Farewell to the Hon Justice John Bryson

The Hon Justice John Bryson retired as a judge of the Supreme Court of New South Wales on Wednesday, 28 February 2007, when a ceremonial sitting was held in the Banco Court.

Bryson JA 'decided to work towards the Bar' at age 11 – even though he had 'little idea what barristers did'. His Honour attended Fort Street Boys' High School and began working in the state public service in 1954 at age 16.

> I first worked on the site of this court building in the Department of the Attorney General and Justice as assistant record clerk doing very humble things, and took the opportunity to read all the ministers' letters in and out to get some idea of how the community was governed. I attended lectures in the mornings and evenings at the law school in Phillip Street. There was no possibility of leisure or time for reflection.
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> Next year I was assistant staff clerk and became adept in calculating recreation leave balances. I proceeded to the State Crown Solicitor's Office. While my contemporaries were acquiring culture and wisdom in academe, examining the unexamined life and distributing the undistributed middle, I was attending taxations of costs before Mr Deputy Prothonotary Cyril Herbert, a taxing experience in at least two senses, in multiples of six shillings and eight pence with typewriting at one shilling per folio of 72 words.
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> Without any training I was given responsibility for managing litigation, scores of very large and very small law suits and almost all about motor accidents. This was a strange task to give to an untrained undergraduate aged 18 but I learnt a lot of practicalities in a short time. I read a lot of medical reports and files about injuries, minor to catastrophic, when I was 18 and 19 and this gave me habits of caution and a profound sympathy for disability.
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> I travelled the state by steam train to instruct counsel before District courts at remote places before impatient judges who plainly yearned for home. There were no funds for air travel. District Court judges in that age ranged very widely in ability, from polite scholar gentlemen with learning to grace any court, to those who entered court at 10.00am purple with fury and stayed that way all day.
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> Over several years from 1956 I often instructed Kenneth Gee in cases in Wollongong District Court before a judge whose personality was as difficult as any I've encountered. I classify that judge, long dead, as a perverse genius. Ken Gee showed me the appropriate conduct of a barrister in difficult situations.

After leaving government service at the end of 1959, Bryson JA worked in what he described as 'two very different law offices, a small family firm doing the legal work of ordinary suburbanites to whom every expenditure was a challenge, and several years in the litigation mill of Allen Allen & Hemsley where the clients were large corporations from Australia and overseas, banks, charities, churches and schools, which were pillars of society governed by partners of the firm. This introduced me to the big end of town and large scale litigation, hearings that lasted months and years.'

The Hon Justice John Bryson

In February 1966, Bryson JA embarked on practice at the Bar and took silk in 1986. His Honour was appointed to the Supreme Court in 1988 and sat in the Equity Division until appointment to the Court of Appeal in 2003.

Spigelman CJ recalled that 'what transformed pleasure into delight' when appearing before Bryson JA 'was your Honour's personal style – in essence, a black letter lawyer with élan – which style was, quite simply, inimitable, in the strict sense that it defies imitation'.

> Your Honour has an inexhaustible supply of arcane anecdote, informed by a wide ranging intellectual curiosity, a keen eye for the ribald and the ridiculous and a fascination, bordering at times on the world weary, for human fallibility.
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> Everyone in this room has relished your Honour's mode of expression: cliché free, pregnant with insight, deliciously unpredictable, devoid of malice, uncluttered by excessive verbiage, manifesting a love of language and exuberantly sprinkled with wit – that form of humour which illuminates the truth.

Spigelman CJ put 'two examples from my time at the Bar on the record':

> I once attended a conference on 'Law and Literature' at a time when, from my ignorance, I thought that this sphere of discourse had something to do with 'literature' rather than, in the post modernist fashion, a preoccupation with something called 'texts'.
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> I was sitting next to your Honour during an address by a feminist scholar – it was early days in the process of gender sensitising lawyers. The scholar announced to the assembled audience that it was essential that in the future all lawyers should be 'femocrats'. Immediately, your Honour put your head in your hands and said: 'How can she mix those Latin and Greek roots like that? The correct word, if any, is "gynaecrat".'

I give one other example of your Honour's style. An issue arose in a case as to whether or not certain water licences fell within the extent of the security under a mortgage of rural properties. I handed to your Honour an extract from the 9th edition of the English text Fisher & Lightwood on *Mortgages* which stated, without citation of any authority, that 'all incidental rights ... will follow the security'.[1] I then handed to your Honour an unreported judgment of your brother Mr Justice Young, who quoted that sentence and applied it to conclude that a licence for an abattoir was within the mortgage.[2] Finally, I handed to your Honour the 10th edition of Fisher & Lightwood on *Mortgages* which contained exactly the same sentence but, on this occasion, had a footnote attached to the words 'all incidental rights', namely a reference to the unreported judgment of Mr Justice Young.[3]

Your Honour inspected each of the three documents, looked up and said: 'This is going to be very difficult to stop'.

The chief justice said Bryson JA brought to the judicial task 'a profound understanding of, and empathy for, the role of legal practitioners, which you had acquired over many years of practice both as a solicitor and as a barrister'.

You were always aware that matters are not always as they appear to be, particularly by the time a dispute reaches an appellate court. Your Honour's insight in that respect was no doubt informed by your role as instructing solicitor for the state crown, appearing for the GIO, in the classic case of *Jones v Dunkel* when the High Court, somewhat scornfully, commented on the failure of counsel to call or explain the absence of the defendant and crucial witness, being the truck driver accused of negligent driving. You maintain to this day that the High Court should have taken into account the possibility that there may have been such an explanation that could not have been safely adduced before a jury. Indeed there was. In that case, it was difficult to explain to the jury that had to decide whether the defendant had been driving negligently, that he could not be called as a witness, because he was in prison interstate having been convicted on a charge of culpable driving causing death.

Bryson JA said he had 'heard *Jones v Dunkel* misquoted every week of my appellate career...We lost three to two and we had Dixon on our side'.

Spigelman CJ said Bryson JA's long service as a judge of the Equity Division meant that his Honour's judgments covered the entire range of that diverse jurisdiction.

You have delivered judgments on patents and trademarks, company takeovers, special investigators, disclaimers by liquidators, the disqualification of company directors, the validity of meetings, the efficacy of a deed of charge, the interpretation of contracts, the incidents of a joint venture, the interpretation of wills, the fiduciary obligations of solicitors and partners, the law of landlord and tenant, the role of equitable rights under the Torrens system, the interpretation of superannuation trust deeds, the law of estoppel by convention, the rights of patients to access their medical records, the requirements for the admission of documents into evidence, too many permutations of Family Provision Act conflicts to mention and numerous other matters covering the full panoply of equity jurisprudence.

Your Honour brought to the appellate process your long experience as a trial judge and emphasised the respect required of an appellate court for judicial discretion. However, your elevation was accompanied by a noticeable restriction on your Honour's usual list of conversation topics. We all lost the benefit of your running commentary on the inadequacies of the Court of Appeal.

This appointment broadened your Honour's caseload: returning to an early practice with personal injury law, where your Honour displayed a compassion for plaintiffs that few had predicted. In your three years on the court you delivered judgments of significance on such matters as the law of defamation, the liability of public authorities and the law of fiduciaries, notably observations about the threat to proper principle occasioned by the restitution industry.

'Designation of a relationship as fiduciary,' you said, 'is not a signal for exercise of judicial bounty'.[4] No one else has put it quite like that.

[Bryson JA had] rejected the proposition that it was negligent for two parents to go to sleep at midnight on the basis that it was not reasonably foreseeable that the guests at their teenage son's party would attempt to reignite a barbeque at 2.00am and proceed to douse it in methylated spirits'.

Your Honour produced the definitive judgment on what was reasonably foreseeable conduct by teenage males in such circumstances. You identified as foreseeable: 'Horseplay, leapfrogging, dancing on tables, swinging on tree branches and arm wrestling'[5] but not throwing metho on a barbeque'.

Noting that Bryson JA had agreed to return as an acting judge of the court, to sit both at first instance and on appeal, the chief justice said: 'Your continued presence will maintain the strength of this court.'

Speaking of his early days of practice, Bryson JA said: 'I mainly learnt law by doing it but I read some marvellous books on the way.' He continued:

Justice Hutley told various people that I learnt law from Tidd's Practice, which was commended by Uriah Heep to David Copperfield, 'He's a great writer, that Master Tidd.' The fact is, however, I have never read Tidd's Practice. The first law book I ever read was Henry Maine's *Ancient Law* which I bought from Tim Studdert in 1954 with a job lot of first year text books he'd just finished with, I think I paid him ten pounds. Of all the people now associated with the court Justice Studdert is the one I've known the longest. Henry Maine showed me the interaction of legal rules with the workings and development of human society within cultures, and interested me in learning some law which was closer to life's practicalities than the law Henry Maine dealt with. I have always looked at law from the perspective of its history, and during quiet periods early at the Bar I read Holdsworth's *History of English Law,* much of it twice over.

Bryson JA recalled that while at the Bar, he had some involvement with constitutional law, 'a fascinating and fluent subject, more unregulated

and difficult to predict the closer it is examined. Constitutional cases tend to start at the top, so less than most other fields is constitutional law polished in the appellate process.' His Honour added:

> I saw something of the electoral and senate litigation of the Whitlam era. Some advice which I joined with McHugh QC in giving to the state about its legislative powers appears to have won me a modest place in history as it is mentioned in Anne Twomey's *Chameleon Crown*. To my mind the advice then given was as obvious and unremarkable as anything I have ever set my name to, yet the historian found it interesting.
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> I had one or two brushes with history through membership of the Tenth Floor Wentworth Chambers. Adulation rang out at our dinner to celebrate the appointment of Sir John Kerr as governor-general. Sir John Kerr and the then prime minister had both practised on the tenth floor. The prime minister spoke well. While ladling butter from alternate tubs Stubbs butters Judkins, Judkins butters Stubbs.

Late in His Honour's bar career he had many cases about professional duty, 'a long series of disaster stories in which my clients diverted trust accounts, built dams which fell over, buildings the facades of which collapsed in the street, put houses on the wrong block and gave the wrong horse pills to racehorses which promptly laid down and died. The expression in the trade was "became recumbent".'

'I was happy to leave this for the Equity Division. There are only 10,001 equity suits and when 18 years had passed I had heard them all and I was able to find my way through them with no great difficulty', his Honour said.

Bryson JA said that, as a judge, his object had been 'to produce work conforming to the current authorities with appropriate attention to the arguments put forward'.

> It has not been my object to display originality or brilliance, but to come to grips with and resolve what the litigants understood to be their controversy and their problem, work of good artisanal quality, to be the good of which the best is mysteriously the enemy.
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> Judges make law but it has not been my object to make any. There are many judges and the chaos if more than a few of them made some law is alarming. I know that the mood, the approach and the outcome change greatly with generational changes and I have seen much of this transformation.
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> The court and the law have made immense transforming journeys while I have been observing them. I have not been happy with all legal rules, and I think of the *Evidence Act 1995* as a late work of the committee which designed the camel.
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> I first had some colleagues of whom I was slightly awestruck and I mention Hope and Glass and Needham. There are others I forebear to name as they are still with us, people significantly older than I schooled in the old practice before 1972. That pleading system had a high value which has not been destroyed by my perception that the present system is a better one.

At 67, his Honour was the oldest person ever to have been appointed to the Court of Appeal.

> I had to revisit law which I had not looked at for a while. It was challenging but amenable to hard work, energy and application. Appeals brought me back to personal injuries litigation with which I had had so much to do in an earlier era. The juries had vanished, changing everything. I find litigation about personal injuries very harrowing, the impact on lives and feelings is so profound. I hope it's true that negligence law makes people more careful in their behaviour. The thought that this may be true has assisted me. On the Court of Appeal I think of myself with T S Eliot:
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> > No, I am not Prince Hamlet, nor was meant to be, am an attendant lord, one that will do to swell a progress, start a scene or two, advise the prince; no doubt an easy tool, deferential, glad to be of use, politic, cautious and meticulous, full of high sentence but a bit obtuse.
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> Those of you who know it may finish the passage if you think it's appropriate.

The Bar Association's president, Michael Slattery QC, recalled that when Bryson JA had left the Bar, His Honour was heard to say, 'It's such a good life. Don't tell too many people. They'll all want to do it.'

> Your Honour further explained, 'It's the last refuge of the true eccentric.' Your own life on the bench perhaps proves that the bench too has one or two eccentrics.
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> Your Honour brought many things to the bench. Special among them is your sense of humour. To remember your Honour's judicial humour is to capture an instant in one's own life. Your Honour's humour is the humour of the moment, this often a moment of insight into all human pretension and absurdity. Your Honour's remarks are captured and fondly remembered and then savoured by the profession in joint reminiscences for years. These moments often celebrate your Honour's deep sense of humility. One such moment is forever remembered by one senior counsel who was appearing before your Honour in an interlocutory application in chambers some years ago. All counsel were ushered into your Honour's chambers. Seated, your Honour commenced to read the court file. It took some time. Counsel remained standing for a period. One of them then said, 'Does your Honour mind if we sit down?' To this your Honour said, 'Feel free. You can kneel if you wish.' As if that wasn't enough your Honour then added, 'But I shouldn't offer you those temptations.'

1 Fisher & Lightwood's *Law of Mortgages* 9th ed London, Butterworths 1977 at p 37.

2 *Daniels v Pynbland Pty Ltd NSW Supreme Court*, unreported, 12 April 1985.

3 Fisher & Lightwood's *Law of Mortgages* 10th ed London, Butterworths 1988 p 57 fn(m).

4 *Blythe v Northwood* [2005] 63 NSWLR 531 at [211].

5 *Parissis v Bourke* [2004] NSWCA 373 at [52].