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CHIEF JUSTICE OF NEW SOUTH WALES

COUNCIL OF LAW REPORTING FOR NEW SOUTH WALES

REMARKS ON 50th ANNIVERSARY

TUESDAY 29 OCTOBER 2019

1. I would also like to begin by acknowledging the traditional custodians of the land on which we meet, the Gadigal people of the Eora nation, and pay my respects to their Elders, past, present and emerging. They have cared for this land for many generations, long prior to settlement by Europeans. We must always recognise, remember and respect the unique connection which they have with this land under their ancient laws and customs.

2. We are gathered here today to celebrate the 50th anniversary of the Council of Law Reporting for New South Wales, and I am pleased to see that this event has had a healthy attendance from both the profession and the judiciary. This important anniversary takes place following a long period where printed reports were the only game in town,[1] law reporters and legal publishers have, over the past few decades, had to come to grips with the changes brought about by the Internet. The most important has been the free online publication of reasons for decision.[2] Today, a law reporter is no longer able to rely on the desire of the market to access the reasons for decision of a court as their only means of attracting an audience.[3] Indeed, they may not even be able to rely on

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1 See Sir John Baker, *An Introduction to English Legal History* (Oxford University Press, 5th ed, 2019) 188 ff.

2 See, eg, *NSW Caselaw* (Web Page) <https://www.caselaw.nsw.gov.au/>; *AustLII* (Web Page) <http://www.austlii.edu.au/>.

3 Lord Neuberger, 'No Judgment – No Justice' (Speech, First Annual BAILII Lecture,20 November 2012) [3] .

the allure of publishing the *authorised* reasons for decision, given that it is often the courts themselves who oversee online publication.

3. A naïve observer might have said that the end was nigh for traditional law reporting. After all, the *raison d'être* which had sustained it for the past several centuries had disappeared, relatively speaking, in the blink of an eye. No longer would it be necessary for the profession to make their own records of what was said and done in court, as they had been doing since the time of the earliest law reports in the Year Books.[4] It would be possible for them to rely simply on the reasons for decision published online by the courts, as well as, presumably, the help of a well-constructed search algorithm.

4. For a time, at the turn of the millennium, when courts first started online publication, this might have seemed close to becoming a reality. But, fortunately for the future of law reporting, it was not to be. Even for the most experienced practitioners, searching for, reading, and of course, understanding a new case on your own takes time and effort, which may not be well-spent if it transpires that the case does not decide anything useful or relevant to the problem at hand. There remains a real need for trustworthy aids which help identify the most important decisions and what they stand for to make this process efficient and worthwhile. This is all the more the case given the explosion in the number and length of cases available online recently. For example, just last year, the Supreme Court published over 2000 decisions online through Caselaw, while the Court of Appeal published just under 350.

5. Far from making law reporters obsolete, I think that these changes have highlighted their ongoing utility. So long as we are committed to a common law system where the rules of law are those stated by judges in decided cases, there will be a need for resources which help practitioners and students find and analyse those cases. These resources can be in the form of textbooks or treatises which attempt to

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[4] Baker (n 1) 189–90.

expound and explain the rules for a particular area of law in a dogmatic and systematic fashion, but just as important are the headnotes and catchwords to individual cases, which provide succinct summaries of the facts of the case and the principles which were applied. A well-written headnote can make an immeasurable difference to your comprehension of a case and can be just as valuable, if not more so, than many more pages of academic commentary.

6. Now, the headnote itself has only been a relatively recent addition to the institution of law reporting, emerging once a clearer distinction came to be drawn between the additional commentary of the reporter and the actual decision of the court.[5] One early headnote writer was Sir George Lewin, whose preference for summarising the principal holding of a decision in a terse statement of a rule did, at best, little to aid comprehension, and at worst, could inflame tensions which were better left unstoked,[6] such as in his note to *Clement's Case*,[7] which baldly stated that "Possession in Scotland evidence of stealing in England". In a similar vein, his statements that "Omitting the word 'unlawfully' is fatal"[8] and "Encouragers are guilty"[9] could fairly be thought to leave out much essential to understanding the decisions in those cases.

7. My personal favourite in the "laconic headnote" genre of legal writing, however, comes from *Slater v Evans*,[10] reported in the English *Authorised Reports* in 1916, which makes the fairly trivial statement that "Ice-cream is not meat". For those of you who might otherwise be left in suspense, the reason the Court of King's Bench felt compelled to make

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5 Baker (n 1) 192–5.

6 The remaining examples in this paragraph are taken from Sir Robert Megarry, *A New Miscellany-At-Law* (Hart Publishing, 2005) 167 ff.

7 (1830) 1 Lewin CC 113.

8 *Turner's and Reader's Case* (1830) 1 Lewin CC 226.

9 *Nelson's and Others' Case* (1828) 1 Lewin CC 249.

10 [1916] 2 KB 403.

such an obvious holding lies in the previously extremely wide definition accorded to the word "meat" by the courts in section 3 of the *Sunday Observance Act 1677* (UK) in order to avoid the draconian consequences of that legislation.[11]

8. Few headnote writers nowadays would adopt such a minimalist approach, and most cases involve more complicated facts and issues than can easily be summarised in a few pithy words. Nevertheless, I am sure that there are limits to the lengths to which they are willing to go. One can imagine the look of dismay on the headnote writer's face who was confronted by the case of *Mackensworth v American Tradition Transportation Co*,[12] concerning a motion to dismiss an action for wages commenced in Pennsylvania by a seaman against his employer based in New York. The judgment is written entirely in rhyming verse. To their credit, the headnote writer did their best to keep up the conceit, with dubious success, as follows:

> A seamen, with help of legal sages,
> Sued a shipowner for his wages.
> The defendant, in New York City
> (Where served was process without pity)
> Thought the suit should fade away,
> Since it was started in PA.
> The District Court there (Eastern District)
> Didn't feel restricted
> And in some verse by Edward R Becker J
> Let the sailor have his day.

I should take this opportunity to let everyone know that I have been inspired to deliver my next few judgments in verse, and I will expect similar creativity from the headnote-writers if any are published.

9. While I may not have the skill or creativity to ever follow through on this threat, I have no doubt that, if pressed, the editorial team for the New

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11 Ibid 405 (Darling J). I recently explored some of the issues raised by this case in T F Bathurst, '"Icecream is Not 'Meat'": Literal Meaning and Purpose in Statutory Interpretation In Private Law' in Prue Vines and M Scott Donald (eds), *Statutory Interpretation in Private Law* (Federation Press, 2019) 16.

12 367 F Supp 373 (1973), cited in Megarry (n 7) 178.

South Wales Law Reports would do their utmost to discharge this duty. I have always believed their work to be of the highest standard, whether it be in the selection of cases to be reported, the writing of headnotes and catchwords, or even in something as simple, yet vital, as the editing of the final text of the judgment. They have taken on board the lessons of the digital age, and have focused on differentiating themselves from others by crafting a product which suits what practitioners and students actually need, which is an accurate, concise and readable summary of the facts of the case as well as the law which was applied. I do not hesitate to give you my unqualified praise, and congratulate you on your hard work.

10. Even so, it is possible, I think, to place too much emphasis only on the utility of law reporting for the profession in the here and now. While important, the reasons for decision are more than just an instructional manual for modern practitioners and students on understanding how the law works. They are also a public record of the dispute which has been brought before the court. When looked at as a whole, they will become a window into our society for posterity. In this sense, those who make editorial decisions about which cases to report and summarise are contributing to the building of a historical record for the benefit of future generations, one which is perhaps more durable and permanent than the countless number of decisions whose widest distribution will only ever be electronic.

11. In this spirit, I have decided to conclude my remarks this evening by taking a look back at the first volume of the New South Wales Law Reports to have been published, known as [1971] 1 NSWLR. One finds there no shortage of decisions which still have ongoing relevance today, such as: *Re Louis and the Conveyancing Act*,[13] on the enforceability of covenants forming part of a common building scheme under the *Real*

[13] [1971] 1 NSWLR 164.

Property Act 1900 (NSW); *R v Peel*,[14] which upheld the jurisdiction of the Court of Criminal Appeal to hear Crown appeals against sentence for Commonwealth offences; and *Pettitt v Dunkley*[15] on the obligation of a trial judge to give reasons for their decision.

12. However, one also finds decisions on areas of law which have now fallen by the wayside. In particular, the volume was published prior to the extensive reforms made by the *Family Law Act 1975* (Cth). At the time, state Supreme Courts still exercised a wide jurisdiction over matrimonial causes, and divorces could only be obtained on specified grounds. Indeed, the first case ever reported in the New South Wales Law Reports, *Nicholson v Nicholson*,[16] was a divorce case of this type. Unfortunately, for those of you who are old enough to remember the salacious details and the "wildness of the adulterous careers" depicted in the discretion statements tendered in court for these matters,[17] the case is sure to disappoint, concerning as it did only a question of private international law.

13. But even in this jurisdiction rather foreign to modern ears, there are some reminders that the more things change, the more they stay the same. *Illich v Illich*[18] concerned a pleading dispute arising in the matrimonial jurisdiction out of proceedings for a divorce commenced in 1968. Three years later, in 1971, the pleadings had not yet closed, but matters came to a head when the respondent filed a document which itself comprised three separate pleadings: the "Respondent's Reply to Petitioner's Answer to Amended Cross Petition", the "Respondent's Rejoinder to Petitioner's Reply to Respondent's Further Supplementary Answer and Supplementary Cross Petition", and of course, the *magnum*

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14 [1971] 1 NSWLR 247, affirmed on appeal to the High Court of Australia in *Peel v The Queen* (1971) 125 CLR 447.

15 [1971] 1 NSWLR 376.

16 [1971] 1 NSWLR 1.

17 See John P Bryson, 'Anecdotes of the Old Divorce Law' [2013] (Autumn) *Bar News* 73, 76–7.

18 [1971] 1 NSWLR 272.

opus, the "Respondent's Rejoinder to Petitioner's Reply to Respondent's Rejoinder to Petitioner's Reply to Respondent's Cross Petition". Sensibly, the trial judge then remarked "By this time all parties accepted that it was more convenient just to tell the Court what was in issue rather than put anything in writing".[19] One wonders whether that conclusion couldn't have been reached a couple of years earlier.

14. Whether we approve of them or not, these decisions and the law which they apply form part of our history, and it is immensely valuable form them to have been recorded so as to be accessible to future generations. Part of the purpose of any modern series of law reports is to continue this tradition for posterity, in addition to providing for the more immediate needs of practitioners and students. I have no doubt that the high standards and professionalism of the Council and the current editorial team of the New South Wales Law Reports make them eminently well-qualified to this task. I congratulate you on your efforts, and look forward to celebrating the publication of the 100th volume of the Reports next year.

15. Thank you.

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[19] [1971] 1 NSWLR 272, 273 (Carmichael J).