

THE SUPREME COURT
OF NEW SOUTH WALES
BANCO COURT

ALLSOP ACJ
AND THE JUDGES OF THE
SUPREME COURT

MONDAY 5 JULY 2010

**SWEARING IN CEREMONY OF
PHILIP HALLEN SC
AS AN ASSOCIATE JUDGE OF THE SUPREME COURT OF NEW SOUTH
WALES**

HALLEN AsJ: Acting Chief Justice, I have the honour to announce that I have been appointed an Associate Judge of this Court. I present to you my Commission.

ALLSOP ACJ: Thank you, Associate Justice Hallen. Would you please sit whilst the Commission is read. Principal Registrar, would you please read the Commission.

(Commission read)

(Oaths of office taken)

ALLSOP ACJ: Associate Justice Hallen, on behalf of the Chief Justice, judges of the court and on my own behalf, I congratulate you and welcome you as a member of the Court. The Chief Justice asked me to pass on his congratulations and his regrets and apologies for not being able to be here today.

HALLEN AsJ: Thank you, Acting Chief Justice.

ALLSOP ACJ: Ms Needham.

NEEDHAM: Your Honour, this is a notable occasion, being the first public swearing-in of an Associate Justice of this Court. The three current and one former Associate Justices received their commissions by an Act of Parliament

and so there was no public swearing-in. This ceremony marks the importance of the office of Associate Justice and gives the members of the New South Wales Bar an opportunity to show their appreciation of your Honour's appointment. It is clear from this crowded courtroom today how great that appreciation is. I am privileged today to speak on behalf of the New South Wales Bar. The President and the Senior Vice President are each away and send their apologies.

Your Honour graduated with a Bachelor of Arts and a Bachelor of Laws from the University of Sydney. You were then admitted as a solicitor of the Supreme Court of New South Wales in 1976 and practiced for two years. Your Honour has been a member of the Bar since 1978, and read with Dennis Cowdroy, now a judge of the Federal Court. Your Honour commenced practice on the 13th floor of Selborne Chambers and, out of loyalty or perhaps apathy, has remained there until last Friday. Somewhat tellingly, your Honour occupied the room formerly occupied by one J K McLaughlin, and you must be watching his post-judicial career with interest to what it is that you will be doing next. People tend to stay a long time on the 13th floor. In your whole career there you have only had two clerks, Ruth Ross who is here today, and Paul Walker, who would be were he not overseas.

Your Honour took silk in November 1997, having had a significant practice at the bar, covering areas of equity, professional negligence, banking and commercial law. However, it was as the leader of the Probate Bar that your Honour achieved real prominence. What your Honour doesn't know about the legal consequences of death and dying isn't worth knowing. Your Honour is one of the few people who could speak for an hour to a paper entitled 'Funerals and

Burials - Expecting the Unexpected' as your Honour did in a most entertaining and learned way on a panel we shared in 2008.

The earliest case which I could find in which your Honour appeared online dates from 1984. Were it not for your lack of post-nominals and the fact that a house in Burwood was valued at \$84,000, it could have been a case from last week. Mr Hallen for the estate, briefed by Teece Hodgson and Ward, and a successful result for that formidable pairing.

I am told that your Honour, before deciding on the recession-proof area of death as a career, dabbled in crime. That experiment ended abruptly when the judge, whom I shall not name but who was a District Court Judge with a double-barrelled name and a small, stiff, military moustache, so it could be anybody, commenced his summing-up on your client's charges of indecent assault with the words, "I remember when gay meant happy". Apparently it was all downhill from there and your Honour retreated to the relative safety of wills and estates.

In later years, your Honour appeared in many of the important cases in the succession jurisdiction, *O'Loughlin v O'Loughlin* and *Gregory v Hudson* in the New South Wales Court of Appeal, the *Estate of Croyley*, and *Shorten v Shorten* (each of which are decisions which influence the way costs are applied in the Family Provision and testamentary capacity areas respectively), and in large or complex estates such as *Cassegrain v Cassegrain* and *Whiteley v Clune*, the lost will case in the estate of Brett Whiteley. It was as much your undoubted ability and elegance of expression which made your Honour the leader of the Probate bar, as much as your Honour's seniority in that field.

After a recent lunch for John Wilson SC on his retirement from the Bar at which a number of probate silks had gathered to discuss dependent relative

revocation and the operation of s 40 of the Succession Act, a junior counsel who was present mentioned to me that the level of respect, civility, friendliness and even affection which the probate silks have for each other was impressive and not often found amongst senior counsel of other areas of practice at the Bar.

I, for one, can say that in cases where I was opposed to your Honour, almost uniformly in cases where our respective clients loathed each other in a very immediate and well documented way, we were able to put aside the desire of our clients for us to loathe each other too and managed to rub along quite well. Your Honour was a delightful and scrupulously fair opponent and I think we ran fewer cases against each other than we might have done because we had such fun settling them.

It made good sense to settle against your Honour, as underneath your Honour's charm is the steely resolve of a formidable advocate. Apparently that talent dates back to your Honour's university days when you had a job at Reuben F Scarf's menswear, which you attended when your Honour was not driving a taxi. One of the perks of that job was that you were able to buy clothes at a discount and I think your Honour knows what is coming. You were wearing those clothes at work one day when a customer admired your outfit. You immediately offered to sell him those clothes at a profit and was able to buy another outfit from your employer again at a discount.

Your Honour's friends have all told me of how devoted you are to your family, to your wife Vivian who is one of the many instructing solicitors who will miss you professionally, and to your children, Jamie, Alexandra, Jesse and Jessica. You were brought up by your mother who moved you and your sister Helaine to England from India after your father died when you were very young and a few years later the family came to Australia where you had a loving

childhood growing up amongst a large extended family. Your Honour is very close to your cousins as a result and I understand that many members of your family are here today.

Your Honour also has a talent for friendship. Two of your Honour's best friends, Justice Ian Harrison and Justice David Davies, have been appointed to the Bench in recent years and a perusal of speeches made at their swearings-in means that I am bound to mention that your Honour's preferred mode of motor vehicle transport is a Jaguar XK150S. I cannot imagine your Honour tooling around in a Monaro or on a motorbike.

I had morning tea with Justices Harrison and Davies. It was very instructive. They let me in on some of your Honour's peccadilloes. I am not sure if this is true, but they tell me your Honour enjoys both kinds of music, country and western, and your Honour, I am told, is a teetotaller, except when visiting Slovenia. However, your peccadilloes are alarmingly few.

Your Honour, the New South Wales Bar is sad to see you go for the very same reasons that your appointment has been met with universal acclaim. You will be an outstanding addition to the ranks of the Supreme Court judiciary and we look forward to appearing before your Honour. On behalf of the barristers of New South Wales, we congratulate you on this historic appointment and wish you well. May it please the court.

ALLSOP ACJ: Ms Macken.

MACKEN: New Zealand has many claims to fame, not the least being its magnificent landscapes and spectacular scenery, the likes of which provided the setting for Tolkien's Lord of the Rings trilogy, but who would have thought that the modern-day inhabitants of Middle Earth's 'Fangorn Forest' would have had the foresight of that wizard, Gandalf! For on a visit to New Zealand's south

island earlier this year where your Honour trekked the area known as Milford Sound, the local guides presented you with a photo of yourself in which they had taken the liberty of superimposing a judge's wig upon your head.

Three others in this photo also wore photoshopped wigs, courtesy of the guides. However, these three were in fact judges and not, as one declared to the tour group, drug runners. Three months later, your Honour has duly been appointed to the bench. The Kiwis can now add fortune-telling to their list of credits.

On behalf of the solicitors of New South Wales, it is an honour and a privilege to congratulate your Honour on your appointment to the Supreme Court bench where you will undoubtedly acquit yourself with the same diligence, integrity and strength of character for which you are renowned.

Your Honour is very highly regarded by professional colleagues, clients, students and the many others who have benefited from your sage advice and assistance. Known for your warmth and genuine interest in people, your generosity extends to providing many lectures in regional and outlying areas, particularly in Griffith.

I understand that you still intend honouring commitments to the University of New South Wales regarding some upcoming CLE lectures. For someone who can, as Ms Needham has noted, even make a 'Right to Burial' lecture sound absorbing, this is good news indeed for the students.

One self-professed 'Hallen groupie' who has briefed your Honour over a period of some 30 years, was quite effusive in her praise with regard to your excellent analytical skills and your ability to clarify complex issues. Of particular note was your Honour's ability to think laterally and to propose an appropriate but not obvious solution to an issue.

Earlier this year, Justice Davies upon his own swearing-in to this court, described your Honour as a fine advocate with a first-rate legal mind who could always be counted on to give thoughtful and reasoned assistance with any problem. Justice Davies would know.

Called to the Bar in 1978, your Honour quickly fell under the influence of the then barristers, David Davies and Ian Harrison when, as Ms Needham noted, you took up residence in Mr McLaughlin's vacated chambers at 13th floor, Selborne, a good omen perhaps given your Honour is now stepping into the shoes of former Associate Justice John McLaughlin.

Justices Davies and Harrison and your Honour were dubbed the three musketeers in some quarters. I can only surmise that that had something to do with the Alexandre Dumas novel, *Les Trois Mousquetaires*, three musketeers, recounting the adventures of Arthos, Porthos and Aramis, three inseparable friends who lived by the motto, "tous pour un, un pour tous", all for one, one for all.

Your former chamber colleagues also refer to you as Huey, Dewey and Louie, three endearing Disney ducklings with identical personalities and notorious for finishing each other's sentences. In an interesting analogy, the ducks' wild ways were tempered when they came under the positive influence of wise old 'Grandma duck' and became members of the Junior Woodchucks.

In your Honour's case, it was your mother Sarah who had a significant influence in shaping your life and who always impressed upon you and your sister, Helaine, that while upbringing and background shape who you are, you are still responsible for who you become. I know if she could be here today she would be extremely proud to witness her son's appointment to the Bench. I have no doubt that your father, Isaac, would also have shared in that pride.

Born in India, your father, by all accounts a very entrepreneurial man and master of economics, passed away when you were very young. Your mother, a schoolteacher, moved to England and then to Australia to provide a better life for her children with the support of cousins and extended family.

Law was not your Honour's first career choice. Garbage boy at Maroubra primary was your first official appointment, a role which not only gave you the opportunity for time out of class but also resulted in some notoriety when you were snapped by a Daily Mirror photographer hard at work, sitting on a bin. The photograph was duly plastered across the front page of that illustrious and now defunct newspaper.

Another role as 'Fat King Melon' in the school production presaged that your Honour was destined for another stage. In the interim, there was a moment when your Honour contemplated becoming a fireman, when you missed school due to illness and felt you wouldn't catch up on your studies. You not only caught up, you topped Randwick Boys' High in history and English. While we are very fortunate that you chose law, I must admit that 'Fireman Phil' has a certain ring to it. There was also a stint as a cabbie to help you pay your way through university where your Honour, I am told, found it particularly lucrative to cruise the Cross, but this predated the infamous Underbelly and Wood Commission years.

Your Honour is known for your quick wit, communication skills, resilience, drive and determination. Your Honour is not so much known for your practical handyman ability. I am told that even attaching a string to a sink plug became a mammoth task, which was finally completed by son Jesse whose tool belt your Honour is known to covet. On occasions, I believe this young handyman and engineering student sometimes deigns to allow your Honour to use his hammer.

Luckily, your eldest daughter, Jamie, is a physiotherapist and daughter Alexandra a psychologist which could all prove useful in the case of any mishap. Youngest Jessica is still at school, but perhaps she could consider a medical career as well. Car mechanic could be another option given the history of your Honour's restored vintage Jaguars which are reputed to be reliable only if travelling short distances and require a support crew if attempting longer journeys.

A former gym junkie, your Honour is now more likely to be seen playing touch footie at Tunks Park in Northbridge every Saturday and Sunday morning, something your Honour has done for the past 25 years with the same group. Other interests include your state of the art movie cum hi-fi room, the equivalent of the working man's shed where you can let loose.

A normally mild-mannered and relatively quietly spoken family man, your Honour has been known to metamorphose into a raving Mr Hyde if a referee dares to make a penalty call against your beloved Wests Tigers. Likewise, this transformation can occur whilst singing to you favourite country hits with the headphones on.

Your Honour, one of the many enjoyable aspects of your knew role will be annual leave. While your Honour has threatened to build either a car or a computer during this break, can I suggest consideration be given to foregoing such mundane practicalities in favour of planning another wonderful holiday with your partners in crime: wife and lawyer Vivian or those infamous musketeers. As the court pleases.

HALLEN AsJ: Acting Chief Justice, your Honours, colleagues, my friends, ladies and gentlemen, it is truly a great honour to be appointed as an Associate Justice and to have a public ceremony to mark the occasion of the presentation

of my commission and swearing-in. I thank the Chief Justice in his absence for that privilege.

Ms Needham and Ms Macken, you have been overgenerous in your praise. I do not know whether it is just that I am so excited or whether the air is thinner on this side of the bar table, but most of it sounded very credible. Although others may suspect, I know that you have been more than kind in what you have not said.

Any occasion like this provides an opportunity for reminiscence. I wish to acknowledge those who have helped me to get here. Of course, I cannot name all and I hope those omitted will forgive me. I thought it better to leave some out than to have the Court adjourn part-heard on my first occasion speaking from the bench.

As has been mentioned, I completed my practical legal training at the college of law and I started my career as a solicitor with Bell Cadogan Couston & Gengos. I realised very soon that I wanted to be a barrister. I was lucky that the partners permitted me to do any court work I thought I was capable of doing. After a couple of years there, I joined Paul Kennedy & Associates. I was 'the Associate' for about six months. It was Paul who sent me my first brief, a PCA plea at Burwood Court of Petty Sessions.

I had been introduced to Paul Kennedy by John Dorset Shaw, a counsel who I had a often briefed. When I decided to come to the Bar, JD encouraged me to do so. I thank him for his sage advice then and for his genuine friendship since then.

As you have also heard, I read with Dennis Cowdroy, now Justice Cowdroy of the Federal Court. He was then, as he remains, courteous, charming and urbane. If he ever got angry, nervous or flustered as a barrister, I

did not see it. Fortunately, the very first case in which I ever sat at the bar table was reported in the New South Wales Law Reports. My appearance was noted. Now he might feel that to have allowed my name to be referred to with his in the Law Reports as appearing when I did nothing, would constitute misleading and deceptive conduct. Dennis not only provided me with work, but he also introduced me to solicitors, some of whom continued to brief me.

It was in fact Dennis who introduced me to the delightful Janet Coombs and to the 13th floor Selborne Chambers. Having no idea of protocol, I did not know that you needed to apply in writing to a floor of Chambers for the privilege of becoming a floor member before actually moving in.

I just strolled onto the 13th floor after my admission ceremony and took up residence with Janet. I am told, and I choose to believe, that it is only a fiction spread by you know who in one of his many hilarious speeches that he and David Davies and other floor members did not want me to stay. As it happened, I shared chambers with Janet for the next nine months. I then shared chambers with the now retired Magistrate Malcolm Beveridge.

Each of those barristers was more than generous with her and his time and in sharing with me, not only chambers but also experiences at the bar and their vastly superior knowledge of the law. I remain indebted to each.

In what is a striking coincidence, I moved into John McLaughlin's chambers when I purchased them in 1981. Now almost 30 years later I am, in effect, doing that again. Effectively moving into but, I am glad to say, not purchasing his chambers. I am very happy that he is here today so that I may publicly wish him well in retirement. As was said recently, also by Ian Harrison, I may be John's successor but I will never be his replacement.

In leaving the bar, there is sadness in saying goodbye to the floor where I have spent almost half my life. I am extremely proud to have been a member of the 13th floor and I wish all my friends on the floor well. I hope that I have been able to contribute something to life on the floor. I also hope that you will still invite me to floor functions.

I have had two clerks as you have heard, Ruth Ross who was my clerk for 25 years and who remains my good friend and, more recently, Paul Walker. My sincere thanks to both of them. I also thank my secretary Sue Thogersen and the floor's support staff, Sam, Tom and Josie, for all the help given to me.

Like all junior barristers, I worked with some of the leaders of the bar. Again, without intending any discourtesy to others, perhaps the two who influenced me, particularly in my early years, whether either knew it or not were barristers Peter Young and Joe Campbell, now Judges of Appeal. Unintentionally, I hope, each caused me to question my choice of career as a barrister. Often I would return from his chambers following a conference or a court appearance, so humbled by his breadth of knowledge, capacity to absorb so much so quickly and his court craft, that I asked myself how I could ever be that good. Even after each went to the Bench and I appeared before him, I sometimes felt the same way. Hopefully, each will not cause me to experience those concerns again in my new role, or at least not very often. I publicly want to thank each for his help and, more importantly, for his inspiration.

I have also been lucky enough to have appeared before equity and probate judges who have mentored me. For a number of years when my career in the equity, probate and the protective areas was developing, the judge who I appeared before most often was the Honourable Philip Ernest Powell.

My first experience before his Honour, I confess, was not very promising. Early in the case I heard the words, "Never appear in this court again." I was shocked, I looked at the judge who seemed to be scowling at me. I looked at the plaintiff who appeared to be about to throw up. I then turned to my instructing solicitor and said, "Did I actually say that out loud?" Luckily, all he said was, "Don't worry, he didn't hear you!"

I am glad to say that things improved, at least for me, after that, and for as long as I appeared before his Honour we got on very well. I thank him for all his judicial advice and for what he taught me. That he has made a special effort to attend today with his former associate, Trish Hoff, means a great deal to me.

Subsequently, there were many appearances before Justices Needham, Hodgson, Cohen, Bryson, Windeyer and Palmer. It has always been a pleasure to appear before each of them. If I am half as good as any of those judges, I will be very happy. I have no illusions that it will be easy. It will be a great challenge and I shall do my best to meet it.

It would be remiss of me not to mention the associate to some of the judges with whom I have been, and remain, friends, particularly Reny Bergen, Anne Cochrane, Barbara Anderson and Judith Lord. In the years before computers, each could be counted on to provide me with a copy of a needed but unreported judgment. More importantly, each would give me information, gossip really about what was going on around the court. Sometimes, Anne Cochrane would even decorate my copy of the judgment in a case in which I had appeared for the unsuccessful party with the word 'loser' written on it. They were such good times.

I would also like to thank all the court staff and the registrars, particularly Jonathan Finlay and Paul Studdert, as well as the office of Court reporting, particularly Anne Daysan, for all their assistance.

Undoubtedly, as you have heard, the barristers against whom I have appeared most often as junior and senior counsel are Michael Willmott, John Wilson, Paul Blackburn-Hart, Lindsay Ellison, and of course, Jane Needham, all senior counsel. We have had many hard-fought and occasionally, except with Jane, quite fiery cases but we have remained firm friends despite that. I have always respected the intellectual capacity and advocacy skill of each. I am glad that we shall no longer be opposed, at least whilst we are sitting together at the bar table. I would also like to wish John well in his retirement.

To all of the solicitors who have briefed me, I hope you know how much I have appreciated your support and efforts. Self-evidently, without solicitors, I would not be here today. It has been my privilege to have been briefed by you all. I acknowledge so many close friendships which have resulted from our working together. I shall continue to try to understand the difficulties that solicitors face whilst I am on the bench.

To all my family and friends, who, despite being extremely busy, are here. Thank you for coming. My only sister Helaine, her husband, Zeke, and my nephew Ben are here supporting me as they have always done. Helaine was a little miffed that the change of Prime Minister eclipsed the news of her brother's appointment to the Supreme Court, but I digress.

Unfortunately, my parents are not here to share this day. Sadly, my father died when I was three. I really have no memory of him. My mother, who then brought us up alone and who I have often described as the inventor of intensive care, passed away at the end of last year. I must recognise the good

fortune bestowed on me through her loving and unstinting sacrifices. I know that she would have been very proud today. Also, I have no doubt that she would have believed and agreed with everything that was said about me. In fact, she probably would have complained, privately, that more should have been said. I am comforted by the fact that tomorrow which I anticipate will be my first sitting day, is her birthday.

Almost everyone in court knows of my very close relationship and friendship for over 30 years with Justices Ian Harrison and David Davies and Judge James Bennett of the District Court. We have been described as 'The Four Musketeers'. You heard earlier that we were also described, whilst on the 13th floor as 'Huey, Dewey and Louie' but that's another story which does not bear repeating.

We were all together for about 17 years on the 13th floor. We all started our careers there and, like David and Jim, I ended mine there. We have shared the burdens and the blessings of some of the more challenging times of our professional and personal lives. I must publicly acknowledge not only their encouragement, guidance and advice to me over so many years, but also the camaraderie which has always made practice, especially as Ian irreverently said, in dealing with the affairs of dead people, more fun. My life personally and professionally has been enriched in ways that I cannot describe by each. It is all the more enriched because of Julie, Paul and Marylyn.

The court can rest assured that with Justice Davies' chambers immediately next to mine and with him checking whether I am in, morning and evening, as he has always done, my hours of work will not lessen. I am really looking forward to being in chambers again together.

My children, Jamie, Alexandra and Jesse, with Jessica, all of whom will probably be starting to get really nervous about now, have taken a solemn oath that my elevation will not go to my head. Remarkably, each demonstrated great intuition, since they advised me many times, years before I told them of my appointment, how important it was that I not interrupt, that I not ask too many questions, that I just listen patiently and quietly and that I always given adequate reasons for a decision. Surprisingly, none of them is a lawyer.

Each is, however, an extraordinary person. What my two daughters and my son have achieved has been primarily through her and his diligence and dedication and also through that of their mother, Kay, whose help, professionally and otherwise, I greatly appreciate.

I recently read that Sir Harry Vaisey, a senior judge in the Chancery Division of the High court of Justice in England and Wales, said that being a judge is the best career in the world. One is never interrupted, one always has the last word and one is never contradicted until an appeal. He was obviously not married, as I am, to a most extraordinary solicitor.

For the last thirteen-and-a-half years I have had the complete understanding and the unwavering support of Vivian. I owe her so much for all she does for our family and for me, despite her own extremely busy professional life. Without her blessing, I would not be here today.

“Do not take this the wrong way, thank you, but I hope I never see you again.” This is part of the valedictory that I have received many times in my career from a grateful party and/or from those who were simply relieved that a case was over. I can only hope that counsel and solicitors appearing in my court do not feel the same way. You have all honoured me by your presence. Thank you once again.

ALLSOP ACJ: The court will now adjourn.

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