

Justice R P Meagher

An interview by Justin Gleeson SC

Bar News: Thank you for agreeing to talk with *Bar News* Justice Meagher.

Justice Meagher: Pleasure.

Background to the law

Bar News: You are well-known to all of our members as an eminent lawyer, as a fine barrister for many years, as a president of the Bar Association between 1979 and 1981, a Court of Appeal judge and as an occasional visitor to controversy. I wonder first if you could cast your mind back and tell us how you came to the law?

Justice Meagher: I think so. I contemplated being an academic and really the more I thought of it, the more I felt it was full of quarrels and Levantine controversies. I didn't want to go into that, thank you. And then I couldn't think of anything else I wanted to do or was possible to do, so I did law.

Bar News: You had come through with a classical education?

Justice Meagher: Classical education in those days meant doing Latin and Greek and in the process of doing that one did allied subjects such as archaeology, theology and ancient history. So the subjects were fairly broad, they were extremely good too. In Greek there was a first class professor, Professor Trendall, and in Latin a first class scholar, Professor R E Smith. The two professors hated each other, but they both conducted very good departments.

Bar News: How was it you came into the area of roman law?

Justice Meagher: Looking back, I think I taught myself. I thought it was worth knowing so I taught myself. I certainly never did it in arts. In law I did it nominally but it was just a joke. So I bought a few books and taught myself. There are lots of very good books on roman law. Anybody can teach himself very easily.

Bar News: You went on to teach students at Sydney University?

Justice Meagher: Yes, and enjoyed it very much.

Bar News: You have retained many of your interests in that area and I understand that last year you were planning to visit Libya to inspect a few ruins. What happened there?

Justice Meagher: September 11 stopped me. It wasn't made any easier because the Department of Foreign Affairs seemed to imagine that Libya was situated in the Middle East, but I am making another attempt to see Libya next January.

Bar News: What are the particular places in Libya that are of interest to you?

Justice Meagher: The old classical ruins in the west, Tripoli and Leptis Magna which between them are probably the greatest collection of Roman ruins in the world. And in the east you have got Cyrene and other sites, which are very important Greek ruins.

Bar News: Have you cleared your travel plans with the United States?

Justice Meagher: No, no, no. Nor with the Arab fundamentalists.

Chambers

Bar News: We wish you luck and hope that world developments don't get in the way. Turning to when you first came to the Bar could you tell us about the chambers you moved into and the head of chambers?

Justice Meagher: Yes. When I came to the Bar in 1960 Selborne Chambers hadn't been built, although Wentworth chambers had just been. As a law student I purchased a set of chambers in Wentworth Chambers. At that stage the people creating Wentworth Chambers couldn't find enough applicants and they asked law students to buy. Only three law students did, of whom I was one. The price was a thousand pounds and one paid ten shillings a month and no interest until the building was complete. The floor I went on to was mainly workers comp law then. The head



Meagher and his Louis XIV library lecturn.

of chambers was Norman Jenkins and about the only non-workers comp barrister was Jack Kenny, later QC. When Selborne Chambers was built in 1962 or 1963, half of our floor moved across to 8 Selborne, when Jack Kenny became the leader of that floor. That was a much more balanced floor.

Bar News: How was life on the 8th floor?

Justice Meagher: It was very congenial. As far as work was concerned there was essentially somebody on the floor who was a specialist in each field you like to nominate. At various stages there was an income tax barrister, there was an admiralty chap, a couple of equity barristers, workers comp fellows; so any field of law that you were likely to practice there was some expert there. You could wander into his room and get a bit of instruction. As far as the social

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life was concerned it was all extremely congenial. Every afternoon at five o'clock we sat in Jack Kenny's room and had a drink.

If he didn't like that we told him, go and conduct your practice somewhere else.

Bar News: When you came to the Bar were the divisions between the common law and the equity side of practice strong?

Justice Meagher: Yes they were strong. Jack Kenny for example on our floor was equally happy in either jurisdiction. But mostly, barristers were either equity practitioners or common law practitioners.

That text book

Bar News: Students for many years at university have tried to come to terms with the Meagher, Gummow and Lehane equity book. How was it you came to write that originally with your co-authors?

Justice Meagher: Because I lectured on the subject for years. I had an enormous sheaf of lecture notes which I used in order to give lectures which were making my room more untidy and Butterworth's suggested that I write a book. I said I would write a book on equity using my lecture notes to start with. Then as the magnitude of the task became more and more apparent I asked Bill Gummow would he help out and he was very happy to. We decided to do half each, then he said there was far too much for two people why not get John Lehane involved? At that stage I had never heard of John Lehane but Bill Gummow assured me of his fine qualities and he was certainly correct about that. And so the three of us did it.

Bar News: I gather that the fourth edition is about to be issued with your new co-authors being Justice Heydon and Mark Leeming.

Justice Meagher: Yes that should be on the market by Christmas, I hope.

Bar News: And should we expect scandalous comments in the preface will be as prevalent as ever before.

Justice Meagher: I hope so. My co-authors may veto them though.

Bar News: Have you found any more pop groups that need a birching in the fourth edition?

Justice Meagher: No, no I have moved away from pop groups.

Donations of art works

Bar News: How did the tradition develop of barristers buying paintings for the Association?

Justice Meagher: The person who started that was Tom Reynolds. He and I got together and put in certain money each and we bought a painting by Keith Looby which I think is still there, and gave it to the Bar. It seemed to cause a sensation. We thereafter bought other paintings paying half each, except if they got fairly big we sought contributions from other people. Usually, we didn't buy anything for more than a thousand dollars and then we would seek contributions of a hundred dollars from other members of the profession. I must say that other barristers were extremely generous in forking up a hundred dollars. In the annual report of the Bar Association the donors of each piece of art should be recorded.

Meagher art collection

Bar News: Could I ask you about some of the art works here in the chambers which we have been fortunate to photograph for this issue?

Justice Meagher: Yes, that painted wooden statue of a head is Spanish, central Spain about early 19th century I should think. It is one of the twelve apostles. It has the mark XII on the back; I am not quite certain who the 12th apostle was, but anyhow that's him. He would have worn robes when he was carried in procession and you can see that the painting of the flesh ends just below the neck. It is rather a pity that he is taken away from his brethren but there he is.

Behind him is a lectern from the age of Louis XIV that comes from a chateau in the Loire. It is not what people imagine it to be, namely an ecclesiastical lectern. It is a library lectern from the library of the chateau, it is really a very noble and very fine thing. The odd thing about it I think is it seems to be so tall, I don't think the average Frenchman of those days would be tall enough to read a book from that lectern, however there it is.

Bar News: And the mask?

Justice Meagher: Yes that is a rather fine mask from west



Meagher inspects the French west African mask.

Africa, from one of the French nations of west Africa. Period about nineteen hundred. It was a period which of course excited Picasso enormously in paintings like *Les Femmes d'Alger*. They are not very easy to come by now.

Bar News: Could you tell us about the book that you have published about your late wife's art?

Justice Meagher: Yes it is a book which I published this year for private circulation, there were 250 copies of it, each of them numbered. There are about 60 or 70 paintings in it. I have distributed it to relatives and friends. It has been very well received by the donees of it. It demonstrates that while she was not a first class painter, she was a very good painter and there are some extremely estimable paintings in it. The colour reproduction is fairly good. No colour reproduction is ever entirely true but it is as true as we can hope for in this vale of tears. For such a thin work it took a surprisingly long time. It is a very complicated business to produce an art book. You have to consider the paper, photographs, what items to include and what items not to include, what if any commentary to make and so on. However it eventually got produced and I might say due rather to my own sloth it took an enormously long time to do it. She had been dead six or seven years by the time the thing was produced.

Bar News: It sounds like a very fine piece.

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Justice Meagher: I think it is.

That painting

Bar News: Before leaving art, I should ask you about a letter which like some of your letters is brief, it is dated 8 February 1994, apparently delivered by hand to Mr Tobias QC who was president of the NSW Bar Association. It reads as follows: 'I hereby resign from New South Wales Bar Association.' How did that come about?

Justice Meagher: It came about because Mr Tobias for reasons I still can't get at tried to give away a painting by Geoffrey Proud which I had been responsible for giving to the Bar Association. Fortunately he failed in that respect. It came back. I think it went from the premises in the Bar Association to Robin Gibson Art Gallery, but it was returned by that Art Gallery to the NSW Bar Association. I still only partially understand why he did it. The apparent reason why he did it, is he was under pressure from the feminist lobby, which for some extraordinary reason regarded the painting as being sexist, merely because it was a painting of a nude female. In that case, there are an enormous number of sexist paintings in the world. The sad thing about it all is that whilst it did come back to the Bar Association the Bar Council no longer put it on public display. Quite where it is at the moment I am not certain.

Bar News: What was your opinion of the work?

Justice Meagher: I think the work was actually a very good work. It is an airbrush painting of a nude female of a rather chocolate boxie popular type. It is extremely good. Sir Edward McTiernan when he first saw it said he thought it was as good as Renoir, but that is pitching it a bit high.

Bar News: It is obvious that Mr Hughes QC agreed with you at least in 1975 when he wrote to you on 8 September stating that the Council thanked you most sincerely for a painting in the Boardroom which we have all come to admire and appreciate.

Justice Meagher: Just so.

Memorable cases

Bar News: Returning to your career at the Bar as a silk, what were some of the memorable cases?

Justice Meagher: There are a few. There was one *Golden Lights*¹ case where we won in the High Court. I think it was the most complicated case I ever did. The parties were both in the tobacco industry and there was a question of grabbing a name Golden Lights, and we won that eventually in the High Court. That was certainly the case which I found hardest to do.

Bar News: Others that spring to mind?

Justice Meagher: Yes, *FAI v Winneke*² which held that the courts were entitled to go behind decisions of the Executive Council and set them aside if they had reason to do so. Another one was an income tax case, *Chamberlain v the Deputy Commissioner of Taxation* where a taxpayer, who happened to be a Canberra solicitor, received a income tax assessment for some amount, I think it was \$200. The Tax Commissioner said it should have been \$200,000 and that it was only by some sort of mechanical mistake that the wrong figure appeared in the assessment. Well, we won that in the High Court, to the immense displeasure of the Commissioner of Taxation. I remember in the application for special leave, Mr Handley QC as he then was assured the High Court that the Australian Taxation Office had so organised its affairs that no such mistake would ever again occur. But a year or two later he told me that a similar mistake had

occurred and to his own income tax assessment!

Bar News: Who were your toughest opponents at the bar in the first half of the 1980s?

Justice Meagher: Oh without question the present Chief Justice of Australia I should have thought, he was by far the toughest. Handley QC is probably the second.

Bar News: Did you have any juniors of assistance or were they slothful as ever?

Justice Meagher: No, no I had some splendid juniors, marvellous juniors. I had Peter Hely, Dyson Heydon, Bill Gummow and a host of others, they are all judges now.

Appointment to the Bench

Bar News: How then did you come to take an appointment to the Bench?

Justice Meagher: I was offered it, I didn't think I would ever get an offer, not that I was yearning for one, but when it came I grabbed it with alacrity. I had heard that both the NSW and the Commonwealth attorney general had together promised each other that I would never be offered any appointment. But then there was a



Meagher with the 12th apostle looking on.

change of government in NSW and the new attorney general decided to make such an offer. The reason why I accepted it with some alacrity is twofold, I had got extremely tired, deeply tired as a barrister. I don't think the ordinary man in the street realises the tremendous stress that a busy barrister lives under. Stress coming from two different directions, there is the stress coming from solicitors who are always making importunate demands on one, and also stress coming from one's clients who continually expect one to do the impossible, and accumulation of both sets of stress really comes very close to wearing one out. So the attraction of a life devoid of either stream of stress was very attractive indeed.

Equity jurisprudence

Bar News: From your time on the Court of Appeal, how do you see the state of equity jurisprudence in New South Wales and Australia generally at the moment?

Justice Meagher: It seems to me moderately healthy. The great danger is that we are all going to be swamped by the English notion of unconscionability which these days has a sort of become a buzz word for dislike of something. If you say that you have no reason in principle to castigate somebody's cock-up as improper or illegal, then you simply say it is unconscionable. That is a grave danger and it seems to have infected the whole of the law of equity.

Bar News: Do you find that many equity cases have merged

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with commercial cases, perhaps more so than in the past?

Justice Meagher: I do. Certainly to the first part of the question, yes they have merged. The second part of the question, no I don't think more than in the past.

Bar News: Yet there do seem to be some areas of equity work, traditional staples of the equity barrister, which are now not seen so often?

Justice Meagher: Yes amazing, I have often wondered what has happened to the construction of wills. You know when I was a barrister every Friday the whole of the equity Bar used to troop off to the Equity Court and there were always several will construction cases. As a matter of regular course. What's happened to that jurisdiction I don't know, because I suppose some construction of some wills must be debated still, but if so it never comes to the Court of Appeal.

Common law jurisprudence and juries

Bar News: In the area of common law and personal injuries area there has been much public debate in the last year or so about the desirability of changes. What is your impression, having seen many such cases at least at appellate level?

Justice Meagher: I think there is good reason for change, at least in some circumstances. Exactly what those changes should be I am not so clear. I think a lot of appellate decisions on medical practitioners are suspect if not downright wrong. I think the courts have tended to impose liability on doctors in circumstances where they never should do so. The source of the error is almost always at the High Court level and legislation would be required to negate the High Court judgments. Beyond that I don't know what one can do. If one abolished the jury system in personal injury cases, one would I think get a reduction in the average verdict, but it is a terrible price to pay. I don't know what intermediate course should be recommended. One change which I think would probably be sensible, is if the ruling of the High Court in the *Abalos* case² were reversed, and intermediate appellant courts had greater rights to reverse primary findings of facts, even though they may be based on questions of credibility.

Bar News: You mentioned the jury trial a moment ago. What are your views on the continued desirability of juries playing a part in the civil system?

Justice Meagher: I don't know. Until fairly recently I was a great advocate of the retention of the jury system, although as a barrister I almost never appeared before juries. Because it seemed to me that basically juries are very sound. As Sir Garfield Barwick said in a rather different context, you can never trust the judges, whereas jurors could be trusted. Jurors have more commonsense than judges have, but I must say recent experiences have caused me to doubt that a little. The decisions the juries make for example in sec 7A trials under the Defamation Act seem to be so startlingly wrong that something must be done. So there are pluses and minuses. On the whole, except for the anomalous sec 7A defamation cases, I think there is a lot to be said for the retention of jurors still.

Criminal sentencing

Bar News: Moving then to the criminal area, the topic of sentencing has been one that has attracted some public comments in recent times. What are your impressions on sentencing?

Justice Meagher: Well I think this is an area in which the judges have let the public down very badly. Because the way in which the judges approach sentencing is simply to ask what is the current range, so if an appellant comes before the court and says that the trial judge has given a sentence which is a little bit more severe than the average sentence given up to that point in time, it is assumed that the appellant must win. I can't for the life of me see why, because the only result of such a course would be that sentencing will become more and more charitable. The sentences that would be imposed will be lighter, lighter and lighter, no matter what the parliament says is the desirable sentence. If things continue in that way it seems to me that there can only be one reaction, one result and that is a violent reaction by parliament to make sentences mandatory. This is of course entirely undesirable.

Bar News: How do you see the sentence guidelines operating?

Justice Meagher: I rather think that the guidelines have broken down, given a push by the High Court. The fallacy about any guideline is that it assumes that all crimes of a similar description are of similar merit, but that is just not so. One murder is not the same as another murder, one break and entry is not the same as another break and entry, and it seems to me one cannot standardise things by an assumption, expressed or implied, that every crime of a particular description deserves the same sentence as another crime of the same description.

Concluding matters

Bar News: Two final questions Justice Meagher. First off are you a supporter of the continued system of silk?

Justice Meagher: Yes, yes I am. I think it does a power of good, the courts are very much dependent on silk and they expect assistance from silk and they get assistance from silk. It is very important I think that the system does continue, as much as all politicians of any description seem determined that it will not.

Bar News: Finally, is there any truth in the rumour that when you come up for retirement in 2004 you are planning on a new career as an arbitrator/mediator?

Justice Meagher: No certainly there is not.. Certainly not.

Bar News: And will you have mastered Hebrew by 2004?

Justice Meagher: No, but I wish I could.

Bar News: Thank you Justice Meagher.



Meagher enjoying a good CLR.

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¹ *Moorgate Tobacco Co Ltd v Phillip Morris Ltd & Anor*, (1987-1988) 164 CLR 502

² *Abalos v Australian Postal Commission*, (1990) 171 CLR 167

³ [15] CLR 342.