

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

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

Friday 13 November 2009

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

JUDGMENT

- 1 We assemble in this Banco Court to mark the departure as a Judge of Appeal of one of the most prodigiously energetic intellects in the Court's contemporary history. It has been a fruitful and at times exciting journey, which has left all of us breathless with admiration. However, we knew, nine years ago, what we were letting ourselves in for. This occasion marks over 20 years of judicial service, first in Western Australia and then in New South Wales.

- 2 Your professional adventurousness and self-confidence was clear at the very commencement of your legal career. You chose to attend Stellenbosch University where all courses were taught in the Afrikaans language, in which you were not fluent. You were inculcated into the system of Roman/Dutch law in a faculty dominated by one of the great South African legal academics, J C de Wet, who was once described, in words not entirely inapt to yourself, as "[p]ithy, pungent, sometimes remorseless".¹ Those of us who were taught by Bill Morrison at Sydney Law School are familiar with that academic style.

- 3 You were admitted as a legal practitioner in South Africa in 1963, becoming a partner in a well-known Johannesburg law firm the next year.

Between 1973 to 1981 you were a member of the Cape bar. In that year, at the age of 43, you took the decision to migrate to Australia with all the attendant uncertainties and disruption, at a time when few could predict with any confidence when the oppressive apartheid regime of your native land would end and no-one predicted that it could end without significant bloodshed. Again your self-confidence came to the fore. You were convinced that you could adapt from the Roman law tradition to the common law tradition. As you have often said, until the age of 43 you thought that Equity was the name of an insurance company.

- 4 You became an Australian citizen. Apparently the authorities were ignorant of the fact that you named one of your sons Graeme, because he was born on the day that Graeme Pollock scored a century at the Wanderers Ground – against Australia. We have all had to tolerate your relentless barracking for the South African cricket and rugby teams, often through gritted teeth.
- 5 Your progress in Perth was breathtaking. Your success as a counsel was immediate, first as a partner of a well-known firm of barristers and solicitors and then between 1984 and 1989 as a member of the independent Western Australian bar. You were appointed a judge of the Supreme Court of Western Australia in 1989, immediately after qualifying for such an appointment on the basis of the eight year membership of the local profession then required for such appointment.
- 6 As a judge of that Court your Honour participated in all areas of the Court's jurisdiction, as a trial judge in both civil and criminal matters and on both civil and criminal appeals. This Court was the ultimate beneficiary of your broad range of experience.
- 7 You made a contribution to the administration of justice throughout Australia as one of the judges who, during the course of the '90s, transformed the way civil litigation was conducted in this nation. You were the principal driving force behind the introduction of case management and

the recognition of alternative dispute resolution in Western Australia as the first judge in charge of the Expedited List, as the chair of the relevant court committees and from 1993 to 2001 as the judge in charge of the Civil List.

- 8 As Chief Justice Malcolm said at your farewell from the Supreme Court of Western Australia:

“You were the State’s number one mover and shaker in the reform of civil procedure.”²

- 9 Through your example, through your writings and through continual contact with judges seeking to achieve the same results in other States, including New South Wales, your influence was national.

- 10 In your own address on your retirement in Perth you indicated the nature of the reform process when you said:

“Reformist judges in each State frequently discussed with each other what changes were being introduced and how they were working. We all learnt from each other. Something would be tried in one State and the best parts would be copied in another. Each State acted as an experimental test tube for the country as a whole. It was an excellent example, I thought, of the strength of the federal system.”³

- 11 Today attention is focused on harmonisation and uniformity of practice. We should, however, recognise that harmonisation and uniformity, once achieved, can become an impediment to major reform by the operation of the lowest common denominator approach to decision-making. Each generation is prone to suffer the conceit that it has discovered answers of permanent validity. The principal myth associated with the Greek goddess of concord, Harmonia, is that she received a necklace on her wedding day, which proved disastrous for all who later possessed it.

- 12 In 2001 your Honour migrated again – from Perth to Sydney – first as an Acting Judge of the Court of Appeal for over a year and subsequently as a

permanent judge for over eight years. This was an early manifestation of the emergence of a national judiciary. Once again you were the pioneer.

- 13 Your entire period of judicial service has been characterised, to the last day, by your unflagging enthusiasm, your extraordinary capacity for rapid digestion and analysis of legal material and your intensity of application, which everyone who has served with you has come to admire. All of us share with your former Western Australian colleagues, some of whom are present here today, an immense gratitude for your guidance, inspiration and your willingness to do more than your fair share of the hard yards.

- 14 It was always a pleasure to sit with your Honour in court. The power of your intellect, the speed with which you identified the issues in the appeal and your capacity to distil the essential elements, even in the most complex of cases, was of inestimable value to all who sat with you. There were, however, touches of your background in Africa in your judicial method. On the veldt dangers emerge rapidly: big cats must be confronted as soon as they appear. This was your model. Counsel who appeared before you came to understand that your approach to exchanges with the bar table was that of the lion who does not stand in the path, but approaches at the charge, a tactic with which counsel must be equipped to deal. The Honourable Keith Mason AC told me that his practice, as a presiding judge when sitting with you, was to insist that counsel be allowed to complete the announcement of their appearances before you asked the first question.

- 15 Your principal contribution for the future of the administration of justice lies in the judgments which you delivered both in the Supreme Court of Western Australia and in this Court. Your Honour has been a prolific contributor to the courts on which you have served. In the period of just over nine years in which you served on this Court you participated in more than 900 appellate judgments, that is about 100 per year. This is a formidable output.

- 16 Even before I became a judge I was well aware of the quality of your Honour's judgments from Western Australia and your extra-judicial writing. Indeed, in my own swearing-in speech, upon the assumption of this office, you were one of only two judges whom I quoted, and the other quotation was ironic.
- 17 You have throughout your judicial career manifested the capacity to produce judgments that are both erudite, in the sense of manifesting a complete grasp of the relevant legal principles, and, at the same time, written in a manner which has a force, clarity and logical structure, so that the judgment flows and the reader can understand where your chain of thought is going and why. Your Honour has produced many landmark judgments which are still quoted today.
- 18 From your service in Western Australia there are important precedents on the nature of fiduciary obligations;⁴ on equitable compensation in the context of corporate misfeasance;⁵ on full faith and credit in constitutional law;⁶ on director's duties;⁷ on various aspects of sentencing;⁸ on the principles of subrogation;⁹ and on conflicts of interest by solicitors and the permeability of Chinese walls¹⁰ which, as you know, I believe is an inappropriate metaphor, with its suggestion of impenetrable inscrutability. In Australia we should call such an arrangement "the dingo fence".
- 19 Your contribution continued in New South Wales in virtually every area of this Court's extensive civil and criminal jurisdictions. The cases include landmark judgments on powers of other courts in the New South Wales system;¹¹ on extension of limitation periods;¹² on dealing with vexatious litigants;¹³ on promissory estoppel;¹⁴ on the liability of a litigation funder to provide indemnity for costs;¹⁵ on contempt of court;¹⁶ on complex commercial arrangements;¹⁷ and, of course, on every aspect of the law of tort from the duty of care to independent contractors;¹⁸ the duty of care of statutory authorities;¹⁹ of a prison to a prisoner;²⁰ of a retail seller of

goods;²¹ numerous treatments of the concept of causation;²² and the duty of a publican serving drinks to a patron²³ which has a distinct resonance in this week's High Court judgment.²⁴

- 20 This is a body of work of which you can be truly proud. The legal community of Australia will be in your debt for many years to come.
- 21 Throughout your years of judicial service, you also contributed to the administration of justice in the form of articles and speeches on a broad range of subjects. Your best known public role was as the Chair of the Panel appointed by the governments of the Commonwealth and the States and Territories to review the law of negligence. Your recommendations in that report were enormously influential. Most of the criticism of the tort law reform of the period is directed to changes which went beyond your actual recommendations. Your contribution to restoring an appropriate balance in the practical operation of the law in our society was of the first order. Thereafter, in judgments, articles and speeches your Honour continued to contribute to the development and application of these reforms.
- 22 Your Honour's contribution to this Court was, as in Western Australia, not limited to the production of judgments. Your Honour participated fully in the collegial life of the Court and brought your enthusiasm and experience to all aspects of the Court's internal affairs. As Chair of the Library Committee and of the Education Committee you made invaluable contributions to essential aspects of the internal workings of the Court. If judicial independence is to be a practical reality, then it is essential that judges of the Court play an active role in the internal administration of the affairs of the Court. Otherwise the real power to control the court will drift to others. You have set an example to all of your colleagues in this respect and I am personally very grateful for the scope and quality of the contribution you have made.

- 23 I know I speak on behalf of all of the judges when I say we will miss both your wit and your wisdom. Having you around was simply fun. As Justice Allsop has noted, your distinctive laugh should be made into a ring tone.
- 24 Perhaps what I will miss most, however, on a personal basis, is the intellectual stimulation that I received from you over all of your years on this Court by reason of the breadth of your interests, particularly on history and current affairs. You and I exchanged books and articles on a regular basis and I trust that this will not cease, nor require, in view of your new responsibilities, some form of disclosure on a public record.
- 25 The universal response to your Honour's appointment to the Independent Commission Against Corruption is one of congratulations both to you and to the government that had the confidence to appoint you. You are a person of exceptional independence of mind and strength of character. Together with your experience and competence, these characteristics equip you for this new role, as they did throughout your judicial service. I know I speak on behalf of all of your colleagues when I say that we acclaim your sense of public service and look forward to your continued contribution to the people of this State and of Australia.
- 26 **THE HONOURABLE JOHN HATZISTERGOS MLC, ATTORNEY GENERAL OF NEW SOUTH WALES:** Your Honour, today we formally farewell you reflecting on your truly distinguished career to date, a career which has spanned across not only decades but also continents and a career of service to the law, at the Bar and on the Bench and in academia. Born in Johannesburg you graduated from the University of Stellenbosch in South Africa in 1960 with a Bachelor of Commerce and Bachelor of Laws degrees. Your successful career in South Africa included practising as a solicitor, partnership in a law firm, membership to the Cape Bar, serving on the Cape Bar Council and being an examiner in trial practice for the South African Bar Association and in Business Law for the University of Capetown.

- 27 In 1981 you migrated to Australia and I am confident everyone in this room will agree that South Africa's loss has been Australia's great gain. Your contribution to the law, particularly civil law reform in Australia, began in Western Australia which you made your new home. You quickly established your legal provenance and became in 1984 a member of the Western Australian Bar and in the following year appointed Queen's Counsel. It was not long before your talents as a leading member of the Commercial Bar in Perth were recognised by the State of Western Australia and in 1989 you were appointed as a judge of the Supreme Court of that State. It is to your credit that the Western Australian Bar Association to this day regards you with great esteem in appreciation of your outstanding service to that State as a judge.
- 28 You are known to have a superhuman capacity for work and significantly as judge in charge of the Supreme Court Civil List you were instrumental in overcoming considerable backlogs in the work of that court. This included introducing case management and establishing an expedited list and other procedures. Further, you ordered the report which eventually led to the establishment of the Court of Appeal of Western Australia.
- 29 In 2001 you were enticed eastwards and after a brief period as an acting judge of the Court of Appeal of New South Wales you were soon appointed as a permanent judge of the Court of Appeal in 2002. You continued your adventures further east by taking up a part time appointment as a judge of the Supreme Court of Fiji between 2006 and to early this year. Your expertise in negligence and tort law led you to be appointed by the former Prime Minister in 2002 as the chairman of the Panel of Eminent Persons. The panel was tasked with the significant responsibility of examining the law of negligence including its interactions with the Commonwealth Trade Practices Act of 1974. Chief Justice Spigelman commented on the extraordinary work of the panel under your leadership given the stringent time constraints that the panel operated under. The fact that the final report produced by the panel is known as the Ipp Report is evidence of your significant contribution to it and from 2002

to 2004 the report's recommendations were substantially adopted by Parliaments throughout Australia enacting reforms to personal injury. Your role in implementing major reforms of court procedure in Western Australia and in reviewing the law of negligence was recognised by the Government of Australia in 2007 when you were made an Officer of the Order of Australia for your outstanding achievements and service.

- 30 As an appellate judge in the New South Wales Court of Appeal you are remembered for your professional manner and your great ability to engage counsel within the court room in challenging legal debates, all the time penning clear and succinct judgments, not always an easy feat for an eminent scholar. Despite the extensive lists of achievements I have enumerated I have not yet begun to scratch the surface of your Honour's accomplishments in legal practice, judicial service and academia. Your Honour was also a Fullbright Senior Scholar, had Fellowships at the University of Western Australia, the Inns Court and the University of Cambridge in addition to being widely published. Your colleagues and those close to you speak in unison as they describe you as highly personable and a great intellect and those who have worked with you closely speak with heartfelt sincerity when they say that they greatly respect you and that you will be sorely missed.
- 31 I understand from your colleagues that your Honour also has a wonderful sense of humour and a sonorous laugh. They always know you are coming down a corridor because of the laugh that precedes you. There is, however, one thing that they will not miss and is of course your Honour's secret vice. Notwithstanding your unimpeachable position as a judge your Honour is outrageously biased. You do your best to conceal it but every so often you brazenly sledge other judges revealing your unbridled passion for the Springboks. I understand you and Justice Tobias have a running bet of \$5 each time South Africa and Australia play and to the great consternation of Justice Tobias your Honour is currently ahead.

- 32 In farewelling you I also congratulate you on your appointment as Commissioner of the Independent Commission against Corruption. Your wealth of experience, work ethic and knowledge will be invaluable to the Commission. Your Honour's son, Stephen Ipp, was hoping your farewell from this place would translate into more time for your favourite pastimes of cricket, rugby and cooking with your family but despite your new posting I think you of all people will be able to balance the professional and recreational spheres of life.
- 33 Your Honour, the State of New South Wales has been fortunate that such a committed, passionate and personable legal professional such as you has served its justice system for such a long period. On behalf of the State and the New South Wales Bar Association I thank you for your service and wish you all the best in the next chapter of your career. May it please the court.
- 34 **MR H MACKEN, IMMEDIATE PAST PRESIDENT, LAW SOCIETY OF NEW SOUTH WALES:** On behalf of the President of the Law Society of New South Wales, Joseph Catanzariti, who is overseas today, and the 22,000 solicitors of New South Wales I am delighted to add my valedictory comments on the occasion of your Honour's departure from this court. Wonderful things have come from the west, Robert Holmes a'Court, Bon Scott, Rose Porteous, the America's Cup winning team, Special Air Service Regiment and, most relevantly today, some fantastic judicial minds, Ronald Wilson, our current Chief Justice, Robert French, come immediately to mind but most significantly for our fair State it is you, the Honourable Justice David Ipp. Your life and career are reflective of a man of many skills, a gifted mind and a driving passion for both Springbok rugby and the law. The son of Heimann and Freda Ipp, you were born in Johannesburg in South Africa. Your brother, Howard, lives in Toronto and your sister, Sheila in Houston, USA. You studied at the University of Stellenbosch and there you were able to pursue the three great passions of your life, rugby, law and Erina to whom you met there and have been

married ever since and ;your success in two out of three is not bad, rugby can be a very difficult game.

- 35 Your children have generally followed in your footsteps. Stephen is a barrister working in Melbourne, Graham is a pilot, presumably ferrying the lpps around the globe, and your daughter, Tessa, is a social worker. The tyranny of distance for the family may result in the accrual of tens of millions of frequent flyer points but yours is still a close family.
- 36 Your legal career commenced in 64 as a solicitor at Hayman Godfrey & Sanderson, Attorneys in Johannesburg. You were called to the South African Bar in 1973. Your Honour moved across the big ditch to Perth in 1981 and was admitted as a barrister there and appointed Queen's Counsel in 1985. It's reflective of the tremendous regard that you were held in by your fellow professionals and the skills you've developed as a lawyer that you were made a judge of the Supreme Court of West Australia in 1989. This probably even eclipsed the position you then held as treasurer of the Law Society of Western Australia in 1988. Then, as now, you were really going places in the legal profession. You were made a Fellow of the University of West Australia in 1999, admitted to the Inns of Court in the United Kingdom.
- 37 Plenty has been said this morning about your achievements but you were drawn ever east into the sun's morning rays. Like some of your famous West Australian compatriots your skills were required in a bigger arena than that provided by the world's most isolated capital. You were an acting judge in the Court of Appeal in 2001, appointed as a judge to this court in 2002, a position you've held until today. This appointment coincided with the release of the lpp Report into the Review of the Law of Negligence which was handed down on 30 September 2002. The discussions of the effect of the change of personal injury laws have been ventilated in this court room before you for years, you don't need my tuppence worth in respect of that particular process, it's always been the case that you say it better than most and I note a paper you delivered at

the conference to celebrate the 80th anniversary of the publication of the Australian Law Journal where you said:

“Certain of the statutory barriers that plaintiffs now face are inordinately high. Small claims for personal injuries are a thing of the past. Establishing liability in connection with recreational activities has become difficult. Stringent caps on damages and costs penalties make most plaintiffs think twice before suing. Public authorities are given a host of novel and powerful defences that are in conflict with the notion that the Crown and Government authorities should be treated before the law in the same way as the ordinary citizen. It’s difficult to accept that public sentiment will allow these changes to remain long term features of the law.”

38 I don’t need to point out to you that you had some tremendous assistance in the preparation of that report. This was not limited to the late Professor Don Sheldon, a wonderful man and a gifted surgeon who in fact corrected my deviated septum. Of more relevance to me was the professor of sociology who gave evidence to that committee, that is, my mother, who gave me the deviated septum. Thankfully no cause of action arose from the surgery which would have needed the enhanced protection the law gives to medical professionals and I have long since settled with my mother.

39 Better minds than mine have described some of the high points of your judicial life, your erudite, cogent and logical decisions are but a flick of the mouse away. The views of your brother judges are a little bit harder to obtain. I note the Honourable Justice Harrison at the swearing-out of the Honourable Roddy Meagher in 2004 said:

“Justice Ipp has been able to master the technique of looking like a Rembrandt portrait. He can sit in court for hours staring straight ahead but, as with all good paintings, the eyes follow you around the room.”

40 Justice Murray Tobias is one of your colleagues who will miss your Honour’s huge laugh that can be heard from inside the lift shaft and your feet pounding down the corridor to his room. In fact, such is your impact that his Honour said that he would have slit his throat were it not for your

Honour, you are his *raison d'être*, well, so far as coming into work applies anyway, he will miss your Honour tremendously. I am assured by Justice Tobias and those who know that in respect to the \$5 wagers the worm is turning.

41 Your appointment to the Independent Commission against Corruption will limit the opportunities for your Honour's other leisure pursuits including bushwalking, classical music, concerts and perhaps an odd bottle of wine; "a wonderful man", "gregarious", "generous to a fault", "compassionate" and "cheeky" are just some of the descriptive labels given to your Honour by your associate, tippy and other chamber colleagues. I understand that now your Honour is on the move the lolly jar will no longer require constant replenishing.

42 You take with you today the deep-seated thanks and appreciation of the solicitors of New South Wales. You are certainly the greatest legal asset we have ever received from South Africa. As for contributions from the world of the sand gropers it's a line ball between you and Bon Scott. You've demonstrated an intellectual rigour, a logical and insightful grasp of difficult facts, circumstances and a capacity to apply the law efficiently and impartially. These skills, coupled with an ingrained warmth and compassion for your fellow citizens all go very well for your new role at the Independent Commission against Corruption. As a profession we have our favourites. This is a luxury we have but, unhappily for you, you cannot have. We're not pleased to see you leaving this court, you've made a wonderful contribution to its work, however, we are very pleased the public confidence in the administration of justice in this State is protected by your stepping into the breach at the Independent Commission against Corruption. We are really pleased that your contribution can continue.

43 Today is Friday the thirteenth and viewed by some to be a dangerous day by some superstitious types and I am not sure if this is right. Today is a wonderful day for the profession and for your Honour personally. However, South Africa plays France in the next day or so and it is, after all,

Friday the thirteenth. The profession thinks you are fantastic but. that said, come on the Froggies. May it please the court.

44 **IPP JA:** Thank you, Chief Justice, for your most generous remarks and Mr Attorney and Mr Macken for your kind observations.

45 I am honoured by the presence of each of you in this court room this morning. I welcome particularly those retired judges of the High Court and this court and the judges, past and present, of the Federal Court who are here today. I would also specially mention the presence of two very old Perth friends, the Honourable Chris Steytler, until recently the President of the Western Australian Court of Appeal, and Chris Zelestis QC who has for several years been a leader of the WA Bar. I am very happy that my son, Stephen and his wife, Lee, are here from Melbourne.

46 I am an inveterate sceptic but there are two things in which I firmly believe; the rule of law and the traditions of the law. From a very early age I wanted to be involved in the practice of the law. Fifty-four years ago I commenced studying the law and I have not stopped learning since.

47 In 1884 Lord Bowen wrote:

“As fro the law, it is no use following it unless you acquire a passion for it. ...I don't mean a passion for its archaism, or for books, or for conveyancing, but a passion for the way business is done, a liking to be in court and watch the contest, a passion to know which side is right, how a point ought to be decided.”

That passion has been my touchstone and motivating force.

48 In 1956 at the age of 17 I went to Stellenbosch University in the Cape, far from my home in Johannesburg, to study law. As the Chief Justice has mentioned, the language of instruction was Afrikaans, which at that time I spoke and understood very poorly. Later, however, I became fluent. Going to that university was a fateful decision for me. In my fourth year I

met my wife, Erina. Five years later we were married and in the words of the American poet, Robert Frost, “together started out on life’s perilous journey oar to oar and wing to wing”. I have practised law in four cities and two continents. This itinerant life has not been without its crises, struggles and desponds. Without Erina’s wisdom, courage, determination, grace and support, I would not have been able to survive, let alone achieve anything. She is the foundation on which my life rests.

- 49 At Stellenbosch there were but fifteen students in my final year LLB class. All graduated. Pretty rapidly three were struck off the roll. This may remind you of the Springbok rugby team. Happily, I was not one of the three. To teach these fifteen students there were four professors and a senior lecturer, a ratio of three to one. The fact that the four professors had all obtained their doctorates at Leyden University in Holland was not coincidental. In the 1950s the movement to eradicate any influence of English law from Roman Dutch law in South Africa was at its height. Stellenbosch Law School was the leading proponent of this movement which has long since dissipated.
- 50 Much of my time as a law student was spent in listening to how English law was irrational, unprincipled, idiosyncratic and uncertain. I was taught that the civil law virtues of certainty, rationality and devotion to principle were unsurpassed. As I grew older and more experienced, however, I realised that this intense admiration for one’s own legal system is not a unique phenomenon - rather it is ubiquitous, one finds it everywhere. It is merely a manifestation of nationalism and patriotism. As one would say if charging a jury, poor guides for judgment.
- 51 I am part of a generation of lawyers who were trained by men who saw active service in World War II. It has always seemed to me that the experience at a young age of putting one’s life at risk for one’s country moulded attitudes that are not always found today. The returned soldiers who trained me were strong-minded, stern disciplinarians, with an unswerving sense of commitment of duty and of what was ethically right

and wrong. Notions of moral relativism were alien to them. They drummed into me the need for grinding preparation followed by a commitment to whatever conclusion I had reached. No hedging was allowed. One had to take the consequences if one was wrong. Stylistically no adjectives, adverbs, multi-syllabic words or compound sentences were tolerated. Unnecessary length was deplored. Simplicity and clarity counted far more than intellectual grandstanding and the complexity it brings. As an impressionable young lawyer I admired this approach and throughout my career, not always successfully, strove to emulate it.

- 52 Later as a barrister at the Cape Bar I was fortunate to appear often with and against leading silks. Some were barristers of vast skill and experience whose path to the Bench had been blocked by their political convictions. They taught me the great traditions of the Bar and how one should conduct oneself as a barrister. I think of them fondly and with gratitude.
- 53 As a careful and deliberate choice twenty-eight years ago we applied to immigrate to Australia and I have never regretted that decision. I thought of Australia as a truly democratic country where everyone is given a fair chance, no matter what creed or background or colour, and it has proved to be everything I had hoped for. Australia has given me opportunities that I never expected and I am genuinely proud to be an Australian.
- 54 On arriving in Perth in 1981 at the mature age of forty-three I had to adapt quickly to the new legal philosophy and jurisprudence and rid myself of attachment to Roman Dutch principles and influences. Success in coming to terms with equity and the common law was crucial to my survival and that of my family. Of course it was difficult at that age to learn the new system and to apply it in practice. I soon realised what Winston Churchill meant when he said, "England, like nature, never draws a line without smudging it ...in our climate the atmosphere is veiled." He must have had equity in mind. I will not mention the current law of negligence.

- 55 Necessity is a compelling taskmaster. I began to acquire an understanding and appreciation of the law of Australia. I found it thrilling to find how a 20th century judgment was based on a decision of the 19th century, that was in fact based on what Blackstone had written in the 18th century, or the case from Cook in the 17th century, who found it in Littleton's writing of the 15th century, and so to Bracton in the 13th century.
- 56 In time I became totally absorbed in Australian law and today I would not be able to express an opinion on Roman Dutch law. I have acquired a deep admiration for the ageless quality of the common law, its veneration for the past, its pragmatism and flexibility, the way it is able to adapt to modern conditions and its capacity to provide fairness and justice in individual cases.
- 57 Nevertheless, for a long time I believed that my education and training in the civil law was an asset rather than a liability, in effect, a broadening experience. After all, the same stable had produced Lords Steyn and Lord Hoffmann and the legendary barrister, Sir Sydney Kentridge QC, but *Farrah Constructions v Say-Dee* shattered this illusion. There, the High Court deplored, and I quote: "Lawyers whose minds have been moulded by civilian influences to whom the theory may come first." I immediately realised that that described me to a T. Gloom descended. After a while, however, the usual process of rationalisation kicked in and I began to feel better. It occurred to me that perhaps the High Court was thinking of Justice Hammerschlag.
- 58 Civilian lawyers prefer a unified theory of law and, I confess, so do I. I have always believed that if Albert Einstein thought that a single unified theory could explain the entire universe simple, comprehensible legal principles of overarching application should not be beyond our wit. I recognise, however, that this is contrary to the current orthodoxy which eschews top-down reasoning, focuses on historical purity and holds that

judicial decision-making should only move with baby steps away from the umbrella of authoritative canonical cases. This approach has produced an excess of subtlety and complexity and nowadays there are few aspects of legal principle that can be understood by ordinary people - an odd phenomenon in a country that prides itself on being a democracy governed by the rule of law.

- 59 It should not be forgotten that simplicity, commonsense and adaptation to change are not alien concepts, they are part of the traditional pragmatism of the common law. Where necessary, our law has not been afraid to take great leaps forward leaving established principle far behind: *Donoghue v Stevenson*, *Hedley Byrne*, *High Trees* and *Anisminic* are but a few examples of this. Maitland's aphorism remains pointedly relevant: "Today we study the day before yesterday in order that yesterday may not paralyse today and today may not paralyse tomorrow."
- 60 In 2001 I had the great good fortune to be given the opportunity to sit as a judge of this court. Being part of this institution has been a rejuvenating and life-fulfilling experience that I will always treasure. In many ways this has really been the happiest period of my professional career.
- 61 I have had the privilege of working in a court under the aegis of Chief Justice Spigelman. His leadership has added to the quality of the court and court life in countless ways. History will regard him as one of the great chief justices of our country.
- 62 I have also had the privilege to work under the skilful and considerate stewardship of Presidents Mason and Allsop. Both are outstanding lawyers and administrators. The collegiality of the Court of Appeal could not have existed without their guiding hands. The foundation of that collegiality is the working together of judges in intimate, friendly, good-humoured and non-competitive relationships. It involves respect for the worth and strengths of each other. It results in the whole of the court being greater than the sum of its parts.

- 63 A fascinating aspect of this court is the difficulty in forecasting which way a particular judge is going to decide. Although some judges may be thought to be of a particular makeup in my experience each has great independence of mind and can easily react in an unexpected way. It is a mistake to place judges in pigeon holes. I have more than once been on the receiving end of this phenomenon but not more so than when, in my first year on the court, I was sitting in a workers compensation appeal. Justices Meagher and Handley were firmly of the view that the worker's appeal should be dismissed. I thought it should be upheld. They each gave ex tempore judgments and so did I, but in dissent. As we were walking out Justice Meagher said to me, "I didn't know you were a pinko."
- 64 I shall miss the companionship that is so much part of judicial life on the Supreme Court. From the moment we arrived in Sydney all have treated Erina and I with kindness and friendliness. The warmth and hospitality of the judges and their partners have contributed greatly to the fact that our time here has been such a rewarding and agreeable experience.
- 65 I wish to pay tribute to the New South Wales legal profession. When I arrived the thought of being a judicial newcomer in what has been described as the Sydney vortex was intimidating but my fears were quickly allayed. From the time I arrived I was struck by the high quality of representation at both senior and junior level. Having practised law in so many jurisdictions I think I am well qualified to say that the New South Wales Bar stands back for none in regard to courtesy, skill, professionalism and commitment to the ideals to which all barristers should aspire. Some years ago 11th Floor Wentworth Chambers did me the honour of adopting me as a member and that association has meant a great deal to me.
- 66 I have had the good luck of having had two associates, Pam Kirwan and Sally Guth, who have facilitated my daily life with their efficiency, good humour and kindness. I owe them a great deal and thank them both.

67 I have been fortunate to have had as my tipstaves engaging young people of many different cultures and backgrounds and of high ability. I have valued and enjoyed the assistance they have given me.

68 I have tried to produce my judgments as soon as possible after the hearing, usually within a week or two. Some doubt the merits of this approach. I have been urged to take longer to think about the issues and not to be in too much of a hurry. This was particularly the case with the negligence inquiry when I was severely criticised for handing down the report on time. I have taken heart, however, from the words of the illustrious Justice Olive Wendell Holmes. On 4 April 1909, just over 100 years ago, he complained in a letter to Sir Frederick Pollock that some people regarded the fact that his decision was written at once as evidence of inadequate consideration. He wrote,

“Such humbugs prevail. If a man keeps a case six months it is supposed to be decided on great consideration. It seems to me that intensity is the only thing. A day’s impact is better than a month of dead pull.”

69 In every speech Cato the Elder made in the Roman Senate, no matter the topic, he would conclude by saying “Carthago delenda est”, Carthage must be destroyed. Given that precedent, I hope I will be forgiven if I repeat that, firstly, I had no part in the drafting of the Civil Liability Act and, secondly, that Act contains many provisions that I did not recommend.

70 Ever since when at dawn on Friday the thirteenth, precisely 702 years and one month ago, King Philip IV arrested and later tortured the Knights Templar Friday the thirteenth has been regarded as an unlucky and unhappy day but by reason of this ceremony this day has been a very happy one for me. I thank the Chief Justice for this occasion and each one of you for your presence here today. In this historic court room, in the midst of family, friends and colleagues on the Bench and in the profession, I would have to say the race is worth the running. For my part, the joy has

been in the camaraderie, the debate and the doing and, if I may say so, the doing where possible at top speed.

71 I think it fitting after almost twenty-one years to leave this court and close my judicial career with the words, may it please the court.

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- 1 See Andreas Van Wyk, “Johannes Christiaan de Wet” (1991) 2 *Stellenbosch Law Review* 5 at 11.
- 2 Supreme Court of Western Australia, Farewell to the Honourable Justice Ipp, transcript of proceedings, Perth, 1 March 2002 at 4.
- 3 Ibid at 17–18.
- 4 *Permanent Building Society (in liq) v Wheeler* (1994) 11 WAR 187.
- 5 *Biala Pty Ltd v Mallina Holdings Limited (No 4)* (1994) 13 WAR 11.
- 6 See *Bond Brewing Holdings Limited v Crawford* (1989) 1 WAR 517.
- 7 *Vrisakis v Australian Securities Commission* (1993) 9 WAR 395.
- 8 *Jarvis v The Queen* (1993) 20 WAR 201; *R v Liddington* (1997) 18 WAR 394.
- 9 *Woodside Petroleum Development Pty Ltd v H & R–E & W Pty Ltd* (1999) 20 WAR 380; *Speno Rail Maintenance Australia Pty Ltd v Hamersley Iron Pty Ltd* (2000) 23 WAR 291.
- 10 *Mallesons Stephen Jaques v KPMG Peat Marwick* (1990) 4 WAR 357.
- 11 *Air Link Pty Ltd v Paterson (No 2)* [2003] NSWCA 251; (2003) 58 NSWLR 388; *Orellana-Fuentes v Standard K Knitting Mills Pty Ltd* [2003] NSWCA 146; (2003) 57 NSWLR 282.
- 12 *Itek Graphix Pty Ltd v Elliott* [2002] NSWCA 104; (2002) 54 NSWLR 207.
- 13 *Wentworth v Graham* [2003] NSWCA 229; (2003) 57 NSWLR 741.
- 14 *Australian Crime Commission v Gray* [2003] NSWCA 318.
- 15 *Project 28 Pty Ltd (formerly Narui Gold Coast Pty Ltd) v Barr [No 2]* [2005] NSWCA 420.
- 16 See *Street v Hearne* [2007] NSWCA 113; (2007) 70 NSWLR 231.
- 17 *Ingot Capital Investments Pty Ltd v Macquarie Equity Capital Markets Ltd* [2008] NSWCA 206; (2008) 252 ALR 659.
- 18 *Maggiotto Building Concepts Pty Ltd v Gordon* [2001] NSWCA 65; *Rockdale Beef Pty Ltd v Carey* [2003] NSWCA 132.
- 19 *Amaca Pty Ltd v State of New South Wales* [2004] NSWCA 124; (2004) 132 LGERA 309
- 20 *State of New South Wales v Bujdoso* [2007] NSWCA 44; (2007) 69 NSWLR 302.
- 21 *McPherson’s Ltd v Eaton* [2005] NSWCA 435; (2005) 65 NSWLR 187.

²² See, eg, *Flounders v Millar* [2007] NSWCA 238; (2007) 49 MVR 53.

²³ *South Tweed Heads Rugby League Football Club Ltd v Cole* [2002] NSWCA 205; (2002) 55 NSWLR 113.

²⁴ *CAL No 14 Pty Ltd v Motor Accidents Insurance Board* [2009] HCA 47.