which has long been recognised as posing particular difficulties for the fairness of a trial is the use of identification evidence. The prejudicial impact of such evidence has a number of causes. Jurors tend to give it more weight than the reliability of a person's recollection warrants. Witnesses tend to give evidence of identification with a degree of assurance that the plasticity of human memory does not justify.[95] The use of photographs for purposes of identification may distort the process in a number of different ways[96]. This includes the "rogues' gallery" effect, by which possession of a photograph of the accused by the police may suggest that the person has previously committed crimes and the "displacement effect", by which the photograph of the accused displaces the original memory of the offender in the mind of the witness and leads to subsequent confirmation of identification. In court identifications exacerbate these prejudicial effects[97].

The applicable test for excluding such evidence has been propounded in terms of the unfairness arising from evidence of little weight which was gravely prejudicial[98]. However, it is not clear that this formulation was intended to replace the application of the general discretion expressed in terms of probative value outweighing prejudicial effect[99]. Where the Evidence Act 1995 applies, the test is as propounded in s137.[100]

The dangers posed by identification evidence do not always require its exclusion. Where directions to minimise or remove the prejudicial effect can be given the evidence is admissible subject to such a direction[101]. However, where the reliability of identification evidence is in issue, a trial judge is obliged to warn a jury as to the danger of convicting on such evidence. The warning must specifically direct the jury's attention to the factors that may affect the reliability of that evidence in the circumstances of the particular case[102].

Long delay between the events in issue and the trial pose numerous difficulties for the fairness of the trial. These issues have arisen in acute form in cases where sexual misconduct is alleged many years, sometimes decades, after the alleged events. These difficulties are particularly acute when there is no corroboration of the alleged misconduct, but exist even if there is corroboration. Frequently cases of this character are simply word against word. The passage of time means that the accused has lost the ability to explore and test circumstantial facts which are frequently determinative of the credibility of the complainant. Some kind of warning, referred to as a Longman warning, should be given in terms that it would be dangerous to convict on the complainant's evidence alone, without the closest scrutiny of that evidence[103]. The content of any comment or warning will depend on all the circumstances of the case, but where it appears that specific difficulties were encountered by the accused in testing evidence or adducing evidence in his - it is usually a 'he' - defence then those difficulties should be identified to the jury[104].

The common law developed a number of separate categories of evidence which were potentially unreliable and which required a warning, often in terms of a direction that it would be unsafe to rely on the evidence in the absence of corroboration. This approach came to be required in the case of

evidence from accomplices, prison informers, young children and, before statutory intervention, from victims of sexual assault. The rules developed a technicality and a complexity, not made easier by frequent legislative intervention. The law was criticised as "too rigid and technical" by the Australian Law Reform Commission[105].

The Evidence Act of 1995 replaced a variety of different categories of unreliable evidence with a single scheme in s165, requiring warnings about evidence that may be unreliable. The section identified a non-exhaustive list encompassing hearsay, admissions, identification evidence, evidence that may be affected by age, ill health or injury, an accomplice, a prison informer, etc. Where requested, a warning must be given that the evidence may be unreliable and identifying the matters that may cause it to be unreliable together with a warning of the need for caution in determining whether to accept the evidence or give it weight. These provisions identify the major categories which emerged in the case law leaving open the possibility of new categories emerging or unreliability arising on the facts of the specific case[106].

The politics of reliability directions have not, however, come to rest. The Evidence Act 1995 of New South Wales has been amended to prohibit any suggestion that children are unreliable "as a class", but permitting a warning if there are circumstances "particular to" a specific child witness which affect his or her reliability.[107]

It is not possible to be exhaustive about the circumstances in which a direction or warning may be required in order to ensure a fair trial. The New South Wales Criminal Trial Courts Bench Book contains a large number of suggested directions all of which are manifestations of the principle of fair trial. They cover such diverse subjects as: accusatory statements in the presence of an accused; admissions to police; bad character; complaint in sexual cases; consciousness of guilt and lies; election not to call a witness; identification evidence; joint trials; prison informers; right to silence; tendency and coincidence evidence and unfavourable witnesses. The principle of a fair trial is manifest many times every day in our courts.

A Dynamic Principle

As a legal principle rather than a legal rule, the principle of a fair trial has inherent flexibility which enables it to adapt to changing circumstances. In particular it enables the court to acknowledge fundamental changes in community expectations as to the requirements of a fair trial. What is regarded as fair, particularly in the context of a criminal trial, has always varied with changing social standards and circumstances[108]. The proposition was particularly well expressed by Chief Justice O'Higgins of the Supreme Court of Ireland:

"The general view of what is fair and proper in relation to criminal trials has always been the subject of change and development. Rules of evidence and rules of procedure gradually evolved as notions of fairness developed. The right to speak and to give evidence and the right to be represented by a lawyer of one's choice were recognised gradually. To-day many people would be horrified to learn how far it was necessary to travel in order to create a balance between the accuser and the accused."[109]

This flexibility is regarded as equally significant in the application of Bills of Rights texts. As Lord Bingham of Cornhill said with respect to the English adoption of the European Convention for the Protection of Human Rights and Fundamental Freedoms:

"... [S]ince the Convention is a living instrument, the standards guaranteed by the Convention are to be reinterpreted in accordance with changing perceptions of individual rights."[110]

This process of adaptation is a continuing one. Not only do community standards change but so does the relevant technology.

The criminal justice system has been bedevilled for decades by issues surrounding confessions. Questions of voluntariness arose even with respect to signed confessions. Unsigned confessions, commonly called "verbals", were frequently attacked as complete fictions. It was the development of audio-visual technology, in the form of comparatively cheap video-recording equipment, that enabled the High Court to bring this controversy to an end in McKinney[111]. By adopting a general rule of warning juries about uncorroborated disputed confessions, the court gave to the police forces of Australia a powerful incentive to use electronic recording for all confessions proposed to be tendered. This practice has now become ubiquitous. The High Court's enunciation of principle, made feasible by developments in technology, relied, in the same way as the Judges' Rules of 1912 had long relied, on

the understandable institutional imperative of police forces to obtain convictions and, therefore, to adapt their practices and procedures when necessary to achieve that end.

Developments in technology pose new challenges to the ability to ensure a fair trial and will continue to do so. There are proposals in England, and more muted proposals in Australia, to abandon or amend the prohibition on giving evidence of prior criminal convictions in a criminal trial.

A significant difficulty that has now emerged is that by reason of the internet, and the efficiency of modern search engines, availability of prior convictions and other conduct about individual accuseds has been transformed. The assumption that adverse pre-trial publicity will lose its impact on the jury with the passage of time may no longer be valid. Furthermore changes of venue may no longer work in the way they once did. Access to prejudicial material by jurors is not easily detectable. The ease of accessibility of information on the internet has arisen in contempt proceedings and also with respect to applications for the discharge of a jury or on an appeal against conviction[112].

It is not clear whether or not juries should be directed not to access the internet, as this may incite some to covertly do so. We are still feeling our way in this, not only in Australia but abroad. The New South Wales Law Reform Commission has decided that it is too early to conclude that the new communications technologies are such as to render the sub judice rule unworkable[113]. In Queensland, by s69A of the Jury Act 1995, a juror would commit an offence if he or she were to make inquiries about the defendant in the trial. The word "inquire" is specifically defined to include searching an electronic database. These are real issues which have yet to be resolved.

The Balancing Process

I commenced this lecture with a quotation that "truth like all other good things" may cost too much. A fair trial is also "a good thing". Pursuing the fairness of a trial may also "cost too much". This consideration is reflected in statements that a fair trial must be fair to both sides. That is to say, fair not only to the accused but also to the prosecution[114]. International tribunals have also recognised that fairness involves fairness to the prosecution[115]. There is, for example, a continuing debate about the imposition of pre-trial disclosure requirements on defendants in criminal trials[116].

An individual accused in a criminal trial is not the only person who has rights and interests deserving of respect. There is a well-recognised public interest in the securing of convictions of guilty persons and the vindication of the rights of the victims of criminal conduct. The Crown prosecutes on behalf of the whole community. Human rights discourse generally accepts that "rights" are not "trumps", not least because rights conflict with each other. For example, the right of freedom of speech may conflict with the right to a fair trial or the right to privacy. Nevertheless the terminology of "right to a fair trial" does convey a more presumptive quality than the terminology I prefer of "the principle of a fair trial". The maintenance of public confidence in the administration of justice, which may be adversely affected by a lack of fairness in the processes of the court, may also be undermined by a failure to provide protection to the community in the conviction of guilty persons.

Sir Gerard Brennan has on numerous occasions stressed the significance of the broader public interest. In Jago he said:

"The community has an immediate interest in the administration of criminal justice to guarantee peace and order in society. The victims of crime, who are not ordinarily parties to prosecutions on indictment and whose interests have generally gone unacknowledged until recent times, must be able to see that justice is done if they are not to be driven to self-help to rectify their grievances."[117]

To similar effect is the unanimous joint judgment of a High Court when considering whether or not a new trial should be ordered:

"[T]he court must take into account any circumstances that might render it unjust to the accused to make him stand trial again, remembering however that the public interest in the proper administration of justice must be considered as well as the interests of the individual accused."[118]

The process is often described as the balancing of conflicting interests[119]. However, the idea that a right to a fair trial must in some manner be balanced against the interests of the community in securing a conviction, that is, in establishing the truth, is not universally accepted. This involves a value judgment upon which reasonable minds will differ. The degree of emphasis, indeed of absoluteness as an overriding value, to be given to the right of a fair trial will clearly differ from one judicial mind to another. The difficulty that arises is that the conflicting values are, as I have said,

incommensurable and cannot be assessed on the same scale.

A good example is the determination of when the probative value of evidence can be said to outweigh its prejudicial effect. McHugh J said of this test, in the context of the admission of propensity evidence:

"Admitting the evidence will serve the interests of justice only if the judge concludes that the probative force of the evidence compared to the degree of risk of an unfair trial is such that fair minded people would think that the public interest in adducing all relevant evidence of guilt must have priority over the risk of an unfair trial." [120]

A review of authorities on how the balancing exercise is in fact conducted may well reveal common themes and principles. For example, there is authority in favour of the proposition that the more serious the crime, the more weight should be given to the public interest in convictions over conflicting principles [121]. Such a review is beyond the scope of this address.

This issue was recently addressed by the Chief Justice of New Zealand, the Right Honourable Dame Sian Elias, in her address to the Conference celebrating the 100th Anniversary of the High Court. Her Honour said:

"[11] The caricature of the criminal trial is that it is a game where notions of fair play require an accused to be given the sporting opportunity. On this view, the rules of criminal justice put roadblocks in the search for the truth. While there is 'more glitter than substance' in such criticism, it has been hardy. It has led to a perception that criminal justice attempts a balance between the interests of society in securing conviction of offenders and the interests of individuals in not being wrongfully convicted.

[12] Many rules seek to reconcile these two interests. But the idea of criminal justice as a balance between the interests of society and the interest of the accused or between the prosecution and defence strikes me as an inadequate explanation. It fails to identify the public interest in maintaining the constitutional limits upon the executive which are at their sharpest in matters of criminal justice. A coherent and principled law of criminal justice cannot be developed without an understanding of how it connects with the wider legal system and its principles." [122]

Her Honour went on to emphasise the concept of criminal justice as being separate from other areas of the law and subject to particular requirements in which the idea of even-handedness between the prosecution and the accused in a criminal trial may have little role to play.

Chief Justice Elias questioned the appropriateness of a balancing approach in the context of criminal justice and referred to Professor Andrew Ashworth's criticism of the terminology of "balance", which he said leads to "sloppy reasoning" [123]. Professor Ashworth has been critical of the jurisprudence of the European Court of Justice and of the House of Lords with respect to Article 6 of the European Convention on the basis that it tends to weaken the strength of the protection of the right to a fair trial [124]. As he put it:

"[T]o accept that these rights are not absolute is not to concede that they may be 'balanced away' by being compared with a general public interest and put in second place." [125]

This focus is understandable where the terms of reference are determined exclusively by the terminology of "rights". Nevertheless, balancing considerations also arise where rights conflict. A good example is the conflict between the freedom of speech and a fair trial which arises in the context of contempt proceedings. Different views have been expressed as to whether, in Australian law, that balance has been predetermined by giving the right to a fair trial predominance [126]. In the case of police informers the law has determined that the fair trial principle is subordinated to the public interest in maintaining anonymity [127].

Ashworth's critique of a weighing or balancing process cannot be applied in those jurisdictions that have adopted the Evidence Act, which expressly uses the terminology of one matter outweighing another [128].

These issues have been debated in the United States. There is much force in the conclusion of the author of one review of the US debate who said:

"[W]e all share a common intuitive grasp of, or at least are in agreement about, what the metaphor of

balancing interests entails."[129]

As Chief Justice Elias acknowledged, there are conflicting interests involved. There is a broad range of legitimate opinion about which interest should prevail in the various factual circumstances that arise for decision. The determination of whether in particular circumstances the pursuit of truth must be sacrificed to the interests of a fair trial is not a matter upon which we can ever expect to reach unanimity.

Developments in the United Kingdom

In 1998 shortly after the passage of the Human Rights Act in the United Kingdom I made some observations about the effect of this Act, together with the Canadian Charter of Rights and the New Zealand Bill of Rights Act, on the future development of Australian jurisprudence. I pointed out that for the vast majority of Australian lawyers, American constitutional Bill of Rights jurisprudence is virtually incomprehensible. I expressed the apprehension that within a decade it was likely that, in substantial areas of the law, British cases would be equally incomprehensible to Australian lawyers.

This is an important turning point for Australian lawyers. One of the great strengths of our common law tradition is that we have been able to draw on a vast body of experience from other common law jurisdictions as sources of influence and inspiration. I was and remain concerned that Australian common law is threatened with a degree of intellectual isolation that many would find disturbing[130].

Since 1998, the only relevant change is the proposal to enact a Bill of Rights in the Australian Capital Territory. Judges who sit in that jurisdiction will have to draw on the overseas case law.

At least with respect to the implementation of Article 6 of the European Convention on Human Rights guaranteeing a fair trial, my apprehension has not been realised. The full text of the article contains a series of specific rules, in addition to the general obligation to provide a "fair and public hearing", all but a few of which are aspects of the principle of fair trial applicable in Australian jurisprudence[131]. The differences are of a character with which Australian lawyers are used to dealing in terms of explaining English authority due to differences in the applicable statutes. For example, unlike the conclusion in *Jago*, Article 6 contains separate provision for a speedy trial, which may be breached even if a fair trial is possible[132].

Notwithstanding judicial expressions of considerable force with respect to the changes to be expected by reason of the Human Rights Act - such as that it would "subject the entire legal system to a fundamental process of review and, when necessary, reform by the judiciary"[133] and "long or well entrenched ideas may have to be put aside, sacred cows culled"[134] - there is little evidence of "review" or "reform", let alone culling. This may herald some difficulties for the United Kingdom in future cases before the European Court of Justice in Strasbourg but, perhaps, not with respect to Article 6.

The English courts have emphasised that the principle of a fair trial was well entrenched in English law and practice before the adoption of the Human Rights Act[135]. English case law on Article 6 will, in my opinion, continue to be of assistance for the development of Australian common law.

The English Act empowers a court to declare that particular statutory provisions are incompatible with the rights contained in the Convention. It also requires, by s3, a court to interpret legislation so that it is compatible, "so far as it is possible to do so". This latter provision would not, in its practical operation necessarily differ from the application of the principle of our law of statutory interpretation that legislation is presumed not to invade common law rights. The House of Lords applied s3 to construe a reverse onus provision under the Misuse of Drugs Act 1971, with respect to a lack of knowledge that a substance was a controlled drug, so that it imposed only an evidential, rather than a persuasive, burden[136]. It is likely that a similar result would have been attained in Australia.

The position is different however with a strained application of s3. This seems to have occurred in the interpretation of a "rape shield" provision regulating the admissibility of sexual history evidence. In that case the House of Lords concluded that the "right" to a fair trial would be contravened if exclusion of such evidence denied the accused the opportunity to put forward probative material in his defence. By a process, said to be of interpretation, the House of Lords found the statutory provision was subject to a proviso that questioning required to ensure a fair trial was not excluded by the section[137]. It is unlikely that so strained an interpretation would be acceptable in Australia by application of the normal law of statutory interpretation.

One other potential difference between Australian and English doctrine may arise from the position of acting judges. The Privy Council held with respect to the position in Scotland that temporary sheriffs were a contravention of the Article 6 guarantee of an "independent and impartial tribunal"[138]. The position appears to be otherwise with respect to the barristers who act as judges in the capacity of Recorders in the southern province of the United Kingdom[139].

The remaining case law on Article 6 is of a character which could assist Australian jurisprudence. For example, the decision on entrapment draws on reasoning in the High Court in *Ridgeway*[140]; decisions on the right to silence are less robust than recent High Court jurisprudence but are perfectly understandable[141]. The same is true of decisions on the privilege against self-incrimination[142]; on the unreliability of identification evidence[143] and on the obtaining of evidence by improper means [144]. The case law also employs the idea of "balancing", sometimes by reference to the notion of proportionality, a European concept that has long since entered English jurisprudence and, to a certain degree, Australian jurisprudence[145].

Differences exist but of a kind which manifest the great value of being able to look to other common law jurisdictions for influence and inspiration. The Australian common law differs from that of England, but the similarities are such that their case law development remains of significance to our own. At least in the area of the principle of a fair trial that, on present indications, is likely to continue.

Conclusion

The numerous rules, practices, procedures and requirements, to which I have referred in the course of this address, are able to be viewed today as particular manifestations of the overriding principle of a fair trial. However, that principle did not emerge by a process of deduction from an abstract idea. What came first were numerous specific manifestations of the principle, emerging over the course of centuries of legal history, originally in England and in recent centuries in other common law nations. What occurred was a traditional common law development derived from the actual practice of legal decision-making and dispute resolution over long periods of time in the course of dealing with real problems that arose in real factual situations. Once recognised as such, however, a legal principle influences the further development of actual practice.

This is a different process to that which is involved when applying a rule expressed in terms of a "right" in an abstract formulation of words contained in an overriding code, which is to be applied to particular factual situations. That approach is the usual mode of decision-making in civil law systems, whose jurisprudence is derived from Roman law and canon law. As part of the process of convergence of legal systems, perhaps most notably by the adoption of the Charter of Rights in Canada and the Human Rights Act in the United Kingdom, almost all other common law nations now have statutory or constitutional texts to be applied in the manner of a civil law code. Australia is not part of that process except, soon, in the Australian Capital Territory.

The difference is well described in a metaphor derived from a cognate area of discourse in philosophy, namely epistemology, the theory of knowledge. One of the great controversies of the history of philosophy was between empiricists and rationalists. The former sought to relate knowledge, ideas, truth and meaning to experience, whereas the latter related them to pure reason, so that thought about such matters transcended mere experience. It was no accident that most empiricists were British - Bacon, Hobbes, Locke, Berkeley, Hume, whose intellectual tradition included the common law method. On the other hand, the rationalists - Descartes, Spinoza, Leibniz - were Continental, whose intellectual heritage was Roman law and canon law.

Francis Bacon expressed the contrast between the two schools in the following way:

"[E]mpiricists are like ants; they collect and put to use; but rationalists are like spiders; they spin threads out of themselves." [146]

So it has been with our principle of a fair trial, as distinct from a codified right to a fair trial. We must continue to collect the circumstances in which issues of fairness arise in practical day-to-day judicial decision-making and, having done so, apply the principle of fairness. We must do so in a disciplined but determined and flexible manner. For the foreseeable future, Australian lawyers will remain a colony of ants in a world full of spiders.

1 *Minet v Morgan* (1873) 8 LR Ch App 361 at 368.

2 *Pearse v Pearse* (1846) 1 De G & Sm 12 at 28-29; 63 ER 950 at 957.

3 See, e.g. *The Queen v Ireland* (1972) 126 CLR 321 at 335 per Barwick CJ.

4 See, e.g. *Ridgeway v The Queen* (1995) 184 CLR 19 at 52.9; *Nicholas v The Queen* (1998) 193 CLR 173 at 196 [34], see also at 209 [76] per Gaudron J.

5 *The Queen v Swaffield; Pavic* (1997) 192 CLR 159 at 194 [91] per Toohey, Gaudron and Gummow JJ.

6 Oliver Wendell Holmes "Codes, and the Arrangement of the Law" (1870) reprinted in Novick (ed) *The Collected Works of Justice Holmes* (1995) vol 1 pp212-213 (reference omitted).

7 *Dietrich v The Queen* (1992) 177 CLR 292 at 326.

8 *McKinney v The Queen* (1991) 171 CLR 468 at 478.

9 *Jago v The District Court of New South Wales* (1989) 168 CLR 23 at 56.

10 *Dietrich v The Queen* (1992) 177 CLR 292 at 299, 326.

11 *Dietrich v The Queen* (1992) 177 CLR 292 at 330.

12 *Jago v The District Court of New South Wales* (1989) 168 CLR 23 at 43, 54; *McKinney v The Queen* (1991) 171 CLR 468 at 479; *Dietrich v The Queen* (1992) 177 CLR 292 at 323; *Walton v Gardiner* (1993) 177 CLR 378 at 412; and see also his Honour's separate, but not dissenting, judgment in *The Queen v Swaffield; Pavic* (1997) 192 CLR 159 at 185.

13 See *The King v MacFarlane; ex parte O'Flanagan and O'Kelly* (1923) 32 CLR 518 at 541-542.

14 See *Jago v The District Court of New South Wales* (1989) 168 CLR 23 at 56-57.

15 See *Dietrich v The Queen* (1992) 177 CLR 292 at 299, 326.

16 Ronald Dworkin *Taking Rights Seriously*, Duckworth, London, (1977) p 26.

17 *Walton v Gardiner* (1993) 177 CLR 378 at 392-393 per Mason CJ, Deane and Dawson JJ.

18 *Jago v The District Court of New South Wales* (1989) 168 CLR 23 at 28.

19 *Mann v O'Neil* (1997) 191 CLR 204 at 245.

20 See e.g. *Jago v The District Court of New South Wales* (1989) 168 CLR 23 at 29-30 per Mason CJ; *Williams v Spautz* (1992) 174 CLR 509 at 520 per Mason CJ, Dawson, Toohey and McHugh JJ; *Walton v Gardiner* (1993) 177 CLR 378 at 394 per Mason CJ, Deane and Dawson JJ; *Ridgeway v The Queen* (1995) 184 CLR 19 at 62 per Toohey J and 74 per Gaudron J; *Nicholas v The Queen* (1998) 193 CLR 173 at 256 per Kirby J.

21 *Moevao v Department of Labour* [1980] 1 NZLR 464 at 481.

22 *Chu Kheng Lim v The Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 27, see also 37, 55 and 68.

23 See *Polyukhovich v The Commonwealth* (1991) 172 CLR 501 at 607 per Deane J and 703-704 per Gaudron J; *Nicholas v The Queen* (1998) 193 CLR 173 at 185 [13]-[14] per Brennan CJ, 208 [73] per Gaudron J, 220-221 [112] per McHugh J, 232 [146] per Gummow J. See also Justice McHugh, "Does Chapter III of the Constitution protect substantive as well as procedural rights?" (2001) 21 *Aust Bar Rev* 235 esp at 237-241; F Wheeler, "The Doctrine of Separation of Powers and Constitutionally Entrenched Due Process in Australia" (1997) 23 *Monash L Rev* 248; W Lacey, "Inherent Jurisdiction, Judicial Power and Implied Guarantees Under Chapter III of the Constitution" (2003) 31 *Fed Law Rev* 57.

24 Harris v Caladine (1991) 172 CLR 84 at 150; Re Nolan; ex parte Young (1991) 172 CLR 460 at 496; Polyukhovich v The Commonwealth (1991) 172 CLR 501 at 703-704; Nicholas v The Queen (1998) 193 CLR 173 at [73]-[74].

25 See Nicholas v The Queen (1998) 193 CLR 173 at 197 [37] per Brennan CJ and 276 [242] per Hayne J; contra at 209 [74] per Gaudron J, 226 [127] per McHugh J, 256 [201] per Kirby J; Grollo v Palmer (1995) 184 CLR 348 at 365; Wilson v Minister for Aboriginal and Torres Strait Islander Affairs (1996) 189 CLR 1 at 14, 17; Kable v Director of Public Prosecutions (NSW) (1996) 189 CLR 51 at 98 per Toohey J, 107 per Gaudron J, 117, 118-19 and 124 per McHugh J, 113-34 per Gummow J.

26 See Leeth v Commonwealth (1992) 174 CLR 455 at 470. See also Grollo v Palmer (1995) 184 CLR 348 at 365; Kable v Director of Public Prosecutions (NSW) (1996) 189 CLR 51 at 98, 107, 117, 118-119, 121, 124 and 133-134; John Fairfax Publications Pty Ltd v Attorney General (NSW) (2000) 158 FLR 81 at 85-86 [19]-[27].

27 See e.g. Dietrich v The Queen (1992) 177 CLR 292 at 336 per Deane J and 362 per Gaudron J; Kruger v The Commonwealth (1997) 120 CLR 1 at 63 per Dawson J and 112 per Gaudron J; Roberts v Bass (2003) 77 ALJR 292 at [145] per Kirby J; Wheeler, n 23.

28 See John Fairfax Publications Pty Ltd v Attorney General (NSW) (2000) 158 FLR 81 at 89 [51], 93 [75]; R v Whyte (2002) 55 NSWLR 252 at 272 [133], 274 [140]. Now see Attorney General (Qld) v Fardon [2003] QCA 416 where Kable was distinguished by majority and Re Criminal Proceeds Confiscation Act 2002 (Qld) [2003] QCA 249 where Kable was applied.

29 At the time of delivery of this address the High Court was reserved in the appeal from North Australian Aboriginal Legal Aid Service Inc v Bradley (2002) 122 FCR 204. An application has been made for special leave in Attorney General (Qld) v Fardon [2003] QCA 416. Furthermore, the High Court has granted special leave in Baker v The Queen (2002) 130 A Crim R 417. The special leave application in Silbert v Director of Public Prosecutions (WA) (2002) 25 WAR 330, has been referred to the Full Court.

30 The Hon J J Spigelman, "Seen to be Done: The Principle of Open Justice - Part I" (2000) 74 ALJ 290 esp at 293.

31 See, e.g., R v Brown (Winston) [1994] 1 WLR 1599 at 1606E.

32 See Dietrich v The Queen (1992) 177 CLR 292 at 300 per Mason CJ and McHugh J and at 353 per Toohey J.

33 Jago v The District Court of New South Wales (1989) 168 CLR 23 at 57.

34 See The Queen v Glennon (1992) 173 CLR 592 at 605-606, 613, 623-624.

35 See The Queen v Glennon (1992) 173 CLR 592 at 603; R v Yuill (1993) 69 A Crim R 450 at 453-454; Hinch v Attorney-General (Vic) (1987) 164 CLR 15 at 74; Murphy v The Queen (1989) 167 CLR 94 at 99; R v Milat (NSWCCA, unreported, 26 February 1998); R v Bell (NSWCCA, unreported, 8 October 1998).

36 See R v Watson; ex parte Armstrong (1976) 136 CLR 248; Livesey v NSW Bar Association (1983) 151 CLR 288; Vakauta v Kelly (1989) 167 CLR 568; Ebner v Official Trustee in Bankruptcy (2000) 205 CLR 337. See also Aronson & Dyer, Judicial Review of Administrative Action (2000, 2nd ed), LBC, esp at 474ff.

37 See Jago v The District Court of New South Wales (1989) 168 CLR 23 at 34, 57-58, 71-72; Williams v Spautz (1992) 174 CLR 509 at 519.

38 Barton v The Queen (1980) 147 CLR 75.

39 Barron v Attorney-General (1987) 10 NSWLR 215.

40 R v Basha (1989) 39 A Crim R 337 at 340-341.

- 41 Respectively, *Murphy v The Queen* (1989) 167 CLR 94 at 99; *R v Milat* (NSWCCA, unreported, 26 February 1998); *R v Bell* (NSWCCA, unreported, 8 October 1998); *R v Long* (2002) 128 A Crim R 11.
- 42 *Ridgeway v The Queen* (1995) 184 CLR 19 at 41, 60.
- 43 *Jago v The District Court of New South Wales* (1989) 168 CLR 23 at 30-31, 34.
- 44 See *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541 at 550, 551ff; *Holt v Wynter* (2000) 49 NSWLR 128 esp at 143 [84], 147 [119].
- 45 See the compilation by Kirby J in *Dyers v The Queen* (2002) 210 CLR 285 at 314-315 [82]-[83].
- 46 *R v Wilson and Grimwade* [1995] 1 VR 163.
- 47 *R v Wilson and Grimwade* [1995] 1 VR 163 at 184.
- 48 *Connelly v DPP* [1964] AC 1254 at 1347.
- 49 *RPS v The Queen* (2000) 199 CLR 620 at 630 [22]; *Azzopardi v The Queen* (2001) 205 CLR 50 at 64-65.
- 50 See G L Certoma, "The Accusatory System v The Inquisitorial System: Procedural Truth v Fact?" (1982) 56 ALJ 288.
- 51 *Dietrich v The Queen* (1992) 177 CLR 292 esp at 311.
- 52 See *R v Adler* [2000] NSWCCA 152; *R v Osborne* (2002) 133 A Crim R 519.
- 53 See *TKWJ v The Queen* (2002) 76 ALJR 1583 esp at [16], [74]-[78]; *R v Birks* (1990) 19 NSWLR 677; *Chouman v Margules* (1993) 17 MVR 144.
- 54 *R v Lee Kun* [1916] 1 KB 337 at 343; *R v Johnson* (1987) 25 A Crim R 433 at 434-435; *Dietrich v The Queen* (1992) 177 CLR 292 at 331 per Deane J; *Re East; ex parte Nguyen* (1998) 196 CLR 354 at 389-390.
- 55 See *Sutton v The Queen* (1984) 152 CLR 528 at 541-542; *De Jesus v The Queen* (1986) 61 ALJR 1 at 7-8; *R v Annakin* (1988) 17 NSWLR 202 esp at 207.
- 56 See *Sutton v The Queen* (1984) 152 CLR 528 at 542.
- 57 See *Johnson v Miller* (1937) 59 CLR 467 esp at 486-491; *S v The Queen* (1989) 168 CLR 266 esp at 274, 275, 280-281, 284-285; *The Queen v KBT* (1997) 191 CLR 417 esp at 423; *Walsh v Tattersall* (1996) 188 CLR 77 at 84, 107.
- 58 See *Connelly v DPP* supra at 1347-1355; *R v Ambrose* (1973) 57 Cr App R 538 at 540.
- 59 See *R v Brown (Winston)* [1994] 1 WLR 1599 esp at 1606E; *R v Brown (Winston)* [1998] AC 367 at 374G, 376-77; *Lawless v The Queen* (1979) 142 CLR 659 at 667, 674 and 678; *Grey v The Queen* (2001) 75 ALJR 1708 at 1713 [23], 1714 [30]; *In Re Van Beelen* (1974) 9 SASR 163 at 248-249 per the Full Court; *R v Perry (No 1)* (1981) 27 SASR 166; *R v Easom* (1981) 28 SASR 134 at 148-149 per Wells J; *Gouldham v The Queen* [1970] WAR 119 at 122, 133.
- 60 For the New South Wales position see New South Wales Law Reform Commission, Report No 95, *The Right to Silence*, July 2000, esp at 74-82.
- 61 See *Richardson v The Queen* (1974) 131 CLR 116 at 121-122; *Whitehorn v The Queen* (1983) 152 CLR 657 at 674-675.
- 62 See *The Queen v Apostilides* (1984) 154 CLR 563 at 576.
- 63 See *Shaw v The Queen* (1952) 85 CLR 365 esp at 380 and 383; *Killick v The Queen* (1981) 147

CLR 565 at 569; R v Chin (1985) 157 CLR 671 esp at 676; R v Soma (2003) 77 ALJR 849 esp at 854 [27]-[29].

64 See Galea v Galea (1990) 19 NSWLR 263 at 281-282; Burwood Municipal Council v Harvey (1995) 86 LGERA 389, 397-398; Damjanovic v Sharpe Hume & Co [2001] NSWCA 407 esp at [160]-[164].

65 Galea v Galea (1990) 19 NSWLR 263 at 284.

66 MacPherson v The Queen (1981) 147 CLR 512 at 524, 546-547; R v Gidley [1984] 3 NSWLR 168 at 180-181..

67 See Bennion, "Distinguishing Judgment and Discretion" (2000) Public Law 368. See also R v Blick [2000] NSWCCA 61 at [20] per Sheller JA.

68 See Harriman v The Queen (1989) 167 CLR 590 at 604 per Dawson J and 619 per Gaudron J; R v Christie [1914] AC 545 at 559.

69 See Driscoll v The Queen (1977) 137 CLR 517 at 541 per Gibbs J.

70 Festa v The Queen (2001) 208 CLR 593 at 602 [22] per Gleeson CJ.

71 See Van der Meer v The Queen (1988) 62 ALJR 656 at 666; The Queen v Swaffield; Pavic (1997) 192 CLR 159 at 181-182 [26]-[28], 189-190 [53]-[54] and 192-193 [64]-[65].

72 See, e.g. Merritt & Roso v R (1985) 19 A Crim R 360 at 377-378; R v Edelsten (1990) 21 NSWLR 542 at 551-552; The Queen v Swaffield; Pavic (1997) 192 CLR 159 esp at 174-175 [19]-[20] and 178 [22]-[23] per Brennan CJ and at [74] 196 per Toohey, Gaudron and Gummow JJ; Cleland v The Queen (1982) 151 CLR 1 esp at 33-34. The Evidence Acts 1995, s 90 reflect this discretion - the Court may exclude evidence of admissions in a criminal proceeding where they were made in circumstances which would render their use unfair to the accused.

73 See, e.g., Ridgeway v The Queen (1995) 184 CLR 19 at 32-33 per Mason CJ, Deane and Dawson JJ, 49 per Brennan J; The Queen v Ireland (1972) 126 CLR 321 at 334-335; Bunning v Cross (1978) 141 CLR at 74-75; Foster v The Queen (1993) 67 ALJR 550 at 554.

74 See, e.g., The Queen v Ireland (1972) 126 CLR 321 at 335 per Barwick CJ; The Queen v Swaffield; Pavic (1997) 192 CLR 159 at 194 [69].

75 R v Johnston (1998) 45 NSWLR 362 at 367.

76 See generally, J D Heydon, Cross on Evidence (Australian ed., looseleaf), Vol 1 Ch 17; A Ligertwood, Australian Evidence (1998, 3rd ed), esp pars 8.51-8.55.

77 Ward v H S Pitt & Co [1913] 2 KB 130 at 138.

78 See, e.g. Ligertwood, n 76, par 4.32.

79 See Attwood v The Queen (1960) 102 CLR 353 at 359-360.

80 Part 3.6, ss 94-101.

81 See, e.g. BRS v The Queen (1997) 191 CLR 275 at 295, 331; Pfennig v The Queen (1995) 182 CLR 461 at 487-488.

82 Pfennig v The Queen (1995) 182 CLR 461 at 512-513 (references omitted).

83 See Sutton v The Queen (1984) 152 CLR 528 at 564; Hoch v The Queen (1988) 165 CLR 292 at 296; Pfennig v The Queen (1995) 182 CLR 461 at 482-483.

84 At the time of delivery of this address the New South Wales Court of Criminal Appeal was reserved

on the issue (*R v Ellis*).

85 *Pfennig v The Queen* (1995) 182 CLR 461 at 516.

86 See *Fleming v The Queen* (1998) 197 CLR 250.

87 *RPS v The Queen* (2000) 199 CLR 620 at 637 [41] (references omitted).

88 *Longman v The Queen* (1989) 168 CLR 79 at 86. See *Bromley v The Queen* (1986) 161 CLR 315 at 324-325; *Carr v The Queen* (1998) 165 CLR 314 at 330.

89 See also reference to the "overriding duty" in *Crofts v The Queen* (1996) 186 CLR 427 at 451; *Doggett v The Queen* (2001) 208 CLR 343 [118].

90 *Bromley v The Queen* (1986) 161 CLR 315 at 325.

91 *Bromley v The Queen* (1986) 161 CLR 315 at 324. See also *Longman v The Queen* (1989) 168 CLR 79 at 95-96 per Deane J.

92 See *R v Spencer* [1987] AC 128 at 135 and 138 and 141; *Bromley v The Queen* (1986) 161 CLR 315 at 318-319; *Carr v The Queen* (1998) 165 CLR 314 at 320-321; *R v Johnston* (1998) 45 NSWLR 362 at 369, 371.

93 See *Carr v The Queen* (1998) 165 CLR 314 at 337-338.

94 *McKinney v The Queen* (1991) 171 CLR 468 esp at 473-476, 478.

95 *Domican v The Queen* (1992) 173 CLR 555 at 561; *Festa v The Queen* (2001) 208 CLR 593 at 614, 643.

96 See *Alexander v The Queen* (1981) 145 CLR 395 esp at 409.

97 *Festa v The Queen* (2001) 208 CLR 593 at 601 per Gleeson CJ, 609-610 per McHugh J.

98 See, e.g. *Alexander v The Queen* (1981) 145 CLR 395 at 402 per Gibbs CJ and *Festa v The Queen* (2001) 208 CLR 593 at 613 per McHugh J.

99 *Festa v The Queen* (2001) 208 CLR 593 at 603 per Gleeson CJ.

100 Additionally, Evidence Acts 1995 Pt 3.9 contains limitations on the admissibility of identification evidence to ensure that the most reliable form of identification is obtained and adduced in criminal proceedings.

101 *Festa v The Queen* (2001) 208 CLR 593 at 614 per McHugh J.

102 *Domican v The Queen* (1992) 173 CLR 555 at 561-562; *Festa v The Queen* (2001) 208 CLR 593 at 614 [64]-[65] per McHugh J and 643-644 [167] per Kirby J; *Dhanhoa* [2003] HCA 40 at [19] per Gleeson CJ and Hayne J.

103 See *Longman v The Queen* (1989) 168 CLR 79 at 90-91, 93, 94; *Crampton v The Queen* (2000) 206 CLR 161 at 181 [45]; *Doggett v The Queen* (2001) 208 CLR 343 at 356 [51], 374 [119], 376 [123].

104 See *R v Johnston* (1998) 45 NSWLR 362 at 375; *R v DBG* (2002) 133 A Crim R 227 at 235 [32]-[33], 236 [36]-[38].

105 See Australian Law Reform Commission, Evidence - Interim Report No 26 (1985), vol 1 at [1015].

106 See generally *R v Stewart* (2001) 52 NSWLR 301 at 304-305 [7]-[15]; *Bromley v The Queen* (1986) 161 CLR 315 at 319.

107 Section 165(6) inserted by Evidence Legislation Act Amendment Act 2001 (NSW).

108 See, e.g., *Hicks v The King* (1920) 28 CLR 36 at 48 per Isaacs and Rich JJ; *Dietrich v The Queen* (1992) 177 CLR 292 at 328 per Deane J; *The Queen v Swaffield*; *Pavic* (1997) 192 CLR 159 at 202.

109 *The State (Healy) v Donoghue* (1976) IR 325 at 350.

110 *Dyer v Watson* (2002) 3 WLR 1488 at [49].

111 *McKinney v The Queen* (1991) 171 CLR 468

112 See *H M Advocate v Beggs (No 2)* 2002 SLT 139 (High Court of Justiciary, Scotland); *DPP v Weiss* [2002] VSC 153; *R v McLachlan* [2000] VSC 215; *R v Long* [2003] QCA 77 esp at [38]-[39].

113 See New South Wales Law Reform Commission, *Contempt by Publication - Report 100* (June 2003) at par 2.67.

114 See *McKinney v The Queen* (1991) 171 CLR 468 at 488.7 per Dawson J; *R v Fuller* (1994) 34 NSWLR 233 at 240E-F; *R v Lowe* (1997) 98 A Crim R 300 at 318-319; *Phillips v The Queen* (1985) 159 CLR 45 at 62, 64, 67 per Deane J; *Matisevitch v The Queen* (1977) 137 CLR 633 at 654; *Carter v Northmore Hale Davy & Leake* (1995) 183 CLR 121 at 156, 166.

115 See the authorities gathered by the Honourable David Hunt, "The Right to a Fair Trial: A Different Perspective?" (1999) 11 *Judicial Officers' Bulletin* 17.

116 See *Petty v The Queen* (1991) 173 CLR 95 at 108, 128-129. A new pre-trial disclosure regime commenced in NSW on 19 November 2001. See *Criminal Procedure Act 1986 (NSW)* ss134-149. Victoria and Western Australia have introduced mandatory pre-trial disclosure regimes: see *Crimes (Criminal Trials) Act 1999 (Vic)* (replacing the more extensive pre-trial disclosure regime found in the *Crimes (Criminal Trials) Act 1993 (Vic)*, as to which see *R v Smith* [1995] 1 VR 10 at 36-8); *Criminal Code (WA)* ss611C, 636A. Cf *Criminal Code (Qld)* ss 590A, 592A; *Criminal Law Consolidation Act 1935 (SA)* s285C; *Criminal Code Act 1924 (Tas)* s368A; *Criminal Code (NT)* s331. In the United Kingdom, significant reforms to the defence pre-trial disclosure regime in the *Criminal Procedure and Investigations Act 1996* are currently before the House of Lords as Part 5 of the *Criminal Justice and Sentencing Bill 2002*. The proposed introduction of additional, stringent pre-trial disclosure obligations on the defence has been controversial: see Lord Justice Auld, *Review of the Criminal Courts of England and Wales* (October 2001), pp 447-73, United Kingdom, *Parliamentary Debates, House of Lords*, 14 July 2003, columns 715-45.

117 *Jago v The District Court of New South Wales* (1989) 168 CLR 23 at 49-50. See also at 54.

118 *Director of Public Prosecutions (Nauru) v Fowler* (1984) 154 CLR 627 at 630.

119 See, e.g., *The Queen v Glennon* (1992) 173 CLR 592 at 623.8 per Deane, Gaudron and McHugh JJ; *Jago v The District Court of New South Wales* (1989) 168 CLR 23 at 33.5 per Mason CJ; *Hinch v Attorney-General (Vic)* (1987) 164 CLR 15 at 24-25, 27 per Mason CJ, 44 per Wilson J, 88 per Gaudron J; *Walton v Gardiner* (1993) 177 CLR 378 at 396 per Mason CJ, Deane and Dawson JJ. See also The Hon Sir Anthony Mason, "Fair Trial" 19 *Crim LJ* 7 at 8.

120 *Pfennig v The Queen* (1995) 182 CLR 461 at 529.

121 See *Bunning v Cross* (1978) 141 CLR 54 at 80; *Pollard v The Queen* (1992) 176 CLR 177 at 203-204; *R v Burrell* [2001] NSWSC 120 at [38]; *R v Dalley* (2002) 132 A Crim R 169 at 171-172 [2]-[7], 189 [102]; Australian Law Reform Commission, *Report No 26*, n 105, at par 964.

122 The Right Honourable Dame Sian Elias, "Criminal Justice in the High Court", Address on the Occasion of the Centenary of the High Court of Australia, 10 October 2003 (as delivered).

123 See A Ashworth "Crime, Community and Creeping Consequentialism" (1996) *Crim LR* 220 at 229.

124 A Ashworth, "Criminal Proceedings after the Human Rights Act: The First Year" (2001) *Crim LR* 855 esp at 864-867.

125 Ibid at 866.

126 See the analysis of the cases in my judgment in *Attorney General (NSW) v X* (2000) 49 NSWLR 653 at 667-676 [64]-[117] with which Priestley JA agreed at 699 [226] and contrast the dissenting analysis of the cases by Mason P at 687-695 [175]-[200].

127 H Mares, "Balancing public interest and a fair trial in police informer privilege: A critical Australian perspective" (2002) 6 Intl Jnl Evidence & Proof 94 esp at 105-106, 123. See Evidence Acts 1995, s 130(4)(e).

128 E.g., Evidence Acts 1995, ss 101, 135, 137. See the analysis in *ibid.* at 116-118.

129 V Luizzi "Balancing of Interests in Courts" (1980) 20 Jurimetrics Journal 373 at 373.

130 See Spigelman "Rule of Law - Human Rights Protection" (1999) 18 Aust Bar Rev 29 at 32-33; Spigelman "Access to Justice and Human Rights Treaties" (2000) 22 Syd Law Rev 141 at 150.

131 "Article 6 - Right to a Fair Trial

1 In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2 Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to the law.

3 Everyone charged with a criminal offence has the following minimum rights:

- a. to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
- b. to have adequate time and facilities for the preparation of his defence;
- c. to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
- d. to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- e. to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

132 Cf *Jago v The District Court of New South Wales* (1989) 168 CLR 23. See *Porter v Magill* [2002] 2 AC 357 at [108]; *Dyer v Watson* [2002] 3 WLR 1488 at [50] and [73].

133 *R v DPP; ex parte Kebilene* [2000] 2 AC 326 at 374-5 per Lord Hope of Craighead.

134 *R v Lambert* [2002] 2 AC 545 at 561 per Lord Slynn of Hadley.

135 See e.g. the observations of Lord Woolf in *R v Togher* [2001] 1 Cr App R 457 at 467. See also *R v Lambert* [2002] 2 AC 545 at 623 per Lord Hutton.

136 See *R v Lambert* [2002] 2 AC 545 at 563, 574-575, 590 and 610.

137 See *R v A (No 2)* [2002] 1 AC 45 at 56, 69, 87-88, 97 and 106.

138 See *Millar v Procurator Fiscal, Elgin* [2002] 1 WLR 1615.

139 *Lawal v Northern Spirit Ltd* [2003] UKHL 35; see Note, "Part-Time Judges" (2003) 77 ALJ 583.

140 See *R v Looseley* [2001] 1 WLR 2060.

141 See *R v Betts* [2001] 2 Cr App R 257; *R v Francom* (2001) 1 Cr App R 237.

142 See *Brown v Stott* [2003] 1 AC 681; *R v Lyons* [2002] 3 WLR 1562 (the latter being a case to

which the Human Rights Act did not apply),

143 R v Forbes [2001] 2 WLR 1.

144 R v P [2001] 2 WLR 463.

145 See e.g. R v A (No 2) [2002] 1 AC 45 at 64 per Lord Steyn; Dyer v Watson [2002] 3 WLR 1488 at 1508 per Lord Bingham of Cornhill; Brown v Stott [2003] 1 AC 681 at 705-706 per Lord Bingham of Cornhill, 722-723 per Lord Hope of Craighead; R v DPP; ex parte Kebilene [2000] 2 AC 326 at 379, 386-388 per Lord Hope of Craighead.

146 From Cogitata et Visa (1607) in John Cottingham, *The Rationalists* (1988), Oxford University Press, pp1-2.

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Becket and Henry II: The Martyrdom

**BECKET AND HENRY II: THE MARTYRDOM
THE FIFTH ADDRESS IN THE BECKET LECTURE SERIES
TO THE ST THOMAS MORE SOCIETY
BY THE HONOURABLE J J SPIGELMAN AC
CHIEF JUSTICE OF NEW SOUTH WALES
SYDNEY, 29 SEPTEMBER 2003**

In the four months between settlement at Freteval in late July 1170 and Becket's return to England, he and Henry had two face-to-face meetings. At one they argued vociferously. The other was a social call, where Becket was received amicably. There are few records of these conversations. Herbert of Bosham, Becket's assistant and subsequent biographer, reports that Henry told Becket:

"Why don't you do what I want you to do, for, if you would, I would entrust everything to you."

According to Herbert, the archbishop said he was reminded of the devil's temptation to Christ, from Matthew 4:9:

"All these things will I give thee, if thou wilt fall down and worship me."

This exchange encapsulates the institutional conflict that had become personified in these two strong-willed men.

On the one hand, a king seeking recognition of his ultimate authority. Henry expected submission without the qualification in the form that had so infuriated him before the exile, i.e. without the words "saving my order". As a practical, though not a formal matter, he would give Becket and the Church the degree of independence it wished, subject to his ultimate authority.

On the other hand, Becket, not least by his choice of metaphor comparing Henry's position to Satan's temptation, manifested the strength of his own view that the Church was itself the ultimate authority. The independence of the Church had a spiritual foundation that could not be compromised.

There had been no true reconciliation at Freteval merely a truce. Henry's assertion of the customs, reflected in the Constitutions of Clarendon, had not been mentioned at Freteval, nor in the months since the truce.

Becket's preoccupation during this period was the restoration of the institutional authority of the see of Canterbury. He expected, with good reason, that Henry would understand this focus of his attention. The first priority was the restoration of the property of the see, so much of which had been dissipated during the six years of the exile. Canterbury's wealth was an important foundation of its authority but Becket felt a duty to preserve the property of the Church which was grounded in a religious duty.

As I have mentioned in a previous lecture, his predecessor as archbishop, St Anselm, had similarly demanded of Henry I as a condition of accepting the office, that the see of Canterbury would have its property restored as it had been at the time of his predecessor, Lanfranc. Becket accepted, as Anselm had before him, that it was a sin to permit anything which had once been dedicated to God or the saints, to be withdrawn or diminished. Like every bishop or abbot, he was accountable as a trustee or custodian to the saints to whom his church was dedicated. He had sworn as much in his consecration oath.

The second matter requiring early attention was the pernicious precedent that had been set with respect to Canterbury's most distinctive authority - a privilege that gave the Archbishop of Canterbury a distinct authority - the coronation of the king. The coronation of the young Henry as Henry II's successor, in which so many of the senior figures of the English Church participated, could not be accepted as a precedent. It was not, however, only the coronation that had mattered in this regard. That could be fixed by a second coronation conducted by the Archbishop of Canterbury. It was what this incident represented about the loss of the practical authority of the Archbishop of Canterbury over

the other bishops of England who, save for York, swore obedience to Canterbury pursuant to the law and practice of the Church.

It had been the policy of the English Crown since the time of William the Conqueror to recognise this submission for secular as well as spiritual purposes. It had long been regarded as in the interests of a centralised monarchy to have a centralised church. The restoration of such a relationship was the core of the temptation that Henry offered to Becket. That is what he meant when he said: "I would entrust everything to you".

Under pressure from the Church, Henry had compromised at Freteval. He had abandoned his insistence on a written affirmation of the validity of the Constitutions of Clarendon. He had also abandoned his insistence that Becket cease to be Archbishop. He was prepared to tolerate his reoccupation of the office. He had not, however, abandoned his ultimate objective of having the Constitutions recognised, with all that entailed in terms of preserving, in his view, or expanding, in Becket's view, the authority of the monarchy.

Becket had no illusions about Henry. At the meeting in October when they argued - vociferously - about restoration of Canterbury property, he asked for the ultimate public manifestation of reconciliation: that Henry should give him the kiss of peace. Henry said he would give it, but not yet. He wanted a delay, which would preserve his honour so that when the kiss was given it did not appear to be a surrender. Becket was on probation. Reconciliation may be possible but it would take time and it would depend on conduct.

At their final meeting Becket said to Henry:

"My Lord, my heart tells me that I depart as one whom you will not see again."

"Do you count me faithless?", Henry asked.

"May you never be my lord", Becket replied.

At Freteval Becket had presented Henry with a scroll of claims. However, Pope Alexander had failed to insist that a term of the settlement be a full statement of the claims for restoration of property and payment of compensation, although Becket had stressed the significance of precise detail in the case of a duplicitous prince like Henry.

Finally, almost three months after Freteval, Henry wrote letters to England, implementing the promises he had made. To his son, the Young King, he wrote - stressing at the outset that the peace was made "according to my will":

"I therefore command that he and all his men shall have peace. You are to ensure that the Archbishop and all his men who have left England for his sake shall have all their possessions as they had them three months before the Archbishop withdrew from England."

The final short formal document at Freteval promised restoration as at the date that Becket had been appointed archbishop, but that undertaking was subject to the formula "saving the honour of my kingdom", Henry's, no doubt intentionally ironic, adaptation of Becket's own formula at the commencement of their conflict: "saving my order". The actual instruction to England, however, shortened the period of restoration to three months before Becket's departure. At least Becket would keep what Henry had confiscated towards the end, including at the final breach at Northampton in 1164.

Although the instruction sent to some parts of England made reference to possessions as at the date of Becket's departure, it may very well be that there were no properties confiscated in the last three months in those regions. No doubt Henry regarded this as some sort of concession on his part.

Becket could not, however, abandon his claim to be restored to the whole of the property of the see as at the date of his accession. On the other hand, in matters of property Henry was always punctilious in the promotion of his own interests. Subject to Becket's conduct, perhaps more could be conceded. The political negotiations over Becket's property claims would take some time.

Perhaps of the greatest symbolic significance to Becket was his claim for the restoration of the church at Otford. This had been the first benefice bestowed on Becket by Archbishop Theobald. It was the first significant token of his success. During the exile, Henry bestowed this church on Geoffrey Ridel, the man whom Henry had appointed chancellor when Becket first defied him by surrendering the chancellorship upon his accession as archbishop and who had also been installed, in succession to

Becket, as archdeacon of Canterbury. Ridel had risen in Henry's service throughout the period of the exile.

Becket had suspended him from his church offices, revoked all grants made to him during his exile and, eventually, excommunicated him. Becket came to call Ridel "archdiabolus" or archdevil, rather than archdeacon. Becket regarded him as one of the leaders of the group of "evil advisers" which, he maintained, somewhat disingenuously, in his correspondence, was the source of Henry's hostility towards him. For those seeking to ingratiate themselves with the powerful, the "evil advisers" theme is almost a cliché excuse. It gives the ruler a way out. It serves as a comfort for the rejected. Becket used it to the former effect.

After the peace ceremony at Freteval, the irrepressible ecclesiastic prestidigitator, Arnulf of Lisieux - to whom Henry had recently made a huge loan to satisfy the burgeoning debts he had incurred in building his cathedral - suggested that in the spirit of the moment Becket should absolve Ridel. Becket balked, saying Ridel had yet "to make amends for his error". Ridel promptly confirmed the tenuous nature of the truce when he said:

"Never mind. If he hates me, I will hate him. If he wants to be my friend, I will be his."

Henry - who had recently called Becket an "enemy" to Roger of Worcester and, just the day before, had described Becket to the king of France as "your thief" - took Becket aside and told him not to take any notice of such expressions of hostility.

Becket's insistence on the return of the small church at Otford, irrelevant in practical terms, was nevertheless of great personal symbolic significance. In this and other specific respects, what Becket was demanding was that Henry should abandon those who had been most loyal to the king, particularly those who, as clerics, had a conflicting allegiance to Becket. Obliterating the mutual obligations of past loyalty, in a social system based on such obligations, was not something that Henry was likely to do. Not without something tangible in return.

There were many barons and clerics who had picked up bits of Canterbury property along the way and had become used to enjoying it, in some cases for almost seven years. The most important group of such properties were those held by Ranulf De Broc whom Henry had appointed, no doubt for a substantial fee, as in effect, receiver of the bulk of the Canterbury estates. The centrepiece of the holding was Saltwood Castle in Kent. The castle had previously been held by Henry of Essex, then Constable of England, as a tenant of the archbishop of Canterbury. When Henry of Essex was deposed and forced into a monastery by the king, the archbishop's claim to the castle was not acknowledged. The king kept it and allowed Ranulf to occupy it. As its prior occupation by Henry II's principal general in England would suggest, Saltwood castle was of military significance. The baron in occupation controlled significant parts of Kent. The castle, of course much rebuilt over the centuries, is today in private hands. It was bought half a century ago by Sir Kenneth Clarke and remains privately occupied by his son, Alan, the former Tory Minister, war historian and self-proclaimed serial philanderer.

Henry procrastinated about Becket's claim to the castle. The most he would order was an inquest. He wrote to his son:

"You will cause to come before you the senior and more important knights of the honour of Saltwood and by their oath you will cause recognition to be made of what is held there from the archbishopric of Canterbury; and what the recognition shall declare to be in fief of the archbishopric you will cause him to have."

It is by no means clear what level of impartiality could be expected - even under oath - from the knights of Saltwood, most of whom must have been De Broc loyalists. There is no allowance for other forms of testimony - not least from Canterbury clerics or records. Perhaps, however, the subtlety lay - and in legal matters, Henry was capable of great subtlety - in the onus of proof. Only what was formally found to be the Archbishop's could be handed over. An answer expressing doubt would mean that Becket lost. On any view, the posturing continued.

Becket's representatives were greeted coolly at the court of the Young King when they delivered his father's commands. The young Henry retired with his advisers - Geoffrey Ridel and Richard of Ilchester, the Archdeacon of Poitiers who, with Ridel, had been the elder king's most trusted messenger and negotiator during the exile. The Young King came back with a reply which delayed

even further the effect of the order:

"Ranulf De Broc and his agents have held the lands and possessions of the archbishopric, together with the goods churches and revenues of the archbishop's clerks in different places, like all other agents, by order of the Young King's father; and ... the restoration cannot be seen to and effected without summoning the aforesaid agents."

A date was fixed for their return "for carrying out these orders".

At the time, the harvest was being completed and the final settling of annual accounts had just occurred on 1 October, the commencement of Michaelmas, in effect, the end of the financial year in medieval England. Henry would have been aware of this when he delayed implementing his promises at Freteval to return property until October. Delay was in a lot of interests. Ranulf De Broc was despoiling Canterbury's land. As one biographer reported:

"Before the archbishop's men could get seisin of the manor, there was nothing left on them - not an ox nor a cow, capon or hen, horse, pig, sheep or full bin of corn."

Ranulf De Broc had been excommunicated by Becket at Vezelay for his occupation of church property. The return of the property, with an account of profits by way of compensation, was high on Becket's agenda.

In his first letter to Pope Alexander after the truce at Freteval, Becket had said:

"We shall remain in France until the emissaries whom we have sent to receive our properties return to us, because it is not in our mind to return to him as long as he has taken away a single yard of the church's land. By the restitution of our possessions we shall know unquestionably how honestly he is dealing with us ..."

His subsequent change of tactic - to return to England before the restoration of property - would prove fatal.

The news from his emissaries confirmed the delay and prevarication in this regard. Their report concluded with an unqualified warning:

"Again and again my Lord we impress on your memory, that you should not hurry into England unless you are able to secure the unadulterated grace of the Lord King. For there is no man in England, even amongst those you trust, who does not despair entirely of the peace; and those who should give us advice, whom we relied on especially, all avoid our conversation and flee our company."

Notwithstanding this advice, Becket was alarmed by a new scheme hatched by Henry to undermine the archbishop's authority over the English church. During the period of exile five bishoprics had become vacant and could not be filled in a manner which would be acknowledged as valid under canon law. Although Henry was happy to collect the revenue of the vacant sees, there were limits to his rapaciousness. The church was part of the basic fabric of society. The aristocracy and the people expected such posts to be filled.

Becket regarded extended vacancies in such offices as increasing the pressure on the king to compromise. That is why Pope Alexander had ordered that no positions could be filled in the absence from the electoral college of those canons who had followed Becket into exile. The truce at Freteval re-opened the opportunity of filling the vacancies.

Becket's emissaries reported:

"We have received reliable intelligence ... the Lord King of England has summoned Roger, so-called Archbishop of York, Bishops Gilbert of London and Jocelin of Salisbury, and four or six clerks from each vacant church in England, to elect bishops in accordance with his will and the advice of the aforementioned bishops, and to send the bishops elected by his will and their advice to the Lord Pope for consecration, to the damage of the Church of Canterbury and your confusion, which God prevent. This is why he desires your return to England so much and continues to discredit you so repeatedly and outrageously. Moreover, we see very clear evidence of this devilish plot, believed by all of the inhabitants of the region."

Henry was, at the time, urging Becket to return as soon as possible.

Becket, no doubt, believed that the right of the Archbishop of Canterbury to influence the selection of his suffragan bishops was an aspect of his primacy of the English church. Their formal profession of obedience to Canterbury was the foundation of his nation wide authority. Without that he would be no more than the bishop of Kent. This authority was reinforced by the formal consecration of new bishops, which the Archbishop of Canterbury traditionally performed. However, the other traditional, and equally critical, role of presiding at a coronation, had just been breached.

Becket must have been conscious of the fact that in Rome some regarded all of these functions as an aspect of the archbishop's usual role as papal legate, rather than as accruing in his capacity as Archbishop of Canterbury. This was a common tension throughout Europe. It could not be certain that Alexander would continue to support Becket during a long period of stalemate when the king insisted on certain appointments and the offices remained vacant in the interim.

Becket wrote to Alexander and told him how Roger of York, Gilbert Foliot of London and Jocelin of Salisbury had taken steps to assist the king to improperly fill the vacancies:

"They caused six persons to be summoned from each of the vacant churches so that with their advice they may hold episcopal elections for our province in the king's presence, contrary to the canons, in another realm, in the absence of their brethren, so that if we refuse to consecrate those chosen in this way, they will seem to have a cause for sewing discord between us and the Lord King."

Hiding behind the hackneyed theme of a ruler being led astray by "evil advisers", Becket could have been in no doubt that this entire scheme had been orchestrated by Henry.

John of Salisbury regarded Becket's next steps as a direct response to Henry's new plan. It seems likely that it was this imminent threat to his authority over the English church that triggered, or at least accelerated, the course of events that led to Becket's murder.

Since Freteval Becket had shown caution and moderation. He had remained steadfast in his determination not to return to England, until the property of the church of Canterbury had been restored. His failure to return was, and would inevitably be regarded as, a statement of mistrust in Henry's preparedness to fulfil his side of the bargain. That would increase the pressure on Henry.

As he told the pope about his relations with Henry:

"When we approach him on the subject of restitution, he promises that if we wait and show him our earlier devotion, he will compensate us in such a manner that no just cause of complaint will remain. On the other hand, the well-known habits of the man and the evidence of his actions undermine faith in his promises, for we have been able to secure nothing from him so far except words. ... In the meantime, we are guarding against breaking the peace agreement just made, as far as we can, although it troubles our conscience that we are not demanding redress ... We have been silent and we shall continue to be silent, in the interests of true peace, because your majesty and our lords the cardinals who are with you judged in your wisdom that we should do so but ... we shall not relax any part of the divine law for the impenitent, now or in the future."

It is difficult not to see these words of moderation and caution as anything other than dissembling. It was in this very letter that Becket informed the pope that, contrary to his earlier expressed intention, he was now proposing to leave for England. He was doing so contrary to the warnings contained in the report from his own emissaries, which report he appended to this letter to Alexander.

Becket had resolved to go on the offensive

By letter of 10 September 1170, Alexander had empowered him to reassert his authority over the English church, although only after consultation with the King of France. The basis of the pope's action was the involvement of a significant number of ecclesiastics in the coronation who, in the pope's words "offered their presence and ministry in crowning the new King, contrary to the dignity of the Church of Canterbury".

Becket was armed with letters, which would take effect upon delivery. This final step was left to Becket's discretion. He now decided to take that step immediately and to return to England. He was

well aware that this would renew his conflict with Henry.

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By these letters the pope himself suspended Archbishop Roger of York from office and lifted his own absolution of the bishops of London and Salisbury from the sentences of excommunication originally imposed upon them by Becket. Alexander left it to Becket's "authority and power" what should be done with those other ecclesiastics who participated in the coronation ceremony including, by name, Geoffrey Ridel, who the pope says "it is alleged attacked his mother [i.e. Canterbury] more gravely and spurned the sentence of excommunication issued against him by you, which we consider ratified and confirmed by apostolic authority". Going further, indeed as far as he could go, the pope proclaimed that he would allow no appeal from whatever Becket decided to do with this new letter of authority.

Alexander backed up this edict with further letters. In one he expressly declared that the coronation of the Young King by the Archbishop of York did not constitute a precedent and that the right to crown and anoint the kings of England belonged to Canterbury. In another letter, addressed to Becket and the English bishops, Alexander reaffirmed that excommunicates may not celebrate or be present at the celebration of divine office, and that any priest who allows their presence is thereby deprived of all ecclesiastical office and benefit and if they defy the order, Becket was empowered to excommunicate them.

In a further letter, addressed to Becket and the bishops, the pope affirmed that those who had earlier been excommunicated by Becket, and had been absolved, must surrender the property of Canterbury and the profits thereon within a stated period or they would automatically revert to excommunicate status, again without appeal. The pope also issued a fresh appointment as papal legate to Becket, save for the usual exemption of the Archbishop of York. In a further letter, Alexander authorised Becket to pursue "full authority to exercise ecclesiastical justice", if Henry "does not complete the peace he made with you by the performance of deeds and does not restore to you and yours and to your church the possessions and honours which he has taken away from you". Again, without appeal.

With authority of this breadth and, particularly the pope's rejection in advance of any possibility of appeal to himself, Becket received the authority he had long craved over all but the person of the king. When these letters began to arrive from Rome, perhaps in late September or early October Becket was elated. In the letter in which he told the pope of his new plan to leave for England he was gushing:

"Your clemency has sent us letters - surely conceived and dictated by the Holy Spirit - for the correction and punishment both of the archbishop of York and of our fellow bishops and which condemn the king's transgression with the authority befitting the successor of Peter and Christ's vicar."

Becket was not only overjoyed, he was emboldened. He had, as the pope required, consulted the king of France about how to use his new authority. He wrote to the pope in accordance with Louis' concurrence, no doubt in terms proposed by Becket. First, he asked the pope himself to excommunicate Roger of York, not merely to suspend him from his office. Secondly, he asked the pope himself to excommunicate Gilbert Foliot and Jocelin of Salisbury, not merely to lift the suspension and thereby restore Becket's original excommunication. Thirdly, Becket sought a general authority to excommunicate and suspend any other bishop on the basis that "the new peace may be impeded and hindered on various grounds". Becket was all too aware of Henry's infinite capacity for prevarication. With respect to his new authority, he told the pope: "We should use each as required according to the time and circumstances of the case".

Particularly revealing was a further express authority which Becket sought. He asked that he be able to remove the pope's own excommunication of Gilbert Foliot and Jocelin of Salisbury, "if they cannot be punished" he told the Pope "according to your mandate without re-establishing the schism". Becket wanted to maximise his flexibility in the months to come.

Becket was well aware that the exercise of the new authority with which the pope had armed him, as extended by the new requests, would threaten the truce with Henry. The reason he gave the pope for asking him to himself excommunicate the Archbishop of York and the bishops of London and Salisbury, in the latter cases not simply to allow Becket's excommunication to take effect, was expressly in order to avoid an adverse reaction by Henry against Becket, which he expressed in words dripping with irony:

"Because we fear that a sharp word may inflame the tender ears of that very powerful man and impede the recently begun peace, prostrate with complete devotion, we implore your holiness to impose the same sentence on the forementioned archbishop and bishops, because he presumed to

conduct this coronation in our province, while we were exiled for justice and the church's liberty, when everyone agreed that our church had possessed the right of crowning kings for many years ..."

Becket ended this letter to the pope with a note of apprehension:

"We believe that we are about to go into England, whether for peace or for suffering we do not know; but whatever it is, we shall receive the fate divinely ordained for us."

He was right to be apprehensive. He had decided not to await the new authorities from Alexander. He had every reason to believe that he would receive them, not least because he had the agreement of the king of France to the need for the extended powers. Nevertheless, he had determined to deliver the letters in their present form, notwithstanding his anticipation of a furious response by Henry in one of his uncontrollable carpet chewing rages and to which he had referred as the king's "tender ears". He confidently expected that before anything would happen based on his own use of the original letters, their force would be reaffirmed by the pope himself.

There seems little doubt that Becket would, in any event, have used the extraordinary authority that Alexander had invested in him to reassert his authority over the English church. It seems likely that his intentions in this respect were accelerated by his discovery of Henry's plans to fill the vacant bishoprics. The suspension of Roger from office and the restoration of the excommunicate status of Gilbert Foliot and Jocelin of Salisbury would derail that plan.

Henry II's subsequent conduct in this regard establishes the veracity of the intelligence which Becket received at the time. Eventually Geoffrey Ridel would become Bishop of Ely. Richard of Ilchester would become Bishop of Winchester. On that occasion Henry's writ was particularly subtle: "I order you to hold a free election, but forbid you to elect anyone but Richard my clerk". Robert Foliot, nephew of Gilbert, who had left Becket's personal staff after Clarendon - became Bishop of Hereford, Gilbert's previous see. Reginald Fitzjocelin, son of Jocelin of Salisbury became Bishop of Bath and Wells. John of Oxford who had been excommunicated by Becket at Vezelay for his role as Henry's representative to the Emperor, when Henry was threatening to support the anti-pope, and also for his appointment to the vacant office of dean of Salisbury, became Bishop of Norwich. Indeed, Henry even tried to appoint his bastard son, Geoffrey, as Bishop of Lincoln, but no one would ever consecrate him and he eventually gave up the post of bishop-elect after nine years.

Becket's ecclesiastical opponents did not suffer for their support of the king.

Henry's plan to appoint a brace of relatively young clerks to vacant bishoprics would destroy any prospect of Becket recovering effective control over the English church.

The restoration of Becket's authority over the church had been discussed between the archbishop and the king at Freteval. Herbert of Bosham recounts that Becket had received a clearance from Henry that he could punish his own bishops for their involvement in the coronation. That recollection is reinforced by letter written by Count Theobald of Blois to the pope after Becket's death. Theobald had met Henry and Becket in October and confirmed that "the King granted him free licence and authority to pronounce sentence against them".

Furthermore at the time of the martyrdom, William Fitzstephen, an eyewitness and the most reliable of the biographers, says that Becket told the four knights:

"These penalties have been imposed with the assent of the Lord King and with his express permission granted me at the time we made peace together."

Nevertheless, it is strange that Becket never made mention of this express promise in any of his letters to Alexander. It seems reasonably clear that something passed between them on the subject. It is not likely that Henry agreed, in terms, for anyone to be punished for participation in the coronation. It is not credible, further, that Henry agreed to Becket asserting an ecclesiastical disciplinary authority of a character inconsistent with the Constitutions of Clarendon. The customs of the realm reflected in that document had been placed in the too hard basket at Freteval. No doubt Henry expected that Becket, in the fullness of time and after he had satisfied Henry that he was prepared to behave himself, could reassert his authority over the English church. At least he gave the impression that he would be permitted to act in that way. But any such statement was likely to have been expressed in general terms.

Becket clearly understood that there were limits to what he could do in accordance with whatever Henry had said to him and that the letters from the pope when actually delivered would take him beyond those limits.

At the end of November 1170, a day or so before he himself left for England, an emissary was despatched across the channel to deliver the letters to the archbishop of York and the bishops of London and Salisbury. He found all three together at Dover waiting to embark for Normandy. The letters were delivered just as Becket left France for England.

On 1 December 1170, Becket's ship entered the sheltered port of Sandwich, a port which the see of Canterbury in fact owned and which had recently been restored to his control. The ship arrived with his archiepiscopal cross brandished defiantly in the prow. Becket was greeted by an enthusiastic crowd. However, the welcome was interrupted by the arrival of an armed party led by the king's local administrator, the sheriff of Kent, accompanied by Ranulf De Broc. The threats and menaces were palpable and were only avoided by the intervention of John of Oxford, whom Henry had deputed to accompany Becket. He made it quite clear that Becket himself was under the protection of the king.

The twenty kilometre journey from Sandwich to Canterbury became a triumphal procession. The priests of each village brought out their congregation to display their respect for the archbishop. The advance messenger in T S Elliot's *Murder in the Cathedral* described the progress:

"He comes in pride and sorrow, affirming all his claims,
Assured, beyond doubt, of the devotion of the people,
Who receive him with scenes of frenzied enthusiasm,
Lining the road and throwing down their coats,
Strewing the way with leaves and late flowers of the season."

Herbert of Bosham, never short of a touch of religious melodrama, reported that the adoring crowds chanted the refrain "Blessed is he that cometh in the name of the lord" from Matthew 21.9 - the people's cry for Jesus' arrival in Jerusalem.

When he heard of these events, Henry quite probably reacted in the way Christopher Fry described in his play *Curtmantle*:

"There you have the measure of these people, these vulnerable thousands who look to us
for their safe conduct across time.
You can labour night and day to give them
a world that's comprehensible.
But their idolatry goes to any man -
though he reeks of fault and cares less about their lives
than he does for a fine point of heresy
which wouldn't shake a hair in God's nostril -
so long as they think he bargains with a world beyond them."

Arriving at Canterbury, Becket was escorted by the monks of his cathedral, whom John of Salisbury had, on Becket's authority, recently absolved from their status as excommunicate because of their contagion with those whom the archbishop had thrust out of the community at Vezelay at 1156 and Clairvaux in 1169.

William Fitzstephen reported the scene:

"They decorated the cathedral; they clad themselves in silks and precious garments ... the church resounded with hymns and organ music, the hall with fanfare of trumpets, and the city with loud rejoicing on every side."

After prostrating himself on the pavement in front of his cathedral, Becket entered the building glowing with elation. In the choir, he received the monks one by one and gave each the kiss of peace. He forgave them their lack of support for him during his exile. His forgiveness, however, was not total. At that time, he refused to confirm the ordination of those monks who had entered the convent during his exile. He would relent in this just before Christmas.

The range of emotions is personified by T S Elliot in the characters of *Three Priests*.

First, apprehension:

"I fear for the archbishop, I fear for the church.
I know that the pride bred of sudden prosperity
Was but confirmed by a bitter adversity.
I saw him as Chancellor, flattered by the King,
...
His pride always feeding upon his own virtues.
Pride drawing sustenance from impartiality,
Pride drawing sustenance from generosity,
Loathing power given by temporal devolution,
Wishing subjection to God alone."

Second, simple pious elation:

"The archbishop shall be at our head, dispelling, dismay and doubt
He will tell us what we are to do, he will give our orders, instruct us ...
We can lean on a rock, we can feel a firm foothold
Against the perpetual wash of tides of balance of forces of barons and landholders."

The third priest, more worldly, sceptical, perhaps even cynical, was resigned to whatever came:

"For good or ill, let the wheel turn.
The wheel has been still these seven years, and no good
For ill or good, let the wheel turn.
For who knows the end of good or evil
Until the grinders cease."

In reply to an inquiry about whether the armed party of the sheriff of Kent was following him, T S Elliot had Becket reply:

"For a little time the hungry hawk
Will only soar and hover, circling lower,
Waiting excuse, pretence, opportunity.
End will be the simple, sudden, God given
Meanwhile the substance of our first act
Will be shadows and the strife with shadows."

The "first act" to which he referred was the delivery of the letters of suspension and excommunication to York, London and Salisbury.

The next day the sheriff returned with representatives of these bishops demanding that he should absolve those who were suspended and excommunicated. Becket was well aware that, as the sheriff insisted, the very delivery of the letters was itself a breach of the Constitutions of Clarendon. Furthermore, during the exile, Henry had proclaimed extensions to the customs declared at Clarendon. When Geoffrey Ridel and Richard of Ilchester had summoned all the bishops to a synod in 1169 to uphold the new decrees, no-one had come. Later, however, the oath to uphold the new laws was widely administered to both clergy and laity although, perhaps ironically, Roger of York had led the protest.

One of the new decrees had explicitly prohibited what Becket had just done. It said:

"No plea shall be held concerning mandates of the pope or archbishop; nor shall any mandates of theirs be received in England by anyone."

Nothing had been said about any of these matters at the Freteval settlement. Some of the questions asked by the sheriff of Kent, on the arrival of Becket's party at Sandwich, indicated that these decrees were regarded, not least by those like the sheriff who had certainly taken an oath to uphold them, as still in effect.

The delivery of the letters had rendered effective in canon law the sentences of excommunication delivered by Becket at Clairvaux the previous year against Gilbert Foliot and Jocelin of Salisbury. Both bishops were tenants in chief of the king. The original Constitutions of Clarendon prohibited any such

act without the king's permission. In that respect there is little doubt that the Constitutions accurately reflected the customs in England, observed under all of Henry's Norman predecessors. After all the care that had been taken to omit any reference to the Constitutions or the customs in the settlement discussions, the first thing Becket had done on his return was to flagrantly breach an indisputable, longstanding custom of the realm. He understood full well the provocative nature of this act.

In response to the threats from the sheriff, Becket employed the tactic that he had mentioned in his last letter to the pope. Gilbert Foliot and Jocelin of Salisbury could be absolved if they swore, in Becket's presence, to undertake whatever penance the pope would thereafter order. Even this seemingly conciliatory gesture was in fact an act of defiance. Clause 5 of the Constitutions of Clarendon expressly forbade any oath about future conduct being required from an excommunicate.

It may be that Becket calculated that Henry would accept that this clause - which on its face has no obvious effect on royal interests - was less significant than the clause prohibiting the excommunication of a tenant in chief. It also appears to have been one of the innovations at Clarendon. It was not as well established as a custom of the realm. It appears likely that this carefully prepared stratagem was intended by Becket as a signal to Henry that an accommodation with the Crown's vital interests was possible. At least he was showing a level of respect for those interests.

In the case of Roger of York - who had not been excommunicated, but merely suspended from office - Becket pleaded, disingenuously, that that was the act of the pope and Becket had no authority over him. His suspension had to await a decision by the pope himself, perhaps two months away at a minimum. Henry could seek Roger's advice as much as he liked. But the person who gave it was not an archbishop.

This was a high risk strategy but a subtle and feasible scheme. The conditional absolution of London and Salisbury was something which they, according to the records, were inclined to accept. Roger, who if they had done that would become completely isolated, convinced them that they should take no such step until they knew what the king thought. As Becket reported to Alexander:

"But York, that enemy of peace and disturber of the Church, dissuaded them, advising that they should rather go to the lord king, who always supported them, and that they should send messages to the new king, to convince him that we wish to depose him."

Becket had broken the truce over the customs and he knew it. He knew precisely what to expect. At first there would be an earthquake of fury from Henry at this public thwarting of his will and the defiance of the customs of the realm, as he saw them. It may be, however, that this reaction would be modified as the strength of the pope's support for Becket became apparent.

There were limits to the extent to which Becket was prepared to pander to Henry's conception of his rights. It was apparent that when it came to fundamental matters of the authority of the see of Canterbury, Becket had resolved to stay firm. In any other respect he was prepared to be conciliatory. Henry would either have to enforce his "customs" or ignore the breach. There was scope for compromise but some things were not negotiable. The tribulations of the exile had not been endured for nought.

Becket continued his triumphant progress. He went first to Rochester to be greeted by his old mentor, bishop Walter, alone forgiven for involvement in the coronation. This was probably intended as a tangible signal to the Young King and his court that not everyone involved on that occasion was to be punished. Near London a formal procession of Augustinian canons escorted Becket to the church of St Mary's at Southwark, now Southwark Cathedral. Three miles from London the cavalcade was greeted by a mass choir of three thousand scholars and clerks from the city which urged him on with a *Te Deum laudamus*. However, William Fitzstephen recorded:

"[A] certain foolish and immodest and babbling woman, who thrust herself into courts and public assemblies, one Matilda, cried out and oft repeated 'Archbishop beware of the knife'."

Becket sent conciliatory messages to the Young King expressing his sorrow that it was not he himself who had crowned him. Nevertheless, even a fifteen year old could understand that his coronation was more than slightly tarnished if people could be excommunicated for having participated in it. Acting on Geoffrey Ridel's advice, the Young King refused to see Becket and banned him from visiting royal towns or castles. No-one was going to do anything to change the status quo until the real king had indicated his reaction to the archbishop's new challenge.

Precisely what happened when the news of Becket's defiance arrived at the king's Court at Normandy cannot be stated with assurance. For the first time in the narrative of Becket's life, there are no surviving contemporaneous documents. Until this moment, the story can be told in part on the basis of letters written at the time and which have survived. There are, of course, significant gaps in the correspondence, including gaps which the survival of material before and afterwards suggests may not be entirely accidental. There are also biases and distortions in the written word. Nevertheless, many critical aspects of the story, until the end of 1170, are capable of verification without the distorting effects of memory, ex post facto rationalisation and self-protection as refracted through the prism of the martyrdom.

There is no document referring to events at the king's court that came into existence before the assassination. Everyone present at that court was an accessory to the crime of the century. This is not a situation conducive to candour. Everything said and done after the assassination is more than usually suspect.

With respect to the events which led to Becket's murder - and in particular about the involvement and knowledge of the king in that murder - no witness, nor any recitation of events can be regarded as reliable. The case against Henry is, necessarily, an entirely circumstantial one. The crucial gathering of the king's attendant barons, joined by the deposed prelates newly arrived from London, occurred near Bayeux at Bur-le-Roi, like Woodstock and Clarendon, one of the king's favourite hunting lodges and the place where in 1066 the knights of Normandy had sworn an oath to William, before crossing the channel

The ringing tones of a particular phrase have proven irresistible to historians and playwrights down the centuries: "Will no-one rid me of this turbulent priest." No contemporary source actually uses the phrase "turbulent priest" - picked up, for example, by Christopher Fry in his *Curtmantle*. Nor "pestilent priest" which is Tennyson's version.

One contemporary version of Henry's fatal complaint was:

"I have nourished and promoted in my realm sluggish and wretched knaves who are faithless to their lord and suffer him to be tricked thus infamously by a low clerk."

Another biographer has this version:

"A man who has eaten my bread, who came to my court poor and I have raised him high! He has shamed my kin, shamed my realm; grief goes to my heart and no-one has avenged me."

A third version, perhaps the source of the "turbulent priest" formulation was:

"A curse, a curse light upon all the false varlets I have maintained, who have left me so long exposed to this insolence from a priest and have not attempted to relieve me of him."

Each of these versions may very well have informed the other. They may also have been influenced by an earlier event which was the subject of a contemporary chronicle. Immediately after the excommunications at Vezelay, four years before, John of Salisbury wrote:

"The king complained exceedingly of the Archbishop of Canterbury with sighs and groans; as those who were present reported afterwards, he declared with tears that the archbishop would take from him body and soul. Finally, he said they were all traitors who could not summon up the zeal and loyalty to rid him of the harassment of one man."

However, in 1166 Henry had been actively pursuing the objective of having Becket removed from his position, in a more orthodox manner than murder. Whatever he precisely said in December 1170 was pregnant with more significant consequences.

It was only with the arrival of the English bishops, led by Roger of York, that Henry heard the full text of the papal letters. They accused him of "persecuting the English church", referred to his Constitutions as "evil customs" and "unrighteous statutes" and described his conduct as "prevaricating" and "obdurate". It is easy to accept the account of one biographer that the text made him turn "white with fury".

William Fitzstephen, in style, temperament and experience the most reliable of the biographers, was in Canterbury and had to rely on hearsay about the events at the royal court. His account links the outburst to a particular conversation:

"The King asked the Archbishop of York and the bishops of London and Salisbury to advise him what to do. 'It is not our part' they said 'to tell you what must be done'."

They told him to seek counsel from the barons and knights. This is revealing. The one thing that a priest could not advise was the shedding of blood. Fitzstephen's account goes on to refer anonymously to one of the bishops, almost certainly Roger, who made the point clear:

"At length one says 'My lord, while Thomas lives you will not have peace or pride or see another good day'. On hearing this such fury, bitterness and passion took possession of the King, as his disordered look and gesture expressed, that it was immediately understood what he wanted."

The suggestion contained in this passage was set in writing in the years immediately after the martyrdom when Henry was still king, indeed, during the period when he was swearing oaths that his fit of pique had no such intent. In the circumstances, this is as close to an allegation that Henry ordered the murder as one would expect to find.

There can be no doubt that Henry received complete support from his secular barons for strong action against the archbishop.

The version subsequently accepted, by at least some of the contemporary chroniclers, was that there were two groups of barons who left Bur-le-Roi. On Christmas Eve, some time after Henry's outburst, four barons left the meeting in, it was subsequently asserted, a covert way. However, some assert that a different group of barons was formally appointed by the king to go to England to arrest the archbishop. If the latter group existed at all, it proved less speedy than the former.

On Christmas day, before celebrating mass, Becket ascended the pulpit of his cathedral to deliver a sermon. He was fatalistic about the risks he was taking. He noted that the cathedral already had one martyr, St Elfdige and he said: "It was possible that in a short time they would have another". Like his predecessor St Elfdige - murdered by marauding Vikings in 1012 for refusing to pay money - Becket did not seek martyrdom. He was, however, resolute in his course and understood that death was a possibility.

T S Elliot captures the sense of inner contentment of a man who had made up his mind after the anguish of long irresolution. In his version of Becket's last sermon on Christmas day - composed for verisimilitude as a speech in prose, not in the poetic form of Becket's other remarks in the play, unlike the four knights who never spoke in poetry at all - Becket said:

"A Christian martyrdom is never an accident for saints are not made by accident. Still less is a Christian martyrdom the effect of a man's will to become a saint, as a man by willing and contriving may become a ruler of men. Martyrdom is always the design of God for His love of men, to warn them and to lead them, to bring them back to His ways. It is never the desire of man; for the true martyr is he who has become the instrument of God, who has lost his will in the will of God and who no longer desires anything for himself, not even the glory of being a martyr."

These observations hark back to his rejection of the ultimate Tempter earlier in the play:

"The last temptation is the greatest treason:
To do the right deed for the wrong reason."

There was nothing maudlin about Becket's sermon on Christmas day. His tone, according to Herbert of Bosham, became "fierce, indignant, fiery and bold". He repeated the excommunication of the three prelates who had participated in the coronation. He proceeded to excommunicate others including, again, Ranulf De Broc and Nigel de Sackville, whom had already been excommunicated at Clairvaux. Sackville had been appointed to occupy the church on the archbishop's manor at Hayes. Only two months before, Nigel, who was the personal chaplain to the king, was present when Becket and Henry met at Ambois. Sackville had recommended that a requiem mass be said so that Becket could not ask the king for a kiss of peace, which was omitted in such a mass.

In his final letter to the pope, Becket was particularly scathing of the continued insubordination of the clergy who had attached themselves to Henry's court:

"... The intruders still occupy our churches by violence; among these our archdeacon, Geoffrey Ridel and Nigel de Sackville, his clerk, are the foremost in all this plague and distress in the church: one, namely Geoffrey, holds the church of Otford by force and the other, namely Nigel, occupies the church of Hayes, which according to your mandate they should have returned to us and the clergy to whom they belong, together with the revenues received from them."

By continuing to strike at Henry's closest personal aides, Becket was re-emphasising his defiance of the king. He would not compromise on the rights of his church, as he defined them. The advice which Henry had received was unquestionably correct: for as long as Becket lived the king could look forward to continuing confrontation with an archbishop who appeared to have the unqualified backing of the pope.

The threat that had made Henry compromise - an interdict over England and his continental lands together with a personal excommunication - was a blunt weapon. Usually an order of this character was imposed indefinitely until something was done or something being done was stopped. It is harder to conceive of its use as a punishment for past conduct, unless backed by military force from internal revolt or the king of France. If Becket were dead there was not much that the pope could order the king to do, at least not about the death. There would be consequences, perhaps serious ones. Henry had to balance those risks against the effects of continuing confrontation without predictable end.

One can never be sure, the records do not permit that. In my judgment, Henry knew.

Later when the royal court was forced into a process which we would today call "spin" - to deny complicity in the murder - the assassins were portrayed as simply having misunderstood the king's enraged remarks. However, the four knights were not illiterate, bovine ruffians. They were not, to use T S Elliot's phrase, from "the raw nobility whose manners matched their fingernails". They were as Herbert of Bosham described them: "... barons of his household, magnates of substance, notable even amongst his great friends".

Hugh de Morville held extensive estates in the north centred on the king's castle and town of Knaresborough in Yorkshire. He was one of a handful of barons who were called upon to formally witness the Constitutions of Clarendon. William de Tracey counted amongst his ancestors the sister of Edward the Confessor and an illegitimate son of Henry I. An experienced soldier with thirty knights fees he had estates in Devon, Gloucestershire and Somerset. Reginald Fitz Urse, who also held land in Somerset, had a mother described as a "niece" - probably a euphemism for a bastard daughter - of Henry I. Richard Le Bret, the youngest member of the gang, was the youngest son of a family with significant holdings in Somerset and had been a close friend of William, Henry's deceased younger brother.

The probability that such barons would act covertly in the way that the official information management exercise successfully put forward, must be very low.

The four knights proceeded to England and raised a band of troops, in the king's name. They confronted the archbishop and made specific detailed demands, again in the king's name. They ransacked the archbishop's lodgings and gathered all the private papers, letters and charters they could find and despatched them to the king. They invaded the sanctuary of the church and assassinated the king's principal enemy. They did all this motivated by loyalty, misguided loyalty, so the royal spin doctors would have it.

Even after 800 years it is difficult to believe that they did not discuss the matter with the king and receive approval. More likely they had approval, qualified by the king's need to deny involvement.

Most revealingly, they were never punished. Their names and those of their descendants appear in the records acquiring and disposing of property and, in the case of de Tracey, being appointed to an official position in Normandy. No doubt some form of penance was extracted from them, as it was from the king himself, who submitted to a public flogging at Canterbury two years later.

One record suggests that de Tracey's penance included a gift to the chapter of monks at Canterbury. A deed in the cathedral records indicates that he donated a manor and did so in the name of Becket. He did not, however, make his gift conditional on prayers for himself but, tactfully, required the gift to

be used for the more general purpose of "celebrating masses for the living and the dead". It was, perhaps, asking too much to ask the monks of the cathedral to pray for the soul of the martyr's murderer.

The renewed excommunications of Christmas day would have been the first news delivered to the four knights as they converged on Ranulf De Broc's Saltwood Castle on the evening of 28 December. Greeted and briefed by De Broc, they were fortified in their determination.

The next morning, the four knights left Saltwood castle accompanied by an armed band drawn from the De Broc estates and proceeded the twenty-five kilometres along the old Roman road known as Stone Street to Canterbury.

The chronicles are unanimous that the four asserted to De Broc, and to others who sent armed men to accompany them, that: "They had come to settle the affair by order of the King". According to the later royal explanations this statement was false. This was not an official posse that got out of hand. They had no right to claim to represent the king at all. Deniability in such matters was, of course, essential.

The band gathered first at St Augustine's Abbey on the outskirts of the walled city of Canterbury. They were welcomed and given additional armed knights by the royal loyalist Abbot Clarenbald, whose venal and lascivious conduct - including seventeen illegitimate children at one of the abbey's manors - was already a public scandal. He had been appointed by Henry in 1163, but was never formally consecrated before being removed in 1172.

Accompanied by Robert de Broc and a core group of a dozen armed men, the four knights proceeded into the walled cathedral precinct. They dismounted and left their arms and armour under a large mulberry tree in the centre of the courtyard. With cloaks hiding their chain mail, they approached the archbishop's palace adjacent to the cathedral. It was mid-afternoon.

The next hour - with no less than five eyewitness chronicles and additional accounts based on investigations with other eyewitnesses - is, as the foremost historian of the period Dom David Knowles stated, the best recorded hour in medieval history. There are differences in the various versions, but also a substantial overlap. Reading them together enables the events to be recounted in some detail which, at least in general terms, is likely to be reasonably accurate.

The four knights were immediately recognised as royal courtiers and ushered into the archbishop's private chambers adjacent to the Great Hall of his palace. Reginald Fitz Urse who had been appointed spokesman asserted:

"Our lord the King has sent us from overseas to demand that you absolve the bishops whom you excommunicated on your return to England and restore those whom you suspended from office. Afterwards, at Winchester, you must make satisfaction to the King, his son, whom you are seeking to deprive of his crown, and there stand the judgment of the court."

Becket defended his position forcefully and in a way that made it clear that there was no room for any conflict of loyalty. The bishops owed their primary loyalty to him, just as the knights owed their primary loyalty to the king. Becket continued:

"Moreover it is not for me to annul the sentence of the lord pope; since an inferior power cannot loose those whom he has bound. Nevertheless, although I have no power to bind or loose in my province, I have granted the petition of the bishops of London and Salisbury for absolution and the removal of their suspension from all the others, on condition that they humbly sue for pardon and agree to stand judgment before the ecclesiastical court and to give security the same. They have rejected this offer which, however, still remains open."

Becket treats as irrelevant the clause of the Constitutions of Clarendon which, in terms, forbids such conduct on his part. He continued:

"As for the coronation of the new King, it stands firm, steadfast and unshaken. The lord pope has punished the agent of the coronation without detriment to the dignity of the Crown - because one who had no right to do so usurped the prerogative of our office in a place where he had no right to act and the whole episcopate is afflicted by this injury which it has borne in silence. These penalties have been imposed with the assent of the lord King and with his express permission granted me at the time

we made peace together."

According to one biographer, Becket elaborated the last assertion. Addressing Fitz Urse he said:

"You were there yourself Reginald, and so were two hundred knights, when the king granted me permission to avenge the wrongs done to my holy church. I will right them myself; it is for me to do it."

Fitz Urse vociferously denied he was present when anything like that occurred and explained:

"What, did the king give into your hands all the men who crowned his son? And everything they did, as you know, was done by him. In our very hearing you make him out to be a traitor! You dishonour him as you have always done."

"No I do not" Becket replied. "I do not think him a traitor. I do not seek to shame him. But he did grant me permission to do justice to them on the day when God set love and peace between us two. I complained to him about them by name and he granted me - and 200 men heard me - permission to take my full rights on them."

Whatever Henry may have said - no doubt accepting Becket's right as primate and legate to impose ecclesiastical discipline such as suspensions - it is inconceivable that Henry had agreed to turn a blind eye to acts which breached the Constitutions.

Hugh de Morville, who Becket regarded as the highest in rank of the group before him, spoke for the first time:

"Why did you not complain to the King of these outrages? Why did you take upon yourself to punish them by your own authority?"

Becket snapped back:

"When the rights of the church are violated, I shall wait for no man's permission to avenge them. It is my business and I alone will see to it."

Another biographer elaborates this crucial, and in many respects, tragically definitive assertion:

"The King has nothing to do with me or with my clerks. I will punish them, as it is my business to do. I cannot go running to court for every offence. No, I am a priest and as such I will exercise divine justice upon those who offend against holy mother church."

It was plain that the Archbishop was resolved never again to compromise his core authority. He was dismissive of suggestions by John of Salisbury to calm the proceedings. The time for negotiations and diplomacy had past.

Fitz Urse demanded: "From whom then do you hold your archbishopric?"

Becket responded:

"My spiritual authority I hold from God and the lord pope. My temporalities and material possessions from the lord king."

Fitz Urse said:

"Do you not recognise that you hold everything from the king".
"By no means; we must render the king the things that are the king's and to God the things that are God's."

Here, near the end, the irreconcilable institutional conflict at the heart of this whole saga, is stated with pellucid clarity.

Grinding his teeth with rage, Fitz Urse proceeded:

"Well then this is the king's command, that you leave the kingdom and all his other dominions with everything belonging to you, for from this day there can be no peace between him and you or any of your people because you have broken the peace."

Determined not to fail in his duty to the church, as he had once done at Clarendon, Becket refused:

"Cease your threats and still your brawling. I put my trust in the King of Heaven who for his own suffered on the cross. For from this day forward no-one shall see the sea between me and my church. I have not come back to flee again. Here shall he who wants me, find me."

Another eyewitness recalled him saying:

"Once I fled like a timid priest. Now I have returned to my church and the counsel and the obedience of the lord pope. Never more will I desert her. If I am allowed to perform my priestly functions in peace, well and good; if not, God's will be done."

Sceptical to the end, perhaps calling their bluff, Becket added:

"You have no right to bring me such a message. My lord the King is a man of honour and loyalty. He would not send me anything of this kind. He will not ratify it."

Fitz Urse responded, lying again according to the later royal spin doctors:

"... And we will make them good, for you ought to have shown respect for the King's majesty and submitted your vengeance to his judgment, you have followed the impulse of your passion and basely thrust out from the church his ministers and servants."

Overborne by passion - which one biographer called "fervour of spirit" and another characterised as Becket being "brave as a lion" - the archbishop disdainfully exclaimed:

"Whoever shall presume to violate the laws of the Holy Roman see or the privileges of Christ's Church and shall refuse to come of his own accord and give satisfaction for the offence, whoever he shall be he shall be met with no mercy at my hands, nor will I delay to inflict the censures of the church on the delinquent."

Irrespective the knights should understand, of any secular customs or laws.

Stepping forward, threateningly close, Fitz Ures declared:

"We tell you plainly that what you have said will recoil upon your head."

Unmoved Becket was defiant:

"Are you then come to slay me. I commit my cause to the great Judge of all mankind and will not be moved from my purpose by your threats. Your swords are not more ready to strike than my soul is to suffer martyrdom."

As the four knights left the room one of them uttered a last unrecorded insult which Becket heard. Rushing to the door, he angrily declared: "Here shall you find me! Here shall I wait for you!"

The archbishop's assistants were alarmed but still unsure what to expect. John of Salisbury questioned the archbishop's emotional response:

"My lord it is a most remarkable thing that you will take advice from no-one. What need was there for a man of your rank to rise up only to exasperate them still more and to follow them to the door? Would it not have been better to have taken counsel with those who were with you and given them a milder answer."

Becket replied:

"My counsel is now all taken, I know well enough what I have to do".

"Those knights only want an excuse for killing you" John said.

"We all have to die" the archbishop said "and we must not swerve from justice for fear of death."

The four knights went back to the mulberry tree in the centre of the yard to remove their covering garments, put on their hauberks, and gather their swords. Returning to the palace they found axes at a building site and used them to smash through doors.

Becket's assistants pointed out that vespers was about to commence in the cathedral. With a measured step, which was excruciatingly slow to the monks about him, Becket, preceded by his cross bearer, left his chambers in procession. The eyewitnesses are in stark conflict, some only recall rush and panic, others recall the archbishop's calm dignity. The procession went down the staircase, connecting the palace to the cloisters.

As they entered the northeast transept of the cathedral from the cloister, the tumult of the knight's party caused the monks in the choir to stop singing vespers. As some monks tried to close the doors from the cloister Becket turned on them:

"It is not right to make a fortress of Christ's church which is a house of prayer. It is able to protect its own even if its doors are open. We shall triumph over our enemies by suffering rather than by fighting, for we came here to suffer, not to resist."

Perhaps Becket had in mind that, whatever orders the knights had received from Henry, they would not despoil the sanctuary of the cathedral. Most of his assistants, including John of Salisbury, had no such faith. They fled to pray at the various altars or to hide in the dark passages and recesses of the crypt or to seek refuge up a spiral staircase in the arched chambers of the roof.

The sanctity of this consecrated place was soon to be tainted by the pollution of blood. From this day for almost a year, until 21 December 1171, there would be no services in the cathedral. As one biographer recorded:

"The monks whispered the day and night services in their chapter house, without chant; the crosses in the church were covered and the altars empty."

Led by Fitz Urse crying: "After me, King's men!", the four knights clad in full armour with visors down, drawn swords in one hand and axes in the other, entered the cathedral by the northeast transept.

"Where is the traitor?" Fitz Urse bellowed. There was no reply.

"Where is the archbishop?" one of the knights cried out.

"Here I am, what do you want".

"That you die now! It is impossible that you should live a moment longer."

"I am prepared to die for my God to preserve justice and my church's liberty."

They offered him a last chance:

"Absolve and restore to communion those whom you have excommunicated and the functions of their office to the others who have been suspended."

"There has been no satisfaction made and I will not absolve them."

"Then you shall die this instant and receive your dessert."

"I too, am prepared to die for my Lord, that in my blood the Church may obtain peace and liberty."

The four knights tried to drag him outside, to avoid aggravating their sacrilege by defiling the sanctuary. Becket, tall and strong, resisted by clasping a pillar:

"I will not go hence. Here shall you work your will and obey your orders."

Note "obey your orders". At this moment, if the chronicles are to be believed, Becket's scepticism that this could be occurring at the instance of the king had disappeared. He had concluded that these men - whom he knew well - would not dare behave in this way without express authority. His judgment is entitled to respect.

As Fitz Urse swung his sword to deliver the first blow, Becket is recorded as saying:

"To God and Saint Mary and the saints who protect and defend this church, and to the blessed Denis, I commend myself and the church's cause."

At this last moment, Becket invoked Saint Denis, patron saint of France. He knew that these words would get back to King Louis and, more significantly, to Henry. For the king of France was Henry's most bitter rival and Becket's most likely avenger. Henry would understand the words as treachery and as an appeal to Louis for vengeance.

With a second blow Becket, still obstinately upright said: "Into thy hands oh Lord I commend my spirit."

At a third stroke, he fell to his hands and knees and softly uttered his last recorded words:

"I am ready to die for the name of Jesus and the protection of his church."

With a fourth stroke, as the winter evening gloom engulfed the cathedral, Becket was dead.

Forensic Accounting in an Adversary System - Address to the 4th Annual National CA Forensic Accounting Conference

**FORENSIC ACCOUNTING IN AN ADVERSARY SYSTEM
ADDRESS BY THE HONOURABLE J J SPIGELMAN AC
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THE 4TH ANNUAL NATIONAL CA FORENSIC ACCOUNTING CONFERENCE
INSTITUTE OF CHARTERED ACCOUNTANTS IN AUSTRALIA**

SYDNEY, 4 SEPTEMBER 2003

It would be remiss of me not to commence these remarks with an acknowledgment of the enormous assistance that the judiciary receives on a daily basis from the skill and dedication of expert witnesses who appear before the courts. Judges are frequently called upon to resolve disputes on a basis which requires an understanding of arcane subjects including, for those of my colleagues who are mathematically challenged, matters of computation which may appear quite simple to you. Such complexities extend further to the need to understand the prospects of businesses and, regrettably on occasions, to the complexities of determining alleged negligence on the part of accountants.

Such assistance comes, first, in the form of helping solicitors and barristers to put the material in a form likely to be comprehended by a judge. This process is brought to fruition in the expert report and oral evidence.

The contribution made by expert witnesses, relevantly accountants, is much appreciated by judges. In a large proportion of the work we have to do the work simply could not be done without such assistance. I realise that for some of you it is an integral part of your business. Even so, the process is not always an undiluted pleasure.

Many of you will, no doubt, have experienced the tribulations encapsulated recently by an English judge, Sir Stephen Sedley, who propounded what I believe will become to be known as Sedley's Laws of Documents as follows:

First Law:

Documents may be assembled in any order, provided it is not chronological, numerical or alphabetical.

Second Law:

Documents shall in no circumstances be paginated continuously.

Third Law:

No two copies of any bundle shall have the same pagination.

Fourth Law:

Every document shall carry at least three numbers in different places.

Fifth Law:

Any important documents shall be omitted.

Sixth Law:

At least 10 percent of the documents shall appear more than once in the bundle.

Seventh Law:

As many photocopies as practicable shall be illegible, truncated or cropped.

Eighth Law:

(a) At least 80 percent of the documents shall be irrelevant.

(b) Counsel shall refer in court to no more than 10 percent of the documents, but these may include as many irrelevant ones as counsel or solicitor deems appropriate.

Ninth Law:

Only one side of any double-sided document shall be reproduced.

Tenth Law:

Transcriptions of manuscript documents shall bear as little relation as reasonably practicable to the original.

Eleventh Law:

Documents shall be held together, in the absolute discretion of the solicitor assembling them, by:

(a) a steel pin sharp enough to injure the reader,

(b) a staple too short to penetrate the full thickness of the bundle.

(c) tape binding so stitched that the bundle cannot be fully opened, or,

(d) a ring or arch-binder, so damaged that the two arcs do not meet.

I am sure you all have witnessed some or all of these laws in their practical operation. However, you, like all judges, have had to soldier on regardless.

The particular topic on which I have been asked to address you directs attention to the relationship between expert evidence and the adversary system. That system is one of the two great mechanisms for the identification of the truth that is the product of centuries of human ingenuity. It stands in contrast with an alternative system, frequently referred to as the inquisitorial system. Both approaches have, and indeed always have had, detractors. There is, however, over recent decades, a distinct sense of convergence between the two systems. The multi-faceted process known as globalisation has unquestionably increased the awareness of practitioners in each system of the virtues of the other. This convergence is occurring both in terms of substantive law and procedural law.

It is not as if we have never had experience of investigatory methods. Judges have, over the years, frequently been appointed to conduct inquiries into matters including, for example, accidents which led to death or injury and financial scandals. When a judge is appointed to a commission of inquiry of that character he or she will have a completely different relationship with experts than that which prevails in an ordinary trial, including for judges who may conduct trials arising from the same events.

The structure of an inquiry inevitably produces a number of parties who are clearly in an adversarial relationship, generally seeking to point the blame at each other and protect their position in future litigation. The judge does receive great assistance from the forensic skill of those representing parties before the inquiry and of course from the respective experts. However, in an inquiry, as distinct from a trial, a judge will have experts available to him or her, frequently as members of the tribunal inquiring into the incident or as consultants or on staff. The judge will develop a relationship with the experts of a character similar to that which the judge will have experienced when a legal practitioner calling experts in a case. In such a context it is possible to have informal, sometimes lengthy, discussions about the basic aspects of the field of expertise, including the ability to have first principles explained laboriously but cost effectively. The principle of open justice requires that, in a trial context, this process of educating the judge occurs in open court and at greater expense.

Over the past two decades or so, the degree of involvement by judges and other court officers, in the preparation for and the conduct of trials has been transformed. In many respects the changes have constituted a modification of the pure form of adversarial system. Judges accept greater responsibility for the management of cases. This process may not have seen its course.

Two distinct considerations have been driving this transformation. The first is the change in public expectations with respect to accountability for public funds that has affected all governmental institutions. The second is a traditional, albeit enhanced, concern for access to justice.

Many areas of activity have witnessed almost revolutionary changes in the practice and procedures of governmental institutions. There are increased public expectations about the accountability of public decision-makers, especially with respect to public funds. Restrictions on the availability of resources and public expectations of restraint or reduction in tax burdens have focused attention on the efficiency and effectiveness with which public institutions are conducted. The emergence of case management in place of the traditional hands-off approach to the conduct of litigation has been the judicial response to these changed expectations.

Considerations of access to justice, perhaps a more traditional concern of the judiciary, have reinforced these developments. Much case management has been directed to reducing delay which itself, in the traditional aphorism, is a denial of justice. Delay is, further, one of the factors which increases the costs which litigants must bear as participants, not always willing participants, in the civil justice process. The cost of litigation lies at the heart of the access to justice debate. It remains a major challenge.

As is well known, the traditional symbol of justice is a woman with a blindfold, a sword and a pair of scales. The origin of this symbol is Themis, the Greek goddess personifying justice, wisdom and good counsel, often portrayed carrying a pair of scales. The blindfold, it appears, was introduced with the Roman goddess, Justitia. This image may need to be modified in order to reflect contemporary judicial practice. When Gulliver went to Lilliput, he discovered that the representation of the image of "Justice" in Lilliput was quite different. In Lilliput the statue of "Justice" had both eyes firmly open. Indeed, the statue also had eyes in the back of her head. This is an appropriate symbol for judicial case

management.

The courts are well on the way to overcoming the problems of excessive delay. The extraordinary delays of the past have been overcome. There is some way to go before we can claim victory, but I believe we can expect that delay occasioned by the courts will no longer be a major difficulty in the courts of this State in the foreseeable future.

This, of course, is not cause for complacency. Contemporary expectations of governmental functioning do not permit such complacency. The focus of attention will now be on creating a proportionate relationship between the costs of litigation and the issues in dispute. We have a long way to go before there is any such proportionate relationship. In the short term our target should be the more modest one of ensuring that there is, in all litigation, a rational relationship between the cost of the litigation and what is in dispute. We can then move on to try to establish a proportionate relationship.

It is a fundamental part of the adversarial system that litigants determine, in large measure, what issues are raised and how they are fought. At the heart of the system is a recognition of the autonomy of the individual. Individuals are entitled to exercise control over their own lives and they are entitled to participate in decisions which affect their lives to the maximum degree possible. No arm of the state, including the administration of justice, should control how citizens conduct their affairs, including their legal affairs.

Personal autonomy and participation and personal freedom have very deep roots in this country. They are solidly grounded in the 900 year old tradition of the common law. One of the reasons why these values are so secure is because they have been, and continue to be, reflected every day in the procedures within the courts, indeed within the very structure of our courtrooms. It is true that the adversary system is not the cheapest form of legal decision-making. However, nor is parliamentary democracy the cheapest form of government. It is a system that is particularly effective in protecting personal freedoms.

For those of us who believe in the value of this historical tradition, it is incumbent upon us to continue to improve the effective operation of the adversary system. That improvement may require limitations on the freedom of action of the legal profession and on other professions who appear as witnesses to give expert evidence. Here are limits on the public resources which are appropriate to be devoted to resolution of private disputes. There are difficulties in ensuring that the costs of the process are proportionate to what is at stake.

An economist would put the problem in terms of market failure. In a market for legal services in which knowledge was perfect, clients would ensure that the cost of litigation would be minimised and reasonably proportionate to the value to them of success in the litigation. Of course the value to a particular litigant of asserting a principle may have no relationship to its objective value to others. Many of the most important cases that have advanced the common law over the centuries, have been brought by pig-headed people. I stress that the standard I apply in this hypothetical market is the value to the litigant, not some objective valuation done by a person in an official position such as a judge.

The inadequacies of the information available to clients about the legal process and about the skills of their own lawyers prevent them exercising control over the market for legal services in the way a competitive market would. The system is not geared to obtaining second and third opinions. Even with the benefit of hindsight, it is not easy to assess the value of the advice and representation that has occurred along the way. Repeat players in the litigation process such as insurance companies may have advantages in this respect. However, generally, there is a significant market failure which leads to disproportionate costs on too many occasions. Managerial judging may be regarded as a form of state regulation by judicial officers to offset the market failure caused by the inadequacy of information about legal services available to individual clients.

The task of establishing a rational, let alone a reasonable, proportionality between what is at stake in proceedings and the resources of the parties and of the community that it is appropriate to devote to the resolution of a particular dispute, is a difficult one. It is a matter which is complicated by appeals, sometimes multiple appeals, as of right or by leave. The judicial system is organised in layers, like Dante's Hell and for much the same reason.

In an English dispute involving distribution of property after a divorce where the total value of the property was 127,400 pounds, the legal costs expended in deciding how they should be divided

exceeded 128,000 pounds. In that case Lord Hoffman said:

"To allow successive appeals in the hope of producing an answer which accords with perfect justice is to kill the parties with kindness." [1]

The legal system must stop killing parties with "kindness". From the perspective of the legal profession, and from the perspective of others involved, like expert witnesses, the process may be more accurately described as "killing the goose".

We have witnessed, particularly over the last twelve months, a great deal of legislative intervention in the administration of civil justice designed to limit the frequency of civil litigation. This is the culmination of over two decades of such developments, commencing with motor vehicle accidents, then industrial accidents, then medical negligence proceedings and, more recently, other professional negligence actions and public liability proceedings. In all of these debates, over the decades, the cost of administering the system has been a significant feature. The replacement of an adversarial system by some form of administrative process, which has happened in a number of different areas, has been influenced to a substantial degree by what is regarded as an excessive proportion of the total amount made available for compensation that is consumed by the process of deciding who gets what and how much.

This is what I refer to as "killing the goose". It is incumbent on all of us who are part of the system to do what we can to ensure that the costs of the process are proportionate to what is at stake. That has included changes in the way expert evidence is administered within the system.

In addition to the factors to which I have referred, there has been one other consideration influencing the change in court practice with respect to expert evidence. That consideration is the issue of bias by experts. When I refer to bias, I do not refer to unprofessional conduct, let alone to dishonesty. Instances of that character are fortunately few and far between. The issue is one of partisanship, of the expert acting as an advocate, of the expert identifying him or herself as a member of an adversarial team, whose role is to formulate arguable proposition. In the old aphorism: "He who pays the piper ...".

The difficulty posed by partisanship is not simply one of cost and delay, although there are such effects. Rather it is a question of the quality of the decision making process.

Where a judge is reliant on experts to assist in determining important issues in dispute, it becomes extremely difficult to determine the best or correct outcome in the face of conflict between experts that is driven by partisanship of this character. The more esoteric the relevant area of expertise, the greater the risk of an inappropriate outcome. From what source is the judge to acquire the information that will enable him or her to choose in a proper and informed way between expert testimony that bears this partisan character? Sometimes there are clear distinctions between the experts in terms of their professional standing and level of expertise. However, experts are not always selected for such standing or competence. Nor are they always selected because their opinions are representative of the relevant professional discipline. The predominant view in the relevant discipline may not even be presented to the court. Where the court is presented with opinions at the extremes of plausibility in the relevant discipline, the judicial decision maker will often find it extremely difficult to determine an appropriate outcome.

Surveys of judges, confirmed by my own conversations with trial judges, indicate that the belief that expert witnesses are often biased is widespread amongst the judiciary. That has been an important factor in determining the new procedures that have been introduced over recent years. This consideration is motivated by a concern with the fairness and justice of the outcomes of the decision making process. It is not simply driven by cost considerations.

The new procedures with respect to expert evidence adopted in most Australian courts are basically of a similar nature, for example, in the Federal Court and the Supreme Court of New South Wales. There is an alternative model which differs in some respects, one of which is of considerable significance. That is the procedure in England under the Civil Procedure Rules, which has influenced new rules to be implemented in the Family Court. I will concentrate on the practice in the New South Wales Supreme Court found in Pt 36 r13C and r13CA, the Expert Witness Code in Schedule K and Pt 39 of the Supreme Court Rules and Practice Note No. 121 on "Joint Conferences of Expert Witnesses".

The details of these rules are, I am sure, well known to this audience and do not require to be set out.

The topic on which I have been asked to address you does however indicate that some elaboration is appropriate before I turn to making observations about the direction in which this process of court involvement in the preparation and presentation of expert evidence may be going.

The first matter is the affirmation of the principle that an expert witness has an overriding duty to assist the court; that the expert witness is not an advocate for a party and the paramount duty is to the court, rather than to the party. This approach, which commenced as a judicially promulgated set of principles in *The Ikerian Refer*[2], has come to be reflected in various guidelines or codes promulgated by courts and by professional organisations. This now includes your own "Statement of Forensic Accounting Standards - APS 11 & Guidance Note 2", issued today.

This is not a duty which the court enforces by a sanction in the same manner as it may enforce duties to the court owed by legal practitioners. In a very real sense, what underlies the duty to the court is in fact a duty of fidelity to the field of expertise, often of a professional character. The public interest in the administration of justice demands that fidelity to professional standards be manifest in legal proceedings as one of the requirements of the privileges which are otherwise granted to a profession. I realise that not all expert witnesses are "professionals". Nevertheless, the professions do cover a wide area of expert evidence, including that of accountants.

The identification of a duty to the court does represent a modification of a pure adversarial model. There is some anecdotal evidence that the introduction of the new requirements has had some effect on the practice with respect to expert witnesses. I do not, however, see any evidence that the adversarial culture has yet been modified to a substantial degree. Long established practices will, I appreciate, take time to modify. However, it is not apparent that the adversarial culture in many areas of conflicting expert evidence will dissipate over time to any substantial degree without further changes.

The second feature of the modification of practices is the emphasis given to joint conferences of experts. This is the subject of express powers in the Supreme Court Rules and a detailed Practice Note by way of guidance as to how such a conference should be conducted. This is reflected in your own new Standard. The objective of these conferences is to reduce the scope of disputation between the experts. It is the experience of judges that, when experts confer, improbable hypotheses are abandoned and extreme views are moderated. Pride in one's expertise and one's reputation amongst fellow experts is often, but not always, an antidote to the commercial self-interest that may make an expert act as a member of an adversarial team.

There are difficulties in joint conferences in terms of differences in style and authority amongst experts which could lead one to prevail over another in circumstances where that is not justified. The courts will need to be conscious of the possibility that a systematic bias does not emerge in favour of those repeat players who can secure the services of the best and most assertive experts on a more regular basis than their opponents.

The joint experts procedure has significant advantages. However by the time experts are conferring, litigants have already incurred the major part of the cost of having at least two experts who, frequently, agree on a wide-range of matters.

The overwhelming majority of cases settle. Even in the case of those which are litigated, there are many cases in which the bulk of each expert's report turns out to be entirely uncontroversial. The cost of determining the non-controversial matters has, in effect, been double what it ought to have been. This is not a system likely to endure in the current and foreseeable political and economic climate.

I accept, of course, that there are major disputes in which conflicts of expert evidence must be investigated in depth even at the risk of duplication. In the context of forensic accountants I have in mind such areas as auditors negligence litigation. There is, however, a substantial area of expert evidence involving forensic accountants in which duplication may be able to be avoided. I have in mind, particularly, issues of quantification of loss or damage.

It is the experience of the courts that in matters such as quantification, even where cases are in the event litigated, the parties usually agree on most issues of quantum.

I indicated that the English experience differed from ours in one particular respect. That respect is the extent to which the English have come to use a single joint expert in litigation. What was until recently known as the Lord Chancellor's Department in England and is now called the Department of

Constitutional Affairs - or, informally, "DECAF" - conducted surveys of the use of a single joint expert in the English County Court, which has a jurisdiction roughly comparable to the District Court of New South Wales. The result of those surveys was confirmed by Sir Anthony May, a Lord Justice of Appeal and Deputy Head of Civil Justice of England and Wales who recently visited Australia for the purpose of attending the annual conference of judges of the Supreme Court of New South Wales. What has happened in England, after only five years, is that now in about 50 percent of all cases in which expert evidence is called in the County Court, that evidence is given by a single joint expert. Sir Anthony confirmed that in the High Court, the jurisdiction of which overlaps with the District Court of New South Wales but encompasses the whole of the jurisdiction of the Supreme Court, the figure is lower but still substantial.

This is a very significant shift in practice in a short period of time. Some aspects of the survey conducted by the former Lord Chancellor's Department are, Sir Anthony convinced us, inadequate and unreliable. However, the basic proposition of a substantial and growing use of single joint experts does represent a dramatic change which Sir Anthony confirmed has occurred.

One can see immediately the impact such a change will have on the culture of giving expert evidence. When it becomes usual, or at least common, for an expert to give evidence to a court on his or her own, the traditionally adversarial culture will progressively dissipate. The driving force of "He who pays the piper ..." will be progressively attenuated. Experts will become accustomed to approaching their evidence in court in the manner for which the present codes of conduct and guidelines of the courts now call, i.e., the overriding duty to assist the court.

The use of a jointly instructed single expert appears to be particularly appropriate for issues of quantification and valuation. That is not to say that in some cases difficult issues will not arise as the appropriate methodology of valuation: for example, the choice between comparable sales or a discounted cash flow basis for valuing a business. Frequently the choice of methodology will determine the outcome. Experience suggests that the ultimate decision may be determined more by an assessment of how "comparable" the allegedly comparable sales in fact are, on the one hand, and the degree of crystal ball gazing and wishful thinking involved in cash flow projections, on the other hand. All too often it is possible to craft a reasonable set of assumptions and methodology which coincidentally serves the interests of the client. If either of the, almost always well qualified, experts who manufacture this ammunition for their team, were asked to determine the issue as if he or she was an arbitrator, then the approach may very well be different. It is the recognition of that fact which often leads to agreement in joint conferences. The system may work much better and more cheaply if we started off with a single opinion by a person who both parties were, in advance, prepared to trust.

A good example of the scope of savings that can be effected by the English approach is found in a case in which a child sued for significant personal injuries. The court ordered no less than seven single experts on different aspects of quantification: an educational psychologist, an employment consultant, a nursing specialist, an occupational therapist, a physiotherapist, an architect and a speech therapist. The issues of quantification, in a case in which liability was not in issue, were thought to be appropriate for a single jointly trusted expert in all the different heads of damage requiring quantification[3].

From time to time apprehension has been expressed about the use of single experts, including court appointed experts, that the result on important questions is, in substance, delegated to that expert. Of course, cross-examination of the expert will always be possible and even in the English system additional expert evidence may be called where the report of the single expert proves unsatisfactory.

I understand this apprehension. However, it is appropriate to regard a joint single expert as, in substance, an element of alternative dispute resolution within the rubric of the overall judicial proceedings. It is no different from the position where the court exercises the power to refer an issue out to a referee, as is frequently done in commercial, particularly construction, disputes, subject to the ability of the court to refuse to adopt the report.

I am not suggesting that the lynch pin of the English system, which is that their rules provide that no expert of any kind may be called except with the leave of the court, should be adopted here. Nevertheless one trusts that where the parties jointly select an expert it is almost certain that a witness will be chosen who is not known for undue sympathy or for undue scepticism or for propounding views outside the mainstream of opinion. In other words the parties will jointly select an expert who will be much more useful to the court than the experts who are sometimes now called. Furthermore, one would expect that a report of this character is more likely to lead to an early settlement.

For many years the English provisions for court appointed experts were left unused, as our provisions to the same effect have been. The new approach that they have adopted of jointly instructed single experts has proven to be much more popular. It is not an approach that can be adopted in all areas of expert evidence. There are, however, many subjects that can be profitably approached in this way.

I am not suggesting the widespread use of experts in such a way as to take away the initiative from the parties. What I am suggesting is a greater degree of attention to the possibility of practitioners jointly co-operating, in advance, to minimise the cost to their clients. It is, however, possible to use the court appointed expert rules or Pt 39 of the Supreme Court Rules, to bring about a result similar to that which now applies in England. This is because of the amendment to Pt 39 r6 of the Rules made earlier this year by which, where a court has appointed an expert, no other expert may be called on the same question except with the leave of the court. This option is worthy of attention by parties at an early stage of litigation. They can request the Court to appoint the jointly selected expert as a court expert.

The Supreme Court as you know operates through a system of separate lists and this procedure will be more appropriate for some lists than others. I intend that the Court will investigate the possibility of incorporating in its case management practice an early identification of the prospects of appointment of a single joint expert on subjects where experience suggests that agreement often eventuates. Issues of valuation and many aspects of quantification of damage and loss are candidates for such treatment.

Plainly there will be occasions when the single expert even if jointly instructed will not prove adequate. Additional costs may be incurred by briefing a shadow expert, although it is unlikely that the costs of shadow experts, whose role is a checking function rather than compiling the entire report, would lead to a result where in effect three experts have to be paid for instead of two. Like any other system there are risks that it will not work as intended and that the result will, on occasions, be to increase costs rather than to minimise costs. That may be true of other aspects of case management, which does tend to front load costs, and for that reason it is appropriate to proceed with due caution in this regard.

I appreciate that some of you may understand these observations as a threat to cut your business in half. Recent history suggests that current practices are not sustainable in the long term. Unless the costs of conducting litigation are brought first, into a rational relationship with what is at stake and, then, into a proportionate relationship with what is at stake, significant areas of disputation will be taken away from a process in which expert evidence is used at all. I am sure you will profit from contacting your English colleagues in order to learn what you can about how the system of joint single experts is operating in the area of forensic accounting. I am also sure that the Court will profit from what you learn in this regard.

1 *Piglowska v Piglowski* (1999) 1 WLR 1360 at 1373.

2 (1993) 2 Lloyds Rep 68 at 81-82.

3 See *Peet v Mid-Kent Health Care Trust* (2002) 1 WLR 210.

Address on the Occasion of the Opening of the Refurbished Court 3 of the King Street Supreme Court Complex.

**ADDRESS ON THE OCCASION OF
THE OPENING OF THE REFURBISHED
COURT 3 OF THE KING STREET SUPREME COURT COMPLEX
WEDNESDAY, 13 AUGUST 2003
THE HONOURABLE J J SPIGELMAN AC
CHIEF JUSTICE OF NEW SOUTH WALES**

It was in August 1827, exactly 176 years ago, that this building was handed over to the Judges of the Court as a permanent home. It is now restored to the Court, not only upgraded and adapted for contemporary use, but in a better condition for such use than it has ever been in its history.

The original conception of Francis Greenway was for a single court on this level and the monumental staircase leading to a second court on the upper level, with entrance from Hyde Park via a grand flight of stairs leading to a colonnade of Doric columns. Instead of a single court on this level of 70 feet by 46 feet, capable of accommodating 500 people, two courts were constructed. After Greenway was removed from office, the construction of the building was contracted out. This resulted in the demolition of the part of the facade of Doric columns that had been constructed and also the installation of a roof which proved grossly inappropriate. This did not prevent the semi-official Sydney Gazette reporting the contractor to be a "clever and excellent builder". He relished in the name, according to the Gazette, of "Gough the builder". [1]

When 150 years later the then Chief Justice Sir John Kerr was persuaded to oppose the proposal to demolish this complex of buildings, as part of the contract to construct the new court complex at Queen's Square, there is no record that he did so to preserve the handy work of "Gough the builder" in honour of the then Prime Minister of Australia. Not even Sir John could have known of the extraordinary size and scale of the only recently discovered sewage and drainage works under the building. I hasten to point out that when he wrote his letter of opposition in June 1973, it was two months before he was first approached to become the Governor General of Australia.

For several decades, Court 3 was the principal court used for both criminal and civil matters, with Court 2 serving as a second court when required and otherwise used by the Court of Requests and by Quarter Sessions.

Complaints about inadequacies and inconveniences of the court complex - encompassing smell, noise, cold, ventilation and fittings - commenced almost immediately. It took many years for the internal fit-out of the courts to acquire the quality and indeed grandeur that the restoration project has revealed to us was eventually attained. A long history of higgledy-piggledy makeshift adjustment of the court complex ensued. The details of this are magnificently set out in both the draft of a publication on the history of the Court buildings which has been prepared and also the chronology in digital format which may one day be available on CD Rom.

Originally, the major public entrance to the court was through a covered portico from Elizabeth Street immediately behind the bench from which I am now speaking. The bench was then at the opposite end of the room. In the 1840's, as part of a major upgrade to the facilities of the Court, a new entrance was constructed on the King Street side, the configuration of the Court reversed and the original east and west entrances blocked up. Subsequently, the Elizabeth Street portico was removed. By that stage the passageway from King Street through to the Greenway staircase at the back of the building, providing access to the offices above, had been carved out of Court 2.

Everyone in attendance here today has heard me emphasise the significance of the longevity of our fundamental institutions of governance, both of the rule of law and of the parliamentary democracy, in some cases, on more occasions than you would care to remember. As I have repeatedly emphasised, the contribution to our social stability and economic prosperity made by these long standing institutions is of the highest order. The physical heritage associated with those institutions is an important aspect of that continuing contribution.

There is a new appreciation of the fundamental significance of what is described as "social capital". The importance of social capital was emphasised recently in a publication of the Productivity Commission.[2]

However, social capital, like forms of other capital, requires new investment to overcome the inevitable effects of depreciation and to enhance the capital base or adapt it to changing circumstances. Much of the expenditure on the administration of justice is investment of this character which, therefore, cannot be regarded as simply the provision of a publicly funded dispute resolution service. Investment in our heritage buildings, not least those associated with the core institutions of our civic order, is also a form of investment in social capital. Its value, albeit intangible, cannot be under-estimated.

Beyond pragmatic considerations, restoration of our heritage is food for the soul.

This has been a wonderful process. It has been and is a magnificent restoration project and, although not complete, its major elements are now in place. The whole process and the trials and tribulations involved and the identity, quality and character of the persons primarily responsible for the work is well set out in an article in the May issue of the Law Society Journal.[3]

I wish to acknowledge some of the principal contributors to that process. Justice Simon Sheller and the other members of the Building Committee of the Court have participated in the restoration of the complex with dedication and enthusiasm over many years. The Attorney General's Department has, by various officers, supported the project throughout.

It is perhaps invidious to name any of the persons whose skill and dedication has led to the magnificent outcomes that we see in the various parts of the court complex, including this courtroom that we re-open today. However, Barry Johnson as the original supervising architect for most of the period of the project has done more than anyone to ensure that the project was kept alive and on track. He was ably assisted, and is now succeeded, by Dianne Jones. I also acknowledge the critical role of the builder, Mr Victor Essey, and the skill of his tradesmen, notably Joseph Karram the project manager and Stephen Chad as french polisher. A book has been prepared to record the names of every artisan who has worked on this project, which is the first such comprehensive documentation in the history of these buildings.

As I said in May 2001, on the occasion of the re-opening of Court 2, it is rare for a building of heritage significance to be recycled for its original use. This objective is substantially achieved with the re-opening of this courtroom. I am sure I speak on behalf of all of the Judges of the Court when I thank all of those who have made this magnificent achievement possible.

I have pleasure in inviting the Premier of New South Wales, the Honourable Bob Carr MP, to open the refurbished Court 3.

1 For Gough the builder see J.M. Bennett, History of the Supreme Court of New South Wales, Law Book Company Sydney 1974 p4.

2 See Productivity Commission "Social Capital: Reviewing the Concept and its Policy Implications" Commission Research Paper, Commonwealth of Australia, Canberra, 2003.

3 Mary Rose Liverani "Doing Justice to the Old Courts" 41 Law Society Journal 42 (May 2003); with corrections by Dr J.M. Bennett in August 2003, 41 Law Society Journal 8-10.

Judging Today - Address to the Local Courts of NSW 2003 Annual Conference

JUDGING TODAY

ADDRESS BY THE HONOURABLE J J SPIGELMAN AC

CHIEF JUSTICE OF NEW SOUTH WALES

TO THE LOCAL COURTS OF NEW SOUTH WALES

2003 ANNUAL CONFERENCE

SYDNEY, 2 JULY 2003

I have taken as my title the overall theme of the Conference which is "Judging Today". It is one of the great abiding themes of the common law that the content of the substantive law, the mechanics of the procedural law and the institutions of the administration of justice are, and always have been, characterised by the omnipresence of both continuity and change. The role of the common law judge continues to evolve to meet the requirements of society as society changes.

One of the great contributions that our institutions of the law make to our social welfare and economic prosperity is the sense of stability which they provide. Stability, however, does not mean stasis. The Chief Justice of Israel has recently observed:

"Like the eagle in the sky that maintains its stability only when it is moving, so too is the law stable only when it is moving."^[1]

In times of rapid change in the surrounding social and economic circumstances, stability can only be achieved by changing with the times. As Giuseppe di Lampedusa had one of his characters advise the declining Sicilian aristocracy:

"If you want things to stay the same, you must change."

Change has been a constant for the judiciary in this State. Over the last two to three decades, no part of the judiciary has changed more than the magistracy. There have been many occasions on which the transformation of the magistracy from a bureaucratically inclined organisation to a genuinely independent body of judicial officers has been celebrated. The address by the Honourable Justice Michael Kirby at this Conference last year identified both the nature and the significance of these changes in historical perspective.^[2] I agree with his Honour's remarks. They do not need repetition.

I realise that if I were to continue the theme of emphasising the considerable improvement in the quality of appointees to the Local Court and the transformation in the independence, impartiality and quality of your decision-making, it would be unlikely that I would be interrupted. The time has now arrived where we should take this transformation for granted and move on. You are now fully part of the broader process by which the role and functions of the judiciary as a whole continues to evolve.

At the core of the judicial function are responsibilities which do not change in their essential nature, albeit their application may vary from time to time. All judicial officers must administer justice according to law. That requires both the capacity and the dedication to make impartial findings of fact and to conscientiously apply the law. The basic requirements of integrity and impartiality are fundamental and do not vary. These are the conditions upon which society has given judges the authority to make decisions that bind parties and punish offenders.

The performance of this governmental function is particularly manifest in the day-to-day application of statutes and of the settled legal principles of the common law. Many of these laws give judges a discretion, both in the strict sense of an ability to choose between alternatives and in the broader sense, in which the term is sometimes used, of making a judgment. However, such discretions or

judgments must be exercised judicially.

There is ample scope for all judicial officers to apply their values, knowledge and understanding without compromise of integrity or impartiality. Nevertheless, there are real limits which confine that scope. It is those limits which sustain public acceptance of judicial authority and provide what Chief Justice Gleeson has described as "judicial legitimacy".[3] His Honour said:

"Judicial power, which involves the capacity to administer criminal justice and to make binding decisions in civil disputes between citizens, or between a citizen and a government, is held on trust. It is an express trust, the conditions of which are stated in the commission of a judge or magistrate, and the terms of the judicial oath."

His Honour went on to say:

"The quality which sustains judicial legitimacy is not bravery, or creativity but fidelity. That is the essence of what the law requires of any person in a fiduciary capacity, and it is the essence of what the community is entitled to expect of judges. There is often room for disagreement amongst lawyers and judges as to what the law requires, but the terms of the trust upon which judges are invested with authority set the boundaries within which the contest must be conducted."

His Honour concluded:

"Like fairness, legitimacy should be constantly on display in courts".

Whilst these fundamental requirements remain undiminished in their force, the task of convincing the public at large that the requirements are being met has become more difficult. This is a manifestation of a change in attitude towards authority in all its forms. Over recent decades the public at large has come to treat assertions of authority with greater scepticism in all areas of our society. This has affected the position of leaders in politics, in the military, in religion, in education, in medicine, indeed in every section of our society. The law could not be immune to such a widely spread change in social attitudes. Nor has it been.

The requirements of what is sometimes referred to as "accountability" and "transparency" are distinctively different today than they were two decades ago. The greatest challenge for judicial administration in these new circumstances is to ensure that the new demands for accountability remain consistent with the imperative of judicial independence.

The primary mechanism of judicial accountability is the principle of open justice which encompasses both the obligation to sit in public and the obligation on all judges to give reasons for their decisions. Reasons for judgment perform other functions, particularly that of ensuring the quality of decision-making and its amenability to appellate review. However, what is generally referred to as "accountability" is some form of responsiveness to the broader public.

The principle of open justice by which all processes are conducted in public and lead to reasoned decisions which are also publicly available, is a form of accountability to the public to which no other public decision-makers are subject. Others have different forms of accountability, notably elections. But they are not obliged, as a matter of routine, to publicly explain reasons for all their decisions.

Judicial officers are not, and should not be, immune from public criticism. Sometimes criticism is neither fair nor accurate. There are, however, real limits on the ability of judges to correct unfairness or inaccuracy. In particular, it is not desirable that judges explain their judgments. A judge who enters public debate about such matters cannot enter and leave on his or her own terms. It is all too easy to become embroiled in a process which will reflect adversely on the reputation of the court for impartiality. Other mechanisms for correcting inaccuracy are required.

In recent times judges have developed mechanisms to assist accuracy in reporting of reasons by providing summaries of a judgment, particularly in cases likely to attract media attention. Sometimes these "summaries" masquerade in the traditional format of a "headnote". They should be accepted as an important part of the judiciary's relationship with the public. A summary prepared by a judicial officer is much more likely to be accurate than a similar summary prepared by a journalist.

Such measures do not guarantee that media reporting will reflect what the judge thinks is important in the case. Within the bounds of accuracy, different perspectives as to what matters and what does not,

can be legitimately held. What is of interest to the readers or viewers of the mass media is not necessarily the same as what interests the parties to proceedings, let alone what interests the lawyers.

There is today a much more widespread acceptance throughout the institutions for the administration of justice that the public is entitled to information about judicial decision-making processes and the way courts function. There is no doubt in my mind that these heightened expectations have improved the quality of judicial decision-making, including with respect to the administration of courts.

All judicial officers share a responsibility to conduct themselves in such a way as to maintain public confidence in the administration of justice. This responsibility must influence, not only the means by which we make decisions and the content of those decisions, but also many other areas of judicial conduct. What is required to maintain such confidence will of course vary from time to time. There is little doubt that the expectations are higher now than they once were.

Public confidence in the administration of justice is primarily maintained by the practical operation on a daily basis of the principles of open justice. The maintenance of public confidence is, as Justice Gummow has said:

"In present times, ... the meaning of the ancient phrase 'the majesty of the law'." [4]

This responsibility is not only one assumed by each judicial officer as an individual. It is genuinely a collegial responsibility. The maintenance of public confidence in the administration of justice is one of our most important collective tasks. Any judge who misconducts him or herself, whether in the course of a judicial proceeding or outside court, betrays this collective responsibility.

Public confidence goes beyond matters of mere public opinion, which frequently involve merely short term responses to particular events. As Chief Justice Gleeson has emphasised, these matters of temporary significance must be distinguished from structural or institutional issues. His Honour said:

"Confidence in the judiciary does not require a belief that all judicial decisions are wise, or all judicial behaviour impeccable, any more than confidence in representative democracy requires a belief that all politicians are enlightened and concerned for the public welfare. What it requires, however, is a satisfaction that the justice system is based upon values of independence, impartiality, integrity and professionalism, and that, within the limits of ordinary human frailty, the system pursues those values faithfully.

Courts and judges have a primary responsibility to conduct themselves in a manner that fosters that satisfaction. That is why judges place such emphasis upon maintaining both the reality and the appearance of independence and impartiality." [5]

Our collective ability to maintain public confidence is made difficult by the selectivity of media reporting. Inaccurate reporting and unjustified criticism does occur, but there is as much point in complaining about that as there is in complaining about the weather. Much that would once have led to prosecutions for contempt now passes into ephemera. The principal concern is not inaccuracy in the transient stories of the day. What is of most concern is the creation of a completely inaccurate representation of the operation of the judiciary as a whole.

There are long term institutional or structural implications arising from the fact that much of what courts do is not properly understood at all. The concentration of the media on a handful of cases promotes this misunderstanding. These difficulties and the attendant pressures, arise most acutely in the administration of criminal justice. I will concentrate my observations on that sphere.

The sentencing of convicted criminals engages the interest, and sometimes the passion, of the public at large more than anything else judges do. The public attitude to the way judges impose sentences determines, to a substantial extent, the state of public confidence in the administration of justice.

I venture to suggest that in all of recorded history, there has never been a time when crime and punishment has not been the subject of debate and difference of opinion. This is not likely to change in the future.

The problem may be said to have started in the Garden of Eden when God called Adam to account for his transgression. He, of course, blamed his wife. She - more imaginatively - blamed the snake. All

three were the subject of condign punishment. For millennia, theologians and others have been debating whether the punishment has had the desired effect of general deterrence and whether mankind has good prospects of rehabilitation.

We do not have, thankfully, a system of popular justice. Nor do we have, contrary to the lazy journalism that appears all too frequently, a system in which the victim determines the punishment. One of the great advantages of judicial independence is that the injustices that would otherwise be perpetrated in the name of private revenge or popular outrage are avoided. All this is readily acknowledged by anyone in the media, although not, as often appears, so as to interfere with the dramatic retelling of the immediate event.

Judicial officers will generally share and, in any event, must accept and apply community values. Many of the principles of sentencing are specific manifestations of widely held values. A judge must, of course, remain above the fray. Sentencing cannot be determined by community sentiment about a specific case. If the judiciary were to pursue popularity that would, in the long run, destroy public respect and confidence. Sometimes, perhaps often, this job is a lonely one.

I am concerned that public confidence in the administration of justice and public respect for the judiciary, is diminished by reason of ignorance about what judges actually do in terms of the sentences that are imposed. Plainly there are occasions when a particular sentence attracts criticism and that criticism is reasonably based. There have been many cases in which a sentence was, and was widely seen to be, grossly lenient. What concerns me is that such cases appear to be widely regarded as typical, when they are not.

There is a considerable body of research which indicates that, with respect to crime and, particularly with respect to sentencing, there is a significant disparity between what actually happens and what a majority of the public believes happens. Research in a number of nations shows, for example, that the public believes that crime is going up, when it is not and that the amount of violent crime is greater than it actually is. Members of the public believe that they are much more likely to be the victim of crime than the objective facts suggest. Many believe that judges generally sentence much more lightly than they actually do.

There is a widely held view that judges sentence too leniently. However, detailed research in many nations, including Australia, has shown that when the full facts of particular cases are explained, the public tends, to a very substantial degree, to support the sentences actually imposed by judicial officers or, at least, to express the opinion that the sentences were lenient to a significantly lesser extent than answers to general questions about judicial leniency in sentencing would suggest.[6]

This is not an area in which there can ever be unanimity. The most that can be expected is that when the facts of particular cases are known, the proportion of the public which believes that the judge's sentence was too high, is of the same order of magnitude as the proportion which believes that the judge's sentence was too low. That is in fact what research studies of situations in which the public knows or is informed of details of the case, e.g. jurors, establish to be the case.

There is a large discrepancy between public perception and reality with regard to sentencing practice. The integrity of our judicial system requires us to do what we can to minimise that discrepancy.

As I said, there are occasions when public criticism of specific sentences for leniency is justified. These errors are not always able to be rectified on appeal. There are significant inhibitions on the Crown initiating appeals on sentence at all. When they are instituted, appellate courts approach such appeals with the application of the principle of double jeopardy and are reluctant to interfere with the exercise of the sentencing discretion. Nevertheless, the appeal process does ensure that both manifestly inadequate and excessive sentences are generally changed.

The problem is that the occasional inadequate sentence receives much more significant public exposure through the media than the continuing, day in and day out, imposition of sentences that are generally regarded as correct and, for that reason, pass without comment. Furthermore, it is an almost invariable rule that when a first instance decision, that has attracted howls of controversy, is overturned on appeal, the appellate decision receives virtually no publicity.

In such a context, judges are entitled to feel a little irritated when, although they apply themselves diligently to a difficult task, they are frequently accused collectively of excessive leniency and of being out of touch.

There is an important task of educating the public about the actual level of sentences imposed. The media, with its understandable focus on high profile cases and controversy, fails to inform the public about what judges are actually doing in the normal line of case. There are not adequate alternative means of public information. We should develop such alternatives. At the least, what is required is to foster a recognition, on the part of the public, that it is only getting part of the story.

There have been periods in the history of all societies when the public believed in the need for the imposition of severe punishment. In the past, that has taken the form of death, mutilation, whipping and other forms of infliction of pain. In our own times the call is for significant periods of incarceration.

There is a wide spectrum of legitimate opinion about appropriate levels of punishment for criminal offences. It is, of course, impossible for courts to satisfy all sections of the community with respect to a matter like sentencing. There is a distinct view held by some that sentencing should be more severe than it in fact is, at least for certain kinds of offences. In the broad spectrum of community opinion those who have that view are often balanced by another distinct view, that sentences at the present level of severity, let alone any increased level of severity, do not serve what that group believes to be the proper function of sentencing: rehabilitation, rather than punishment. The judiciary cannot satisfy both points of view.

The permissible range for the reasonable exercise of the sentencing discretion on the part of the judiciary is necessarily narrower than the broad range of opinion held by significant sections of the community. One reason for this is that the core value of fairness in the administration of criminal justice requires the range to be narrow, so that criminal justice is seen to operate reasonably equally.

Inevitably there will be differences on the part of judges in terms of their philosophical approaches to the exercise of the sentencing task. Judges or magistrates, as members of the community, will naturally reflect the wide range of opinions on this matter. Nevertheless, it would fundamentally undermine public confidence in the administration of criminal justice if it became widely believed that the sentence depended in large measure on who the judge was.

It is, I believe, essential for the maintenance of public confidence in the administration of justice that the outcomes of similar cases are, within reasonable bounds, the same. Consistency in sentencing must be more than empty rhetoric.

There is a tension between the principle of individualised justice and the principle of consistency.[7] The former requires all of the circumstances of the individual offence and of the individual offender to be taken into account. The latter reflects the need to ensure systematic fairness between offenders as a manifestation of an ordered system in which discretion, even the discretion of judges and magistrates, is subordinated to the rule of law.

This is a particular manifestation of the principle of equality in Aristotelian ethics: like cases must be treated similarly and unlike cases must be treated differently. The crucial matter is the determination, in a principled way, of the factors which justify different treatment. These factors are generally manifestations of community values and are reflected in sentencing principles, both at common law and, increasingly, in statutory formulations.

Although individual judges may hold opinions on sentencing which reflect the full spectrum of irreconcilable views held in the community, those views cannot be reflected in an unconfined way in decisions. The range of permissible judicial discretion is much narrower than the range of actual public opinion. For that reason, the outcome of the judicial sentencing task will, necessarily, not be acceptable to some segment of public opinion. It is, of course, permissible for that segment to seek to have its opinion prevail by statutory change. Unless this happens, however, it is important for the legitimacy of our judicial institutions, that any disaffected segment of the public appreciate that judges operate within constraints that do not permit decisions at either extremity of public opinion.

The exercise of judicial discretion must be tempered by the collective wisdom of the full body of sentencing judges represented in the formulation of sentencing principles and in the pattern of sentencing for particular offences, patterns which emerge and change over time.

Public confidence will not, in the long run, turn on transient controversy, but on recognition that judges and magistrates apply a coherent body of principles, so that sentences manifest a high degree of regularity and order, avoiding what Lord Tennyson described in *Aylmer's Field*:

"... the lawless science of the law
That codeless myriad of precedent,
That wilderness of single instances."

Sentencing is a collegiate task. It is not permissible to hide idiosyncratic personal philosophy behind the rhetoric of "judicial discretion", "individualised justice" or "instinctive synthesis". The constraints of consistency arise at all levels of the judicial hierarchy. They are not absent from the Court of Criminal Appeal. The High Court, of course, is different. The range of permissible judicial opinion is narrower than the diversity of personal philosophies amongst judicial officers. We all operate under constraints of a collegiate character. Idiosyncratic conduct in sentencing can do more than anything else to undermine public confidence in the administration of justice.

It is impermissible for individual judicial officers to approach sentencing on the basis of their personal philosophy, for example, that only rehabilitation matters. All factors must receive appropriate weight, including punishment. Revenge is not a pretty or even admirable human motive, but it is a natural and omnipresent one. The criminal justice system must accommodate it. Our collegial responsibility to maintain public confidence in the judiciary requires the application of the full range of sentencing considerations.

The reason why debate about sentencing will know no rest, is because the ineluctable core of the sentencing task is a process of balancing overlapping, contradictory and incommensurable objectives. It has always been thus. The requirements of deterrence, rehabilitation, denunciation, punishment and restorative justice do not point in the same direction. Specifically, the requirements of justice, in the sense of just desserts, and of mercy, often conflict. Yet we live in a society which values both justice and mercy.

Centuries of practical experience establish that the assessment of the multiplicity of factors involved in the sentencing task is best served by the exercise of a broad discretion. That same practical experience, over centuries, suggests that this difficult process of weighing and balancing all of the relevant considerations is best done by an independent, impartial, experienced, professional judge. It is not best done on talkback radio.

The existence of sentencing discretion is an essential component of the fairness of our criminal justice system. Unless judges are able to mould the sentence to the circumstance of the individual case then, irrespective of how much legislative thought has gone into the determination of a particular rule or regime, there will always be the prospect of injustice in the individual case.

The history of the imposition of severe punishment in the past has been that at a certain level of severity, the punishment becomes tolerable no longer. It comes to be regarded by many to be virtually as repulsive as the crime. There appears to be a natural oscillation in the balance of outrage in such matters.

There is nothing new about the debates we have had in recent times in this regard. In 1883 the New South Wales Parliament passed legislation which created a sentencing structure with five distinct steps or categories, including both minimum and maximum sentences. The scheme led to palpable injustices, so that the Sydney Morning Herald editorialised on 27 September 1883:

"We have the fact before us that in a case where a light penalty would have satisfied the claims of justice, the judge was prevented from doing what he believed to be right, and was compelled to pass the sentence which he believed to be excessive, and therefore unjust, because the rigidity of the law left him no discretion."

The scheme was abandoned by statute a year after its introduction. As the philosopher George Santayana put it:

"Those who forget the past are condemned to repeat it."

Interaction between the courts and public opinion with respect to sentencing has an echo in the area of bail decision-making. Similar considerations arise, including the need for consistency and the multiplicity of conflicting considerations which must be balanced before making the final decision. From time to time decisions are made that should not have been made. Sometimes the grant of bail proves tragic, as occurred during the course of this year when a person released on bail by a member

of this court, as affirmed with varied conditions in the Supreme Court, killed his wife and committed suicide.

As in the case of sentencing, the public debate on bail is often distorted to a degree that is profoundly disturbing. It is simply not the case that judges and magistrates let accused out on bail to a significant degree in circumstances which can be seen with the benefit of hindsight to be incorrect. Of the tens of thousands of judicial bail decisions that are made in this State each year, a small proportion result in persons committing offences while on bail.

I am unaware of any research which determines the extent of such offending. The frequency with which sentencing courts must take into account the fact that an offence was committed whilst on bail indicates that there is a real, albeit not major, problem. This is, however, only an impression. Nothing suggests that there is any systematic inadequacy in bail decision-making.

The judiciary, like all human institutions, is not perfect. Mistakes are made. Public attention focuses on the mistakes, with the benefit of hindsight. The thousand or so bail decisions made every week pass without comment or notice, precisely because they are correct. As with sentencing, mistakes are sometimes portrayed as typical, when they are not.

Public debate is inevitably distorted. Attention focuses on persons who have been released on bail, but should not have been. On the other hand, there are many people who are kept in custody and, with the benefit of hindsight, should never have been in custody. There are few if any stories, let alone dramatic events, which flow from the injustice perpetrated on such persons.

Over the period 1995-2000, of the persons refused bail in the Local Courts about 15 percent were subsequently acquitted. In the Higher Courts it was about 12.5 percent. Perhaps more significantly, of all persons who were refused bail in Local Courts only 50 percent received prison sentences. In the Higher Courts over 80 percent were imprisoned. It may be that in many cases the period in custody on remand was regarded as enough.[8]

No-one doubts the basic proposition that a bail hearing does not determine guilt or innocence, although of course the strength of the Crown case is, and always has been, a very relevant consideration. There have been numerous examples throughout history of criminal justice systems which kept people in custody because the police believed they had committed an offence. We do not regard any of those systems with admiration and we do not accept any of them as role models.

The discretion with respect to bail has been progressively restricted to the point where there will be a significant range of alleged offenders who are, in effect, presumed to be likely to commit further offences or to abscond. The possibility of individualised justice, in the sense of a judicial assessment of the facts of an individual case, has been eroded by a presumption against bail on the basis of a general assumption that these categories of persons are likely to offend and/or abscond.

The effect of the changes to the Bail Act over the last decade or so and in prospect, is that fewer persons are released on bail and the remand population in our prisons continues to grow. Within that increased population there will be persons who, if they had been released would have re-offended during the period of bail. However, there is also a component of that increased population who have not committed any crime and will in due course be acquitted. This latter group does not seem to have a voice in the media.

The Bureau of Criminal Statistics and Research study I have noted, suggests that this group represents something of the order of 15 percent of the total number of persons who are refused bail in the Local Court and over 12 percent of the Higher Courts. However, those percentages are derived from all offences, not the narrow range of offences and circumstances in which there will be a presumption against bail. Nevertheless, the possibility of injustice by keeping an innocent person in prison remains.

During the course of the recent debate one example was mentioned in the daily newspaper of Dubbo, a newspaper not notably weak on crime. A Dubbo man who was accused of murder for stabbing his wife's brother was released on bail to be with his wife who was dying of cancer at the time. Some fourteen months after the event he was acquitted on the grounds of self-defence. He was, as the editorial in the paper has stated, at no stage a danger to the community. It is by no means clear, the newspaper noted, that he would be entitled to bail under the new regime.[9]

The primary consideration in bail decision-making is the protection of the community. It has always been such. It was true at common law and under the legislative regime before the discretion to grant bail was progressively attenuated. Whether, and if so to what degree, the public is prepared to tolerate the incarceration of innocent persons, so as to have greater confidence that those likely to further offend or to abscond will also be incarcerated, is a matter for political judgment. Judges will apply the law and do so in circumstances where the ability to balance the relevant considerations is in some respects pre-determined.

We can, however, ensure that proceedings are brought on as expeditiously as possible to minimise the injustices that may arise. The courts must not be permitted to become an instrument of injustice. I am confident that in this, as in other respects, the New South Wales magistracy will continue to observe the judicial oath.

1 President Aharon Barak, The Supreme Court, 2001 term - "Foreword: A Judge on Judging: The Role of the Supreme Court in a Democracy" (2002) 116 Harvard Law Review 16 at 29.

2 See the Honourable Justice Michael Kirby AC, "The Rise and Rise of the Magistracy" (2003) 15 Judicial Officers' Bulletin 1.

3 The Honourable Murray Gleeson AC, "Judicial Legitimacy" (2000) 20 Australian Bar Review 4 at [4].

4 See *Mann v O'Neill* (1996-97) 191 CLR 204 at 245.

5 The Honourable Murray Gleeson AC, "Public Confidence in the Judiciary" (2002) 76 ALJ 558 at 561.

6 See the references collected in J J Spigelman, "Sentencing Guideline Judgments" (1999) 73 ALJ 875 at fn 23-28.

7 See *R v Whyte* (2002) 55 NSWLR 252 at [147]-[184].

8 Chilvers et al, "Absconding on Bail", *Contemporary Issues in Criminal Justice*, No 68, Bureau of Crime Statistics and Research, May 2002, p10.

9 See *Daily Liberal* (Dubbo) 30/5/2003, p6.

Negligence and Insurance Premiums: Recent Changes in Australian Law - The Spencer Mason Trust Lecture, Auckland

**NEGLIGENCE AND INSURANCE PREMIUMS:
RECENT CHANGES IN AUSTRALIAN LAW
ADDRESS BY THE HONOURABLE J J SPIGELMAN AC
CHIEF JUSTICE OF NEW SOUTH WALES
THE SPENCER MASON TRUST LECTURE**

AUCKLAND, NEW ZEALAND

27 MAY 2003

My invitation to deliver the Spencer Mason Trust Lecture was accompanied by a request that I develop aspects of an address I gave just over a year ago entitled "Negligence: The Last Outpost of the Welfare State"[1]. The basic thrust of that address was the recognition that the law of negligence in Australia, in its practical application, had become unsustainable. The subtitle was intended to suggest that, notwithstanding the fact that the system required proof of fault, the practical operation of the system appeared to find fault quite readily, perhaps too readily.

Other than in specific fields, for example, traffic accidents in Victoria, Australia never developed a no-fault system of accident compensation for personal injury of the character which has existed in New Zealand in an evolving form since the original Woodhouse Report of 1967 was adopted. The trade-off between universal compensation at some level and generous compensation for only some, has been resolved differently in Australia.

In my address last year I noted that, about two decades ago, there commenced a series of ad hoc statutory interventions with the operation of tort law both in terms of liability and damages designed to limit the amount being paid out. Although these changes never displayed the degree of coherence that the distinctive New Zealand system does display, the necessity for frequent legislative intervention is not entirely dissimilar to what I understand has had to occur by amendment of your own scheme from its original form culminating in the Accident Compensation Act 1982, and thereafter further amendments culminating in the Injury Prevention, Rehabilitation & Compensation Act 2001.

Much of this, albeit by way of critical reaction, is a tribute to the ingenuity of the legal profession. This process has not yet seen its course in either of our countries.

When assessing the efficacy of statutory reform, I am reminded of the attempt by the City of New York to control its burgeoning litigation bill by adopting a law to the effect that the city could not be sued for a defect in a road or sidewalk unless it had had fifteen days notice of the specific defect. The plaintiff lawyers, or, as they call themselves, trial lawyers of New York City established the BAPSPC, the Big Apple Pothole and Sidewalk Protection Committee. The function of this committee was to employ persons to continually tour the streets and footpaths of New York to note each and every blemish and, forthwith, to give the City of New York precise details of each defect. Regular reports cataloguing the notices which had been given to the City were available for sale to trial lawyers[2].

At any one time the total cost of curing the defects of which the City had been given notice was several billion dollars. Needless to say the City has never successfully defended a case under the fifteen days notice law. I am confident that Australian and New Zealand lawyers lose little by way of invidious comparison with their American cousins on the scale of creativity.

Pressure on Insurance Premiums

In Australia the primary focus of attention with respect to tort law reform has been insurance premiums rather than the cost to the taxpayer. As a matter of substance the distinction between these two sources of revenue for purposes of compensating injured persons is not as strict as may first appear. I have expressed this on one occasion, if I maybe permitted the sin of self-quotation, in the following way:

"The judiciary cannot be indifferent to the economic consequences of its decisions. Insurance premiums for liability policies are, in substance, a form of taxation (sometimes compulsory but ubiquitous even when voluntary) imposed by the judiciary as an arm of the State. For many decades, there has been a seemingly inexorable increase in that form of taxation by a series of judicial decisions, on substantive and procedural law." [3]

There is a further reason why the private/public distinction has become blurred. Even though no overriding system of the character administered by the Accident Compensation Corporation exists in Australia, in the major areas of litigation - involving motor vehicle and workplace accidents - some form of governmental underwriting has often emerged, administered by bodies similar to your Corporation. Such bodies develop the same defendant's shop mentality as is common among litigators representing insurance companies, with the peculiar advantage that they have a more direct route to influencing the legislative process.

By reason of the extent to which insurance is effectively underwritten by the taxpayer, there has emerged a new role for the state as 'insurer of last resort'. This role has expanded over recent years in Australia to include government underwriting of most of the obligations of one of our largest insurers HIH, which became insolvent; government guarantees of the major medical insurer when it became clear that it could not meet its obligations, now extending to a government supported national scheme for medical indemnity; guarantees by government after a major reinsurer withdrew from the market for "insurance" with respect to building defects and insolvency of builders and proposals for government underwriting of risks associated with terrorism.

As I indicated last year, it took many years for the government role as "lender of last resort" to take the institutional form of the contemporary central bank. The institutional form of the "reinsurer of last resort" function is still developing, in Australia's case with all the usual contortions of federalism, which provide us with so much legal entertainment. [4]

The distinction between private insurance and public taxes, as the source of revenue for compensation payments, is becoming increasingly blurred.

At the time I gave my paper last year there was already a discernible sense of crisis in certain areas of the law of negligence, particularly focused on public liability and the liability of the medical profession. In the months after I delivered my paper that sense of crisis reached something of a fever pitch, in the course of which there were virtually daily reports about the social and economic effects of increased premiums: the abolition of charitable and social events, ranging from dances to fetes to surfing carnivals, even Christmas carols; the closure of children's playgrounds, horse riding schools, adventure tourist sites, even hospitals; the early retirement of medical practitioners and their refusal to perform certain services, particularly obstetrics; the inability of other professionals to obtain cover for certain categories of risk led to similar withdrawal of services, for example, engineers advising on cooling tower maintenance could not get cover for legionnaires disease, building consultants could not get cover for asbestos removal, agricultural consultants could not get cover for advice on salinity; many professionals were reported to have disposed of assets so as to be able to operate without adequate, or even any, insurance.

A sudden explosion in insurance premiums or, in many cases, a refusal by insurance companies to offer cover on any reasonable terms or even at all, caused widespread concern. Many of the changes over the previous two decades had been explicitly determined by a desire to reduce insurance premiums. [5] Insurance companies had come to be regarded as a bottomless pit or even a magic pudding. The political will to limit the amounts required to be paid by way of premiums was reinforced by the direct calls on the public purse that had become institutionalised or implicit.

I am quite satisfied that the underlying cause was the practical application of the fault based tort system in the context of adversary litigation. This had produced outcomes which the community was no longer prepared to bear. What brought the issue to a head, however, were developments in the insurance industry.

There is a cyclical element to the insurance business, as there is in any industry. By 2002, what had for many years been a buyers' market in insurance had become a sellers' market. At an international level there had been a series of natural disasters which had drawn down the capital of insurance companies, particularly that of reinsurers. The events of 11 September 2001 in New York exacerbated this process. This coincided with the end of the share market boom which further reduced the capital

available to insurance companies. Quite quickly, demand exceeded supply in the global reinsurance market. This was immediately reflected in premiums and in decisions as to what kinds of businesses to write and where.

In Australia this development was accentuated by problems of our own making. One of the biggest general insurers, HIH, particularly active in the professional negligence and public liability market, collapsed. It appears that one reason for the collapse was that HIH had been aggressively underpricing in a number of areas of insurance in order to increase market share. In a sense, the increased insurance premiums that should have emerged gradually over the course of a decade or so, came all at once when this particular insurer was removed from the market.

Acute pressures emerged in the professional indemnity insurance market as international insurers withdrew from, and others refused to enter, a market perceived by some as especially unfriendly towards insurance companies. These perceptions were affected by the breadth of liability arising from a literalist interpretation of the Trade Practices Act. They were also affected by a similar approach to interpreting s54 of the Insurance Contracts Act which has rendered the restrictions inherent in a claims made and notified policy virtually irrelevant[6]. This is the traditional kind of policy offered to cover professional indemnity. The interpretation of s54 has made such a policy difficult to price or to quantify provisions for claims.

In the particular case of medical insurance, the old system of a mutual operation, in which reserves were determined on the basis that there was no contractual obligation to provide cover, notwithstanding the universal expectation that that would occur, was finally accepted to be inadequate. Australia's largest medical indemnity insurer - covering some 50% of Australian practitioners - was faced with insolvency and has been saved by the financial support of the Commonwealth Government. The government further assumed certain unfunded liabilities of all the medical insurers, to be recouped by a levy; it has assumed liability for 100 percent of a claim above a certain amount - the blue sky factor; it has ensured the availability of run off cover for retired doctors - the long tail factor; the government will also subsidise premiums in certain fields of practice where the damages are large and the doctors rarely win, like obstetrics.

These problems have been building up over decades. However, 2002 was the year in which quite a number of chickens came home to roost.

In judicial decisions over the course of three or four decades, there had been a discernible process of what Professor Atiyah described as "stretching the law"[7]. There was, on occasions, an equally significant process which can be described as "stretching the facts", a process not confined to jury decision-making.

The approach of some members of that generation of judges which came to maturity during the years of triumph of the welfare state was influenced, notwithstanding protestations to the contrary, by the assumption, almost always correct, that a defendant was insured. Many judges may have proven much more reluctant to make findings of negligence if they knew that the consequence was likely to be to bankrupt the defendant and deprive him or her of the family home. The ubiquity of insurance was a factor that, step by step over the course of decades, led to a progressive increase of the burden on those who had to pay insurance premiums. The choice was often quite stark. In an obstetrics case, for example, litigation was always between an injured child and a bucket of money. It is no surprise to know that the bucket rarely won. Under your no-fault scheme, you have avoided the worst of this here.

In Australia the reaction began about two decades ago. For over a century judges had been universally regarded as conservative and mean and too defendant oriented. This lead parliaments to expand liability, for example Lord Campbells' Act, the abolition of the doctrine of common employment, the abolition of the immunity of the Crown, the creation of workers' compensation and compulsory third party motor vehicle schemes, provision for apportionment in the case of contributory negligence.

As more fully set out in my paper last year, from about 1980 legislative intervention in Australia reversed its character and proceeded on the basis that the judiciary was too plaintiff oriented. A generational change in the judiciary coincided with a change in the opposite direction in the social philosophy of the broader polity, which came to re-emphasise persons taking personal responsibility for their actions. There may be an iron law which dooms judges to always be a decade or two behind the times.

In almost all States of Australia, in different ways and at different times, new regimes were put in place, particularly for the high volume areas of litigation involving motor vehicle and industrial accidents. By 2001, New South Wales had also developed a special regime for medical negligence cases. Notwithstanding the new restrictions imposed from time to time, including in 2001 with respect to workers' compensation, the perceived crisis of 2002 has now led to further legislative intervention affecting virtually every aspect of the law of negligence.

The Ipp Report

In collaboration the Commonwealth and the States appointed a group to review the law of negligence. The Panel was chaired by the Honourable David Ipp, formerly a judge of the Supreme Court of Western Australia and now a judge and judge of appeal of the Supreme Court of New South Wales. His Honour's Panel proposed a range of changes in its two reports. Ministers of the Commonwealth and of the States agreed to implement the recommendations and the process of doing so is well advanced. There was an express commitment to proceeding on a nationally uniform, or at least nationally consistent, basis. At the time of this lecture, that is not yet apparent.

It was evident even before this process got underway that the attitude of the courts had changed. A series of cases in the High Court of Australia in which, if the prior tendency to "stretch the law", to use Professor Atiyah's phrase, had continued in existence, the plaintiffs would have won, resulted in verdicts for the defendant[8]. The trend was clear. However, the parliaments of Australia have taken the view that this process of change did not meet the exigencies of the crisis that had arisen or, at least, was perceived to exist. Altering decades of judicial attitude is akin to turning an oil tanker. The political exigencies did not permit a measured approach.

Most of the changes that have been implemented in Australia by legislation and by the drift of judicial decision-making are not of significance for a New Zealand audience. Indeed the principal thrust of the change is directed at the limitation of circumstances in which damages can be recovered for personal injury and the quantum of damages that can be so recovered. The kinds of changes that have been introduced in this regard include the following:

- * Establishment of thresholds of a percentage of permanent impairment before a person may sue at all.
- * Establishment of an indexed maximum for the recovery of economic loss.
- * Establishment of a threshold and maximum for recovery of non-economic loss.
- * Restrictions on the recovery of damages for gratuitous services.
- * Fixing and in all cases reducing the rate of interest that can be awarded.
- * Fixing and increasing the discount rate established by the courts for the determination of the present value of future loss.
- * Limiting the liability of a volunteer or a good Samaritan.
- * Restricting liability of persons who act in self-defence to criminal conduct.
- * Providing that an apology cannot constitute an admission.

Furthermore, the Ipp Panel recommended legislation to abolish liability for failure to warn of an obvious risk. It recommended that a provider of recreational services should not be liable for injuries suffered by a voluntary participant in a recreational activity as a result of the materialisation of an obvious risk. It also recommended that the law as to voluntary assumption of risk should be changed so as to make it easier for that defence to succeed.

These recommendations reflect the fact that the terms of reference of the Ipp Panel were directed to personal injury. Nevertheless, as will appear, many of its recommendations were taken up and applied more broadly.

In this address I propose to focus on some only of the changes made to the law and practice in Australia. I have selected those which appear to have some relevance to the New Zealand situation, bearing in mind your comprehensive regime for dealing with personal injury.

Reasonable Foreseeability

The language of reasonable foreseeability remains at the heart of the law of negligence. It is applicable in New Zealand outside the field of personal injury. Over the decades it is cases of personal injury that have attracted the sympathy of judges in such a way as to distort this principle.

In the paper I delivered last year I identified the commencement of the process of "stretching the law" in this regard in the reasons of Lord Reid for the Privy Council in the *Wagon Mound* [No 2][9]. The test

of foreseeability there propounded has been applied in Australian law, both at the level of duty and of breach, in a formulation identified in the language of the High Court in *Wyong Shire Council v Shirt*[10] to the effect that a risk of injury is foreseeable, unless it can be described as "far-fetched or fanciful". I remain of the view I expressed last year that I cannot see that "reasonableness" has anything to do with a test that only excludes that which is "far-fetched or fanciful". The test appears to be one of "conceivable foreseeability" rather than "reasonable foreseeability"[11].

The application of this test had had the effect, accurately described by Justice Fitzgerald, when he was a judge of the New South Wales Court of Appeal, of:

"... impermissibly expanding the content of the duty of care from a duty to take reasonable care to a duty to avoid any risk by all reasonably affordable means."[12]

McHugh J expressed similar sentiments when he said late last year:

"Many of the problems that now beset negligence law and extend the liability of defendants to unreal levels stem from weakening the test of reasonable foreseeability. But courts have exacerbated the impact of this weakening of the foreseeability standard by treating foreseeability and preventability as independent elements. Courts tend to ask whether the risk of damage was reasonable foreseeable and, if so, whether it was reasonably preventable. Breaking breach of duty into elements that are independent of each other has expanded the reach of negligence law."[13]

His Honour went on to outline principles of negligence law which, if they had represented the majority of the High Court, may have averted the need for any legislative intervention at all. However, by the time this judgment was delivered, in September 2002, the process of legislative intervention was already well underway.

The Ipp Panel had an express term of reference to consider the issue of foreseeability of harm and the standard of care, albeit limited to cases of personal injury or death. The Panel's report was critical of the "far-fetched and fanciful" approach. My own preference had been to simply overrule the restriction inherent in the "far-fetched and fanciful" test and allow the common law to reformulate the approach, perhaps by returning to the test of "practical foreseeability" adumbrated by Walsh J in *Wagon Mound [No 2]* at first instance[14]. The Ipp Panel considered a number of options and eventually resolved to recommend that the far-fetched and fanciful test be replaced by statutory provision that a risk be "not insignificant".

The Ipp Panel also recommended that the legislation explicitly identify a number of factors, which were drawn from the case law, to be taken into account in determining breach: probability of harm arising, the seriousness of the harm, the burden of taking precautions and the social utility of the activity creating a risk. There is a bias of 20:20 hindsight. The Report's approach requires the assessment of precautions to consider not only the particular causal mechanism of the case before the court, but also precautions that may be suggested by similar risks.

These changes have been adopted or are proposed in some States[15] but not yet in others[16]. In the case of the latter a second stage of legislation appears likely.

I do not know whether the mischief of "stretching the law", to which this particular statutory provision is directed, is present in the practical application of New Zealand tort law. Its principal source in Australia has been cases involving personal injury. The legislative change is not, however, restricted to that area.

Causation

Nothing is more calculated to excite a common lawyer, or exasperate the uninitiated, than a discussion on the subject of causation. Brushing aside the arcane speculations of philosophers, common lawyers have become accustomed to stating that the issue of causation is one of "commonsense"[17]. Perhaps a more candid approach is to openly acknowledge that there is a normative element in deciding causation and what often occurs in practice is to ask whether, in all of the circumstances, the defendant should be made liable for the plaintiff's loss. Although this has been acknowledged in judgments[18], in some Australian States this approach will now receive statutory approval in some cases.

The Ipp Panel acknowledged the "commonsense" test applicable in Australian law but, nevertheless, founded its analysis of causation on the proposition that the basic principle was the "but for" test, that

is, "the harm would not have occurred but for the conduct"[19].

An issue to which the Ipp Panel directed particular attention was what has been identified as "evidentiary gaps"[20]. This was a reference to the difficulties of determining causation where injury arises because of the cumulative operation of two or more factors, for example where a worker contracts mesothelioma as a result of successive periods of exposure while working for different employers, and where injury arises from the cumulative operation of two or more factors, for only one of which the defendant is responsible. Attempts to bridge such "evidentiary gaps" have encompassed a test of whether particular conduct made a "material contribution" to an injury[21] and if the conduct "materially increased the risk"[22].

The Ipp Panel described the issue in terms of when the "but for" test should be relaxed. It said this raised a normative issue and required a value judgment about the allocation of the cost of injury. It recommended that, whilst the determination of such issues should be left to common law development, the normative character of the process should be made explicit in legislation. It recommended a provision that when deciding whether there was a material contribution or a material increase in risk, a court should consider whether responsibility for the harm should be imposed on the negligent party[23].

The recommendation of the Ipp Panel in this respect has been adopted in some States[24].

The legislation identifies two distinct elements in the determination of causation. The first, referred to as "factual causation", is that "the negligence was a necessary condition of the occurrence of the harm". The second, referred to as "scope of liability", involves a conclusion that it is "appropriate for the scope of the negligent person's liability to extend to the harm so caused". The legislation provides [25] that "in an exceptional case" i.e. one in which there is an evidentiary gap and a factual "necessary condition of the occurrence of harm" cannot be established, the court is obliged to consider "whether or not and why responsibility for the harm should be imposed on the negligent party".

One can anticipate a considerable body of litigation about the scope, meaning and application of this provision. These proposals arose from difficulties apparent from personal injury litigation. The provisions are not so limited. Their application to cases of property damage and pure economic loss may surprise us.

The Panel noted that another means of resolving the problem of evidentiary gaps was the suggestion that the onus of proof on the issue of causation could shift from the plaintiff to the defendant, merely on proof of a duty to take reasonable care to avoid the risk and a failure to take the required care[26]. In order to overcome this suggestion, the Ipp Panel recommended an express new provision stating that the plaintiff always bears the onus of proving on the balance of probabilities any fact relevant to the issue of causation. This has been adopted in some States[27].

Another matter that the Ipp Panel reviewed was the situation where an issue has arisen as to what a plaintiff would have done if a defendant had not been negligent. This is of considerable practical significance in view of the number of cases that turn on a failure to warn, notably affecting medical practitioners who have actually done nothing wrong as clinicians, but failed to warn their patient about certain remote risks[28].

Evidence by a patient that he or she would not have given permission for a particular medical procedure to be undertaken is almost impossible to cross-examine about or to verify. In the usual case it never rises above the level of self-serving assertion, with the full benefit of hindsight. Findings of fact in this regard are virtually unchallengeable on appeal.

Causation turns on what would have happened in the individual case and the Ipp Panel accepted that the appropriate test of causation is a subjective one. The Ipp Panel rejected an objective test, *inter alia*, on the basis that such a test would answer the question "what should have happened", not the causal question "what would have happened". It also rejected what it identified as a Canadian test which asks objectively what a reasonable person would have done, but stipulates that such a person must be placed in the plaintiff's position and with the plaintiff's beliefs and fears. As the Panel noted:

"A problem with this approach is that it may require an answer to the nonsensical question of what a reasonable person with unreasonable views would have done."[29]

The Ipp Panel recommended that in view of the difficulty of counteracting hindsight bias and the

virtually appeal proof nature of the finding, whilst the subjective test should remain the rule in Australia, a statement by a plaintiff as to what he or she would have done should be made inadmissible. That has been enacted in some States[30].

Professional Negligence

One matter of longstanding concern, particularly in cases involving medical negligence, has been the preparedness of some judges and juries to find negligence in defiance of the balance of professional opinion, by favouring minority opinions and even "junk science". The English Bolam test[31] which, in substance, meant that it was not open to a court to find a standard medical practice to be negligent, was applied in some Australian courts until the High Court determined in 1992 that it would not apply [32]. New Zealand case law had developed in the same general direction so that evidence of professional practice was admissible and helpful to indicate whether there had been a breach of a duty of care but it was not decisive[33]. Eventually the House of Lords also accepted that the Bolam test was not conclusive on the issue of breach[34]. There appears to be a certain degree of convergence in the approach to this matter amongst common law countries, but the English have not moved as far from Bolam as Australia, or at least, not yet.

In 2001, when the New South Wales Parliament passed special legislation changing the principles and practices with respect to medical negligence, the introduction of a version of the Bolam test was considered but, in the event, not adopted[35]. By 2002 the sense of crisis, particularly with respect to the liability of medical practitioners, accentuated as it was by the near collapse of the major medical insurer, had changed the environment. The way that some of the parliaments have responded to this issue has, however, extended beyond the medical negligence field and, accordingly, applies to cases not involving personal injury. This was a response to the across the board explosion in premiums for professional liability policies and the exclusion of many risks from cover.

The Ipp Panel directed its attention to the position of medical negligence and posed the question in terms of whether, and if so when, the courts should defer to a substantial body of expert opinion. It noted instances in which a strongly held and reasonable, albeit minority, body of opinion had subsequently been shown to lead to unacceptable consequences[36]. The Panel recommended a modified version of the Bolam test to the effect that the standard of care in medical negligence cases should be that treatment is not negligent if it was provided in accordance with an opinion widely held amongst a significant number of respected practitioners. This would be subject to an ultimate ability of the court to intervene if it believed that even such an opinion was "irrational". During the course of the debate the example most frequently referred to was the use of electro-convulsive therapy on a systematic basis in a Sydney psychiatric hospital which led to considerable controversy a decade plus ago.

The Ipp Panel considered the possibility of extending the new principle beyond medical practitioners to all professionals or even to all professions and trades. It accepted that this was a political decision and raised the possibility that legislation would apply only to medical practitioners, leaving it open to the courts to extend the approach to other professions[37].

Some States have enacted, or proposed[38] the substance of the recommendations although in different terms. Other States have not, or have not yet, done so[39]. Although the differences amongst the enactments do not appear major, they may lead to different results. In each State, however, the new test extends to all professions, not just medical practitioners.

Notably, no Act defines a "profession". The quest for "professional" status has been a matter of great concern for many occupations, not traditionally regarded as "professions". This will now become a matter which requires determination by the courts in the full range of cases in which "professional" status has been asserted, such as chiropractors, psychologists, teachers, journalists. Perhaps just as likely is a challenge to whether the clergy, that has historically had professional status, can continue to make the claim to such status.

The New South Wales formulation is that a professional does not incur liability, if it is established that he or she acted in a manner that was widely accepted in Australia by peer professional opinion as competent professional practice[40]. However, such peer professional opinion cannot be relied upon if the court considers it to be irrational. Furthermore, this restriction does not apply to liability in connection with the giving, or failure to give a warning or advice in respect to the risk of death or injury to a person. This last provision has the consequence that the actual decision in the seminal High Court authority, *Rogers v Whitaker* - which involved the failure of medical practitioner to give advice to a person with one good eye of the most unlikely, but nevertheless extant, risk of an operation leading to the loss of sight in that eye - would still be decided in the same way[41].

This is likely to be an area that will require some period of litigation to determine the precise effect of the changes. Unlike the new system of proportionate liability, the operation of which has been suspended, these provisions will forthwith apply to cases of alleged negligence by lawyers, accountants and auditors. The possibility that the standards applicable in this respect will differ from those determined by the courts to apply under the Trade Practices Act and its State replicas, is a further layer of complexity that only a federal system like ours can enjoy. As litigation of this character is often national in an integrated national economy, the differences amongst the recent State Acts may become an additional burden in the litigation process. The identification of precisely where a national corporation committed certain acts is not something that is worth the time and expense that may well be required.

New South Wales and Western Australia have legislation which provide caps on liability with a quid pro quo of regulation of professional standards including a risk management regime. The caps are of limited effect because of the option to sue under the Trade Practices Act. A uniform national approach, with attendant complementary Commonwealth legislation, has recently been agreed but the details are not yet known. The scheme may be extended to medical practitioners for the first time.

Proportionate Liability

A change that has been considered over a long period of time is whether or not the traditional common law position of solidary liability should be replaced by some form of proportionate liability. The rule is that a defendant is liable to compensate a plaintiff for the whole of the harm suffered and liability is not decreased by the fact that some other person's tortious conduct also contributed to that harm.

This matter was considered in 1992 by your Law Commission, which recognised that there were arguments in favour of abolishing the rule. The Commission was not convinced that it should be abolished, but it was influenced by the fact that others who had considered this change had also rejected it[42]. That was the case in Australia where consideration was given to the same issue at about the same time and no change eventuated[43]. Insofar as your Commission was influenced by this parallel development in Australia, as appears to have been the case[44], that position has now changed.

At no stage during the course of the recent debate in Australia did anyone advocate the introduction of proportionate liability for personal injury. When I revived the matter in the context of the checklist of possible reforms I advanced in my paper last year, I limited the possible change to a situation of financial loss[45]. In my view it is by no means clear why one defendant, because it is wealthy or insured, should, in effect, become an insurer against the insolvency or impecuniosity of co-defendants, who have contributed substantially to the pecuniary loss in question.

My understanding of what had happened with respect to the proposals for change in Australia in the mid to late 90s was that they had foundered on opposition from the Commonwealth Treasury which had administrative responsibility for the consumer protection provisions of the Trade Practices Act 1974 (Cth). There was, and is, no point in introducing proportionate liability for the tort of negligence when almost all such proceedings could result in parallel proceedings under the Trade Practices Act, and the application of that Act throughout the Commonwealth by the uniform Fair Trading Acts of the States.

The Ipp Panel considered the issue of proportionate liability in the context of its terms of reference, which were limited to personal injury. It recommended that in that context proportionate liability not be introduced[46]. No Parliament has sought to do so.

Nevertheless, this issue has been taken up by the Parliaments with respect to actions for economic loss and damage to property, whether in contract, tort or otherwise and, particularly, extending to contravention of the Fair Trading Act.

With respect to actions of this character, the Act or Bill in some States[47] provides that the liability of a concurrent wrongdoer is limited to an amount "reflecting that proportion of the damage or loss claimed that the court considers just having regard to the extent of the defendant's responsibility for the damage or loss". There are a number of consequential and ancillary provisions to implement the scheme which at this stage differ from State to State[48].

There is one fundamental divergence amongst the schemes enacted or proposed. In Queensland, the

Act excludes claims for damages of less than \$500,000. That is to say in Queensland, unlike other States, solidary liability will remain the case for property damage or economic loss claims below the \$500,000 threshold.

Neither Pt 4 of the Civil Liability Act 2002 of New South Wales, nor Ch 2 Pt 2 of the Queensland Act have been proclaimed to come into effect. This is because the parallel Commonwealth scheme has not yet been announced. This delay is also affected by the desirability of efforts to achieve national uniformity. In both Western Australia and Victoria the proposals are still at bill stage.

The Commonwealth and the States have set up a working party to create a more harmonious regime. There is no publicly agreed model at this stage. However, all will strive to reach a situation in which, at least, the Fair Trading Acts of the respective States remain identical with the Commonwealth Trade Practices Act and with each other. The political will for uniformity in all respects appears strong. There is scope yet for the emergence of the lowest common denominator phenomenon, so commonly triumphant in federal systems. It appears likely that there will be a common regime although specific variations could be accommodated such as the Queensland \$500,000 threshold.

When Australia promulgates a coherent scheme in this regard, it will have a dramatic effect on certain kinds of litigation. The search for deep pockets, often in the form of a professional who is insured - a legal practitioner, accountant, auditor or valuer - will become much less of a determinant of litigation, particularly with respect to economic loss arising from corporate insolvency. A number of cottage industries - amongst liquidators, litigation financiers, expert witnesses - will be threatened by this change.

The courts will have to deal with a new kind of decision-making process similar to, but not the same as, an apportionment exercise between co-defendants. The determination of who is responsible, and in what proportions, for an ultimate loss in a case of insolvency between, for example, directors on the one hand and auditors or advising lawyers on the other hand, will give rise to some very difficult and complex factual issues. The issue will have to be determined even if some of the persons whose conduct contributed to the loss are not parties to the proceedings.

Litigation of this character will be transformed. The risks to plaintiffs and, increasingly in Australia, to their independent financiers taking advantage of the abolition of the doctrines of maintenance and champerty, will be considerably increased. I anticipate that many such proceedings will no longer be pursued when, on an objective analysis, it appears that outsiders, whether accountants or lawyers, have little real responsibility for the demise of the corporation, in comparison with the responsibility of insiders. Nevertheless, for those proceedings that are worth pursuing even for a proportion of the ultimate loss, one can expect that the cases, historically lengthy, will be even longer than they have traditionally been because of the new issues that must be determined, that is, the identification of the appropriate proportion to be borne by the defendants who are able sued.

Mental Trauma

Another area in which legislation has intervened is that of liability for mental trauma. As I understand the position in New Zealand under the Accident Compensation Act 1982, recovery was permitted for cases of mental injury unaccompanied by physical injury[49]. However, as compensation for pure mental harm had become a burden on the scheme, the reforms of 1998, continued in 2001, excluded mental injury not consequent upon physical injury or a criminal offence of a sexual character.

Compensation under the Act is denied when mental illness was not consequent upon the physical injury. However, where the mental harm is found to arise indirectly out of a personal injury compensation at common law may also be denied because of the statutory bar now found in s317 of the Act[50]. A case of pure mental harm - arising neither directly nor indirectly from personal injury - is not caught by the bar and, accordingly, a common law action will be available[51]. It has been held that the bar does not apply if mental trauma is suffered by a person who observes or, presumably, subsequently hears of, personal injury to another[52].

There are, therefore, as I understand the position, circumstances in which damages for mental trauma can be pursued at common law. Accordingly, the Australian position in this regard is potentially relevant to New Zealand.

It is difficult to justify at an intellectual level a different treatment for psychiatric injury from personal bodily injury. However, as Fullagar J once warned us, we should resist "the temptation, which is so apt to assail us, to import a meretricious symmetry into the law"[53].

The courts have consciously adopted, from time to time, control devices to prevent the floodgates opening in this respect. One such device was the rule that recovery for pure mental trauma could only occur if a plaintiff had directly observed events which caused the trauma. So a parent who had only heard about an injury to a child could not recover. This led in England to the case law distinguishing between primary and secondary victims. Another control element that had been adopted was to confine recovery to situations that could be described as "nervous shock", i.e. where there had been a sudden assault on the senses. Both these restrictions were swept aside by the High Court of Australia late last year in *Tame v New South Wales*[54]. However, the Court affirmed one aspect of the prior position that recovery at common law was not available for any form of mental distress, but is restricted to a recognised psychiatric condition.

Another issue raised in the judgments in the High Court was the test of normal fortitude, that is, is recovery for this kind of injury limited to situations in which a person of a normal fortitude would be liable to suffer mental trauma? This matter was not so clearly determined.

The two factual situations before the High Court were as follows:

In one case, a woman suffered an acute mental disturbance upon realising that a traffic accident report had referred to her as the person who was under the influence of alcohol, rather than the other driver. In the other case a father and mother had suffered a psychiatric disturbance after being informed by the defendant of their son's death, which had occurred in circumstances of a failure by the defendant employer to properly supervise the young man notwithstanding express prior assurances to his parents.

Of the two cases it was quite clear that the woman who had been wrongly identified as under the influence was not a person of normal fortitude (and she lost). However, the parents' reaction to hearing of the death of a son was the kind of reaction that one could expect from a person of normal fortitude (and the parents won).

The person of normal fortitude test was apparent in prior case law[55]. The English position was that normal fortitude was still required for what they had come to call "secondary victims", but not for "primary victims".

In *Tame*; *Annetts* the High Court discussion of the person of normal fortitude test was expressed in different ways[56]. There was scope for further refinement at common law in these differences. That will continue to be the case in New Zealand.

The Ipp Panel concluded that the judgment in *Tame v New South Wales*:

"... establishes ... that a duty of care to avoid mental harm will be owed to the plaintiff only if it was foreseeable that a person of 'normal fortitude' might suffer mental harm in the circumstances of the case if care was not taken. This test does not require the plaintiff to be a person of normal fortitude in order to be owed a duty of care. It only requires it to be foreseeable that a person of normal fortitude in the plaintiff's position might suffer mental harm. In this sense, being a person of normal fortitude is not a precondition of being owed a duty of care."[57]

The Ipp Panel recommended that the majority opinion which it detected in the judgments should be enshrined in statute. In some States, but not elsewhere⁵⁸, this recommendation has been accepted. The possibility of further development at common law will now be set aside by the application of a statutory formula which categorically states that no duty is owed to a person, unless the defendant ought to have foreseen that a person of normal fortitude might suffer a recognised psychiatric illness. This is to be determined in accordance with "the circumstances of the case", which circumstances expressly include reference to sudden shock, direct perception of death or injury and the nature of the relationship between the plaintiff and any person killed or injured or between the plaintiff and the defendant.

In New South Wales and South Australia, the legislature has gone beyond the Ipp recommendations by restricting recovery for pure mental harm to persons who directly witnessed a person being killed or injured or put in peril or were a close family member of the victim[59].

The Ipp Panel recommended that claims for consequential mental harm - harm associated with physical harm - should be subject to the same constraints as attach to claims for pure mental harm.

There are many cases in which physical impairment is minor but has led to substantial continuing effects which are mental rather than physical. This has been enacted[60].

Liability of Public Authorities

In 2002, the Australian debate extended to the liability of public authorities. One of the terms of reference of the Ipp Panel was to "address the principles applied in negligence to limit the liability of public authorities". The Panel identified two types of cases as having given rise to concern. The first is where an authority is alleged to have failed to take care of a place over which it has some level of control, such as highways and national parks. Concern about the frequency of litigation of this character has been particularly acute at the level of local government.

The issue came to a head in the decision of the High Court in *Brodie v Singleton Shire Council*⁶¹ in which the court abolished the rule that a highway authority was not liable for non-feasance. The majority judgments in that case, however, identified an ability on the part of the highway authority to excuse its failure to remedy the defect on the basis of limitations of its resources and the identification of other priorities. This has given rise to a substantial amount of disputation about the resources and priority decision-making processes of particular local authorities⁶². Liability with respect to such matters is likely only to arise in the context of personal injury.

The second kind of case identified by the Ipp Panel is not so limited. It is directed to liability of public authorities in contexts in which the relevant decision-making process involves political, economic, social or environmental considerations. Australian case law has not always allowed such factors to justify a failure to remove a risk.

The Ipp Panel considered whether or not a "policy defence" should be available to all public authorities[63]. In this category of cases the interests of individuals after materialisation of a risk had to be balanced against a wider public interest, including the taking into account of competing demands on resources of the public authority. The Panel's recommendation was that in a claim for damages arising from the negligent performance or non-performance of a public function, liability should not arise where there was a "policy decision" involved. The Panel recommended that the definition of "public functions" be allowed to develop at common law. A "policy decision" was identified as a "decision based substantially on financial, economic, political, social factors or constraints". In such a case liability should only arise if the decision was so unreasonable that no reasonable public decision-maker would have made it, that is, a *Wednesbury* unreasonableness test.

The Ipp Panel's recommendations were confined, in accordance with its terms of reference, to personal injury matters. The relevant legislative changes are not so confined. Some States have pursued the Ipp recommendation for a policy defence. There are, however, significant differences from the Panel's recommendations[64]. In New South Wales the defence is stated in terms of principles for determining whether a duty exists or breach has occurred. These principles include the proposition that performance may be limited by financial and other resources that are reasonably available to the authority, that the general allocation of those resources by an authority is not open to challenge, and that the conduct of the authority is to be assessed by reference to the full range of its functions. Furthermore, an authority may rely on evidence of compliance with its general procedures and applicable standards, as evidence of the proper exercise of its functions[65].

In the case of alleged breach of statutory duty, that is, not alleged negligence, some Acts provide that any act or omission of the authority does not constitute such a breach unless the act or omission was so unreasonable that no authority could properly have considered the act or omission to be a reasonable exercise of its function. This is the adoption of the *Wednesbury* unreasonableness test for breach of statutory duty[66].

The New South Wales Act alone provides that a public authority is not liable for a failure to exercise a function to prohibit or regulate an activity if the authority could not have been required to exercise that function in *mandamus* proceedings instituted by the claimant[67]. This may well come to test the limits of proceedings by way of *mandamus*.

The cumulative effect of these changes is likely to be substantial. This is a matter on which pleas for national uniformity are likely to appear less compelling.

Exemplary Damages

Notwithstanding the restrictions on common law actions in New Zealand, proceedings for exemplary damages are permitted. The New Zealand jurisprudence on this subject has developed over a period,

culminating in the decision of the Privy Council in *A v Bottrill*[68]. To some degree, one suspects, this case law may reflect an attempt to redress perceived inadequacies in the level of compensation provided under the statutory scheme.

By definition the award of exemplary damages serves social purposes other than compensation. Punishment for egregious conduct will serve as a deterrent and also as a vindication of a plaintiff's rights. By majority, the Privy Council overruled the Court of Appeal which had held that an award of exemplary damages should be limited to the case of intentional wrongdoing or conscious recklessness.

Recent Australian legislation has dealt jointly with exemplary damages and with aggravated damages, which are a form of compensatory damages relating, as they do, to the additional injury suffered by a plaintiff in the form of mental suffering due to the manner in which a defendant behaved. The award of exemplary damages in this context has generated different views over a long period of time[69].

In Australia at various times over the years, States abolished both aggravated and exemplary damages in their respective motor vehicle accident regimes. In mid 2002, prior to the Ipp Panel, Queensland abolished such damages in all cases of personal injury or death and New South Wales in such cases where caused by negligence. The Ipp Panel recommended that that occur elsewhere. Subsequently legislation to that effect has been passed in the Northern Territory[70].

I am unaware that there has been any empirical research with respect to this matter. The issue has been dealt with in a broad brush manner that any form of "extra" damages was something that should be taken away, in the interests of reducing insurance premiums. Exemplary damages were rarely awarded. I doubt that their abolition has made any practical difference to insurance premiums. The speed with which the changes have been introduced and the focus on controlling premiums did not permit the consideration of the various social purposes, other than compensation, performed by the law of torts.

It may be that these new restrictions will lead to a revival in proceedings, at least in the alternative, for the intentional torts, which have been somewhat sidelined by the tort of negligence for the last half century or so[71].

Conclusion

The process of change in Australian tort law is not complete. In a number of crucial respects the overriding wish that there be national uniformity will require modification of some of the recently enacted provisions. I have concentrated on those changes which impinge to a significant degree on areas other than personal injury. It is by no means yet clear where, in many of these respects, Australian law will come to rest.

One thing is clear, by a combination of a major change in judicial attitudes, led by the High Court, and wide-ranging legislative change, the imperial march of the tort of negligence has been stopped and reversed. New categories of liability, which were a feature of recent decades are now less likely to emerge.

There is one occasion when a court refrained from extending liability in a novel case. This was a claim for damages by a landowner of the costs of protecting and reinvigorating a "beautiful oak tree" into which an errant motorist had crashed his Chevrolet. This led the Michigan Court of Appeals to be moved to verse, in lament.

The Court's judgment as reported was:

"We thought that we would never see
A suit to compensate a tree.
A suit whose claim in tort is prest
Upon a mangled tree's behest;
A tree whose battered trunk was prest
Against a Chevy's crumpled crest;
A tree that faces each new day
With bark and limb in disarray;
A tree that may forever bear
A lasting need for tender care.
Flora lovers though we three,

We must uphold the court's decree.
Affirmed."

This, I emphasise, is the whole judgment. The headnote was also in verse. For the doubters amongst you, the reported case reference is *Fisher v Lowe* (1983) 333 NW 2d 67. You may find some consolation in the fact that the reason the oak tree lost was because it was not covered by the Michigan system of no-fault liability.

1 J J Spigelman, "Negligence: The Last Outpost of the Welfare State" (2002) 76 ALJ 432.

2 *The New Yorker*, April 21 and 28, 2003, at p101.

3 *Kinzett v McCourt* (1999) 46 NSWLR 32 at [97]; cf at [116].

4 Spigelman, above n 1, 434-435.

5 Spigelman, above at n1, at 440.

6 *Antico v Heath Fielding Australian Pty Ltd* (1997) 188 CLR 652; *FAI General Insurance Co Ltd v Australian Hospital Care Pty Ltd* (2001) 204 CLR 641; *East End Real Estate Pty Ltd v C E Heath Casualty & General Insurance Ltd* (1991) 25 NSWLR 400.

7 Atiyah, *The Damages Lottery*, Hart Publishing, Oxford, 1997, Chapters 2 and 3.

8 See *Agar v Hyde* (2000) 201 CLR 552; *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254; *Rosenberg v Percival* (2001) 205 CLR 434; *Liftronic Pty Ltd v Unver* (2001) 75 ALJR 867; *Sullivan v Moody* (2001) 207 CLR 562; *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460; *Derrick v Cheung* (2001) 181 ALR 301; [2001] HCA 48; *Ghantous v Hawkesbury Shire Council* (2001) 206 CLR 512; *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 77 ALJR 183; *New South Wales v Lepore* (2003) 77 ALJR 558.

9 *Overseas Tankship (UK) Limited v Miller Steamship Co Pty Ltd* [1967] 1 AC 617.

10 (1980) 146 CLR 40 at 47.

11 Spigelman, above n 1, at 441.

12 *Rasic v Cruz* [2000] NSWCA 66 at [43].

13 *Tame v New South Wales*; *Annetts v Australian Stations Pty Limited* (2002) 76 ALJR 1348 at [98].

14 See *Miller Steamship Co v Overseas Tankship (UK)* (1963) 63 SR(NSW) 948 at 958-959. See also Spigelman, above n 1, at 442.

15 *Civil Liability Act 2002 (NSW)*, Pt 1A Div 2; *Civil Liability Act 2003 (Qld)*, Ch 2 Pt 1 Div 1; *Law Reform (Ipp Recommendations) Bill (SA)* (introduced 2 April 2003), cl 31, 32; *Civil Liability Amendment Bill (WA)* (introduced 20 March 2003), cl 8 (s 5B).

16 The Australian Capital Territory, Tasmanian and Victorian legislatures have not sought to enact the Panel's formulation.

17 See *March v E & M H Stramare Pty Ltd* (1991) 171 CLR 506.

18 See, eg, *Barnes v Hay* (1988) 12 NSWLR 337 at 339F-G and 353E-F.

19 Commonwealth of Australia, *Review of the Law of Negligence: Final Report* (September 2002) at [7.26].

20 See, eg, Jane Stapleton, "Lords a'Leaping Evidentiary Gaps" (2002) 10 TLJ 276.

21 See *Bonnington Castings Ltd v Wardlaw* [1956] AC 613.

22 See *Fairchild v Glenhaven Funeral Services Limited* [2003] 1 AC 32. See also *Bendix Mintex Pty Ltd v Barnes* (1997) 42 NSWLR 307 and *Jane Stapleton*, above n 20.

23 Review, above n 19, at [7.33].

24 Civil Liability Act 2002 (NSW), Pt 1A, Div 3; Civil Liability Act 2003 (Qld), Ch 2 Pt 1 Div 2; Law Reform (Ipp Recommendations) Bill (SA) (introduced 2 April 2003), cl 34; Civil Liability Amendment Bill (WA) (introduced 20 March 2003), cl 8 (Pt 1A Div 3).

25 Civil Liability Act 2002 (NSW), s 5D(2); Civil Liability Act 2003 (Qld), s 11(2); Law Reform (Ipp Recommendations) Bill (SA) (introduced 2 April 2003), cl 34(2); Civil Liability Amendment Bill (WA) (introduced 20 March 2003), cl 8 (s 5C(2))

26 Review, above n 19, at [7.34]. The matter arose from observations in *Bennett v Minister of Community Welfare* (1992) 176 CLR 408 at 420-421; *Chappel v Hart* (1998) 195 CLR 232 at [27]; *Naxakis v Western General Hospital* (1999) 197 CLR 269 at [31] and [127]. See also *Bendix Mintex*, above n 22, at 315-316 and *Seltsam Pty Ltd v McGuinness* (2000) 49 NSWLR 262 at 278-280.

27 Civil Liability Act 2002 (NSW), s 5E; Civil Liability Act 2003 (Qld), s 12; Law Reform (Ipp Recommendations) Bill (SA) (introduced 2 April 2003), cl 35; Civil Liability Amendment Bill (WA) (introduced 20 March 2003), cl 8 (s 5D).

28 See, eg, *Chappel v Hart*, above n 26 and *Rogers v Whitaker* (1992) 175 CLR 479.

29 Review, above n 19, at [7.39].

30 Civil Liability Act 2002 (NSW), s 5D(3); Civil Liability Act 2003 (Qld), s 11(3). These provisions add to the recommendation of the Ipp Panel an exception for statements of the plaintiff against his or her own interests.

31 *Bolam v Friern Barnet Hospital Management Committee* [1957] 1 WLR 582.

32 *Rogers v Whitaker*, above n 28.

33 See Todd, *The Law of Torts in New Zealand* (3rd ed), Brookers, Wellington, 2001 esp at 402-403.

34 *Bolitho v City and Hackney Health Authority* [1998] AC 232.

35 See *Health Care Liability Act 2001* (NSW).

36 Review, above n 19, at [3.9]-[3.11].

37 Review, above n 19, at [3.30].

38 Civil Liability Act 2002 (NSW), Pt 1A Div 6; Civil Liability Act 2003 (Qld), Ch 2 Pt 1 Div 5; Law Reform (Ipp Recommendations) Bill (SA) (introduced 2 April 2003), cl 41.

39 The Australian Capital Territory, Victorian, Western Australian and Tasmanian legislatures have not taken steps to implement this aspect of the Ipp Review.

40 Civil Liability Act 2002 (NSW), s 5O. In South Australia, the protection from liability extends to professionals who act "in a manner that...was widely accepted in Australia by members of the same profession as competent professional practice" and in Queensland "in a way that...was widely accepted by peer professional opinion by a significant number of respected practitioners in the field as competent professional practice."

41 All three jurisdictions exclude from the application of the 'accepted professional opinion' test, liability claimed in respect of the giving of, or failure to give, a warning, advice or other information as part of a professional service in respect of a risk of personal injury or death. In South Australia, the exclusion is limited to cases involving the provision of a health care service. In Queensland, the

recommendations of the Ipp Panel regarding a doctor's duty to warn have been enacted (Civil Liability Act 2003 (Qld), s 21; see Review, above n 19, at [3.35]-[3.70]).

42 See Law Commission of New Zealand, Apportionment of Civil Liability, Preliminary Paper No 19, Wellington (1992) and Law Commission of New Zealand Apportionment of Civil Liability Report No 47, Wellington (1998).

43 See Davis, Commonwealth of Australia, Inquiry into the Law of Joint and Several Liability, Report of Stage 2 (1995); NSW Law Reform Commission, Contribution Between Persons Liable for the Same Damage, Discussion Paper No 38 (1997); NSW Law Reform Commission, Contribution Between Persons Liable for the Same Damage, Report No 89 (1999), esp Ch 2. See also Swanton & MacDonald "Reform to the Law of Joint and Several Liability - Introduction of Proportionate Liability" (1997) 5 TLJ 109.

44 See Todd, *The Law of Torts in New Zealand* (3rd ed), above n 33, at 1157-1158.

45 Spigelman, above n 1, at 446-447.

46 Review, above n 19, Ch 12.

47 Civil Liability Act 2002 (NSW), Pt 4; Civil Liability Act 2003 (Qld), Ch 2 Pt 2; Wrongs and Limitation of Actions Acts (Insurance Reform) Bill (Vic) (introduced 20 May 2003), cl 3; Civil Liability Amendment Bill (WA) (introduced 20 March 2003), cl 9.

48 Those provisions include, in all States adopting proportionate liability, the abolition of claims for contribution between concurrent wrongdoers, the capacity for the plaintiff to claim against concurrent wrongdoers in subsequent actions provided the total recovered does not exceed the actual loss suffered by the plaintiff, provisions for the joinder by the court of concurrent wrongdoers not having been the subject of a previous judgment and the preservation of the operation of vicarious liability and the several liability of partners. In addition, in the Queensland Act, joint and several liability is preserved against a defendant who committed an intentional tort pursuant to a common intention, was the principal of a liable agent, was engaged to provide professional advice which failed to prevent a loss caused by another, committed fraud or engaged in misleading or deceptive conduct in trade or commerce. Of the additional categories in the Queensland Act, Victoria has proposed to include only fraud and principals of agents. Victoria has also expressly preserved the court's power to award exemplary or punitive damages against a defendant in an apportionable proceeding.

49 Todd, *The Law of Torts in New Zealand* (3rd ed), above n 33, at p73 esp fn 35.

50 See, under the previous scheme, *Brownlie v Good Health Wanganui Ltd* (unreported, NZCA, 10 December 1998).

51 *Queenstown Lakes District Council v Palmer* [1999] 1 NZLR 549; see G McLay "Nervous Shock, Tort and Accident Compensation: Tort Regained?" (1999) 30 VUWLR 197.

52 Mullany "Accidents and Actions for Damage to the Mind - Kiwi Style" (1999) 115 LQR 596 esp at 597.

53 *Attorney General (NSW) v Perpetual Trustee Co Ltd* (1952) 85 CLR 237 at 285.

54 *Tame v New South Wales; Annetts v Australian Stations Pty Limited*, above n 13.

55 See my consideration of the cases in the court below, *Morgan v Tame* (2000) 49 NSWLR 21 at [14]-[20].

56 Cf Gleeson CJ at [16], Gaudron J at [61], McHugh J at [109] et sec, Gummow & Kirby JJ at [196] et sec, Hayne J at [273] and Callinan J at [366].

57 Review, above n 19, at [9.13].

58 Civil Liability Act 2002 (NSW), s 32; Civil Liability Amendment Bill (WA) (introduced 20 March 2003), cl 8 (s 5P); Law Reform (Ipp Recommendations) Bill (SA) (introduced 2 April 2003), cl 33.

Tasmania, Victoria, Queensland and Western Australia have not enacted the Recommendations of the Panel in this regard.

59 Civil Liability Act 2002 (NSW), s 30; Law Reform (Ipp Recommendations) Bill (SA) (introduced 2 April 2003), cl 54. The South Australian provisions possibly cover a person present at the scene of the accident when it occurred but not actually witnessing the occurrence.

60 Civil Liability Act 2002 (NSW), ss 32(1), (3) and 33; Civil Liability Amendment Bill (WA) (introduced 20 March 2003), cl 8 (ss 5P(1), (3) and 5Q); Law Reform (Ipp Recommendations) Bill (SA) (introduced 2 April 2003), cl 33(1), (2)(b) and 54(3)).

61 (2001) 206 CLR 512.

62 This may be attenuated to some degree by a recent decision of the Court of Appeal of New South Wales in which attention was directed to the obligations under the Local Government Act upon all Councils to incorporate in their Annual Report an outline of the public works required to bring public facilities up to a satisfactory standard and an estimate of the cost of doing so. As all Councils in New South Wales have to produce such a report on an annual basis it appears likely that councils will be readily able to establish the defence envisaged by the majority judgment in Brodie. See *Roads & Traffic Authority of New South Wales & Ors v Palmer* [2003] NSWCA 58, esp at [159]-[173]. Contrary to the recommendations of the Ipp Panel, three States have reintroduced the non-feasance immunity rule for highway authorities: Civil Liability Act 2002 (NSW), s45; Civil Liability Act 2003 (Qld), s37; Law Reform (Ipp Recommendations) Bill (SA) (introduced 2 April 2003), cl 42. In South Australia the immunity will apply only in negligence actions. In New South Wales and Queensland, the immunity does not operate where an authority had actual knowledge of the relevant risk.

63 Review, above n 19, at [10.20]-[10.29].

64 Civil Liability Act 2002 (NSW), ss 41, 42; Civil Liability Act 2003 (Qld), ss 34, 35; Civil Liability Amendment Bill (WA) (introduced 20 March 2003), cl 8 (ss 5R, 5T, 5U). The contents of the Annual Report referred to in note 62 above will be relevant to the new policy defence.

65 The New South Wales, Queensland and Western Australian provisions are closely similar in this regard. All three States have applied the 'principles' to bodies specified in the Act, constituted under other Acts, or identified (in respect of all or specified functions) by regulation. The Western Australian Bill in addition proposes the policy defence with respect to 'public functions' as recommended by the Ipp Panel.

66 Civil Liability Act 2002 (NSW), s 43; Civil Liability Act 2003 (Qld), s 36. In contrast, the Western Australian Bill adopts the 'compatibility' test recommended by the Ipp Panel, *Wednesbury* unreasonableness being a defence to all claims for damages against a public body or officer: Civil Liability Amendment Bill (WA) (introduced 20 March 2003), cl 8 (s 5V). See Review, above n 19, at [10.34]-[10.45].

67 Civil Liability Act 2002 (NSW), s 44.

68 See *A v Bottrill* [2003] 1 AC 449, on appeal from *Bottrill v A* [2001] 3 NZLR 622.

69 See, for example, H Luntz, *Assessment of Damages for Personal Injury and Death* (4th ed), Butterworths, Australia, 2002, at [1.7.9]. See also Review, above n 19, at [13.163], [13.164].

70 Review, above n 19, [13.159]-[13.167]; Civil Liability Act 2002 (NSW), s21; Personal Injuries Proceedings Act 2002 (Qld), s 50 (the provision is now at Civil Liability Act 2003 (Qld), s 52); Personal Injuries (Liabilities and Damages) Act 2003 (NT), s 19. The Queensland provision excepts cases of unlawful conduct with the intention of causing personal injury and cases of unlawful sexual assault or misconduct.

71 See *TCN Channel Nine Pty Ltd v Anning* (2002) 54 NSWLR 333 at [152]-[169] and [179]-[188].

Address by the Honourable JJ Spigelman AC to Launch Phillip Ayres' Owen Dixon: A Biography

**ADDRESS BY THE HONOURABLE J J SPIGELMAN AC
CHIEF JUSTICE OF NEW SOUTH WALES
TO LAUNCH PHILLIP AYRES'
OWEN DIXON: A BIOGRAPHY
SYDNEY, 22 MAY 2003**

Sir Owen Dixon possessed the most formidable legal mind in all of our history. If there was a Nobel Prize for reasoning he was the most likely Australian to have been a recipient. Amongst the philosophers of the world, and particularly amongst the lawyers, over the first seven decades of the twentieth century, his particular genius for reasoning and power and clarity of expression placed him in the first rank.

For those of us attracted by intellectual sex appeal, and for whom that is not just a function of age, his judgments and essays retain their allure to this day, even in respects in which opinion has moved in a direction of which Sir Owen would have profoundly disapproved.

He was one of the great common law judges of the twentieth century. His peers included Frankfurter, Cardozo and, because of longevity, that nineteenth century figure Oliver Wendell Holmes. There were few, if any, contemporary English judges in his league. In his diary - covering 1911, the first two months of 1929 and the thirty-one years of 1935 to 1965, and without which this estimable biography would have lost much of its rich detail - he recorded those judges of whom he had a high regard, such as Lords Macmillan, Atkin and Maugham[1] and why his regard for Maugham and Macmillan diminished[2].

One of many intriguing revelations in this biography is the identification of the length of time for which Sir Owen, for all of his anglophilia and his affection for English legal institutions, had harboured the most profound reservations about the abilities and conduct of many of the most illustrious British silk and judges of the day. The strength of his opinions in this regard were, no doubt, a product of the extraordinary confidence he had in his own abilities a confidence which, for those who have hitherto known him only from the judgments and speeches of his mature years, this biography reveals had clearly emerged in full force at a young age. It was only such confidence that could have enabled him to soar to the top of the senior bar of Melbourne and Australia in a remarkably short period and of which achievement this book is the first comprehensive testament.

The biography reveals that, from the time of his practice as a silk appearing in the Privy Council, Dixon developed a poor regard for the qualities, including the diligence, of many senior English legal figures, both counsel with whom and against whom he appeared and, particularly, for the judges who sat on the Privy Council. Their refusal to engage in the hard work, and the harder thinking, required for cases of complexity appeared to particularly offend his own profound sense of duty. Because of the significance of the federal system for the Australian polity, Dixon found the indolence of the English judges who sat on the Privy Council and their refusal to understand the depths of their own ignorance in this regard, to be particularly offensive. These were not sentiments that he felt able to express publicly. His sense of deference, which by 1960 he was able to describe to Felix Frankfurter as "too much British sentiment"[3], was in many ways the other side of the coin to the indifference to, bordering on contempt for, colonial affairs, which found expression in the conduct of which he was long critical.

He held such views long before *Parker v The Queen* in 1963[4]. The House of Lords having gone wrong on a matter of fundamental principle - that a conviction for murder could be upheld on the basis of the natural consequences of an offender's acts, leading Fullagar to say to him "Well, Dixon they're hanging men for manslaughter in England now"[5] - Dixon pronounced, for an unanimous High Court in *Parker*, that henceforth the Court would no longer regard itself as bound by decisions of the House of Lords. Unlike all other steps in attaining legal independence from England, there was not a hint of disputation, given the eminence of the source.

Phillip Ayres does not speculate why, although appointed a Privy Councillor in 1951, Dixon never sat. It appears likely that he would not participate in a decision-making process that prevented delivery of a dissenting judgment. Indeed, as I understand the position, Sir Garfield Barwick only sat after that practice had changed. It may be that Dixon's attitude would have been different if he had a higher regard for his likely colleagues.

For those of us like myself whose primary exposure to Dixon was his judicial work, this biography reveals a broader persona and a richer career. His love and depth of learning in the classics is well-known and his capacity to draw on the literature of another culture, particularly that of Ancient Greece, to add depth to his reasoning and as a manifestation of the power of the western intellectual tradition, is a skill now lost to those of us who Roddy Meagher alone would describe as Dixon's epigoni.

Bernard Riley told the story, not in the book, of a conversation to the following effect:

DIXON: I have recently heard a wonderfully amusing joke Riley, I suppose I can tell it to you in Greek?

RILEY: No, it's one of the regrets of my life that I have no Greek.

DIXON: Well then perhaps Latin will suffice.

RILEY: I regret that whilst I studied it at school, my Latin is very rusty.

DIXON: Well then, there's no point in telling you the joke.

One area of Dixon's life which has come as a considerable revelation to me is his public service during the war, as chair of the regulatory agencies supervising wool and shipping and then as our representative in Washington with the title "Minister" - only the representative of the United Kingdom, representing the whole British Empire, could be called "Ambassador". Dixon had access at a level and of an intensity that no Australian has ever had since. It is clear that his capacity for balanced judgment came to be much appreciated by the most powerful men in Washington. No doubt in the absence of conversation about the classics or the law, Dixon's appeal lay partly in what would appear to others as his refusal to engage in small talk.

The closest of these relationships were with men like Dean Acheson, who shared with him a profound anglophilia. They were not representative of the true focus of power in Washington. Although his achievements were many, and his contribution of the highest order, there is a sense of missed opportunity particularly for the long term.

He, like many others including, for example, Churchill and Menzies, continued to believe that the British Empire could emerge from the war in something other than a subordinate position to the American imperium. It was the Anglo Saxon part of the American heritage with which he felt comfortable, not its economic and military power, let alone the social and cultural force of its diversity. England to him, like to many Australians of his generation, was still "home". At late as 1950 he wrote to his daughter that he would have liked to retire to England, but could not[6].

Perhaps the saddest moment in the book is the observation that Dixon made in another letter to his daughter in 1950 when he found himself in New York. He told her: "I can't think of anything I want to see or do". He accepted that there were numerous concerts, theatres, movies, galleries etc. but he said, "I don't want to go to any of them"[7]. New York at that time was the cultural capital of the world. It may have been a bit much to expect Dixon to visit the jazz clubs or to go up to Harlem to listen to some blues, but there was plenty else to do and see. On a subsequent visit he would record that he went to the Metropolitan and saw "some Rembrandts", but that he had somehow "missed the merit" of the Van Gough's at the Museum of Modern Art[8], a place which he regarded as replete with "ugly things"[9].

To some degree Dixon's depth came at the expense of breadth.

All lawyers will relish the further revelation of the internal workings of the High Court. That Dixon and others wrote many judgments for the lazy Sir George Rich is well known. However, until this book, I was not aware that, on one occasion, Rich's judgment had been written by the judge from whom the appeal was brought[10].

It is also well known - particularly from the Latham papers[11] - that relationships amongst the judges had been bad and often poisonous. The book provides us with rich new detail on this account.

The contrast between the fractiousness of the court under the inveterate intriguer Latham and the relative harmony under the leadership of Dixon, could not be more acute.

Latham, of course, had to deal with the impossibly rude Starke. At Issac Isaacs' funeral, it is said, Starke turned to Rich, already 80, and said "George, are you sure it's worth your while going home?"

With great skill Phillip Ayres has presented the life of an extraordinary Australian. Dixon's legal legacy will long endure. The biography also reveals the respects in which Dixon was a product of a time which has passed. An Australia which has cut its umbilical cord, no longer has, and can no longer afford to have, the prejudices of an earlier time, prejudices which the author does not seek to hide.

Dixon was a strong supporter of the White Australia Policy and regarded India as a future threat[12]; he abhorred the idea of African judges sitting on the Privy Council[13]; when the late Queen Mother expressed her own distaste for "knifey people" like Italians and Greeks, Dixon defended only the Greeks because of what they had done for Australian troops in World War II[14]; he dismissed Australian Aborigines as belonging to the "stone age"[15].

Phillip Ayres is at pains to point out that Dixon's attitude to Jews was based on "cultural preferences" rather than a biologically based racism. Dixon regarded many Jews as displaying "something Oriental or Levantine, a tendency to the florid and slightly colourful"[16]. As you see.

Dixon found it difficult to accept that the best doctors to treat his son's condition were German Jews rather than just Germans[17]. He regarded Isaiah Berlin, who was in Washington during the war, as a smart Alec[18]. He was concerned about the "Americanisation" of Melbourne Law School by Zelman Cowen[19] and, no doubt, of Sydney Law School by Julius Stone.

I have found particularly revealing the two occasions on which Phillip Ayres reports Dixon's particular choice of an annotation to express his view that a person was lying. The annotation was "Credate Judaeus Appella"[20] a quote from Horace's Satires. The full line adds the words "non ego", but a classicist would know the additional words "not I", so they went without saying. Dixon's choice of expressing a proposition roughly equivalent to "and pigs might fly", in the words "the Jew Appella may believe this, but I don't", reflects an attitude commonly held in genteel circles of the time.

Dixon was a member and President of clubs which did not admit Jews but, of course, some of his friends were Jewish. Sir John Monash, who - according to the conventional stereotype - neither looked nor talked like a "Jew", was a member of the same walking club as Dixon[21]. Eventually the stereotype would change. After the Israeli army swept down to the Suez Canal in 1956, Dixon would confide: "Nor did I ever expect to find myself in such full sympathy with the Jews in Palestine"[22].

A set of beliefs so firmly held, and so widespread amongst the elite of that era, could not but be reflected in judgments. I am reminded particularly of the case of *Browning v The Water Conservation & Irrigation Commission of NSW*. An Italian-born Australian, who had been naturalised in 1934, sought to acquire a water licence by assignment in 1946. The Commission had a firm policy that, save in special circumstances, it would not approve transfers to Italians for three reasons: first, Italians had recently been enemy aliens, secondly, they were not good farmers under irrigation methods and, thirdly, it was undesirable to permit further aggregation of Italians in the irrigation area. Each of these criteria was quite explicit.

In the Full Court of the Supreme Court, Sir Frederick Jordan dismissed these considerations as irrelevant, or in Sir Frederick's blunt words it was "no business" of theirs[23]. The appeal to the High Court was allowed, unanimously.

Not only were these considerations accepted to be relevant, but some of their Honours, particularly Chief Justice Latham indicated approval of the policy[24]. Dixon contented himself with the observation that issues of "suitability and desirability" were matters for the Commission[25].

This was the low point of High Court jurisprudence. It may be regretted that the editors of the recently published Oxford Companion to the High Court of Australia did not interrupt their triumphalist tone to include a section on the High Court's worst judgments. This case would feature prominently on any such list. It should serve as an example of the necessity for judges to be aware of the possibility of unconscious prejudice[26].

Browning bothered me when I first read it when studying administrative law at the University of

Sydney. As best I recall, it was the only Dixon judgment that had such an effect. For a lawyer who attended law school in the mid to late 60s, as I did, the then recent judgments we studied emanated from one of the great common law benches of history. Led by Dixon, and including Kitto, Fullagar and Windeyer, the judgments of the Court were and are an inspiration.

The force of Dixon's reasoning and power of expression was one of the most important influences formulating my own approach to the law. It remains such. This biography, which is launched in Sydney today, enables lawyers of my generation to better understand the man who had the most profound intellectual influence on us. It is a fitting testament to an exceptional Australian.

1 Phillip Ayres Owen Dixon: A Biography, Miejunyah Press, 2003, at p106-107.

2 Ayres 110-111.

3 Ayres 277.

4 Parker v The Queen (1963) 111 CLR 610 at 632.

5 Ayres at 276.

6 Ayres at 216.

7 Ayres at 216-217.

8 Ayres at 250.

9 Ayres 240.

10 Ayres 191.

11 See Clem Lloyd "Not Peace But a Sword! - The High Court under J.G. Latham" (1987) 11 Adel. L Rev 175.

12 Ayres at 211 and 269.

13 Ayres at 273 and 364 fn 70..

14 Ayres at 266-267.

15 Ayres at 161.

16 Ayres at 103.

17 Ayres at 105.

18 Ayres at 338 fn 78.

19 Ayres 270.

20 Ayres at 190 and 344 fn 43.

21 Ayres at 54.

22 Ayres 359 fn 73.

23 See Browning v The Water Conservation & Irrigation Commission (1947) 47 SR (NSW) 395 esp at 400.

24 See Water Conservation & Irrigation Commission of NSW v Browning (1947) 74 CLR 492 esp at 496-497.

25 Ibid at 505-506.

26 Justice Keith Mason "Unconscious Judicial Prejudice" (2001) 75 ALJ 626.

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Retirement from the Supreme Court and the Court of Appeal of the Honourable Justice Paul Stein AM

ADDRESS BY THE HONOURABLE J J SPIGELMAN AC

CHIEF JUSTICE OF NEW SOUTH WALES

UPON THE RETIREMENT FROM THE SUPREME COURT AND THE COURT OF APPEAL

OF THE HONOURABLE JUSTICE PAUL STEIN AM

We gather here today to celebrate your Honour's contribution to the administration of justice of this State particularly as a judge over a period of almost twenty years. You were appointed a judge of the District Court in June 1983, became a judge of the Land and Environment Court in June 1985 and were appointed a judge and a judge of appeal of this Court in April 1997. On behalf of all those associated with the administration of justice in this State and in particular on behalf of the judges of this Court, I thank you for the contribution you have made.

Even before becoming a judge your Honour made a significant contribution to the law and to public administration, for example, in the position of the Deputy Ombudsman between 1977 and 1979 and as President of the New South Wales Anti-Discrimination Board between 1979 and 1982.

Your public service in a wide variety of spheres of discourse included acting as Chair of the Juvenile Leave Review Committee between 1985 and 1988; as President of the Intellectually Handicapped Persons Review Tribunal under the *Child Welfare Act* 1970 between 1983 and 1989; as Chair of the Council of the Community Justice Centres of New South Wales under the *Community Justice Centres Act* 1983 between 1987 and 1993; as Chair of the National Consumer Affairs Advisory Council between 1987 and 1993; as Chair of the Commission of Inquiry into the ACT Leasehold System 1995 and as a member of the Board of the State Records Authority of New South Wales between 2001 and 2003.

In addition to official appointments your Honour was associated with numerous community organisations, for example, the board member and Chair of the Australian Consumers Association between 1974 and 1986; a member of the NRMA Crime Safe Committee between 1997 and 2000; and Chair of the NRMA Community Advisory Committee between 1993 and 1998.

This is a lengthy and diverse period of service to the people of this State.

Your Honour's contribution to environmental law and to the community was recognised by the Award of Membership of the Order of Australia in 1994.

You have played an active role in judicial training, both of Australian judges and judges from Southeast Asia. Your Honour's contribution to environmental law in this country as a lecturer, as an editor, as an author, as chair and member of various organisations, and as a judge, is unsurpassed. You have spoken and published regularly, both in Australia and overseas, at conferences and in courses, on the full gamut of issues that arise in the context of the protection of the environment by the legal system.

This is a record of public service of great distinction. On this occasion, however, it is particularly appropriate for me to focus on your Honour's contribution as a judge.

No doubt two seminal judgments at first instance in the Land and Environment Court are particularly close to your heart. In *State Pollution Control Commission v Caltex Refining Company Pty Ltd* (1991) 72 LGERA 212 your Honour held that the privilege against self-incrimination does not extend to companies. The Court of Appeal reversed your decision (*Caltex Refining Co v State Pollution Control Commission* (1991) 25 NSWLR 118), but the High Court reinstated it, with the judgments drawing on many of the same policy considerations which you had analysed in your judgment (see (1993) 178 CLR 477 esp at 508).

In *Oshlak v Richmond River Council* (1993) 82 LGERA 222 your Honour identified that the nature of the proceedings being a challenge to the validity of development consent at Evans Head on the basis of the impact of the development on endangered fauna was sufficient to constitute special circumstances to displace the usual rule that costs should follow the event. The Court of Appeal overruled your decision ((1996) 39 NSWLR 622). The High Court allowed the appeal (*Oshlack v Richmond River Council* (1998) 193 CLR 72).

As a judge of the Land and Environment Court your Honour made major contributions to every aspect to the burgeoning jurisprudence of the Court. Particular note should be made of litigation involving the Forestry Commission and wildlife protection (*Corkhill v Hope* (1991) 74 LGERA 33 and *Corkhill v Forestry Commission of New South Wales (No 2)* (1991) 73 LGERA 127). The Chaelundi State Forest which was in issue in these proceedings was described by your Honour as home to "a veritable forest dependant zoo, probably unparalleled in south-eastern Australia". This was the first occasion in Australia that wildlife protection law was enforced against a government authority. It laid the foundation for future statutory regimes, both in this State and at the Commonwealth level. On this occasion your Honour was affirmed by the Court of Appeal (*Forestry Commission of New South Wales v Corkhill* (1991) 73 LGERA 247).

In *Parramatta City Council v Peterson* (1987) 61 LGERA 286 your Honour's judgment was the seminal decision about the application of s94 of the *Environmental Planning and Assessment Act 1979* as to when a consent authority may require dedication of land or payment of a monetary contribution for the increased demand for public amenities and public services arising from a development.

In a number of judgments you contributed to the evolution of the jurisprudence of the *Aboriginal Land Rights Act 1983*. In *Tweed Byron Aboriginal Land Council v Minister Administering of Crown Lands (Consolidation) Act* (1999) 72 LGERA 177, you set aside a ministerial certificate and granted part of land claimed by the Aboriginal community at Fingle Head. However, in *New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act* (1992) 76 LGRA 192, your Honour rejected the claim to the grand colonial New South Wales Department of Education building in Bridge Street, holding that, notwithstanding that the fact that it was virtually vacant at the time of the claim, it was nevertheless being used for a public purpose and was not claimable.

In *Leatch v National Parks & Wildlife Service* (1993) 81 LGERA 270 your Honour considered the then recently developed precautionary principle in environmental law. Drawing on the growing body of literature and recognition in international instruments, you applied the principle in the course of litigation for the first time, I believe, in the common law world. Your judgment has attracted considerable attention in the international environmental law community. It has been referred to many times, not only throughout Australia, but also in judgments in England and New Zealand. It will long remain a seminal contribution to environmental law.

Upon your elevation to the Court of Appeal your Honour continued to make significant contributions to the development of environmental law. In *Coalcliff Community Association Inc v Minister for Urban Affairs & Planning* (1999) 106 LGERA 243 you considered that the lapsing of development consents and the requirement for compliance with conditions. In *Scharer v State of New South Wales* (2001) 53 NSWLR 299 your Honour considered the exclusive jurisdiction of the Land and Environment Court.

In this Court, of course, your Honour's contribution covered a broader range of the law. You have made a notable contribution to the application of the special laws of this State with respect to dust diseases. Your dissent on the issue of causation in *Bendix Mintex Pty Ltd v Barnes* (1997) 42 NSWLR 307 was recently cited with approval by the House of Lords in *Fairchild v Glenhaven Funeral Services Limited* (2003) 1 AC 32 at 64-65 and 116. You wrote the leading judgment in a case considering the relationship between the duty of care of an employer with respect to the use of asbestos products and the duty of care of the manufacturer of such products, including questions of apportionment and indemnity (*Rolls Royce Industrial Power (Pacific) Limited v James Hardie & Co Pty Ltd* (2001) 53 NSWLR 626).

Numerous other areas of this Court's broad jurisdiction attracted significant contributions from your Honour. This included the interaction between worker's compensation and migration legislation, in the context of the entitlement of an illegal entrant to worker's compensation (*Nonferral (NSW) Pty Ltd v Taufin* (1998) 43 NSWLR 312); the position of self-defence in circumstances of home invasion (*R v Munro* (2001) 51 NSWLR 540); the jurisdiction to deal with related summary offences under Pt 10 of the *Criminal Procedure Act 1986* (*DPP v Sinton* (2001) 51 NSWLR 659); the discretion to allow representation of parties by unqualified persons (*Damjanovic v Maley* (2002) 55 NSWLR 149).

These are amongst the public contributions which are, and will remain, well known to practitioners of the law. However, what is not so widely known is the contribution that your Honour has made to the collegial life of the Court. The strength of the Court of Appeal arises from the willingness of each member to join the others in getting the work done. Your Honour is a man with strong and well-informed views about many things. Nevertheless your Honour is always able to present those views in tones of moderation and with an understanding of different points of view.

In every case on which you have sat your Honour has made a contribution of substance, whether your Honour has written a lengthy judgment or merely concurred. Even in the longest and most tiresome of cases, of which there have been several during your Honour's period on this Court, you have produced careful well-reasoned and unfortunately necessarily long judgments and have done so promptly and without leaving any argument uninvestigated.

Your colleagues on the Court will long remember the conscientious devotion that you have always displayed to your duties. We will particularly miss the sense of fun that you have always brought to our collective endeavour. We all wish you well in this new phase of your life, where we know that you will continue to make a significant contribution to the administration of justice particularly, by lecturing and writing about environmental law and also in judicial training.

Of course you must leave with regrets. Perhaps high on that list is your failure to convince your fellow judges to abandon wigs. You yourself may now do so. We wish you well in what we know will be an active retirement.

Dealing with Judicial Misconduct - 5th World Wide Common Law Judiciary Conference, Sydney, Australia, 8 April 2003

DEALING WITH JUDICIAL MISCONDUCT

THE HONOURABLE J J SPIGELMAN

CHIEF JUSTICE OF NEW SOUTH WALES

5TH WORLD WIDE COMMON LAW JUDICIARY CONFERENCE

SYDNEY AUSTRALIA, 8 APRIL 2003

It is as difficult to find anything new or different to say about judicial misconduct as it is to do so about judicial independence. I am reminded of Lord Bingham's expressed hope that his lecture on "The Future of the Common Law" could be included in any future list of the one hundred best lectures entitled, "The Future of the Common Law"[1]. I have no such lofty ambition. The top thousand speeches on judicial misconduct will do me. To so distinguished an audience, I apologise in advance for the unavoidable element of a lecture on egg sucking.

This Conference has delegates from over a dozen nations and a number of jurisdictions within federal systems. The issue of judicial misconduct, including corruption, poses problems of varying levels of frequency and seriousness in these disparate jurisdictions. It has evoked a variety of institutional responses. I regard my primary task to be to provoke discussion about the common issues that arise. Most of my remarks will be directed to the Australian and, specifically, the New South Wales experience.

I find it helpful to consider issues of judicial misconduct and judicial incompetence from a rule of law perspective. The rule of law requires that laws are administered fairly, rationally, predictably, consistently and impartially. Judicial misconduct and judicial incompetence are incompatible with each of these objectives.

Fairness requires reasonable consideration of the rights and duties asserted. Rationality requires a reasoned relationship between the rights and duties and the outcome. Predictability requires a process by which the outcome is related to the original rights and duties. Consistency requires similar cases to lead to similar results. Impartiality requires the decision-maker to be indifferent to the outcome. Judicial misconduct, particularly improper external influence, distorts all of these objectives.

The preservation of the rule of law is the basic reason for establishing mechanisms for dealing with judicial misconduct, whether it takes the form of corruption or less serious forms of misbehaviour. The rule of law consists of numerous interlocking principles. One such principle is the right of a fair trial. Judicial misconduct in the context of litigation denies that right. The rule of law is also best served where there is a high level of public confidence in the judiciary. Judicial misconduct, whether within or beyond the litigation context, adversely affects such public confidence.

As with every aspect of public life of any importance, there are conflicting considerations which need in some manner to be balanced. The rule of law itself requires a high level of structural independence of the judiciary and, at least in common law systems, individual judges are independent of each other, including of judges who have higher status or who have supervisory or administrative responsibilities within the same court, even of chief justices.

There is an inevitable tension between the requirements of judicial independence and any mechanism for dealing with judicial misconduct. This tension must be recognised within the institutional arrangements for dealing with misconduct and the operations of those mechanisms.

The basic institutional design for the protection of judicial independence has been developed in much

the same way in different systems of law over many years. The principles are well known to this audience. Security of tenure is universally regarded as an essential part of any such institutional structure. Dismissal of judges must only occur in accordance with extraordinary modes of decision-making, usually involving the legislature.

I will deal with the relevant issues under three headings. First, judicial corruption, secondly, standards of conduct and, thirdly, mechanisms for dealing with misconduct.

Judicial Corruption

In an article published a few years ago Judge Clifford Wallace stated that "no country is completely free of corruption"[2]. It is not clear whether he intended to suggest that no judiciary is entirely free of corruption. I would contest that proposition. However, there is no doubt that judicial corruption does exist in many jurisdictions and in some places is endemic.

Judge Wallace went on to state that the way to protect judicial independence whilst dealing with the problem of corruption, is to have a permanent organisation of judicial peers to investigate such allegations. That may be essential in some nations. In others there are limits to the applicability of this approach. It may be seen to conflict with the principle of equality before the law.

It is trite to observe that judges, like everyone else in the community, are subject to the law. An Australian who contravenes the law by committing crimes, including offences of corruption, is subject to the normal processes of the law. An allegation against a judge of this character is investigated, and subject to trial, in the same manner as an allegation of contravention of the same law by any citizen. What, if any, implications such conduct has on his or her continuation as a judge is a different matter.

Many nations have special institutional arrangements for dealing with allegations of corruption. In New South Wales there is an Independent Commission Against Corruption, modelled on the Hong Kong Commission. The judiciary of New South Wales would be subject to its investigatory procedures. It has never happened. I do not expect that there will ever be an occasion for it to happen. In contemporary Australian history, the number of incidents which, even at the level of rumour, could be classified as judicial corruption, can be counted on the fingers of one hand. There are, of course, nations in which special provision may need to be made for such conduct. Happily Australia is not one of them.

Throughout the world there have been major changes in attitudes to governance corruption, including judicial corruption, over recent decades [3]. One issue that arises is whether or not standards with respect to corruption are universal or are culture specific. This is not a new problem.

Perhaps the most dramatic example occurred in the late 18th century in the impeachment proceedings in the House of Lords against Warren Hastings for his conduct in India. Hastings defended himself against charges of bribery and corruption on the basis that his conduct was what was expected of a ruler in Asia and he should not be judged by the moral standards applicable to public officials in Britain. His principal accuser, Edmund Burke, denounced this as "geographical morality" by which "actions in Asia do not bear the same moral qualities which the same actions would bear in Europe". Burke rejected the proposition that when a person crosses the equator "all virtues die". Nor is it a proposition we would readily accept in Australia. Warren Hastings was, of course, acquitted by the House of Lords.

For many years the basic approach, at least in common law systems, was to consider issues of corruption and bribery from a moral perspective and on the basis that the moral principles were universal, even if often honoured in the breach. For the most part, corrupt conduct in the colonies was simply not a matter for polite discussion, except perhaps to make invidious comparisons in the safe environment of a London club.

During the course of the 1960s a number of social scientists developed a revisionist approach to the issue of corruption and came to analyse its functional role in more positive terms. This wasn't simply a question of reliance on cultural differences, let alone a sense of colonial superiority. Some of the revisionists drew substantially on the United States experience with political machines in the major American cities. They treated with some sympathy the contribution that those machines had made to breaking down barriers to political participation and to economic development, particularly by overcoming inequalities based on ethnicity, religion and class.

It was one of the Republican machine party bosses of New York City, Senator Roscoe Conkling, who

had in 1880 excoriated moral reformers:

"Some of these worthies masquerade as reformers. Their vocation and ministry is to lament the sins of other people. Their stock in trade is rancid, cant and self-righteousness ... Their real object is office and plunder. When Dr Johnston defined patriotism as the last refuge of the scoundrel, he was unconscious of the then undeveloped possibilities of the word 'reform'.[4]"

Senator Conkling would not have approved of the return, over the last decade or so, of a global critique of corruption in all areas of governance, including the judiciary.

The primary thrust of recent focus on corruption has not been moral but economic. The triumph of the market economy as a form of economic organisation throughout the world and the multi-faceted process often referred to as "globalisation", has focused attention on the institutional requirements for a successful market economy. One of the matters that has emerged as part of this consensus is the significance of the institutional autonomy and independence of the judiciary. There has been what one commentator has called "the rule of law revival"[5]. There is a new appreciation of the economic significance of the courts. To give one example, studies undertaken for the World Bank indicate that, amongst global investors, the predicability of judicial enforcement is the most robust predictor of economic growth [6].

There is now a vast array of multilateral and bilateral governance initiatives all of which have both judicial independence and anti-corruption as focal points of attention. They include the World Trade Organisation, the World Bank, other development banks, and the United Nations Development Program, the OECD and a variety of national aid agencies such as the US Agency for International Development (USAID). Needless to say there is no shortage of NGO's who have become involved and a specialist organisation directed to this very issue has emerged: Transparency International. A number of international conventions and other instruments about corruption have been adopted or suggested. Nevertheless, it is by no means obvious that what Edmund Burke denounced over two centuries ago as "geographical morality" is still not exceptionally influential in the attitudes and approaches of those in the North to what are perceived to be cultural differences in the South.

One of the effects of this new focus on the quality of governance, by which I intend to refer to matters going well beyond corruption and bribery to encompass other aspects of conduct including competence, is the emergence of a much greater level of exchange between the judiciaries of nations. A month does not go by in which Australian judges are not involved in some form of exchange, particularly various forms of training both in Australia and overseas. These primarily involve judges from China, Vietnam and Indonesia. Australian judges in numerous courts have actively participated in such exchanges with great enthusiasm and this process shows no signs of decelerating.

Standards of Conduct

Deciding how to deal with criminal conduct including bribery and corruption is often more clear cut than dealing with less serious forms of inappropriate conduct by judges. Chief Justice Gleeson in an address last year said:

"As a rule, the more serious the complaint, the easier it is to devise means to deal with it. And the converse is true. If a judge is alleged to have committed a crime, then the matter is investigated and tried in the same manner as any other allegation of crime against the citizen. If a judge is alleged to be suffering such incapacity as warrants removal, the procedures to be followed are clear. The difficult cases tend to be those in which the complaint, even if made out, would not justify removal. The complainant is likely to assume there must be some other sanction available. It can be difficult to satisfy an aggrieved person whose complaint is justified, but who sees no form of sanction visited upon the judicial officer involved. False expectations can be created.[7]"

As Chief Justice Gleeson suggests, difficult issues arise when attention is focused on standards of judicial conduct other than conduct for which legislation of general application exists. This is a matter to which much attention has been devoted in many jurisdictions, particularly over the course of the last few decades. The product of this deliberation has often taken the form of a Code of Judicial Conduct or of Judicial Ethics.

There is a wide variety of approaches to this issue but it seems that many, if not most, jurisdictions have come to accept that some form of authoritative compilation of expectations of judicial conduct can play a useful role in meeting contemporary expectations of what is often referred to as "accountability" and "transparency". There are various models, ranging from the prescriptive to the

hortatory to the discursive. Last year the Council of Chief Justices of Australia adopted a statement entitled "Guide to Judicial Conduct" which will be made available to delegates to this Conference. The word "guide" was chosen to distinguish the document from a "code", a word which carries a more prescriptive connotation.

The Australian Guide is intended to be a source of practical guidance for the conduct of judicial officers both on and off the bench. It was, as the Chief Justice of Australia informed judicial officers upon its circulation, "not meant to be a set of instructions, but a useful form of practical assistance". The Guide may be of particular assistance to those who are absent from the collegiate environment at a time when an issue requiring consideration arose. It was also hoped that the Guide would assist the public, particularly the media, to report on matters involving public concern about judicial conduct.

The Guide consciously avoided using the expression "judicial ethics". It focuses on identifying appropriate standards of conduct, the maintenance of which was thought to be necessary to ensure public confidence in the independence and trustworthiness of judges. The Guide considers the principles of impartiality, independence and integrity and discusses a range of issues capable of arising under each of these headings.

The Australian approach was significantly influenced by the Canadian Judicial Council publication "Ethical Principles for Judges" which also adopts a non-prescriptive, practical guidance approach. The language of the Australian Guide avoids the prescriptive tone of what a judge "should" and "should not" do, which is a feature of other documents, e.g. the Code of Conduct for United States judges.

A recent example of a prescriptive model for judicial conduct is "The Bangalore Principles of Judicial Conduct 2002" published in January of this year. The ubiquity of the issues that arise is reflected in the thirty-two different instruments, upon which the authors of the Principles say they drew, ranging from the Codes of Conduct of Idaho, Kenya, Pakistan and Texas to Principles of Judicial Independence of the International Bar Association, the Solomon Islands and the Beijing Statement.

Until its most recent version this document was known as a "Code of Judicial Conduct". That has been dropped in favour of the less prescriptive terminology of "Principles". The overwhelming majority of the Instruments referred to, however, are called Codes. This process is undertaken by the Global Programme Against Corruption within the United Nations Centre for International Crime Prevention in Vienna. The document is still in draft but the participants envisage that some form of international instrument may be propounded as a result of this process. I will make available a copy of these Principles to those attending the Conference. It is a recent alternative model to the Guide.

Mechanisms for Dealing with Misconduct

New South Wales has a fifteen year old formal mechanism for handling complaints about judges called the Judicial Commission of New South Wales. The Commission was established in 1986 and was modelled to a significant extent on the Californian Commission established in 1960. I will outline its operations as a basis for discussion.

The creation of a statutory body for dealing with complaints against judges was the subject of resistance from some judges of New South Wales. The effective operation of the Commission over fifteen years has, however, resulted in the disappearance of any controversy about this matter. Nevertheless, the dissemination of this model elsewhere in Australia, whether to other States or at the federal level, has not been welcomed and, it is fair to say, in most cases has been resisted.

The traditional informal means of complaints being handled by a head of jurisdiction remains the preferred course. Such processes do not always satisfy contemporary public expectations. In two States difficulties arose in handling complaints about the Chief Magistrate in each State. One resigned, the other process is ongoing.

The inquiry by the Australian Law Reform Commission which reviewed the federal civil justice system made recommendations on what it described as "Accountability Measures for Federal Judicial Officers" [8]. This will, I understand, result in a formal protocol dealing with complaints, presently under consideration between the Commonwealth Attorney-General and the federal courts. Chief Justice Black and Justice Brown may be able to elaborate.

A formal institution appears likely to emerge in Victoria, Australia's second biggest State [9]. The New South Wales model, as well as the Canadian model, were considered closely in Ireland by a committee chaired by Chief Justice Ronan Keane which reported in December 2000 [10]. Perhaps

Chief Justice Keane can update the conference on developments in Ireland.

As I have indicated, there was judicial criticism at the time that the Judicial Commission was established. Fears were expressed that an official body with the function of dealing with complaints about judges would make judges vulnerable to harassment and pressure, that litigants could act on the basis of ulterior motives, such as ensuring media attention to a complaint in circumstances where they wish the judge to step aside. Fears about the implications for judicial independence extended to concerns about giving disciplinary powers to the heads of jurisdiction collectively or individually. It was feared this could introduce hierarchical elements into a collegial environment [11].

The New South Wales Commission consists of myself as President and five other judicial officers who are the heads of jurisdictions of the various courts within the State system. There are also four appointed members one of whom must be a legal practitioner, but in fact three of the four are lawyers. The existence of a clear majority of judicial officers on the Commission is an important structural component of the system.

The Commission has two functions in addition to the hearing of complaints. It is the body responsible for judicial education. It is also the body responsible for the compilation of statistical and other information on sentencing, bench books and other legal research material. The fact that the same institution provides assistance to judges in a form and at a level of quality that has been universally regarded as exceptional, has had a lot to do with the acceptance by the judiciary of the complaints handling function by the Commission.

More significantly, however, the manner in which complaints have been dealt with over a long period of time has appeased the original concerns. After fifteen years of operation I am not aware that any New South Wales judge is critical of the system.

Under the Act constituting the Commission any person may complain to the Commission about a judicial officer. A complaint can relate directly to the performance of judicial duties, but can extend to any matter which bears upon fitness for office.

In its practical operation the complaints function of the Judicial Commission has led to remarkably little in the way of public controversy. The overwhelming majority of complaints are dismissed. Most of them are no more than complaints by litigants who did not believe they should have lost. This often arises in circumstances where the litigant had rights of appeal that they did not feel willing or able to exercise. Even in such cases the Commission has performed a useful "sounding off" role.

The legislation authorises the Commission to summarily dismiss complaints on a number of grounds including frivolousness, triviality, remoteness, alternative means of redress, etc. It may deal with a complaint on the general basis that, in all the circumstances, further consideration would be unnecessary or unjustifiable. With respect to complaints which are not so dismissed, the Act requires the Commission to classify complaints according to whether or not they could justify parliamentary consideration of the removal of the judicial officer complained of.

The Commission would not undertake any investigation into an allegation of a criminal offence. That would be investigated in the normal course and dealt with by the criminal justice system. However, the Commission would have a role to play following the completion of criminal investigations or proceedings. That, of course, does not mean that the Commission would not consider conduct which may be unlawful, but it is not a substitute for the criminal justice system.

A complaint that is classified as serious must be the subject of a hearing by a Conduct Division. Such Divisions must be made up of a panel of three judicial officers specially appointed for the particular case, one of whom can be a retired judicial officer. At this crucial stage, with respect to serious matters, the process of investigation is entirely in the control of judicial officers. If a Conduct Division forms an opinion that a matter could justify parliamentary removal, then it makes a report to that effect and the report is tabled in Parliament. That can trigger the formal constitutional mechanisms for dismissal of a judge.

The Commission has a formal role in the Parliamentary process leading to dismissal of a judge under the New South Wales Constitution. A report by a Conduct Division must be prepared before the Parliamentary processes are instituted. The Division must report that it has formed an opinion that the conduct could justify consideration of dismissal. These formal mechanisms operate as a safeguard.

One of the apprehensions of the original judicial hostility to the Commission was the fear that judges would have their conduct assessed by persons lower in the judicial hierarchy than themselves. Questions of seniority are taken into account in determining the composition of the Conduct Division. Consultation amongst the various heads of jurisdiction, as a collegial body in the Commission decision-making process is something I find to be extremely useful. The collective experience of heads of jurisdictions of subordinate courts has been of great assistance to me. I am not aware of any continuing complaint of this character about the operations of the Commission.

Five years ago a Conduct Division, by majority, made an adverse finding against a judge of the Supreme Court. The conduct was egregious delay in delivery of judgments. The matter was considered formally by one of the two chambers of the New South Wales Parliament. The debate was wide-ranging and vigorous. The judge in question addressed the chamber during the course of its deliberations. The reluctance on the part of parliamentarians to take a step which could be seen as interfering with judicial independence was palpable. The motion was defeated in parliament after considerable debate. The next year, after further complaint was made about the judge's conduct, the judge resigned. Nevertheless the process worked in a manner which in retrospect was fair, transparent and effective.

I should emphasise that the Conduct Division has no power to punish a judicial officer. Indeed, nor does the Judicial Commission. The Conduct Division may report in the manner I have outlined. With respect to less serious complaints, the Commission may, if it does not dismiss the complaint, refer it to the head of the jurisdiction. There is no power in either the Conduct Division or the Commission, or indeed in the head of jurisdiction, to impose some form of punishment. However, the head of jurisdiction may, unlike the Commission, privately admonish or reprimand or counsel the judicial officer, or may adopt administrative arrangements designed to avoid repetition of the problems.

There was one occasion on which a Conduct Division did, by majority, purport to issue a reprimand to a judge for his conduct, whilst finding that the conduct was not such as to warrant consideration by Parliament of dismissal. I agree with the dissentient in that Division that neither the Division, nor the Commission itself, has power to issue a reprimand. Nor in any formal sense do I or any head of jurisdiction have such a power. There are other ways of making the views of a Chief Justice or Chief Judge known.

The principle reinforcement of any such expression of view by a head of jurisdiction is not, in my opinion, the exercise of hierarchical authority. Rather it is the manifestation, through the head of jurisdiction, of the collective opinion of all of the colleagues of a judge who has performed inadequately or improperly. So long as we have courts, as the courts of New South Wales still do, which manifest a high level of collegiality, it is the embarrassment occasioned by how a judge will be regarded by his or her peers that is the most effective sanction.

After consideration by the Judicial Commission, complaints of the less serious character are dealt with by the head of jurisdiction, who does not have any formal powers of discipline. Nevertheless, the head of jurisdiction expects to have an influence on the future conduct of the judicial officer by means of persuasion. There have been one or two cases in which that expectation has not been entirely met, but not, in my opinion, in a way that warrants any more formal arrangement.

The lack of formal disciplinary sanctions, short of dismissal, will in the future, no doubt, lead to criticism of the Judicial Commission as constituting in some way a "toothless tiger". We will just have to deal with that as it comes. As I understand the position in some jurisdictions the inquiry process can lead to some kind of formal expression of disapproval.

I do not find that there is any need for any formal disciplinary power or sanction to be exercised by myself.

In Victoria, the recent inquiry into the complaints system has concluded that not only would the legislature be unlikely to proceed in the direction of formal sanctions short of removal, but that any such moves would undermine both judicial independence and the collegial nature and customs of the judiciary [12].

A comparative perspective is instructive. Mechanisms for administering discipline short of removal vary widely in their formality and in the degree of publicity accorded to the complaints-handling process.

At the informal end of the spectrum, in the United Kingdom, the Lord Chancellor may take informal action personally following the preliminary investigation of a complaint, or, following more formal investigation by a judge of appropriate standing nominated by the Lord Chief Justice, if the Lord Chancellor decides that some action short of removal is appropriate then he will take such action with the concurrence of the Lord Chief Justice [13].

In New Zealand, complaints of substance may result in the head of the court concerned asking the relevant judge to convey an apology to the complainant, accompanied by the publication of summaries of such complaints and their outcomes in the Annual Report of the Judiciary [14].

A similar process was recently recommended by the Australian Law Reform Commission, which suggested that each federal court and review tribunal should publish a complaints handling protocol and provide statistical details of outcomes of complaints made in its annual report to Parliament [15]. The reluctance to recommend sanctions, short of removal from office, for federal judicial officers arose in part because s72(ii) of the Australian Constitution casts doubt on the validity of formal disciplinary mechanisms that would interpose a judicial commission or other body which is a creature of the executive branch of government.

Formal procedures for discipline short of dismissal exist in Canada, despite the fact, as I understand the position, that the Judicial Council has no express powers to discipline or reprimand judges. I understand sanctions are able to be imposed by provincial and territorial judicial councils in Canada. The Council has been guided by a legal opinion that it does have the power to "express disapproval" of judicial conduct and has issued such Expressions in the past. The Canadian Judicial Council can investigate any complaint or allegation made in respect of a judge, including holding a public inquiry [16]. Where a Panel of three Council members decides that there is merit in a complaint, but the matter is not serious enough to lead to a formal investigation by an Inquiry Committee, it may close the complaint file with an Expression of Disapproval of the Judge's Conduct, which takes the form of a letter sent by the Panel Chairperson to the judge. A press release will be issued to accompany the Expression of Disapproval where the facts of the case are already in the public domain [17], and in some cases Panel documentation has been tabled in the Canadian Parliament.

Some other jurisdictions have adopted disciplinary measures short of dismissal that are even more formal and have the capacity to be very public, depending on the seriousness of the alleged misconduct.

In California, the Commission on Judicial Performance has three levels of investigation: a staff inquiry, a preliminary investigation and a hearing [18]. As part of a preliminary investigation, the Commission may monitor a judge's conduct for a period of up to two years, including in-court observation [19]. Outcomes of the lower two levels of investigation may include an advisory letter to the judge recommending caution or expressing disapproval, or issuance of a notice of intended public or private admonishment [20]. After a formal hearing, the Commission may publicly censure, or publicly or privately admonish a judge. When formal proceedings are instituted, the notice of charges, the answer by the judge and all subsequent papers and proceedings are open to the public [21]. The Commission maintains summaries on its website of all private admonishments issued, as well as extensive documentation of all public admonishments and censures [22].

The formality and publicity characteristic of the Californian model appears to be common in other States in the USA. Other measures short of dismissal available to judicial monitoring bodies in the various States include suspension for a definite period [23], with or without pay, loss of retirement benefits [24], public warnings [25], and public or private Orders of Additional Education [26]. Public or private censures or reprimands are also available to the judicial council of each Federal Circuit in the USA [27].

A comparable system has been recommended in South Africa, where a number of judges have proposed legislation to create a Judicial Council with the power to privately or publicly record its findings in relation to complaints, as well as to caution or reprimand the judge concerned and recommend appropriate steps for the effective administration of justice in the relevant Court [28].

The Irish inquiry chaired by Chief Justice Keane recommended that the Committee it proposed should be able to issue reprimands both private and public.

There are both advantages and disadvantages in proceeding in this way. It is not, at this stage, on the agenda in New South Wales or, as far as I am aware, elsewhere in Australia.

- 1 Bingham, "The Business of Judging: Selected Essays and Speeches", Oxford, UP, 2000, p373.
- 2 Judge J Clifford Wallace "Resolving Judicial Corruption While Preserving Independence: Comparative Perspectives", (1998) 28, Cal. W. J. Nt'l L. J. 341.
- 3 In this analysis I draw on Padideh Ala'i, "The Legacy of Geographical Morality in Colonialism: A Historical Assessment of the Current Crusade Against Corruption", 2000, 33, Vand. J. Transnational Law, 877.
- 4 Dorothy S. Truesdale "Rochester Views the Third Term 1880", 1940, 2, Rochester History, 1 at 5.
- 5 Thomas Caruthers "The Rule of Law Revival", Foreign Affairs, Vol 77, March/April 1998.
- 6 See Frank B. Cross "Law and Economic Growth", 2002, 80, Texas L. Rev., 1737 at 1768-1769.
- 7 The Honourable Chief Justice Murray Gleeson AC, "Public Confidence in the Judiciary", 2002, 76 ALJ, 558 at 563.
- 8 Australian Law Reform Commission Report No 89, Managing Justice: A Review of the Federal Civil Justice System, 2000, pp185-202.
- 9 See Peter Sallmann The Judicial Conduct and Complaints System in Victoria: A Discussion Paper, Melbourne, July 2002.
- 10 See Committee on Judicial Conduct and Ethics Report, Dublin, December 2000.
- 11 For the criticisms see the Honourable Mr Justice McClelland "Disciplining Australian Judges" 1990, 64, Australian Law Journal, 388; S. Shetreet "The Limits of Judicial Accountability: A Hard Look at the Judicial Officers Act 1986", 1987, 10 University of New South Wales Law Journal, 4.
- 12 Professor Peter Sallman, Crown Counsel for Victoria, The Judicial Conduct and Complaints System in Victoria (2002) at 22.
- 13 Lord Chancellor's Office, Procedure Relating to Formal Disciplinary Action and/or Removal from Office of Full Time Judicial Office Holders, cl 5.
- 14 Offices of the Attorney-General and Chief Justice of New Zealand , Judicial Complaints Process (2000) p 5.
- 15 Australian Law Reform Commission, Managing Justice: A review of the federal civil justice system, Report No 89 (2000), Recommendation 11.
- 16 Judges Act 1971 s63(2) (Canada).
- 17 Jeannie Thomas, Paper Presented by Jeannie Thomas Executive Director Canadian Judicial Council To a Conference of the Irish Courts Committee on Judicial Conduct and Ethics, in Committee on Judicial Conduct and Ethics Report (Dublin, 2000) 73 at 77.
- 18 State of California Commission on Judicial Performance, Commission Rules, Rule 109.
- 19 State of California Commission on Judicial Performance, Commission Rules, Rule 112.
- 20 State of California Commission on Judicial Performance, Commission Rules, Rules 113, 115.
- 21 California Constitution, Article VI, s18(j); Commission Rules, Rule 102(b).
- 22 See <http://cjp.ca.gov>.
- 23 See e.g. General Statutes of the State of Connecticut, section 51-511.

24 See e.g. Texas Constitution, Art 5, s1-A(6); Commonwealth of Pennsylvania, sanctions able to be imposed by the Court of Judicial Discipline following recommendation by the Judicial Conduct Board.

25 See e.g Texas, State Commission on Judicial Conduct, Summaries of Public Sanctions, Public Warnings.

26 See e.g. Texas Constitution, Art 5, s1-A(8).

27 See Judicial Conduct and Disability Act of 1980, 28 U.S.C s372(c)(6)(b).

28 Bill to Amend the Judge's Remuneration and Conditions of Employment Act 88 of 1989 to create a Judicial Council (South Africa).

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The Rule of Law in the Asian Region

**THE RULE OF LAW IN THE ASIAN REGION
ADDRESS BY THE HONOURABLE J J SPIGELMAN AC
CHIEF JUSTICE OF NEW SOUTH WALES
INTERNATIONAL LEGAL SERVICES ADVISORY COUNCIL CONFERENCE, SYDNEY,
AUSTRALIA
20 MARCH 2003**

Writing in the prestigious international relations journal, *Foreign Affairs*, one author identified what he called a "Rule of Law Revival". He said:

"The concept is suddenly everywhere – a venerable part of western political philosophy enjoying a new run as a rising imperative of the era of globalisation."

A focus on the rule of law is widespread internationally, not least in Asia. Only a few years ago the concept would have been criticised as Eurocentric. We hear much less about the distinctiveness of "Asian values" these days.

There are two broad themes in recent rule of law discourse. One is governmental and the other is economic. The former is concerned with the authoritarian nature of pre-existing political systems. The latter is concerned with the emergence of a market economy. Both themes are often encompassed within a unifying concept, namely the multi-faceted process often called "globalisation". There are, however, differences of emphasis between the two themes apparent in different parts of the world.

When the rule of law revival emerged about two decades ago in Eastern Europe and the former Soviet Union, a primary focus was on governmental issues, although economic issues were never far from the main debate. In Asia the balance appears to me to have been quite different. The primary focus has been on the emergence of a market economy, with governmental issues present but not prominent and, sometimes, barely visible.

Markets in the face-to-face sense such as an Oriental bazaar or a Mediterranean rialto have always existed under all systems of government and law. A market economy is, however, a very rare phenomenon. Only certain kinds of society, governmental structure and legal system have been able to sustain a market economy.

Similarly, societies in which it can be said that the law "rules" are by no means uncommon. However, there is a fundamental distinction between "rule *by* law" and "rule *of* law".

The two ideas are frequently confused. For example, Article 5 of the Constitution of the People's Republic of China adopted in March 1999, employs the term *fazhi guojia*. That is sometimes translated as "socialist rule of law state". However, official translations use the terminology "socialist country ruled *by* law". There is a wide-ranging debate within China as to whether the recent reforms are directed to one or the other [1]. Similar confusion has arisen in Indonesia in a debate as to whether or not the words *negara hokum* go beyond rule by law to encompass rule of law [2]. In both nations experience with lawlessness and authoritarian rule indicates that rule *by* law is, itself, a substantial advance. The further development towards rule *of* law remains in these, as in many other cases, distinctly problematic.

A core characteristic of the rule of law is that the law must operate to constrain the arbitrary exercise of power, both private power and public power. (The significance of restraint on private power is not always emphasised in rule of law discourse.) Persons and institutions who have power, whether social, religious, political or economic, must exercise that power within, and subject to, a comprehensive framework of binding rules. The number of nations in Asia which can be said to operate under the "rule of law" in this sense are few.

In both respects, i.e. economic and governmental, there have been quite dramatic changes, not least

in the Asian region, over recent decades. However, we are now engaged in the longest and most difficult part of this process: the phase of institution building. This involves the full range of governance, but my focus is on the administration of justice, particularly by courts.

The central significance of the law for economic prosperity was recognised as long ago as Adam Smith, who wrote in his *The Wealth of Nations*:

“Commerce and manufactures can seldom flourish long in any state which does not enjoy a regular administration of justice, in which the people do not feel themselves secure in the possession of their property, in which the faith of contracts is not supported by law, and in which the authority of the state is not supposed to be regularly employed in forcing the payment of debts from all those who are able to pay. Commerce and manufactures in short, can seldom flourish in any state in which there is not a certain degree of confidence in the justice of government” [3].

Quite recently the discipline of economics stepped beyond the confines of its neo-classical economic tradition and began to acknowledge the central significance for economic prosperity of political and legal institutions. The new institutional economists, as they came to call themselves, have proven to be particularly influential [4]. This influence is now palpable in the broad range of bilateral and multilateral programs which require and/or assist institution building of an effective legal system.

Perhaps the most influential of such requirements are those imposed by membership of the World Trade Organisation. However, the World Bank and other development banks have programmes and impose conditions on loans of a similar character. There are projects undertaken in the United Nations Development Programme. There are also a wide variety of bilateral government programmes conducted by most western nations, including Australia. Most significantly, of course is the recognition within recipient nations of the need for internal reform if they are to reap the benefits of economic prosperity and, perhaps not so widely recognised, the advantages of political freedom.

This broadly based process does not involve the simple migration of an identifiable, single set of ideas and institutions from one nation or culture to another. There is no single recipe for the rule of law.

Different nations and cultures have and, of course, will continue to have distinctive practices in relevant respects, particularly as to how to balance the requirements of personal autonomy and the preservation of social cohesion. The idea of the rule of law encompasses a mixture of ethical and political principles.

It is important to recognise that the rule of law is not inconsistent with the exercise of authority. It is, however, inconsistent with the exercise of authority in an arbitrary manner. Governmental authority is in fact essential to a system to the rule of law. The administration of justice emerged as a core function of government precisely in order to prevent violence, or the exercise of coercion by the strong, the powerful or the wealthy against others, less powerful or less well off, or less well organised. The proper exercise of government authority is, I repeat, an essential aspect of the rule of law, not least to prevent the arbitrary exercise of private power.

However, it is not enough to be concerned only with the systematic and consistent application of a body of general rules. That is only rule *by* law, not rule *of* law. The former is a prerequisite of the latter, but it is not a substitute for it, let alone its equivalent. What however, is required to permit a nation to assert that it enjoys the rule *of* law, not just rule *by* law?

There is no universally accepted content of the “rule of law”. In the jurisprudence of some, the concept encompasses forms of government, economic systems and human rights. These kinds of matters have their own separate discourses. In my opinion, it is not appropriate to subsume them under the category of excessive breadth. The label becomes progressively less useful as its scope extends.

Experience over many generations, and in many different societies, has identified then requirements of institutional design of the judiciary for a rule of law system. The most significant of these requirements are usually discussed in terms of the need for judicial independence. At the very least, it is essential that the judiciary, as the ultimate guardians of the rule of law, has the level of competence, the integrity and the status that enables courts to act as an effective constraint on the exercise of power and as a rational and fair dispute resolution mechanism.

There is no one model appropriate for all societies. However, there is a widespread agreement on the

core requirement for judicial independence. Although there has been important progress on these matters, there are many nations in Asia which have a long way to go in this course of institution building.

In most Asian nations, the easy part of rule *by law* has been done. There has been a substantial investment in the promulgation of laws with a reasonable degree of accessibility, in the sense of being public and ascertainable, and of certainty and coherence. Most often, the missing factor is enforcement.

All of the other values associated with the rule of law such as accessibility, certainty, stability, etc. of a little moment if the practical significance of the law is not high. There must be a narrow gap between, as it is sometimes put, 'law on the books' and 'law in action'. Unless this gap is a narrow one, then the rules contained in law will not provide a clear signal about what is permitted and what is proscribed. Persons will never acquire the requisite degree of security and predictability in their dealings with others.

A State cannot claim to be operating under the rule of law unless laws are administered fairly, rationally, predictably, consistently and impartially. Improper external influences, including inducements and pressures, are inconsistent with each of these objectives.

Fairness requires a reasonable process of consideration of the rights and duties asserted. Rationality requires a reasoned relationship between the rights and duties and an outcome. Predictability requires a process by which the outcome is directly related to the original rights and duties. Consistency requires similar cases to lead to similar results. Impartiality requires the decision-maker to be indifferent to the outcome.

Improper influence, whether political pressure or bias or corruption, distorts all of these objectives. So, of course, does incompetence and inefficiency.

Furthermore, judgments of the courts are not self-executing. Orders must be backed up by sanctions, including fines or imprisonment for contempt of court. The enforcement of court orders requires robust law enforcement institutions which have the requisite level of authority and are themselves not characterised by corruption, bias or inefficiency.

Building such institutions takes such time, as well commitment. To give only one example, on a recent calculation, there is currently 2.5 billion renminbi of unenforced court rulings in the Peoples Republic of China [5].

The significance of enforcement cannot be underestimated. Studies undertaken for the World Bank indicate that amongst global investors, the predictability of judicial enforcement is the most robust predictor of economic growth [6].

The judiciary and the legal profession are, as we know from our own experience over the centuries, interrelated in a symbiotic manner. The provision of legal services in Asia, which is the primary focus of this Council's concern, encompasses a wide range of collaborative projects between Australian lawyers and lawyers in nations which are engaged in legal institution building. I am aware that the Council contributed to the clear statement of the significance of strengthening the judiciary and the legal profession found in the Department of Foreign Affairs and Trade publication last year: "*Strengthening Economic Legal Infrastructure in APEC*" [7].

The principal focus of this Conference is on business opportunities. This is not a topic which is directly within my area of responsibility. I wish to observe that the interaction between the legal service providers and Asian legal systems occurs in a context which is broader than business relations. That broader context enables the thickening of the relationship between Australian lawyers and Asian lawyers in a manner which will assist development of commercial relationships.

The interrelationship between opportunities for the profession and the role of the judiciary was brought home to me on two visits I made to Hong Kong since my appointment. On both occasions I met the Chief Justice of Hong Kong, Andrew Li, who on the first occasion said he was proposing, and on the second occasion confirmed that he had carried into effect, a recommendation that ad hoc admissions for appearance in the courts of Hong Kong for Australian barristers was to occur on the same basis as had been the case for English barristers for many years. He emphasised to me that he had high regard for the quality of the Australian bar and expected more Australian barristers to appear in Hong

Kong courts, particularly in the appellate courts. It was also made perfectly clear to me that, in view of the level of fees which English silk had been charging for years, Hong Kong expected to benefit from some competitive pressure.

On both of the occasions that I was in Hong Kong, the former Chief Justice of Australia, Sir Anthony Mason, was there sitting as a member of the Final Court of Appeal. Sir Anthony's contribution, together with that of Sir Gerard Brennan, to Hong Kong jurisprudence since the creation of the Special Administrative Region and the "one country two systems" policy, has been of great significance. There are many levels of contact on a personal basis between the Australian legal profession and that of Hong Kong. However, there is no doubt, however, that the influence, particularly of Sir Anthony, has led to a situation in which Hong Kong judges, and inevitably the profession, have become as accustomed to citing the Commonwealth Law Reports these days, as they traditionally were accustomed to citing the English Appeal Cases.

Service of former Australian judges in Hong Kong is unique in Asia. In the Pacific, however, current and former judges are often called on to sit as judges of courts. This is true of Vanuatu, Tonga and is of particular significance in Fiji, where Australian and New Zealand judges now regularly sit in the Court of Appeal and in the final court of the Fijian system, i.e. the Supreme Court, a practice which will soon be significantly expanded.

A particularly significant contribution of the judiciary to the provision of legal services in Asia is made by the body of former judges who have active practices as arbitrators and mediators. The ability of Australian lawyers to substantially expand their participation was an important theme of the International Bar Association's Conference on "International Commercial Arbitration" held in Sydney last month. Sir Anthony Mason, Sir Laurence Street and Mr Andrew Rogers QC all played a significant role in that conference and the promotion of Sydney as an international centre for commercial arbitration.

Australian judicial exchanges with Asian and Pacific nations is already widespread and growing. There is a continual flow of delegations from China. For example, last month I met a delegation from the Supreme Peoples Court, China's highest court, led by the Executive Vice President of the Court, in effect the Deputy Chief Justice of China, investigating our industrial relations laws. Next month there will be a delegation led by the Chief Justice of the High People's Court of Beijing, the city having provincial status.

At least once a year there are delegations of judges from Vietnam and Indonesia who come to Australia for extensive periods of training. Australian judges have visited those countries and lectured there. Over recent years the most substantial number of delegations have come from the People's Republic of China.

China has undertaken in an extraordinarily wide-ranging process of developing its legal infrastructure, particular its judiciary, over recent years. I have summarised these developments in an address I delivered last year, which is available on the Supreme Court's website [8].

My involvement in this debate was stimulated by my participation in an Australian judicial delegation which taught at the National Judges' College in Beijing in November 2001 [9]. This delegation was part of a programme of exchanges on a wide range of human rights related matters, conducted by the Human Rights & Equal Opportunity Commission on behalf of the Department of Foreign Affairs & Trade. This programme is a low key form of diplomacy and international co-operation of a character much more likely to be successful than the brash triumphalism which has, on occasions, appeared to be a national characteristic of Australian involvement with foreigners.

Judicial exchange is one part of a broader human rights dialogue agreed between the Australian and Chinese governments. It has been conducted for some years. In May of this year I will be participating in this project again. Together with three Australian judges, I will return to the National Judges' College in Beijing for a further series of lectures, on this occasion focused on the process of writing judgments.

On the last occasion, the Australian delegation arrived the week after a new directive had been promulgated which, for the first time, imposed a requirement on Chinese judges to give reasons for their decisions. This new requirement was treated with some scepticism, indeed resentment, by some judges who questioned us about the process at the College. No doubt this was in part determined by the fact that the overwhelming majority of Chinese judges have been officers of the People's

Liberation Army. When the Chinese came to recreate a judiciary which had, of course, been destroyed during the Cultural Revolution, the process happened to coincide with the downsizing of the Army in the early 1980's. Tens of thousands of the new judges were former army officers. Whatever other benefits this process may have had, it was not a background which established a personal predilection for explaining yourself in writing.

The Chinese have been actively striving to change the balance of their judiciary. An ever-increasing proportion of judges are law graduates. Future appointees are required to have formal qualifications.

The emergence of a sense of institutional autonomy on the part of the Chinese judiciary, is a significant advance. Neither in the millennia of the long Chinese imperial tradition nor, needless to say, in the history of the People's Republic, has there ever been an institutional model remotely like the rule of law administered by an independent judiciary. The Chinese tradition has always preferred the rule of man to the rule of law.

So many things in China have changed so quickly. I look forward to observing the development of the judiciary in the last eighteen months.

Return visits are, in my opinion, important. I expect to meet some of the same people for a second time. I refer to those responsible for the administration of the College, rather than the trainees, who will be different. On this visit I have taken up the invitations issued to me, when they led delegations to the Supreme Court of New South Wales, by both the Chief Justice of Guangdong and the Chief Justice of Shanghai, to call on them. It is such repeat visits that deepen the relationship in a way which, like all forms of diplomacy and personal contact, has intangible but nevertheless real long-term benefits.

Many judges of the Supreme Court, either directly through the Court or through the Judicial Commission of New South Wales, have participated in meeting and training judges, notably from China, Indonesia and Vietnam. There is a palpable enthusiasm with which all Australian judges who are asked to participate in such judicial training and exchanges, whether in Australia or overseas, approach their tasks. There is a great deal of dedicated activity which I see no sign of flagging. I do not doubt that there would be similar degree of enthusiasm by judges if they were asked to participate in activities which are directed to general aspects of the legal system in Asia, i.e. not limited to the judiciary. I am aware that there has been such participation in the past and have no doubt that the judiciary as a whole will respond well to future requests of this character.

Economists refer to the idea of "comparative advantage" as a key concept in the development of international trade. There should be little doubt that Australia has a comparative advantage in the area of legal services.

Some of you will have heard me emphasise the significance of the longevity of our institutions. We Australians like to think of ourselves as a young country. Indeed the second line of our National Anthem is: "For we are young and free". However, when it comes to the basic mechanisms of governance, whether of parliamentary democracy or the rule of law, this is not a young country. This is an old country.

There are no nations in Asia that have legal institutions as old as ours. The Supreme Court of New South Wales was established in May of 1824. At that time the Qing Dynasty was firmly in control of China. This was twenty years before the first opium war forced the opening of treaty ports in China and the surrender of the island of Hong Kong to English jurisdiction. It was 125 years before the creation of the People's Republic of China. We have old traditions that work.

When we go to Asia as lawyers we should recognise the strength that the longevity of our legal institutions gives us. We should approach our contacts in Asia with a quiet self-confidence. This was the theme that Professor Stephen FitzGerald, our first Ambassador to China and now Chairman of the Asia Australian Institute of the University of New South Wales, adopted when he addressed the New South Wales Supreme Court Annual Conference on "Issues Facing Australia's Future in Asia". Professor FitzGerald said:

"What we have to offer the region most, beyond economic partnership, and aid to countries that need it, is not military, nor is it leadership ... It is the good governance and civil society that sustain our own rights, freedoms, accountabilities, democratic institutions and rule of law. In a range of countries across Asia, including for example China, there is increasing awareness of the place of good governance in economic

performance, poverty reduction, and the capacity of societies to provide for their people generally and for the disadvantaged in particular. Because we are fortunate in these matters, our future in Asia, and the strengths of our own identity, can be secured by being a regional source and provider in governance, not simply under aid programs but across a multitude of areas of collaboration (for example between judges and courts). And not in the jingoistic way that has often informed the projection of this idea by the United States, for example, or that we have seen in Australia in the recent past, but in the tradition of another kind of Australian, who has been in Asia since the beginning, who I have called 'the quiet Australian'. And not with the message that only our tradition counts, but collaboratively, reaching back into all our traditions, including those of Asian societies, many of which are rich in ideas about good governance, ethical government and upright conduct. To do this is a contribution to humanity. It can help the region in its own terms for its own transformation. It can secure the best of what we want in the Australian identity."

I commend these thoughts to all of you who engage in the provision of legal services in Asia.

In conclusion may I congratulate the Council on the important work it does in the national interest. The thickening of our relations with Asian societies is of vital importance to our future. I declare the Conference open.

1 See Albert H Y Chen "Towards a Legal Enlightenment: Discussions in Contemporary China on the Rule of Law" 2000, 17 *UCLA Pacific Basin and Law Journal* 125, esp at 128; Eric W Orts "The Rule of Law in China" 2001, 34 *Vanderbilt Journal of Transnational Law* 43, esp at 45 and 93-101; Randall Peerenboom "Let One Hundred Flowers Bloom, One Hundred Schools Contend: Debating Rule of Law in China" 2002, 23 *Michigan Journal of International Law* 471, esp at 320-325, 474-475. See my address "Convergence and the Judicial Role: Recent Developments in China" to the XVIth Congress of International Academy of Comparative Law, 16 July 2002 accessible at www.lawlink.nsw.gov.au/sc to be published in (2003) *Revue Internationale de Droit Compare* forthcoming.

2 See Timothy Lindsey "Indonesia's *negara hokum*: Walking the Tightrope to the Rule of Law in Arief Budiman et al (eds) *Reformasi: Crisis and Change in Indonesia*, Monash Papers on South East Asia No 50, 1999 at pp326-364.

3 Adam Smith "An Inquiry into the Nature and Causes of the Wealth of Nation" (Encyclopaedia Britannica, ed, (1952) vol 5, 403).

4 See my address, "Economic Rationalism and the Law" (2001) 24 *UNSWLR* 200 esp at 201-203; and V Cross "Law and Economic Growth" (2002) 80 *Texas LR* 1737 esp at 1740-1743.

5 See www.unchina.org/goals/html/obj10law.shtml.

6 See *Frank v Cross* supra at 1768-1769.

7 Commonwealth of Australia, Canberra, 2002 esp at pp14-15.

8 Supra n. 1.

9 I gave an account of this visit in "Law and Justice Address" (2002) 11 *Journal of Judicial Administration* 123, also accessible at www.lawlink.nsw.gov.au/sc.

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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.

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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Opening of Law Term Dinner, 2003

**OPENING OF LAW TERM DINNER, 2003
ADDRESS BY THE HONOURABLE J J SPIGELMAN AC
CHIEF JUSTICE OF NEW SOUTH WALES
TO THE ANNUAL OPENING OF LAW TERM DINNER
OF THE LAW SOCIETY OF NEW SOUTH WALES,
SYDNEY, 3 FEBRUARY 2003**

One of the duties of my office as I perceive it, or perhaps more accurately, one of the tasks I have imposed upon myself, is to deliver public addresses on themes generally related to the law in its practical operation in our society. Tonight I wish to highlight four themes which I developed in four addresses during the course of last year.

It is not the right time in the political cycle for me to repeat – at least not without risk of misrepresentation - the observations I made to this dinner last year about the degree of ignorance that is prevalent in public debate about what judges actually do in sentencing for crime and the unfairness of much of the criticism that is levelled at the judiciary.

Those of you who are aware of my more eccentric preoccupations will be relieved to hear that I do not intend to select as one of the four addresses from last year upon which I wish to comment, the fourth of the lectures I gave to the St Thomas More Society on the relationship between Thomas Becket and Henry II. I do, however, observe that there is only one lecture to go. When I kill Becket later this year, that will be the end of it.

The first of the lectures to which I wish to refer is that which may be best remembered by some members of this audience. It was the address I gave to the Judicial Conference of Australia at Launceston in April, entitled “Negligence the Last Outpost of the Welfare State” [1]. That lecture was delivered at a time when public criticism of the practical operation of tort law had reached an unprecedented level of intensity, a level which would persist for the balance of the year. It appeared at a time when there was a very real prospect that the legal profession would be permitted virtually no input into the process of legislative change then under consideration. Not even in the form of the Standing Committees of Attorneys General. The preference expressed by some relevant decision-makers was that the matter should be handled at the level of the Treasurers, with advice primarily from officials of the respective Treasury and Finance Departments, in large measure to be based on the input of the insurance industry with whom those departments have the closest connection. In the event that did not happen. There was a substantial input from the Attorneys General and in particular, from the report of the Committee, chaired by the Honourable David Ipp, then an acting judge and now a permanent judge of appeal of the Supreme Court [2].

One of my objectives in the speech I delivered to the Judicial Conference was to emphasise the fact that a number of lawyers, particularly judges, had identified inadequacies in the way the law of negligence had developed and difficulties in its practical application. My speech outlined what, in effect, became a checklist of possible changes to the law of tort, in large measure based on various proposals and criticisms advanced by other lawyers.

My ultimate recommendation was that various items should be distributed amongst State and Commonwealth law reform commissions for more detailed inquiry. This did not prove to be acceptable within the timeframe of perceived urgency for legislative intervention. Instead, a Commonwealth/State co-operative scheme emerged in the form of the panel chaired by Justice Ipp which, given the stringent time restraints under which it had to operate, did an extraordinary job.

The issue I addressed in my speech, and the issues addressed by the Commonwealth/State panel, were not concerned with allocating blame for what was referred to throughout last year as a “crisis” with respect to certain areas of personal injury law, particularly public liability and medical negligence. The reason they were the areas of primary focus was that in the major areas of litigation, particularly motor vehicle and workplace accidents, there had already been substantial statutory restrictions on rights of action in the comparatively recent past.

The issues that arose during the course of last year were not the manifestation of some recent change in the conduct of lawyers or judges. Indeed, as I pointed out in the speech, the drift of recent High Court decisions were distinctly pro-defendant. What I identified in my speech was a series of developments, including changes in the law and changes in the approach to fact-finding, which had first emerged some twenty or so years ago.

Those tendencies had been the subject of periodic statutory intervention in all States, particularly focused on the high volume areas of motor vehicle and workplace accidents, within which fields a number of schemes had been adopted over the years. The true implications of many of these developments had been masked over the years by what appears may have been uncommercial pricing by one of the major insurers and the major medical insurer not conducting its affairs on the basis of a proper provision for reserves, presumably on the basis that it had no formal contractual obligation to meet any claims.

2002 was the year those particular chickens came home to roost. It happened to coincide with a change in the international insurance market, particularly after the events of September 11, 2001. The insurance cycle turned decisively and very rapidly. It is by no means apparent that all of these forces have worked their way through the system, even to this day.

The result in New South Wales is the series of legislative interventions with the operation of tort law of which, I am aware, many members of this society do not approve.

One area of legislative intervention, which is of interest to the legal profession as possible defendants in actions, particularly those with commercial practices, is the adoption in New South Wales of a system of proportionate liability, rather than solidary liability in the case of financial loss, but not in the case of personal injury. In view of the substantial overlap between actions under the *Trade Practices Act* and the law of negligence, this part of the recent legislation has not yet been proclaimed, pending clarification of the Commonwealth intentions in this regard.

The introduction of proportionate liability will change the dynamics of much litigation presently brought against accountants and lawyers and others whose conduct results only in economic loss. At least in those areas, the search for deep pockets will be attenuated to some degree. Difficult factual issues relating to the process of apportionment of responsibility is likely to be one of many areas in which the courts will have to consider the implications of the legislative changes over the coming years.

I am reminded at this point of the information I received that when the *Evidence Act* went to Cabinet, that part of the Cabinet submission which identifies the financial implications for the State of the proposed legislation, was stated to be "Nil". Since that time, tens of thousands of judicial hours have been devoted to the exploration and explanation of the changes brought about by that legislation which, together with the hundreds of orders for new trial that have been found to be required, makes the original estimate of "NIL" cost look distinctly low.

I am not sure what happened with respect to the two *Civil Liability Acts* of 2002. There is little doubt that there will be a further decline in litigation, a decline which had already commenced as a result of the changes in legislation during 2001. However, I do not expect the Court of Appeal to benefit from this decline for some period of time.

One other aspect of the recent changes may also have implications for the Court of Appeal. Section 17A of the *Civil Liability Act* 2002 now provides that in determining damages for non-economic loss, a court may refer to earlier decisions for purposes of establishing the appropriate award. This provision overturned the judgment of the High Court in *Planet Fisheries Pty Ltd v La Rosa* [3]. This decision had been criticised on many occasions over the years [4].

Justice Ipp's panel identified the *Planet Fisheries* judgment as inhibiting the development of a system of tariffs, namely conventional amounts or ranges of amounts for different types of injury leading to non-economic loss. The report said:

"13.224 The absence of such a tariff system makes it more difficult for lawyers to advise their clients about the amount of general damages likely to be awarded. It makes the outcome of cases less predictable and hinders the settlement of claim."

The Panel was impressed with the publication of the Judicial Studies Board in England of a document entitled *Guidelines for the Assessment of General Damages in Personal Injury Cases*. These guidelines contain upper and lower limits of awards of general damages with respect to a large number of different types of injury. I understand that the Commonwealth Attorney General's Department has such a publication under consideration. Issues of comparison between States do arise in this regard and it is by no means clear that uniformity is desirable. What is regarded as fair in Hobart may not be regarded as fair in Sydney.

I note that to some degree the publication of the Judicial Studies Board is based on a formal system of guideline judgments by the Court of Appeal of England and Wales [5].

The system of guideline judgments adopted for sentencing purposes by the Court of Criminal Appeal in this State was based on English practice. This practice was derived from the same principles as their practice with respect to guideline judgments for damages.

The reasoning of the High Court in *Planet Fisheries* is similar to the reasoning, including in the High Court, which criticises the role of guideline judgments in the case of criminal sentences. There are substantial arguments on both sides with respect to the proper role of guidelines from appellate courts in the context of a discretion by trial judges. Nevertheless, in the light of the overruling of *Planet Fisheries* by statute, there is a basis for considering whether the Court of Appeal of this State should adopt a guideline judgment system on the English model with respect to the assessment of damages, either of its own accord or with statutory support, as occurred with respect to sentencing guidelines. I raise it only for purposes of initiating debate about the subject, including of course within the Law Society.

The second address to which I wish to refer is the annual Lawyers Lecture which I delivered to the St James Ethics Centre on Competition Principles and Professional Regulation [6]. In that address I outlined the process by which competition principles have come to the forefront as a mode of professional regulation over recent decades. This has, on occasions, come into conflict with the professional dimension of self-regulation by the professional associations. There is also a significant tension with the duties to the court, which all lawyers owe.

There is a basic distinction between a business paradigm and a professional paradigm, as the fundamental approach to regulating the legal profession.

There are substantial differences in the legal obligations of lawyers when compared with other occupations with whom competition regulators assume lawyers are, or ought to be, in competition. In my speech I emphasised that the fiduciary obligations, which all lawyers owe, is a fundamental distinguishing characteristic. It is treated as of greater significance by more recent economic theory, than it is by the theory which appears to prevail in competition regulatory discourse.

Fiduciary obligations are inconsistent with the assumptions as to commercial conduct underlying application of competition principles to the profession. A traditional market model of rivals who maximise benefits to consumers by acting in their own interests is of limited application in such a context.

The future course of regulation depends on whether or not legal practitioners actually behave in practice predominantly on the basis that the primary characteristic of the lawyer/client relationship is a commercial one, or on the basis that it is a professional one, in the sense of a personal bond created in the context of a high degree of personal responsibility. There is a tension between the pursuit of commercial advantage, on the one hand, and the ethic of service to clients and to the public, on the other. The future is in the hands of the profession as to which is, and is seen to be, the primary motivator of actual conduct.

I am concerned, as I know many of the leaders of the Law Society are concerned, to ensure that the ethic of service, which emphasises honesty, fidelity, diligence and professional self-restraint, is not lost. Nevertheless, it is as inevitable as it is embarrassing that those of us who wish to defend the ideals of the profession find ourselves in alliance with those lawyers who intend merely to defend their income.

In my lecture I identified certain indications that the professional paradigm has reasserted itself in recent years in the form of legislative change. This includes the imposition on all legal practitioners of an obligation to report certain offences and bankruptcy events to their relevant professional

association; the reimposition of restrictions on advertising and the creation, by the *Civil Liability Act* 2000, of an obligation on legal practitioners not to provide legal services with respect to any claim or defence of a claim for damages unless the practitioner reasonably believes, on the basis of proof of all facts, and a reasonably arguable view of the law, that the claim or defence has reasonable prospects of success. Each of these changes appears to be inconsistent with the basic ideas that drive the application of competition principles to the profession.

There are a number of competition policy issues that are still not resolved. Many will arise in the context of the determination of a uniform scheme for the regulation of a national legal profession which is well advanced and which, I trust, will not be delayed for too long by the processes of discussion required in a federation such as ours.

Of particular significance, however, is the process of balancing the conflicting public interests involved in competition policy. There is a real doubt whether matters of professional significance, which may have some anti-competitive effects, will receive the weight they deserve in the decision making process. The values of those who are called upon to do the balancing do not reflect the values of the profession. The basic purpose of my address was to assist the profession in making submissions in a form that is likely to be accepted by those called upon to do the balancing.

This particular speech appears to have been reasonably well received but there was one aspect which unfortunately did not receive the attention I had hoped. In the course of discussing the way in which commercial interests may tend to overwhelm professional considerations I referred to the predilection, particularly amongst the larger firms, for the creation of Chinese walls. Irrespective of how solid and impenetrable such walls may be, the *appearance* of a conflict of interest is often as important for a profession as is the reality of such conflict. One of the problems I identified was the terminology itself. The words "Chinese wall" carry an aura of inscrutability and of ancient wisdom, which I do not believe is deserved. I suggested that in Australia we should call it the "dingo fence". I hope that catches on.

A third address to which I wish to refer is one which I was able to deliver twice: first, at the China Education Centre of the University of Sydney and then at the XVth Congress of the International Academy of Comparative Law in Brisbane. The subject was the development of the rule of law in China [7]. In that address I outlined the very substantial reforms that have been undertaken with respect to the legal system in China whilst emphasising that, whether the future offers anything that can accurately be described as a system in which the rule of law prevails, is not yet apparent.

My interest in this subject was prompted by a visit, just over a year ago, in a delegation of Australian judges to lecture at the National Judges College in Beijing. This has been an annual event for some years and has been reinforced by other delegations including one of international judges which was led by Justice Simon Sheller of the Court of Appeal and other occasions in which Justice Blanch, Chief Judge of the District Court, was involved and also Justice Peter McClelland of the Supreme Court. Later this year I will return to the National Judges College in Beijing in another delegation which will include Justice Virginia Bell.

Furthermore, there have been a series of visits by delegations of Chinese judges to Australia, including one last year led by the Chief Justice of Guangdong province. During the visit of the Chairman of the National Peoples Congress, Li Peng, I had the opportunity of discussing the developments of the rule of law in China with him and the senior members of legal committees of the National Peoples Congress.

Exchanges of this character are not limited to our relations with China. There are regular delegations from Vietnam and Indonesia, who come to Australia for extensive training periods. Australian judges have also visited these countries for training purposes.

All of this is based on a recognition of the significance of the administration of justice in the social infrastructure of any society, particularly for a progressive economy. In China's case the determination to change their judicial system was basically driven by their membership of the World Trade Organisation.

Contacts within our region are not limited to delegations and judicial training. Australian judges, both serving and retired, are called upon to sit as judges in other jurisdictions particularly in the South Pacific – notably current and former judges of the Federal Court - and also on the final Court of Appeal in Hong Kong. The contribution we can and do make in this regard is significant. There has been, perhaps, no more significant a contribution, than that that was made by Justice Handley as one

member of the Court of Appeal in Fiji which decided the critical constitutional case that restored the rule of law in Fiji. The result was accepted by those who had overturned the proper constitutional order [8].

In all these respects the Australian legal system does have something important to contribute, based on its longevity and the success of our fundamental institutions of governance. It is an area in which we will continue to be called upon to contribute and, I have to say, members of the judiciary who have become involved in this process have all reacted with great dedication and enthusiasm.

It is also a matter of significance for the profession. There are business opportunities in the supply of legal services to Asia. The role of Australia as a dispute resolution centre in commercial matters is capable of further development and I know a number of individuals and organisations are dedicated to that task. In that regard the supply of what is in substance a judge resource for mediation and arbitration, in the form of extremely experienced and competent retired judges, is likely to prove to be of enduring significance.

The fourth of my addresses to which I wish to refer is related to the theme of Australia's capacity to assist internationally with the development of the legal infrastructure of our neighbours. That is because it displays the longevity of our fundamental institutions of governance. Many of you, I am sure, have heard me say on a number of occasions how significant I regard the fact that the Supreme Court of this State has been operating in much the same way for about 179 years. It is the stability of our institutions in this regard that is attractive to others. The Supreme Court of New South Wales was set up at the height of the Qing Dynasty some twenty years before the first opium war opened up China to western influences for the first time. It was operating for 125 years before the creation of the People's Republic of China led to the establishment of an entirely new political and legal structure in that nation.

This address was delivered the inaugural lecture of the Australian Press Council on "Foundations of Freedom of the Press in Australia" [9]. The theme of my address was the conflict that occurred in the 1820's and 1830's between Sir Francis Forbes, the first Chief Justice of New South Wales and Governor Darling with respect to fundamental issues of the rule of law, the independence of judiciary and the freedom of the press.

Forbes, together with other judges, struck down the attempt by Darling to create a licensing system for newspapers and, in the alternative, to impose stamp duties that would effectively muzzle the press. Thereafter, in a series of proceedings for criminal and seditious libel, a range of issues involving the freedom of the press were the subject of judicial pronouncements that surprise in terms of their contemporaneous feel. Issues relating to the balance between freedom of the press and the tendency to excess in the media have been part of the discourse of our society, in much the same terms, ever since.

Until comparatively recently, Australian history has generally been told in terms that it consisted only of the achievement of independence from England: constitutional, political, economic, military, cultural, social and legal independence – "A march towards the light" as one historian has described it [10]. However, many important institutions were created quickly and have developed in a distinctive way over long periods of time. The rule of law, the independence of the judiciary supported by a vigorous and independent bar, and freedom of the press, driven by cantankerous editors, are such institutions. The strength of these institutions is determined to a substantial degree by their longevity. We do well to understand the source of that strength.

1 Published in 76 ALJ 432.

2 *Review of the Law of Negligence: Final Report*, Commonwealth of Australia, September 2002.

3 (1968) 119 CLR 118.

4 See H Luntz, *Assessment of Damages for Personal Injury and Death* (4th ed) Butterworths, Australia, 2002 esp par 3.1.5 and the notes to that paragraph. See also *Trustees of the Roman Catholic Church v Hogan* (2001) 53 NSWLR 343 esp at [55-56] and [59].

5 See eg *Heil v Rankin* [2001] QB 272.

6 Published as a pamphlet "*Are Lawyers Lemons? Competition Principles and Professional Regulation*" St James Ethics Centre, Sydney, 2002; also published in (2003) 77 *ALJR* 44.

7 Published as "China: Rule of Law or Rule of Law" (2002) *Quadrant* 36; also to be published in (2003) *Revue Internationale de Droit Compare* (forthcoming).

8 Se K R Handley "The Constitutional Crisis in Fiji" (2001) 75 *ALJ* 688.

9 To be published in both *Quadrant* and the *Australian Bar Review*.

10 Alan Atkinson *The Europeans in Australia: A History* vol 1, Oxford UP, Melbourne, 1996, pXII

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The Rule of Law and Enforcement

**THE RULE OF LAW AND ENFORCEMENT
ADDRESS BY THE HONOURABLE JAMES SPIGELMAN AC
CHIEF JUSTICE OF NEW SOUTH WALES
ICAC – INTERPOL CONFERENCE
HONG KONG, 22 JANUARY 2003**

Only a few years ago, discussion of the “rule of law” in international forums such as this would have been influenced, if not dominated, by criticism of the concept as eurocentric, if not neo-colonialist. This has changed as part of the multi-faceted process often called “globalisation”. There has been over the past decade or two what one author has described as a “rule of law revival” [1].

A number of nations particularly in Asia, Eastern Europe, the former Soviet Union and Latin America, have gone through a process of transition from authoritarian State systems, accompanied by the emergence of a market economy. In both respects, that is, with respect to the system of governance and also the organisation of the economy, a process of institution building has been required both at a constitutional level and at the level of the administration of justice. The concept of the rule of law has emerged as a fundamental organising idea in this process [2].

The new focus on the rule of law has been accompanied by a recognition of the importance of enhancing the ability of the key institutions of the legal system, including courts, police and prosecutors, to operate effectively and fairly. Institution building has become a significant focus of attention on both a bilateral and multilateral basis.

There is now a widespread process of assistance and exchange of information and ideas between nations directed at improving systems of governance, including the administration of justice. Sometimes it is a requirement of multilateral arrangements, of which the most significant, perhaps, is the World Trade Organisation. There are important projects in the United Nations Development Program, the World Bank and other development banks, and assistance projects directed to good governance, including the rule of law, funded and organised by a wide variety of governmental agencies on a bilateral basis – from the US Agency for International Development to the British Council. All of this is reinforced by a wide range of privately organised activity, including a large number of NGO’s, think tanks, an endless stream of academic exchanges and a smaller, but no less fervent, flow of judges and jurists.

In my own case, a month does not go by that the Supreme Court of New South Wales does not welcome a visiting delegation of judges from Asia, most often from the People’s Republic of China, but also an annual delegation from Indonesia and Vietnam. Australian judges now regularly participate in judicial educational programmes e.g. at the National Judges College in Beijing, including myself, a year ago. I know that all the Australian judges involved have found their participation highly rewarding. The mechanisms of the rule of law are a primary focus of all these exchanges.

This broadly based, necessarily anarchic process does not involve the simple migration of an identifiable set of ideas and institutions from one nation or culture to another. There is no single recipe for the rule of law. These words are used in a number of different ways [3].

Different nations and cultures have and, of course, will continue to have, distinctive practices in relevant respects, particularly as to how to balance the requirements of personal autonomy and the preservation of social cohesion. It is important to recognise that the idea of the rule of law encompasses a mixture of ethical and political principles.

Nevertheless, there is a core component without which a nation cannot claim to be operating in accordance with the rule of law. The most essential characteristic is that the law must operate to constrain the arbitrary exercise of power, both private power and public power. Persons and institutions who have power must exercise that power within, and subject to, a comprehensive framework of binding rules.

The rule of law is not inconsistent with the exercise of authority. It is, however, inconsistent with the

exercise of authority in an arbitrary manner. Indeed, governmental authority is essential to a system of rule by law. The administration of justice is a core function of government which was developed precisely in order to prevent violence or the exercise of any form of coercion by the strong, the powerful or the wealthy against others, less powerful or less well off or less well organised. The proper exercise of governmental authority is, I repeat, an essential aspect of the rule of law.

However, it is not enough to be concerned only with the systematic and consistent application of a body of general rules. That is only rule *by* law, not rule *of* law. The former is a prerequisite of the latter, but it is not a substitute for it, let alone its equivalent.

The two ideas are frequently confused. For example, Article 5 of the Constitution of the People's Republic of China adopted in March 1999, employs the term *fazhi guojia*. That is sometimes translated as "socialist rule of law state". However, official translations use the terminology "socialist country ruled *by* law". There is a wide ranging debate within China as to whether the recent reforms are directed to one or the other [4]. Similar issues have arisen in Indonesia in a debate as to whether or not the words *negara hokum* go beyond rule by law to encompass rule of law [5]. In both nations experience with lawlessness and authoritarian rule indicates that rule *by* law is, itself, a substantial advance. The further development towards rule *of* law remains in these, as in many other cases, distinctly problematic.

The topic on which I have been asked to address you is: "The Rule of Law and Enforcement". Many of the problems of enforcement arise at the rule *by* law level. It is an obvious, even trite, observation to say that there can be no rule *by* law and, therefore, no rule *of* law, unless the laws are enforced in the sense of being reasonably, fairly and consistently applied to determine the actual outcome of disputes about rights and duties. Insofar as the enforcement of the law is distorted by corruption, these functions are not performed. Insofar as corruption is systemic or endemic, then the nation cannot be regarded as one operating under the rule of law.

Without a substantial level of enforcement, the rule of law is simply devoid of meaningful content. What, however, is required to permit a nation to assert that it enjoys the rule *of* law, not just rule *by* law?

There is no universally accepted content of the rule of law. In the jurisprudence of some, the concept encompasses forms of government, economic systems and human rights. The label becomes progressively less useful as its scope extends. A similar flexibility or indeterminacy arises in the equivalent idea in other languages e.g. Rechtsstaat, État de droit, Stato di diritto, Estado di derecho.

I wish to focus on the core content of a system that can accurately be characterised as manifesting the rule of law. This is a narrower use of the concept than that of some, but the core content of the rule of law has, I believe, widespread agreement.

There are two distinct perspectives to the delineation of the core content: the first is concerned with relations between citizen and citizen and the second is concerned with the relationship between citizen and state. They have been described, respectively, as the horizontal and vertical functions of the rule of law [6].

The horizontal function serves significant social and economic objectives by ensuring that persons and groups can interact with each other with confidence. The vertical function is of social and economic significance also, but its primary purposes are constitutional and, therefore, it has political implications. The vertical function is concerned to ensure that those with power, especially governments, operate within and are subject to a comprehensive legal framework.

From the perspective of citizen and citizen, the minimum content of the rule of law is that the rights and duties of persons in the community, and the consequences of breach of any such rights and duties, must be capable of objective determination. It is only if this is the case that persons and groups in society can interact with each other with confidence and thereby promote social cohesion and economic progress. All forms of social interaction, including economic interaction, are impeded by a system in which personal and property rights are subject to unpredictable and arbitrary incursion, so that people live in fear, or act on the basis of suspicion, rather than on the basis that others will act in a predictable way. It is the predictability that establishes the necessary sense of security and the confidence to act.

The rule of law is not simply a system that contains rules that must be obeyed. The law is a system to

be used by citizens for their own protection and their own advancement in their relations with the state and with other citizens.

The rule of law, including the component of rule *by law*, requires that a number of characteristics are present to a reasonably high degree in the practical operation of the legal system. None of the following propositions should be understood as absolutes. All are qualified by a criterion of reasonable practicality:

- **Accessibility:** Laws must be public and ascertainable or knowable – perhaps with the assistance of a lawyer.
- **Certainty:** Laws must be reasonably clear in their meaning.
- **Coherence:** Laws should generally be consistent and not in conflict. There should be mechanisms to resolve the conflicts or tensions that inevitably arise.
- **Achievability:** Laws should not require impractical, let alone impossible, conduct.
- **Prospectivity:** Laws should generally be prospective in their operation, rather than retrospective.
- **Generality:** Laws should be generally applicable and not specifically directed to individuals and small groups.
- **Stability:** Laws should be relatively stable so that conduct with implications for longer periods of time can be engaged in with confidence.
- **Enforcement:** Laws must be enforced in a rational and fair manner to enable the reasonable expectation of citizens to be realised.

It is important to emphasise that all of the other values of accessibility, certainty, prospectivity, stability, etc. are of little moment if the practical significance of the laws is not high. There must be a narrow gap between, as it is sometimes put, the law on the books and the law in action. Unless this gap is a narrow one, then the rules contained in law will not provide a clear signal about what is permitted and what is proscribed. Persons will never acquire the requisite degree of security and predictability in their dealings with others.

One of the factors driving the revival of interest in the rule of law is the recognition of the critical role that the law plays in economic progress. Studies undertaken for the World Bank indicate that amongst global investors, the predictability of judicial enforcement is the most robust predictor of economic growth [7].

Judgments of courts are not self-executing. If necessary, orders must be backed up by sanctions, including fines or imprisonment for contempt of court. Orders to pay amounts of money must be made effective e.g. by the seizure and sale of property or the garnishee of wages by officers of the court or by law enforcement bodies. The efficacy of court orders requires robust institutions which have the requisite level of authority. Building such institutions takes time as well as commitment. To give only one, albeit proximate, example, on a recent calculation in the People's Republic of China, there is currently 2.5 billion renminbi of un-enforced court rulings [8]. The creation of law enforcement capacity is a large task.

There are two other important aspects of the rule of law which I would identify as part of the core content of the concept. They are concerned with the vertical function of the rule of law: the relation between citizens and authority.

- **Universality:** Everyone, whatever his or her position, is governed by the ordinary law and is personally liable for anything done contrary to law.

All authority, including all aspects of governmental authority, must find an ultimate source in the law. It is this principle which ensures that the rule of law differs from the arbitrary exercise of power. All authority is subject to and constrained by the law. Accordingly, no-one charged with contravening the law can successfully defend the charge on the basis that the violation occurred by command of a superior. The basic proposition that government officials, and other powerful figures in society, are not exempt from the application of the law, is part of the core content of the rule of law. Unless they are so subject, the exercise of power becomes a pure exercise of will. This aspect of the rule of law is frequently considered in terms of constitutional law.

- **Boundedness:** the law is not all encompassing, so that there is a substantial sphere of freedom of action.

Citizens can only be punished, subject to constraint or injury in person or property for violation of the

law and in accordance with the law. Other citizens, corporations, groups or any arm of government cannot impose any such effect, otherwise than in accordance with the law.

I do not intend to include, as some do, within the concept of the rule of law the preservation of political and civil liberties and the protection of human rights. These are matters that have their own separate discourses. Nevertheless, the idea that certain consequences cannot occur to citizens without the application of the law necessarily requires a residual area of freedom of a negative character. The discourse of liberty and of human rights approaches the same issues in a positive way. It is the former negative approach that I regard as a component of the rule of law.

* * * * *

A state cannot claim to be operating under the rule of law unless laws are administered fairly, rationally, predictably, consistently and impartially. Improper external influence, including inducements and pressures, are inconsistent with each of these objectives.

Fairness requires a reasonable process of consideration of the rights and duties asserted. Rationality requires a reasoned relationship between the rights and duties and the outcome. Predictability requires a process by which the outcome is related to the original rights and duties. Consistency requires similar cases to lead to similar results. Impartiality requires the decision-maker to be indifferent to the outcome. Improper influence distorts all of these objectives. So, of course, does incompetence and inefficiency.

Legal institutions are interdependent. In the area of criminal justice the police force, the prosecution and the judiciary have a symbiotic relationship in which the performance and the functions of each depends to a substantial degree on the capacity and integrity of each of the others. The same kind of relationships exist in other areas of the law, involving the broad range of regulatory authorities and adjudicating bodies, including tribunals. If the powers given to any participant in this process are abused by being exercised improperly e.g. to serve the interests of those who wield the power, the whole system is distorted, indeed perverted.

The resolution of private disputes by adjudicating bodies is a basic function of government. The numerous relationships into which persons and groups enter inevitably give rise to disputes. The rule of law requires that those disputes be resolved on the basis of impartial determination, so as not to depend on the mere election of the more powerful or wealthier party and the degree of desperation of the other. Improper manipulation through corruption prevents the law having a real and practical influence on the resolution of disputes.

Distortion can be caused by any of the participants in the legal process. Corruption can occur amongst judges, police or prosecutors. The integrity of each of these institutions is significant. I will focus on the general requirements of the judiciary, which constitutes the ultimate mechanism for enforcement of the law.

Long experience over many generations and in many different societies has established certain requirements of institutional design of the judiciary for a rule of law system. Those requirements are the same, whether the rule of law is approached from the perspective of citizen and citizen or from that of citizen and state. The most significant of those requirements are usually referred to in terms of the need for judicial independence.

Of particular significance is the range of issues that arise in the inevitable interface between the judiciary and the executive arm of government. The judiciary is an arm of government and cannot be entirely insulated from other arms of government.

I do not wish to suggest that there is any single institutional arrangement that constitutes a perfect system. Human institutions do not admit of perfection. Nevertheless, the degree of insulation, either formal or practical, with respect to legal system decision-making processes, is of crucial significance in terms of whether or not a nation can be described as operating under the rule of law.

The starting point for the impartial administration of justice is some form of institutional autonomy. An effective judiciary requires a distinct esprit de corps and its own legitimising traditions. This is often reflected in distinctive form of dress. The judiciary must be, and be seen to be, institutionalised as a distinct group performing distinct functions.

There are numerous decision-making processes capable of impinging on judicial independence.

Judges who are selected or promoted on the basis of how they are likely to rule, rather than on the basis of their professional expertise, are unlikely to disappoint the authorities who select and promote them. Judges may have their appointments terminated by a mechanism which does not contain real restraints, of a formal and informal character, on the process of termination, are unlikely to be prepared to offend persons or groups capable of exercising power in their community. Courts that are continually requesting additional resources from government in order to perform their functions effectively are more likely to be subject to subtle pressures to achieve particular outcomes in matters of significance to those who control the resources. Judges who are inadequately remunerated, given the economic circumstances of their particular nation, are subject to temptations which may be difficult to resist and are not accorded the status required to ensure that the administration of the law in their society is a matter of significance. A judiciary which is accorded a low level of status and, accordingly, a low level of respect in its community, will be less likely to have the level of competence and impartiality required for the effective administration of justice.

There are many choices in the institutional design of the judiciary with respect to these matters. Insofar as the society wishes itself to be known as a society in which the rule of law operates, it is essential that the ultimate guardians of the rule of law must have the level of integrity and the status that enables courts to act as an effective constraint on the exercise of power and as a source of social guidance.

The widespread international recognition of the significance of an independent judiciary is reflected in Article 10 of the Universal Declaration of Human Rights and in Article 14(1) of the International Covenant on Civil and Political Rights, which proclaim that everyone is entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

A useful compilation of the relevant principles of institutional design, expressed so as to apply to a significant range of different legal systems and constitutional structures, is a document known as the *Beijing Statement of Principles of the Independence of the Judiciary*, signed by or on behalf of thirty-two Chief Justices of the Asia and Pacific region, including the President of the Supreme People's Court of China and the Chief Justices of Australia, Fiji, Hong Kong, India, Indonesia, Korea, Malaysia, New Zealand, Pakistan, the Philippines, Singapore, Sri Lanka, Vietnam, Japan and Thailand. This statement includes the following principles:

- "3. Independence of the judiciary requires that:
- (a) the judiciary shall decide matters before it in accordance with its impartial assessment of the facts and its understanding of the law without improper influences, direct or indirect, from any source.
 - (b) the judiciary has jurisdiction, directly or by way of review, over all issues of a justiciable nature."

I interpolate to observe that what is to be regarded as justiciable will vary from one nation to another.

"11. To enable the judiciary to achieve its objectives and perform its functions, it is essential that judges be chosen on the basis of proven competence, integrity and independence.

...

17. Promotion of judges must be based on an objective assessment of factors such as competence, independence and experience.

18. Judges must have security of tenure.

19. It is recognised that, in some countries, tenure of judges is subject to confirmation from time to time by vote of the people or other formal procedure.

20. However it is recommended that all judges exercising the same jurisdiction be appointed for a period to expire upon the attainment of a particular age.

21. A judge's tenure must not be altered to the disadvantage of the judge during her or his term of office.

22. Judges should be subject to removal from office only for proved incapacity, conviction of a crime, or conduct which makes the judge unfit to be a judge.

...

31. Judges must receive adequate remuneration and be given appropriate terms and conditions of service. Remuneration and conditions of service of judges should not be altered to their disadvantage during their term of office, except as part of a uniform public

economic measure to which the judges of a relevant court, or a majority of them, have agreed.

...

33. The judiciary must have jurisdiction over all issues of a justiciable nature and exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.

...

35. The assignment of cases to judges is a matter of judicial administration over which ultimate control must belong to the chief judicial officer of the relevant court.

...

38. Executive powers which may affect judges in their office, their remuneration or conditions, or their resources, must not be used so as to threaten or bring pressure upon a particular judge or judges.

39. Inducements or benefits should not be offered to or accepted by judges if they affect, or might affect, the performance of their judicial functions.”

There is no one model appropriate for all societies. However, there is a great deal of experience which supports the principles set out in the Beijing Declaration.

Chinese tradition contains a well-known role model for the administration of justice in the character of Bao Zheng, known as Bao Gong. He was an outstanding government official of the Northern Sung dynasty, born at the turn of the millennium in 999. As many in this audience will know, Bao Gong is a popular character in Chinese opera, in which he is portrayed with a black face. As I understand it, in Chinese opera, a black face may indicate either a rough and bold character, or an impartial and selfless personality. It is the latter that applies to Bao Gong. He is known for opposing corruption and dispensing justice without fear or favour and with such impartiality that he punished the son-in-law of the Emperor, the uncle of a high-ranking imperial concubine and many government officials.

However, Bao Gong's functions were not only judicial but were executive and even, on occasions, legislative. In the Chinese imperial tradition, the execution and enforcement of the law and dispute resolution were part of an undifferentiated governmental function. There was in that tradition nothing analogous to a separation of powers, nor even of separate institutions sharing power. Separation of power questions may need some modification of the contemporary application of the legend of Bao Gong as a role model. Bao Gong, I should observe, was not a democrat. However, he does personify the essential judicial virtues. The Chinese judiciary does not have to look to the West for a role model of judicial independence, integrity and impartiality.

I conclude, however, with an example drawn from the Western tradition of the “rule of law”, the tradition with which I am most familiar. Many of you will have heard of Thomas More, the Lord Chancellor of England who defied Henry VIII and was beheaded because of his refusal to support the King in his insistence on divorcing and marrying again. In a play by Robert Bolt entitled *A Man for All Seasons*, Thomas More delivers a passionate defence of the rule of law to his future son-in-law, Roper. More asserts that he knew what was legal, but not necessarily what was right, and would not interfere with the Devil himself, until he broke the law. The following exchange then occurred:

“ROPER: So now you give the Devil benefit of law!

MORE: Yes. What would you do? Cut a great road through the law to get after the Devil?

ROPER: I'd cut down every law in England to do that!

MORE: Oh? And when the last law was down, and the Devil turned round on you – where would you hide Roper, the laws all being flat? This country's planted thick with laws from coast to coast – man's laws, not God's – and if you cut them down ... d'you really think you could stand upright in the winds that would blow then? Yes, I'd give the Devil benefit of law, for my own safety's sake.”

This imagery of the law as a protection from the forces of evil is an entirely appropriate one. Each society has its own devils, some real, some imagined. The forest of laws that are planted under the rule of law protects us from those devils.

1 Thomas Carothers “The Rule of Law Revival” *Foreign Affairs* Vol 77 March/April 1998.

2 See, for example, in a now vast literature Martin Krygier and Adam Czarnota (eds) *The Rule of Law After Communism*, Ashgate and Dartmouth 1999.

3 See e.g. Geoffrey De Q. Walker, *The Rule of Law: Foundation of a Constitutional Democracy*, Melbourne UniP, 1988 Chapter 1.

4 See my Address, "Convergence and the Judicial Role: Recent Developments in China" to the XVI Congress of International Academy of Comparative Law, Brisbane Australia, 16 July 2002, to be published in the *Revue Internationale de Droit Comparatif*, accessible at www.lawlink.nsw.gov.au/sc; see also Albert H.Y. Chen "Towards a Legal Enlightenment: Discussions in Contemporary China on the Rule of Law" 2000, 17 *UCLA Pacific Basin and Law Journal* 125, esp. at 128; Eric W Orts "The Rule of Law in China" 2001, 34 *Vanderbilt Journal of Transnational Law* 43, esp. at 45 and 93-101; Randall Peerenboom "Let One Hundred Flowers Bloom, One Hundred Schools Contend: Debating Rule of Law in China" 2002, 23 *Michigan Journal of International Law* 471, esp. at 320-325, 474-475.

5 See Timothy Lindsey "Indonesia's *negara hokum*: Walking the Tightrope to the Rule of Law in Arief Budiman et al (eds) *Reformasi: Crisis and Change in Indonesia*, Monash Papers on South East Asia No. 50, 1999 at pp326-364.

6 See Martin Krygier "Rule of Law" in Neal J Smelser and Paul B Baltes (Editors) *International Encyclopedia of the Social and Behavioural Sciences* Vol. 20 Elsevier, Oxford 2001 at p13406.

7 See Frank B. Cross "Law and Economic Growth" 2002 80 *Texas L. Rev* 1737 at 1768-1769.

8 See www.unchina.org/goals/html/obj10 law.shtml.

Foreword

By the Honourable J J Spigelman AC

Chief Justice of New South Wales

The principal focus of contemporary comparative law is the convergence of common law and civil law systems. This Thematic Issue, concentrating as it does on the common law, also manifests the significance of this comparative law focus.

The particular strength of the common law approach was never better stated than by Oliver Wendell Holmes, who said:

“It is the merit of the common law that it decides the case first and determines the principle afterwards ... It is only after a series of determinations on the same subject matter, that it becomes necessary to “reconcile the cases”, as it is called, that is, by a true induction to state the principle which has until then been obscurely felt. And this statement is often modified more than once by new decisions before the abstracted general rule takes its final shape. A well settled legal doctrine embodies the work of many minds, and has been tested in form as well as substance by trained critics whose practical interest is to resist it at every step.”¹

The formulation of codes or the enactment of legislation is not always tested in this rigorous manner. Nevertheless, statutes occupy more and more areas hitherto the subject of case law including, in the last year or so in Australia, significant aspects of the law of torts. Some areas have been, in effect, codified, e.g. New South Wales, Tasmania and the Commonwealth level in the *Evidence Act*.

On the part of the civil law, the process of codification includes the tendency to adopt adversarial, in substitution for investigatorial, procedures.

The multifaceted process known as globalisation, reinforced by the speed of contemporary communications, both physical and electronic, will inevitably accentuate these trends. As Chief Justice Gleeson has pointed out:

“Our law is increasingly aware of, and responsive to, the guidance we can receive from civil law countries. ... The forces of globalisation tend to standardise the questions to which a legal system must respond. It is only to be expected that there will be an increasing standardisation of the answers.”²

Notwithstanding the process of convergence, there remains a fundamental distinction between a system which recognises judicial decision making as an authoritative source of law and a system which does not. Without a formal doctrine of precedent and *stare decisis*, judges in civil law countries purport always to be implementing the will of the legislature. In some nations, such as France, judgments are expressed, in my limited experience of them, as if the result were somehow automatic. In other civil law nations, such as Germany, the judges seem to have dropped this pretence and canvass the choices open to them in interpreting the law, in a manner which acknowledges the inevitability of a judicial role in interpretation.

No code or statute can make detailed provision for the range of situations that will inevitably arise. The Benthamite illusion of precision and comprehensiveness of legislation has long since been exploded as a myth. Whenever a legislature uses words of general application in a statute, the application of such words inevitably involves a creative process on the part of judges. That does not mean that choice exists in all cases, because in many situations the application was perfectly clear.

I assume, though I have not investigated the subject, that in civil law countries, the publication of reasons for judgment, and informal means of communication amongst judges, result in a judgment influencing how subsequent cases are decided. If this were not the case, then the values of predictability and consistency, which are essential characteristics of the rule of law, could not be attained. Even if case law is not a formal source of law, it must have force which is almost the equivalent. Now that higher courts in common law jurisdictions no longer regard themselves as bound by their own decisions, there is, probably, a process of convergence in this regard also.

Even in the application of a statute or of a code, the traditional common law method to which Oliver Wendell Holmes referred has much to commend it. It is true that the process can at any stage be attenuated by legislative intervention, perhaps by way of overriding a course of judicial decision-making. Nevertheless, the high technique of the common law remains applicable and has, over a very long history, proven that it works.

The course of that history indicates two abiding characteristics of the common law, which are reflected in the articles published in this Issue. First, the capacity of the common law to adapt to new challenges and changing conditions of society and technology. Secondly, however, the limitations on that capacity, particularly in terms of speed of adaptation.

The principles developed in case law are never finally established as universally applicable propositions. They are as Cardozo reminded us “working hypotheses”.³ However, as Dame Sian Elias, the Chief Justice of New Zealand has recently observed:

“It should be recognised that the method of the working hypothesis is a method of change. And it is in that principle of change that the vitality of the common law is to be found. If it is to be successful, the method of the working hypothesis requires close attention to reasons for the articulation of the principles which, applied directly or by analogy, underlie the determination of the courts. The future of the common law depends upon the ability of our legal system successfully to operate by this method.”⁴

The contributions to this Issue manifest the proposition that the working hypothesis continues to operate in significant areas of the law in Australia.

There is much wisdom deeply imbedded in the pragmatic philosophy of the development of the law by judicial decision-making. The alternative approach of deduction from abstract ideas is, of course, a real alternative, with strengths of its own. It is not, however, our mechanism. As Lord Goff has stated, the pragmatism of the common law is “inbred into our very being”.⁵

I suspect that rules enunciated in codes or statutes, in language of a high level of generality, develop in a manner closely resembling the working hypothesis model. As Lord Bingham has put it:

“... the accurate and faithful interpretation of a statute ... is not a simple mechanical task below the notice of a judge. It calls for qualities of judgment and insight scarcely less demanding than the application or development of common law principle.”⁶

His Lordship went on to note:

“Perhaps, in part at least, because of its mongrel origins, the common law has proved an avid importer and a vigorous exporter”.⁷

Such jurisprudential exchange proceeds apace, as this Issue testifies. Globalisation, particularly from the perspective of the antipodes, is not a new phenomenon.

¹ Oliver Wendell Holmes “Codes and the Arrangement of Law” (1870) reprinted in SM Novick (ed) *The Collected Works of Justice Holmes*, 1995 Vol. 1 pp212-213 (references omitted).

² A M Gleeson AC “Global Influences on the Australian Judiciary” (2002), 22 *Australian Bar Review* 184 at 188.

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- 3 Benjamin Cardozo *The Growth of the Law* (1924) at p43.
- 4 S Elias “The Usages of Society and the Fashions of the Times”, paper to the 13th Commonwealth Law Conference Melbourne, April 2003 at [14].
- 5 Lord Goff of Chieveley “The Future of the Common Law” (1997) 46 *ICLQ* 745 at 760.
- 6 “The Future of the Common Law” reported in Tom Bingham *The Business of Judging* OUP, 2000 at p382.
- 7 Ibid p383.