

**ADDRESS ON THE RETIREMENT OF THE
HONOURABLE JUSTICE MASON AC
BY THE HONOURABLE J J SPIGELMAN AC
CHIEF JUSTICE OF NEW SOUTH WALES
BANCO COURT, SUPREME COURT OF NEW SOUTH WALES
SYDNEY, 30 MAY 2008**

Today marks the culmination of 23 years of public-spirited service to the legal system of this State that has rarely been surpassed. With a degree of personal sacrifice, about which your Honour has never been known to comment, let alone complain, you turned your back on a lucrative career at the commercial bar to become the full-time Chairman of the Law Reform Commission in the middle of 1985.

From the Law Reform Commission you were appointed in early 1987 as Solicitor-General of this State, where you served for a decade to universal acclaim and, in the light of the contemporary attitude of the High Court to State submissions on constitutional matters, with considerable fortitude. Bloodied but not bowed, your Honour was appointed President of the Court of Appeal on 4 February 1997 and it is the culmination of your service in that post that we commemorate today.

The long term significance of your term of office will be found in the intellectual leadership you have displayed for the judiciary of this State and the development of the law. Your Honour has delivered judgments of the highest quality and depth of learning over the entire jurisdiction of this Court – torts,

contracts, trusts, fiduciary duties, insurance, defamation, environmental law, conflicts, restitution, estoppel, evidence, procedure, criminal law, as well as the full range of statutes which have required exegesis of the principles of statutory interpretation. By reason of your experience as Solicitor-General you understood the interface between government and the law and the weft and weave of current issues in constitutional law.

As one who has sat with you often, I can testify to the open mindedness, diligence and courtesy with which you approached each and every hearing and the sense of joy you always brought to the investigation of legal principle, although, over the years, there seemed to be more and more statutes and authority to which the word joy would not be an appropriate description of your Honour's reaction.

The quality of your judgments, both in terms of exposition of facts and depth of understanding of the law, are widely recognised throughout the State, indeed, throughout Australia. Many of your judgments will stand the test of time though, perhaps regrettably, you will frequently suffer the obscurity of an intermediate appellate judge whose reasoning is accepted, and often enough replicated, in an unsuccessful appeal to the High Court, whose judgment will in the future stand alone as authority for the proposition first articulated with force and clarity by your Honour. This was, for example, the case with your Honour's judgment on litigation funding.¹ I also have in mind a case when your Honour sat at first instance, in which your Honour came to a conclusion on a particular basis, rejected by the Court of Appeal, but upheld by the High Court without express reference to your Honour's reasons.²

Your Honour delivered a number of important dissenting judgments on matters about which reasonable minds could and did differ and about which your Honour's reasons stand as a full exposition of the minority view which, by reason of the quality of your judgment and the continuance of disputation on issues at the borders of the legal discourse, such as wrongful birth,³ and the award of exemplary damages in equity,⁴ will guarantee your Honour a life in academic legal footnotes for many years to come, and, possibly, vindication by a future High Court.

Beyond cases which are of sufficient difficulty or significance to attract the attention of the High Court, stands a formidable body of judgments by your Honour which have clarified the law in virtually every field of legal discourse and which will guide practitioners and judges in matters of significance in the administration of justice in this State for many years to come. I can only identify a handful of the scores of such judgments encompassing: recovery for psychiatric injury;⁵ the finality of commercial arbitral awards;⁶ the concept of notional estate in the *Family Provisions Act*;⁷ the equitable doctrine of contribution;⁸ duties owed by employers in labour hire arrangements;⁹ the ownership of poker machine licences;¹⁰ the existence of a contractual duty of good faith;¹¹ abuse of process in criminal proceedings;¹² on comity between Australian intermediate appellate courts;¹³ the scope of statutory remedies.¹⁴ I could go on for much longer if time permitted.

Of equal significance is the body of judicial decisions which may not be of broader significance but each of which was of considerable importance to the

parties. Whether in civil or criminal appeals and, on some occasions, sitting at first instance, your Honour approached every case with the same high level of dedication and commitment.

You brought all your formidable intellectual skills to bear on the frequently complex range of specific facts involved in this core of the appellate jurisdiction. These are not the cases which make it to the law reports or excite academic interest. Nevertheless, they constitute the day-in day-out service that the judiciary provides for the fair and effective operation of our economy and society. They require personal empathy, an understanding of individual motives and societal forces, a capacity to bring practicality to bear on legal learning and an ability to identify the relevant legal principles and apply them to the circumstances of each case. All of which you consummately displayed.

Your conduct has been characterised by the seriousness with which you approached your tasks, both as a leader of the Court and as a judge. You have addressed with diligence, erudition and sensitivity, on an annual basis, the difficult task of explaining to judges of the District Court precisely how and why the Court of Appeal has exercised its appellate jurisdiction with respect to their judgments.

You set high standards for the relations between judges and each other, particularly for judges such as yourself towards the top of the judicial hierarchy who have more than the usual range of opportunities to treat others in a manner in which they would not wish to be treated themselves. We have all been chastened by your careful analysis of the importance of civility on the part of

appellate courts when explaining why it is that an appeal should be allowed, so that adverse conclusions are expressed without any sense of discourtesy to the judge below and, perhaps even more importantly, without diminishing the status and respect of that court in the public eye. You were always scrupulous in this respect yourself.

You have always understood the importance of certainty in the law and the role of an intermediate appellate court in observing prior and higher authority, whilst accepting the opportunity, when it arises, to develop the law in accordance with the common law method. You brought to this task a set of ethical principles which found their origin in your religious beliefs and the strength of your faith.

I hesitate to attribute to you the appellation of that much misused term "reformer", which has the connotation that there is something wrong. *You* are an improver. You always proceeded on the basis that things can be done better.

You would, I believe, find comfort in the pithy dictum of an American judge, the poly math Richard Posner, who said that: "only in law is 'innovative' a pejorative"¹⁵ and in his consequential observation: "American law is too vague, too complicated, too expensive; and it is these things in part because judges are too fond of sterile verbalisms and outmoded distinctions."¹⁶ That could never be said of your Honour.

You have always had to hand an unnervingly accurate moral compass to guide your decisions and conduct, both as a judge and in your active role over many years in the Anglican Church.

It was this moral compass that led you to engage in the movement to encourage the ordination of women in your Church. That moral compass was also, I believe, the foundation of your intellectual interest in the law of restitution, a subject on which you are the co-author of the basic Australian text. In neither case was the strength of your principles capable of being diverted with the answer that that is not the way it has been done before.

You are perfectly, indeed uniquely, placed to investigate and explain to us all how it has come to pass that Sydney has become a world centre, indeed one of the bastions, of both evangelical Anglican theology and evangelical equity scholarship. Is there a connection?

To every aspect of your professional life, whether it be the course of administration, the conduct of hearings, the writing of judgments, the interaction with your colleagues, or the topics and content of the numerous addresses you made to public and legal audiences, you manifested a remarkable combination of an intellect of the highest order, an exceptional equanimity of temperament, personal civility bordering on grace and moral strength that is exceedingly rare.

This remarkable combination of personal characteristics endeared you to everyone with whom you came into contact in your professional life, including every member of this Court. Your performance of the administrative and

pastoral functions of the leader of the Court of Appeal has always been exemplary. Your multiple kindnesses, often at personal expense, to all of the members of the Court, their staff and court employees will never be forgotten. You continued the practice of some, but not all, of your predecessors, of courtesy to practitioners and consultation with all judges of appeal. You took an interest in the activities, concerns, achievements and the comings and goings of the staff of the Judges of Appeal, which was one of many manifestations of your profound concern for other people.

From the time of my appointment as Chief Justice, the tenth anniversary of which was last Sunday, to this day I relied on your experience, advice and support. I am and will always remain personally profoundly grateful to you. Furthermore, I know I speak on behalf of every judge of this Court and every judge who had the pleasure of serving on this Court during your period as President, when I express our most heartfelt of thanks for your leadership and collegiality in all of our interactions with you as a President, as a colleague and as a friend.

Your quiet self-confidence, which often appeared self-effacing without any sense of false humility, led you to abjure any need to display your considerable ability or to seek celebration for it. No doubt this occasion, and perhaps these remarks, may be a little uncomfortable for you. However, it is our need not yours to celebrate the extraordinary breadth of your achievement. We, and I, will miss you greatly.

¹ *Fostif Pty Ltd v Campbells Cash and Carry Pty Ltd* [2005] NSWCA 83; (2005) 63 NSWLR 203.

-
- 2 *Paliflex Pty Ltd v Chief Commissioner of State Revenue (NSW)* [2003] HCA 65; (2003) 219 CLR 325.
- 3 *Harrington v Stephens* [2004] NSWCA 93; (2004) 59 NSWLR 694.
- 4 *Harris v Digital Pulse Pty Ltd* [2003] NSWCA 10; (2003) 56 NSWLR 298.
- 5 *Kavanagh v Akhtar* (1998) 45 NSWLR 588; *Morgan v Tame* [2000] NSWCA 121; (2000) 49 NSWLR 21.
- 6 *Raguz v Sullivan* [2000] NSWCA 240; (2000) 50 NSWLR 236.
- 7 *Kavalee v Burbidge* (1998) 43 NSWLR 422.
- 8 *Cockburn v GIO Finance Ltd (No 2)* [2001] NSWCA 177; (2001) 51 NSWLR 624.
- 9 *TNT Australia Pty Ltd v Christie* [2003] NSWCA 47; (2003) 65 NSWLR 1.
- 10 *Jabetin Pty Ltd v Liquor Administration Board* [2005] NSWCA 92; (2005) 63 NSWLR 602.
- 11 *CGU Workers Compensation (NSW) Ltd v Garcia* [2007] NSWCA 193; [2007] 14 ANZ Ins Cas 61-746.
- 12 *Adler v Director of Public Prosecutions (Cth)* [2004] NSWCCA 352; (2004) 149 A Crim R 378.
- 13 *Tillman v Attorney General (NSW)* [2007] NSWCA 327.
- 14 *Akron Securities v Iliffe* (1997) 41 NSWLR 353.
- 15 See *United States v McKinney* 919 F 2d 405 (7th Cir 1990) at 421 per Posner J.
- 16 *Ibid* p423.