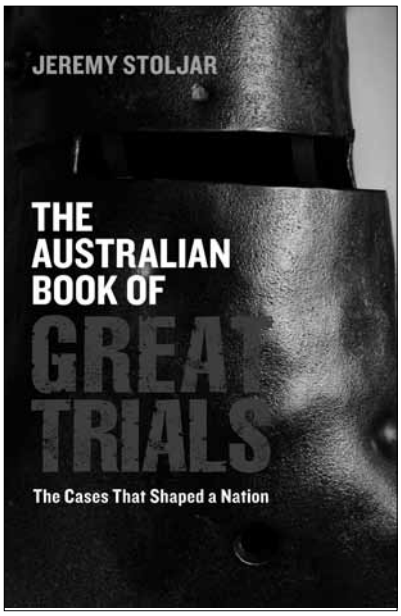
The Australian Book of Great Trials: The Cases That Shaped a Nation

Jeremy Stoljar SC | Pier 9 | 2011



The following speech was delivered by the Hon Justice Heydon AC at The Mint, 20 September 2011.

Jeremy Stoljar is a senior counsel. But times are hard at the bar even for senior counsel. Alternative sources of income must be found. He has decided to earn money by his pen. As Dr Johnson said: 'No-one but a blockhead wrote, except for money.' Authors, unfortunately, like barristers, are members of an impoverished class. To authors the level of royalties is the subject of eternal interest. They share the world-view of Field Marshal Slim, who, after his term as Governor-General of Australia ended, returned to England to promote his autobiography, *Defeat Into Victory*, with the words: 'We field-marshals have learned, in peace as in war, to sell our lives dearly'.

Now Pier 9, which has published this book, deserves much credit for it. Like other publishers, it runs many risks. No doubt the contract it has made with Jeremy will include clauses about defamation, manuscript preparation, obscene material, breach of contract and plagiarism.

Why defamation? Because many authors whom publishers of books about law have to deal with are academic lawyers, and their profession almost exclusively consists of defaming judges.

Why manuscript preparation? Because publishers know that although authors supply manuscripts which have a beginning, a middle and an end, they do not necessarily appear in that order.

Why breach of contract? Publishers know that some authors are more famous for the books they are going to write than those which they have actually written. They remind one of Hugh Trevor-Roper's conversation with the Prime Minister, Margaret Thatcher, in which he said he had a book on the stocks, to which she retorted: 'On the stocks? *On the stocks?* A fat lot of good that is. In the shops, that is where we need it.'

If there are clauses giving Pier 9 control over obscene material, I think that Pier 9 will have overlooked commercial realities as they are in the age of Dominique Strauss-Kahn. Pier 9 should have remembered that Rousseau's *Confessions* has been described as 'a lucid journal of a life so utterly degraded that it has been a bestseller in France ever since.'

Why do publishers worry about plagiarism? Publishers take care not to be rude about the books they publish, because you never know who wrote them. But they should remember Sir Owen Dixon's aphorism: to copy out one book is plagiarism; to copy out two is diligent scholarship; to copy out three is original research.

In some ways this book reminds us of how the law in practice has changed. The early trials described were very short affairs – they were prepared quickly, they did not last long, their consequences ensued almost at once. They say that in Russia everything is true, eventually. But in modern litigation some things are true all the time. One of these modern truths is that any given event takes much longer than people expect. Justice Jacobson has a female court officer who comes from Spain, the land of the siesta. He occasionally takes a five minute adjournment in the middle of the morning or the afternoon. The other day he said: 'Adjourn the court for five minutes.' The court officer then realistically called out: 'All rise! The court will adjourn for seven minutes.'

One reason why litigation in practice has changed is the increased complexity of evidence, particularly expert evidence. This book shows that it played a small role in the case of Dean in 1895, but an enormous role in the Chamberlain case in 1982, where, in Mr Justice Morling's opinion, it caused a miscarriage of justice. And as scientific expertise increases in complexity and ambition, it will become a growing problem in the decades to come.

But the law has become more complex and unpredictable in other ways as well. Ian Callinan QC was once cross-examining in a commercial cause before Mr Justice Rogers. At one point his junior

passed him a note: 'Ask him about Fay Richwhite.' So he asked in his quiet but determined style: 'Do you know a Miss Fay Richwhite?' The somewhat startled witness said: 'No', before being rescued by Mr Justice Rogers: 'Mr Callinan, she is not a lady; it is a merchant bank!'

Then there are the increased difficulties of criminal procedure, with its multitude of jury warnings, some necessary, some discretionary. Only Judge Gibson of the District Court rebelled against this when he said: 'The prosecution must prove its case beyond reasonable doubt; but it does not have to go beyond that.'

There are examples in the book of the eternal continuities of Australian life. We experience great heat and bushfires, as the northwest wind blows across the fierce and terrible purity of the desert, and we call this 'climate change': yet the book records that there were great temperatures and bushfires in 1851, just before the gold was found which led to the Eureka Stockade trials. We intensely debate flood taxes and carbon taxes and mining taxes: the book analyses how those Eureka Stockade trials arose out of mining taxes. We worry about the impact of the law of restitution on older doctrines. Earlier this year, Mr Bret Walker was asked in the High Court if a claim in restitution had been pleaded in the statement of claim. With the disapproving glare of Justice Gummow burning down on him, to my recollection Mr Walker replied – and if he did not say this he ought to have – 'Of course not! It would be plain professional negligence to do a silly thing like that.' Yet the book

reveals that in the first civil trial in Australia, described in this book, the *Cable Case* in 1788, a bailment case about the loss of a parcel on the First Fleet, the case of the plaintiff convicts was put in restitution.

The book will remind readers of many things. In analysing the case of Ronald Ryan, the last person on whom a death sentence was carried out in Australia, the book describes the trial and other hearings before Mr Justice Starke. Sir John Starke, at the end of his much-admired career at the bar and before he had become a judge, had managed to prevent Robert Tait from being hanged – culminating in the scene when Chief Justice Dixon, speaking for the court, not only made an urgent order staying Tait's execution, but also added an order directed to the Deputy Premier and Chief Secretary, and later arranged for that order to be served on him personally in order, as he said, to prevent that statesman from inadvertently committing murder. Sir John Starke was the son of the great Sir Hayden Starke, the man of whom Sir Owen Dixon after his death said that he had 'a forensic power as formidable as I have seen.' He was once on a Victorian country circuit in which the case before his was a murder trial. The jury returned at a late stage of the evening and convicted the accused. The trial judge placed the black cap on his head and pronounced the mandatory death sentence. He then said: 'Call the next matter!' Hayden Starke objected because of the late hour. The judge said: 'What has that got to do with it?' Starke said: 'My client's case is important. It is about pounds, shillings and pence. It's not a mere hanging matter.'

One theme of the book is the role of the law in protecting the weak – the plaintiff convicts in the *Cable Case*, the Aboriginal victims of the Myall Creek murderers, the miners in their struggle against the government in the Eureka Stockade Trials. Those three pieces of litigation took place before the arrival of democracy. But the book also tends to vindicate the qualms of those nineteenth century thinkers, like Alexis de Tocqueville, Robert Lowe and Lord Salisbury, who opposed or feared democracy because of the impact which the tyranny of the majority would have on the liberties of minorities. The twentieth century taught us that the wars of the peoples are more terrible than the wars of kings. So is the wrath of the peoples against marginalised and powerless minorities. That is particularly so if a minority is thought to carry a risk of causing physical danger, like the Australian Communist Party in the 1950s or Muslims this century. The author describes how the High Court struck down legislation banning the Communist Party. He also describes the various

pieces of litigation concerning Joseph Thomas. Some think the legislative system of control orders which affected Thomas to be too oppressive; although the High Court did not strike it down, the *Communist Party Case* may have influenced some softening of it. In general Australia is an exception to the rule that there is no advertisement for colonial government like post-colonial government. But the protection of minorities remains an ever-present need.

On the whole the book is kind to both judges and legal practitioners. Indeed it is sympathetic to most of the protagonists in the dramas it discusses, including guilty criminals. Jeremy Stoljar is not like President Theodore Roosevelt's daughter, Alice Roosevelt Longworth, who would say: 'If you don't have anything nice to say, come sit here by me.' The book reveals many unusual and little-known things about Australian life over the last 22 decades. Further, it reminds us of the great ability of Mr Justice Hunt: I refer not so much to his role as a defamation lawyer, or as an appellate judge, but to his capacity to preside faultlessly over extremely complex and stressful criminal trials. The book reminds us, too, of the strange posthumous career of Justice Murphy. In *Miller v TCN Channel Nine Pty Ltd*, delivered one hour before his death, all the other six judges opposed his contention in that case that there was an implied guarantee of free speech in the Constitution. Yet less than six years later, three of those six judges, together with three new judges, said in the *Australian Capital Television Case* that there

was; and numerous other ideas of Justice Murphy propounded on the court and emphatically rejected in his lifetime were taken up after his death. It would be good to have a detailed study of Justice Murphy, neither hagiographical nor abusive, but penetrating.

Let me conclude by saying in the presence of his son Sam that Jeremy Stoljar is the son of one of the greatest academic lawyers who ever worked in Australia – another Sam Stoljar. As one would expect, his very interesting book is written with great clarity and liveliness.

I have only one complaint. The author's portrait makes him look like a cross between a member of the Italian Red Brigades and an East German film director of the 1970s. These representations are not accurate guides to his character. With only that small demur, I have great pleasure in launching this book and wishing it every success. Go out and buy! There are only three shopping months to Christmas.