

THE HON T F BATHURST AC
CHIEF JUSTICE OF NEW SOUTH WALES
FAREWELL CEREMONY FOR THE HONOURABLE JUSTICE
CAROLYN CHALMERS SIMPSON UPON THE OCCASION OF HER
RETIREMENT AS A JUDGE OF THE COURT OF APPEAL OF THE
SUPREME COURT OF NEW SOUTH WALES
27 MARCH 2018*

1. We are here this morning to mark the occasion of the Honourable Justice Carolyn Simpson's retirement as a Judge of the Court of Appeal. This ceremony gives us the opportunity to show our gratitude for the 24 years of service you have given to the administration of justice in this State, first in the Common Law division, and more recently in the Court of Appeal.
2. You became a judge in 1994. It is with no disrespect that I note you were appointed 3 months before your current tipstaff was born. You have served this Court tirelessly since then. There is only one complaint I can make. Your Honour is far too humble and reserved about your own achievements. It made the construction of this address rather difficult. Predictably, I firstly turned to your swearing in speech, marked Tuesday the 1st of February 1994. It is, of course, reflective of your humility.
3. You spent the entirety of it thanking those who had helped you along the way. You also noted that your oath of office was a commitment to the public, and the Court, and you pledged to do your utmost to justify the faith that had been placed in you. You can be rest assured that the vow you made at that time has been more than fulfilled. And thankfully you have colleagues and friends who have witnessed its fulfilment and were more than happy to share with me the things that your humility prevents you from publicising.

* I express my thanks to my Research Director, Ms Naomi Wootton, for her assistance in the preparation of this address.

4. Firstly, there is your character as a judge. Many judges display judicial virtues of independence, impartiality, clarity of thought and expression and legal ability. Few express them all and to such a high degree as your Honour. You are unfailingly polite to those who appear before you. You are open to entertain arguments and are not possessed of the weakness attending many clever people of leaping to a conclusion that there is nothing in a particular line of argument. You are always willing to listen to its explanation and in doing so, give the person appearing before you the respect to which they are entitled. That is not to say you are easy to appear before. Once giving ample time for explanation, the sense that you are about to ask a question should strike fear in the most experienced of counsel, as it will immediately reveal the flaws in the arguments put.
5. Secondly, and in a similar vein, there is your commitment to the rule of law, access to justice, and the protection of civil liberties. I was told that on the occasion of the swearing in of one of your colleagues, whilst encouraging the new judge, you also gave the following warning: “you don’t want to overestimate the amount of times you’ll think you are doing good in this job”. Now, you probably did enough good prior to coming to the bench to last you a lifetime. You were President of the Council for Civil Liberties, and as a barrister you frequently represented people on a *pro bono* basis.
6. On the bench you have maintained your concern for people interacting with the law in the way you deal with the matters before you. All the epithets that are trite about judges are true of you. You are fair. You are concerned about individual rights. It is evident that you feel a great sense of responsibility and understanding of the importance of these issues to the individuals involved. Ultimately you are concerned with justice. Perhaps some of us should not have overestimated how much good we can do, but for you it is the opposite. No one leaves your Honour’s court with any doubt that they received a fair hearing, and following judgment, substantial justice, according to law.
7. Thirdly, you maintain with ease the delicate balance between independence of thought and collegiality. You are “definite in your views”, but certainly not obstinate. Even when your opinion differs you are not one to just say “I’ll write

separately” but instead discuss your views at length with your colleagues. You are always available to them for advice or as a sounding board. You are also very influential in your views, particularly those in the Court of Criminal Appeal.

8. In that respect, on a personal note, I can’t thank you enough for the help, advice and guidance you have given me since I came to the bench. You are always available, always firm in your views but prepared to discuss them, and I think I can say, you are almost always right. My job would have been much more difficult without you.
9. Now the other thing of note in your swearing in speech was your confession as to a distinct lack of typing ability. Your associate of over 11 years, Lyn Nielson, informed me that nothing has changed. This would be fine, except that your dictation “corrections” should more accurately be called “hieroglyphics”. Of course this came with the caveat, corroborated by your band of tipstaves, that this is the only area in which you are not entirely self-sufficient.
10. You pay meticulous attention to detail and have mastered the art of statutory construction. Your ascension to the bench coincided with the introduction of the Uniform Evidence Act, so naturally, these abilities were indispensable. You have, since its introduction, had a consistent and leading role in working through its provisions. You were also doing this at a time when neither the Bar nor the Bench were quite prepared to accept that the Evidence Act meant what it said. It may have taken the rest of us another 10 years, but your analyses, particularly of section 97 in *Fletcher*¹ and *XY*,² and section 98 in *Zhang*,³ now garner the support of a majority in the High Court.⁴ Your judgments have not only stood the test of time, but can be seen as the first expositions of now accepted doctrine.

¹ *R v Fletcher* (2005) 156 A Crim R 308; [2005] NSWCCA 338, [33]-[48].

² *R v XY* (2013) 84 NSWLR 363; [2013] NSWCCA 121, [158]-[178].

³ *R v Zhang* (2005) 158 A Crim R 504; [2005] NSWCCA 437, [139]-[141].

⁴ See *IMM v The Queen* (2016) 257 CLR 300; [2016] HCA 14; *Hughes v The Queen* [2017] HCA 20.

11. Your contribution to the Court of Criminal Appeal is not confined to the Evidence Act. While in the division you probably sat in the CCA as much as the Chief Judges who came and went during your time. In fact, according to a computer search, you have sat on over 1500 published cases. I note in particular your helpful elucidations about sentencing young offenders⁵ and the weight to be given to drug addiction at sentence.⁶ The following passage from your Honour's judgment in *Henry* exemplifies those judicial attributes I spoke of before, where you said: "Drug addiction is not always the disease; it is, as often as not, a symptom of social disease ... this Court should not close its eyes to the multifarious circumstances of disadvantage and deprivation that frequently precede and precipitate a descent into illegal drug use."⁷ As the longest serving judge of this Court, you have been a significant source of consistency and continuity, and a good measure of common sense, in CCA decisions for over two decades.

12. Your influence is not confined to crime, but also includes the civil sphere and particularly defamation. Your Honour ran many high profile defamation cases during your time in the Division. It is rumoured you actually enjoyed running civil trials. I highlight the following series of events as an example of your quiet yet considerable influence on the common law. In the case of *Megna v Marshall*⁸ you considered the defence of qualified privilege as applied to volunteered statements, and following careful analysis, found that a requirement of "pressing need" had been accepted as orthodoxy by reference to what was in fact an obiter comment in a dissenting High Court judgment.⁹ Judgment was delivered on 25 June. On 29 June, Mr McClintock SC successfully argued for an adjournment in separate Court of Appeal proceedings as he wished to challenge a line of authority – the precise one

⁵ See, eg, *Cowan v R* [2015] NSWCCA 118, [5]-[6]; *MS2 and Ors v Regina* (2005) 158 A Crim R 93; [2005] NSWCCA 397, [9].

⁶ *R v Henry* (1999) 46 NSWLR 346; [1999] NSWCCA 111.

⁷ *Ibid* [337]-[356].

⁸ *Megna v Marshall* [2010] NSWSC 686.

⁹ *Ibid* [153]-[166].

you had pointed out as flawed 4 days prior.¹⁰ The adjournment was granted, the line of authority not followed by a five judge bench,¹¹ and that decision later upheld by the High Court.¹²

13. Your time in the Court of Appeal has been no different. I note in particular your interesting discussion in *Bartlett v ANZ*¹³ considering the issue of good faith in employment contracts, and in *AG v DPP*¹⁴ concerning the nature of an appeal to the District Court.

14. Your judgments are also widely known to be particularly lucid – to the extent that District Court Judges have approached you to thank you for finally explaining this or that rule of evidence in an understandable way. I of course make no comment on whether that is more of an indictment on the rest of us than a compliment towards you.

15. The clarity of your judgments perhaps stems from your command of the English language. This in turn perhaps, stems from your first career as an English teacher. What I am sure stems from that career is your Honour's fine eye for punctuation in a judgment – you demand the correct use of a semicolon, you loathe unnecessary capitalisation of headings and you share with Justice Ward a distinct horror at the sight of a split infinitive.

16. Another habit you share with your fellow judges is that of inveterate collecting. Unlike some of your fellow Judges, who shall of course remain nameless, your collections are not confined to things of worth. Along with art and textiles which cover your walls from floor to ceiling, you are also known to collect things like the insides of old washing machines, which you claim will one day be useful. You have never thrown out a jar in your life, and it does seem that all of the depression-era green-glass ornaments produced in the first half of

¹⁰ See *Holmes a Court v Papaconstuntinos* [2010] NSWCA 329.

¹¹ *Holmes a Court v Papaconstuntinos* [2011] NSWCA 59.

¹² *Papaconstuntinos v Holmes a Court* (2012) 249 CLR 534.

¹³ *Bartlett v Australia & New Zealand Banking Group Ltd* [2016] NSWCA 30, [108]-[136].

¹⁴ *AG v Director of Public Prosecutions (NSW)* [2015] NSWCA 218, [50]-[107].

the twentieth century have wound up in your hands. You are many things, but you are not a minimalist.

17. What we hope is that your new role gives you more time to spend collecting the things that bring you joy, and particularly, more time to escape back to the country, where we know you are valued member of the local community, and continue your habit of service as a volunteer fire fighter. Not too much time, though, as we look forward to a continued association because of your appointment as an acting Judge. I could not be more pleased personally that this offer has been accepted. That is not in the least because it means continued enjoyment of your dry humour, stimulating conversation and quick wit. Thank you.