

which seeks to be definitive and yet concise. They have included those citations that seem to them would help a reader to appreciate the proposition, rather than every citation.

The result is a text that allows a practitioner, whether expert in the area or otherwise, to readily identify the key principles guiding the law of contract of employment and the leading authority or authorities that underpin those principles.

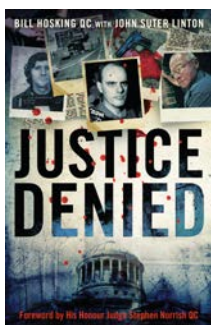
The second edition to this excellent text is very welcome in circumstances where there have been some significant changes since 2012. Not least is the High Court decision in *Commonwealth Bank of Australia v Barker* (2014) 253 CLR 169 which put to rest the so-called implied term of mutual trust and confidence but has given potential scope to the implied term of good faith as it applies in an employment context.

The new edition also addresses recent authorities on the test for identifying a contract of employment including *ACE Insurance Ltd v Trifunovski* (2013) 209 FCR 145 and *Tattsbet Ltd v Morrow* (2015) 233 FCR 46.

There are times as a practitioner when you have the time and inclination to immerse yourself in the full depth of the law on a subject, and there is a place for textbooks which consider what the law might be or should be.

Yet for most practitioners there is a special place on the shelf for textbooks which strive simply to give you the law as it is, and state it briefly and accurately. The Modern Contract of Employment is such a text.

Reviewed by Ingmar Taylor SC



Justice Denied

Hosking QC and Linton

Memoirs of retired judges and barristers are occasionally worth reading, but rarely page-turners.

Bill Hosking's recently published book, *Justice Denied*, is a cracker. It is structured as a series of gripping true-crime short-stories, each telling the tale of a significant case.

I suspect that its very readable style is due in large part to Hosking's co-author, John Linton, who has written extensively for radio, television and print media, and five true-crime books.

But the content is so good because Hosking was in each of the cases, as barrister or judge, and can bring to life the criminals, barristers and Judges that populate each trial. The extract published with this review gives a decent introduction to the book.

Hosking was for much of his career a public defender, and in that role appeared for the defendant in many of the major criminal trials from the 70s onwards. He appeared for one of the Amanda Marga Three and put the submission that 'the well of justice has been poisoned at its source'. He acted for Carl Synnerdahl, who successfully fooled everyone into thinking he was blind, before escaping from prison. He tells the tale of Peter Schneidas, jailed for three years as a young man for a white collar crime whose experiences in jail turned him into a violent murderer. In his last trial he appeared for one of the five convicted of the Anita Cobby rape and murder.

Part of the joy of the book is the descriptions of how the law and the Bar operated in the 70s and 80s. The book is leavened with incisive pen-sketches of leading members of the Bar and the Bench, including Marcus Einfeld, Frank McAlary, Ken Shadbolt, Justice Wood and Sir Kenneth McCaw. Michael Adams is captured by a quote from Shakespeare: 'And then the justice in fair round belly with good capon lined, with eyes severe, and beard of formal cut, full of wise saws and modern instances.'

The book explains by stark examples the 'police verbal': in the age before tape-recorded interviews these were the typed notes of a police interview allegedly recording a confession which the accused had refused to sign, and were often being the only significant probative evidence. The book includes such gems as Roger Rogerson's statement to the Sun Herald in 1991: 'The hardest part for police was thinking up excuses to explain why people didn't sign up'.

The book is, by its nature, made up of harrowing tales, yet it is laced through and through with humour. Hosking recounts his now famous exchange with Justice Roden, who during a sentencing hearing had become deeply unimpressed with the time Hosking was taking to answer the question 'How does your client explain why the gun was loaded?' Hosking, looking down at his brief, said:

'I don't f***ing know.' Justice Roden became flustered, understandably angry and threatened to discipline me unless I apologized and spoke respectfully. I looked up and, with my finger digging into the page, explained "I don't f***ing know". This was answer forty-six in my client's record of interview, Your Honour. Justice Roden severely sentenced my client, which, thankfully, was overturned at appeal.

As well as disclosing his sense of humour, Hosking includes in every chapter something to be learned, whether it is the injustice of a police verbal, the inhumanity of the maximum security jails, the suffering of being committed to a mental hospital when sane, the difficulties of sentencing those with a high risk of re-offending, and the importance of legal representation even for the most evil in our society.

Ultimately, like all good memoirs, one learns as much about the author as the events. The book concludes with a quote from Justice Keith Mason: 'At the end of the day, judges and lawyers find it impossible not to be themselves, more or less, both on and off the bench.'

Reviewed by Ingmar Taylor SC

The following extract from Justice Denied has been reproduced with permission.

Introduction

Public defenders are briefed in the most serious criminal cases, particularly when clients can no longer afford to retain the Bar's elite. My clientele was wide and varied. The notorious, the oppressed, the young and the old. The wise and the foolish. My clients included solicitors, police, schoolteachers, doctors and nurses, underworld heavies and prostitutes.

These memoirs recall some of the many notable cases in which I appeared as a barrister. They provide a rare insight into the emotion and complexity of a defence barrister's role. I have appeared in cases at all levels, the Local Court, District Court, Supreme Court, Court of Criminal Appeal, and six times before the High Court of Australia as leading counsel - only once successfully - and once for the Crown as junior counsel to the Solicitor-General, Harold Snelling QC. These are narratives of my clients' misfortunes.

It is rare and more interesting to read a barrister's frank admission of his own mistakes and errors of judgement, rather than accounts only of courtroom triumphs. There are both in this book. The emphasis is categorically, and unobtrusively, from the defence viewpoint. Human frailty and its dark side underline the criminal trial process.

These are not impartial narratives, but my memoirs. There are none drawn from my years as a judge. Enough has been written about that period by the Court of Appeal and the Court of Criminal Appeal.

Justice is an elusive end, and not always

achieved. Hence the title *Justice Denied*.

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Whenever I drive past a gaol I feel a sense of sadness and fear. Going inside the forbidding walls and hearing the inevitable clanging of gates is worse. The Victorian-era East Maitland Gaol, Paramatta Gaol, Goulburn Gaol and the sprawling Long Bay complex are the worst. Thankfully, the first two are now closed.

Imagine entering the prison, handcuffed, from the back of a stuffy, windowless prison van. Being stripped naked, washing in the communal shower, and then being handed the drab prison green garb. Each stage of the 'welcoming' is designed to destroy your self-respect. This is the start of days, months and years of personal danger and torment.

This is the fate of some of the worst villains who falsely claim membership of the human race. As this book tells, it is also, sadly, the fate of too many innocent people.

How many is too many? One is too many.

From time to time, innocent people are convicted. That is the flaw in our system of justice. There can be no greater injustice than a person being convicted of a crime they did not commit. Justice is not infallible and sometimes it is denied. When it is denied, we are all somehow diminished. Traditionally, the mythical goddess Justice is depicted blindfolded, which is said to portray even-handedness and impartiality. The great English advocate Sir Edward Marshall Hall KC told juries the blindfold was to shield her look of infinite pity from public gaze. When an innocent person is sent to gaol, justice truly is denied, and there have been far too many instances of that in Australia.

On 29 October 1982, a pregnant Mrs Alice Lynne Chamberlain received the mandatory life sentence for the murder of her baby, Azaria, and was sent to gaol. Her appeal to the Federal Court of Australia was dismissed. By majority, her appeal to the High Court of Australia was also dismissed. Years later, she was exonerated by a royal commission and paid some money and released. Scientific evidence had proved she was innocent. No crime had been committed by anyone.

The system had well and truly failed her. Mrs Chamberlain is not a lone figure. On 27 May 2008, in an Australian first, the Victorian government pardoned Mr Colin Campbell Ross. Scientific evidence proved he also was innocent of murder. It was too late to pay any money to Mr Ross. In a brief but solemn ceremony, he had been hanged by the neck until dead at Melbourne Gaol in 1922. He was thirty years of age when his life was ended. The system had well and truly failed him.



Bill Hosking QC

For a murder committed in 1936, in central western New South Wales, a trial was held at Bathurst eleven years later. The death sentence was passed upon Mr Frederick Lincoln McDermott. The Court of Criminal Appeal dismissed his appeal and so did the High Court of Australia. Fortunately, the death sentence was not carried out. In 1952, after a royal commission, Mr McDermott was cleared. He was given the princely sum, in today's money, of \$1000 as compensation after serving more than five years in prison. He died a broken man in 1977.

In 2013, DNA evidence confirmed Mr McDermott's innocence. The Court of Criminal Appeal not only quashed the murder conviction but, even though McDermott was dead, found him not guilty. This is the only time in Australian history this has ever happened. Sadly, in Mr McDermott's lifetime, the system had failed him.

All three of these trials took place in the twentieth century. Two resulted in the death sentence. In all three cases, the jury verdicts were later proved to be wrong. The appellate courts, all the way up to and including the High Court, also got it wrong. In each case, years later, the government sought, in vain, to make amends with a pittance.

Two other monumental jury miscarriages of justice involved Alexander McLeod-Lindsay in 1964 and Ziggy Pohl in 1973. Mr McLeod-Lindsay was convicted for the attempted murder of his wife, even though she tried to exculpate him at his trial. Likewise, Mr Pohl, a humble and gentle migrant, had been the victim of circumstantial evidence, and convicted of the murder of his wife. He too had served more than a decade in gaol.

Unscientific scientific evidence was the forensic rock on which Mr Alexander McLeod-Lindsay perished. That happened at his trial, on appeal, and at a specially set up judicial inquiry in 1969.

It was the so-called expert, but wrong, explanation of his wife's bloodstains on his clothes that convicted him. The police, court and jury all disbelieved his wife when she claimed it wasn't her husband who had bashed her and their four-year-old son. Mr McLeod-Lindsay was cleared, but not before he had served his entire long sentence. He never gave up. It took a second judicial inquiry in 1991 to eventually clear him. But it was not until 26 July 1994 that the Court of Criminal Appeal finally quashed the conviction. Mr McLeod-Lindsay passed away in 2009.

The denial of justice to Mr Pohl, which was not finally recognised by the Court of Criminal Appeal until 17 December 1993, was almost as complete as Mr Ross's tragic and wrongful death by hanging. At all times Mr Pohl had protested his innocence, but in vain. He received a life sentence. His case was simply closed until, years later, the actual killer came forward, confessed and was sentenced. Otherwise, the injustice would have remained unrecognised to this day.

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Miscarriages of justice do not recognise national or state boundaries.

On 22 August 2014, a full bench of the Australian Capital Territory Supreme Court quashed the murder conviction and life sentence of David Eastman. At that stage, Mr Eastman had served nineteen long years of his life sentence. The decision followed a top-level judicial inquiry, which found there had not been a fair trial and the conviction was a miscarriage of justice. It must be said, any blemish in the Eastman trial was not through any shortage of talent at the bar table. For the Crown was Michael Adams QC, soon after to be a Justice, and for Mr Eastman, the future leader of the New South Wales criminal bar, Winston 'The Hat' Terracini SC.

The Crown did not hoist the white flag of surrender. Instead, it exercised its right to require Mr Eastman, after all those years, to stand trial again. Not surprisingly, Mr Eastman and a procession of lawyers provided for him by legal aid resisted this decision. A distinguished and experienced trial judge from New South Wales was objected to and eventually stood aside. Senior counsel for Mr Eastman were dismissed. One silk became seriously ill. At the time of writing this book, the prolonged, unresolved, unhappy Eastman saga continues to occupy the Supreme Court of the nation's capital. Justice again denied and heavily delayed.

Mr Eastman was not a once-in-a-generation aberration. On 22 December 2014, the South Australian Court of Criminal Appeal quashed the murder conviction and life sentence of Henry Keogh, who had served, like Mr Eastman, a shade less than twenty years in gaol. The Crown elected

to put Mr Keogh on trial for a third time. Bravely, Mr Keogh elected to set aside a jury trial and be tried by a judge. The Crown rejected this challenge and discontinued the prosecution in November 2015. Keogh's defence was an unusual but not an unprecedented one. He argued there had never even been a murder, as the deceased had died of natural causes.

Roseanne Beckett, formerly Catt, was convicted by a jury in the Supreme Court in 1991 for attempting to kill her husband. She was sentenced to twelve years gaol with a non-parole period of ten years and three months. Her appeal was dismissed. Ten years after going to gaol, she was released on bail when evidence came to light that she had been framed. It was a hollow victory. Her non-parole period was weeks away from expiry and, thus, she was due for release anyway. A new trial was ordered, but this time the DPP hoisted the white flag. Roseanne Beckett sued the government for malicious prosecution. She won. In 2015, the Supreme Court awarded her \$2.3 million plus costs, which will exceed \$1 million. Over \$3 million for all those wrongful years in gaol. Adequate compensation? No. Ten times that amount and more would not be enough for what she suffered. As Justice Harrison so succinctly and eloquently put it, there is no way of knowing what Ms Beckett's life would have been had she not been charged. That applies to all those unfortunates to whom justice has been denied, with Colin Campbell Ross the ultimate, tragic victim.

It was the famous jurist Sir William Blackstone who wrote in the eighteenth century: 'It is better that ten guilty escape than one innocent suffer.' It must be remembered that this presumption in favour of the innocent is never absolute.



The RBG Workout

By Bryant Johnson

Forget the Atkins diet and pack away your Jane Fonda DVDs, 'The RBG Workout' is the authoritative fitness regime for barristers and judges.

This inspiring book is the workout regime of octogenarian United States Supreme Court Judge, Justice Ruth Bader Ginsburg.

In this book, the 'notorious RBG', as she is referred to fondly by admirers, proves that even with an enormous workload there is simply no excuse not to take care of yourself. Indeed, it is the very busy in intellectually demanding jobs who benefit most from exercise, giving them the physical stamina to complement the mental stamina necessary for their work. The indefatigable judge is 84 years old.

Justice Ginsburg has sat on the Supreme Court for 24 years. She trains twice-weekly with the book's author Bryant Johnson, and attributes her continued success and longevity on the court in part to her rigorous workout routine.

It has been reported that US President Donald Trump recently speculated that he would appoint RBG's successor during his administration. Not if the liberal judge has anything to do with it. She plans to sit on the bench for as long as she is healthy and able (unlike the Australian Constitution and other Australian legislation there is no prescribed retirement age for judges in the US).

Johnson, a court clerk, personal trainer and former member of the US Special Forces, has RBG completing overhead tricep curls, planks, one-legged squats and medicine ball push-ups, to name just a few of the exercises in her impressive regime. Remember, she is 84!

The book is full of fantastic illustrations of the judge doing her exercises and also explanations of how to do them properly. Many of

the exercises can be done in chambers (just like RBG does) and each exercise has variations to increase the difficulty as your fitness and strength improve.

On doing push-ups, Johnson says 'When I first started training with the justice, she wasn't strong enough to do regular push-ups (she now does 20!), so we began with this easier alternative (standing push-ups against the wall). If necessary, you can work your way up from push-ups against the wall, to push-ups while resting on your knees, to the full-on regular push-up.'

Johnson says, it doesn't matter what you can do or how much you can do, as long as you do something. 'It's not about how much RBG can bench. It's about making sure she feels good enough to stay on the Supreme Court bench. There's nothing wrong with setting specific goals, but the most important outcome of an exercise routine can't be quantified. It comes down to being healthy, feeling good and staying consistent.'

Johnson says 'The body is like a machine – it's made to move. If you don't move it, you will lose it.'

RBG is known for working long hours to get her judgments right. She says 'I am often consumed by the heavy lifting Supreme Court judging entails, reluctant to cease work until I've got it right. But when the time comes to meet with Bryant, I leave off and join him at the gym for justices. The hour-long routine he has developed suits me to a T. This book, I hope will help others to experience, as I have, renewed energy to carry on with their work and days.'

So whether you want to keep up with a US Supreme Court judge, or just reach your own fitness goals, RBG reminds us that it is never too late to start looking after yourself.

Justice Ginsburg's contribution

In her 24 years on the Supreme Court, Justice Ginsburg has been a bastion of liberal thought. These are some of the important cases in which she has been involved.

United States v Virginia, 1996

In 1996, the Virginia Military Institute (VMI) was the United States' last remaining all-male public university. The United States filed a suit against the school, arguing that the gender-exclusive admissions policy violated the 14th Amendment of the Constitution. The state of Virginia argued that women were not suited for VMI's rigorous training. The Supreme Court disagreed and struck down VMI's all-male admissions policy. Justice Ginsburg wrote the majority opinion that made it clear gender equality was a constitutional right. Her Honour held that '[n]either the goal of producing citizen soldiers nor VMI's implementing methodology is inherently unsuitable to women.' She