A postscript to 'The Orr Case Revisited'

By The Hon R V Gyles AO QC

One of the Tasmanian stories recounted in Peter Heerey's *Excursions in the Law* (The Federation Press 2014) is 'The Orr Case Revisited'. The *Orr Case* was a cause celebre of the 1950s. Sidney Sparkes Orr was the professor of philosophy at the University of Tasmania. He was dismissed on 16 March 1956, on the principal ground that he had seduced a female student. He sued for wrongful dismissal. The case was rejected by the Supreme Court of Tasmania, upheld by the High Court of Australia in May 1957. Controversy continued. Orr had many supporters and many detractors. Families were split. Academics blackballed appointment to the chair of philosophy at the university. Orr did not receive another academic appointment. I can add a piece of trivia and some substance to 'The Orr Case Revisited'. First, the trivia.

In 1960 Malcolm McLelland, Jeremy Badgery-Parker (both to become Supreme Court judges) and I visited the University of Tasmania in Hobart to represent the University of Sydney at the interstate moot competition for that year. As it happened, Peter Heerey was one of the law student hosts. The chancellor of the university invited the assembled mooters to a welcoming reception. The *Orr Case* was known to law students in Sydney but more because of the salacious content than for any legal principle. As will appear, it is not clear that the same was true north of the Tweed.

I found myself in a circle of students together with the chancellor (strongly anti-Orr, although his son was strongly pro-Orr) and Reginald (Reggie) Wright QC, a Commonwealth Senator and a leading Tasmanian counsel, who had appeared for the university against Orr (although his brother was one of Orr's leading supporters). One of the Queensland mooters said: 'What's this Orr case all about?' Even the other mooters had picked up the fact that this was, to say the least, a sensitive topic in Hobart. There was a lengthy silence. Reggie Wright, in his unusual voice – which was a cross between a Somerset farmer and a town crier – said: 'Did you mention that man Orr? I have a farm on the north-west of this island. I visit that farm most weekends. I set traps for rodents. I go around the traps and collect the rodents. Every one of those rodents is better than that man Orr!' Even the Queenslander was silenced.

Now as to substance. Peter Heerey says 'Finally in 1966, shortly before Orr's death, a financial settlement with the university was achieved and the black ban lifted.' I can provide some background to that sentence.

In 1958, the vice-chancellor of the university, one Isles, wrote and published a booklet entitled *The Dismissal of SS Orr by the University of Tasmania*. It was defamatory of Orr. If published only in Tasmania, it is likely that the matter would have ended there, as the view in the legal profession at the time was that any case brought by Orr against the university in the courts of Tasmania would be bound to fail. However, the author was incautious enough to cause or permit the booklet to be published outside Tasmania, including in New South Wales.

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By then, Orr was living in Sydney and had become a client of solicitor Donald Champion of the firm of WS Kay, Davies & Champion of Parramatta. Don regularly briefed Robert Ellicott, later to become a leader of the bar, Commonwealth solicitor-general and attorney-general and (briefly) a Federal Court judge. Publication of the booklet in New South Wales came to their attention. Between them, they devised the strategy of suing on the publication of the booklet in New South Wales which would lead to a jury trial in Sydney. Sydney juries were notoriously generous in awarding damages for defamation. The booklet had been published not long before the 1958 NSW Defamation Act had come into force, and the defendant Isles pleaded (in addition to justification) defences of fair comment and qualified privilege under the common law and under the 1958 Act. This added a complication to the already complicated field of defamation pleading. Orr moved to strike-out the defences of fair comment (as pleaded) and qualified privilege. If successful, this would leave the defendant to prove the truth of the defamatory imputations and that it was for the public benefit that they should be published. No easy task .

I was fortunate to be reading with Bob Ellicott at the time. He had by then persuaded CLD Meares QC, one of the leaders of the common law bar and later a Supreme Court judge, to lead him. Bob took me along to the hearing of the strike-out application as a second junior.

The application was heard by Gordon Wallace J on 17 and 18 August 1964 – I had been admitted to the bar less than one

month previously. We were opposed by Thomas EF Hughes QC leading David Hunt (later to become the chief judge at Common Law in New South Wales). Both had formidable reputations as defamation pleaders. Tom Hughes later became attorney-general of the Commonwealth, and after returning to the bar, developed one of the leading practices in Australia in many fields, including defamation.

On 9 September 1964 Wallace J delivered judgment striking-out all of the defences which had been attacked – *Orr v Isles* (1964–5) 82 WN (NSW) Part 1 103.

The defendant did not take this lying down. He appealed to the full court of the Supreme Court of New South Wales. The appeal came on before Walsh, Ferguson and Taylor JJ on 3, 4 and 5 May 1965. Counsel were the same as at first instance except that Bob Ellicott had by then taken silk and disappeared into a long intellectual property case before the fearsome Freddie Myers J. Judgment was delivered on 3 June 1965 (*Orr v Isles* (1965) 83 WN (NSW) Part 1 303). The appeal was allowed in relation to the plea of fair comment (with Walsh J dissenting), and rejected in relation to the qualified privilege pleas.

About a week before the hearing was to commence, I received the following call from Meares: 'Hello son. You're about to get the chance every junior dreams of.'

The division of opinion on the fair comment plea was of significance for the trial. The plea allowed by the full court permitted the defamatory matter to be defended as fair comment, although the factual material upon which the comment was based was not justified. That could have made the difference between success and failure at the trial. Emboldened by the dissent of Walsh J, a highly regarded judge who was appointed to the High Court not long afterwards, it was decided to seek leave to appeal to the High Court. On 6 August 1965 a court consisting of Barwick CJ, Kitto and Owen JJ granted special leave to appeal .

The appeal was fixed for hearing for 13 December 1965. Ellicott was still tied up with Freddie Myers. Meares had an exceedingly busy jury practice. Thus, by default, preparation devolved upon me. If not entirely out of my depth (because the issues had been argued twice), I was certainly gasping for air.

About a week before the hearing was to commence, I received the following call from Meares: 'Hello son. You're about to get the chance every junior dreams of.' When I politely enquired what he meant, he said: 'I'm jammed on the Broken Hill circuit and will not be able to get back for the hearing. It is up to you.' That was the end of the conversation. It did cross my mind that the fact that the Orr case was virtually pro bono and the Broken Hill circuit was very lucrative may have had an impact upon events. Ellicott was still jammed, and there was no time or money to engage anyone else.

I did the best I could against the formidable Tom Hughes, primed by the indefatigable David Hunt, in a hearing that lasted 13, 14, 15 and 16 December before Barwick CJ, McTiernan, Kitto, Menzies and Owen JJ. As a raw junior, I received a sympathetic run from the bench, particularly Chief Justice Sir Garfield Barwick and his friend, the great Victorian judge Sir Douglas Menzies. Judgment was reserved and nothing was heard in the early months of 1966.

Then, Sidney Orr was diagnosed with a terminal illness. He was anxious that steps be taken to secure the position of his wife as best as could be done. That led to settlement discussions with the university which culminated in a deed of settlement between the university and the parties to the litigation – Orr and Isles. Judgment was never delivered. On 23 May 1966, a court comprising Taylor, Windeyer and Owen JJ ordered the appeal be struck out with no order as to costs. Sidney Orr died on 15 July 1966.

Later that year, Sir Douglas Menzies sought me out at a bar function. He told me that all the judgments had been written well before the settlement, save for one judge who was dragging the chain – with at least a hint that that judge was McTiernan J. From the demeanour and body language of Sir Douglas and the fact that he had approached me, I received a strong impression that Orr would have succeeded in the appeal. But perhaps that was wishful (or wistful) thinking on my part.