Index to compilation of speeches delivered by the Hon. Mr Justice P W Young AO

IN THE SUPREME COURT
OF NEW SOUTH WALES
BANCO COURT

BATHURST CJ
AND THE JUDGES OF THE
SUPREME COURT

Monday 23 April 2012

FAREWELL CEREMONY FOR THE HONOURABLE JUSTICE PETER WOLSTENHOLME YOUNG AO UPON THE OCCASION OF HIS RETIREMENT AS A JUDGE OF THE SUPREME COURT OF NEW SOUTH WALES

1 **BATHURST CJ:** Farewells are often sombre, or at least melancholic, occasions. This one is an exception for a number of reasons. First, we have the consolation of knowing that there is a real possibility that you will return as an Acting Judge. It won't be too long before we hear your keys jingling down the corridor again. Second, and much more importantly, it gives us the opportunity to celebrate your 27 years on the bench, first as a Judge in the Equity Division for 16 years, then as Chief Judge of that Division for eight years, until finally you were persuaded to leave the Division you loved and join the Court of Appeal. Your intellectual powers, your sense of humour and concern and support for your fellow Judges, meant that your contribution to the bench over these years has been unrivalled.

2 Third, as a consequence of being an icon on the bench, there was no shortage of information concerning your activities, to make this speech a true reflection of your time and achievements of the bench, both for those of us fortunate to have been on this side of the bench with you and foolhardy enough to appeared in front of you.

3 Because I speak first this morning, it also occurred to me that I get the first-pick of all the best pieces of information. However, having decided to

be magnanimous I will not monopolise the best stories and deprive my fellow speakers of the opportunity to add their contribution to this celebration of your life and time on the bench.

4 To this end I will not, for example, speak about your predilection for model buses, trams and trains. I note that this order is very important. You are not merely a model train buff – pity the fool who makes so thoughtless an assumption. Your preference for miniaturised automotive transportation goes in precisely this order: Buses first, then trams, and finally trains.

5 If I were to speak about this fondness, I might have told the story of your current tipstaff's first year in chambers, when you asked her to change the calendars and find out who "Miss December" was. Being a thoroughly modern person, she proceeded with some trepidation to where you indicated, and discovered with relief, that Miss December was a refurbished city bus. There was also a Miss December model train, in the model trains calendar and an exotic Miss December from the "Trains of Europe" calendar.

6 You have more than once been overheard to offer your tipstaves, and the tipstaves of neighbouring chambers, the "opportunity" to help catalogue your model bus collection if they had any "free time" over the weekend. Surprisingly, none as yet have been known to take you up on the offer.

7 It might even be said that the sheer number of model trains and antique shops of the Blue Mountains, which inexplicably rival the number in all of Sydney and include your favourite, Mr Pickwicks, is in the proximity of your holiday home which you visited regularly with your wife, Pamela – by train of course.

8 But as I have said, having decided not to take advantage of my first position as speechmaker, I will not tell those stories.

9 To this end, I will also not mention the eccentricities of your chambers. Although this is with some regret, as I managed to get my hands on your swearing-in speech. This in itself was no minor feat as you have been a Judge of the Supreme Court, as you predicted in that first speech, for over 25 years - in fact, it has been 27. This is longer than any other occupation in your life, including your extensive schooling. In your swearing-in speech you thanked your staff for their silence, commenting that many people had sought details of your eccentricities in the weeks leading up to the ceremony, but that few had come to the fore. As I have already said, you were not so lucky this time.

10 You subscribe to every conceivable report, service and circular which results in both a preternatural knowledge of the goings on in other jurisdictions, foreign and domestic, and a chambers correspondingly buried in printed materials. I am told that your long-suffering associate, Reny, who began with you in your very first barrister's chambers, routinely prints out two copies of everything, in anticipation of the guaranteed disappearance of the first.

11 Reny has undoubtedly been masterful associate, whom one might liken to a formidable bus ticket warden, and is as well known in the courts and community around Phillip Street as you are. An exchange between two barristers passing through the security barrier at the entrance to the Law Court building was overheard recently, in which one asked the other: "Who are you before today?" To which the first replied "Justice Reny". One need not say more and neither shall I.

12 At the bar you were known for a brisk step, a jolly (if occasionally ferocious) disposition and a certain amount of self-sufficiency. Little has changed. When asked by a court staffer in the communal kitchen of the level 12 judges chambers, why you make your own coffee in the mornings, you replied that you didn't want your tipstaff to get all of the easy jobs.

13 I will not mention that it is, I believe fair to say, that of your Honour's many prodigious skills, technological literacy does not rank highly. You remain one of the few legal practitioners who continues to note up your many law reports by hand. A tedious, time consuming process which some might confuse with a masochistic form of procrastination. Nevertheless, the habit has great merit.

14 It was only after joining you on the bench that I realised this practice was responsible for a good deal of the terror barristers feel when seeing your name on the daily court list. Referring your Honour to a reported case in court was always a gamble. For no sooner was the case proffered by counsel as a miraculous and unyielding authority for their argued point, than your Honour would ask, "that is all well and good, but what can you tell me about the treatment of that case by …" and then you would insert the name of a high English, New Zealand, United States court or even South African court. Counsel would adopt one manner or another of avoiding or delaying the question, while the real fun (or so I am told) was in watching the solicitor's frenzied dance at the back of the courtroom. A sly, satisfied nod to Reny or your tipstaff told them that, as far as you were concerned, every meticulous not-up entry had indeed been worth it.

15 The speeches made to you at your swearing-in ceremony are also illuminating. Twenty-seven years ago it was said that the list of your publications read like a selection of works essential for any self-respecting legal practitioner. Not only has your Honour maintained and improbably exceeded that standard throughout your time on the bench, both with foundational text and annotations as well as with your editorship of the *Australian Law Journal*, your Honour has also brought that standard and mind for instruction to your judgment writing.

16 Australian law students would be forgiven for thinking that "Young" was an unusually popular name for Supreme Court Judges, based on the number and range of citations of "Young J, Young CJ in Eq and Young JA", they would read in any given year. Indeed, your judgments so often become

the essential statements of principals in the relevant area that you are quoted back to yourself probably more often than anyone else on the bench. I could not narrow down your field of expertise, with any greater specificity than to say that you are an authority, at the least on civil procedure, contracts, conveyancing, declaratory orders, mortgages, property, wills, probate and chancery generally.

17 You also possess an extraordinary ability to dispose of cases. You epitomise how the objectives in s 56 of the *Civic Procedure Act* can be achieved. Your ability to get to the heart of the matter, confine counsel to the relevant points in issue and deliver judgments, which do no more or less than decide the point, have meant that you handled the workload of at least two, if not three Judges.

18 Of your extra-judicial publications, three stand out in my mind. The first is your book, *Declaratory Orders,* which remains the seminal text on the subject. The second was *Fisher & Lightwood's Law of Mortgage*, the Australian edition of which you have co-authored. The third is, of course, Young et al *On Equity*. Mention must also be made of your author and editorships of practice and procedure, conveyancing and property services and reports, and last but not least, the *Australian Law Journal*. Your Honour has been the general editor of the *Australian Law Journal*, 20 years, as of last month. The Journal is, simply, the pre-eminent legal practitioners' journal in Australia. Something would feel quite wrong with the world, if we did not have your opening remarks on Current Issues at the top of our edition each month. I was therefore relieved to read, in the March edition, that you intend to continue with the Journal for the foreseeable future.

19 However, there is one publication, perhaps unduly overlooked, when considered against so formidable a publishing line up. I speak of your 1985 handbook for advocates called "Civil Litigation". It is, so far as I know, utterly unique in its approach to teaching advocacy. It tells the story of one Brian Butterworth, barrister, through which you instruct the reader

on interviewing witnesses, negotiation, adducing evidence and every other conceivable advocacy skill. In your own words, you took this approach, having "spent some part of [your] career teaching law students and lecturing members of the Bar, and hav[ing] always found that the best way of getting the message across is in small doses and in memorable facts situations". You wrote the book in 1984, the year before you were appointed to the bench. I was therefore, particularly curious, to see what wisdom your book offered on dealing with the Judge.

20 Your protagonist, Mr Butterworth, says the following:

> "Judges can be put into three categories. The quiet judge, the garrulous judge and the wise judge. The quite judge is usually a menace, because he sits there, sometimes smiling, but no one knows what he is thinking, no one knows whether one is getting through or not, no one knows whether he is understanding what is happening."

I am sure, Justice Young, no one could accuse you of being a quiet judge. As for the garrulous and wise judge, you say:

> "Worse still is the garrulous judge … [who interrupts] arguments and carr[ies] on an acrimonious discussion with counsel in order to bring him round to the judge's point of view. A great lawyer of this Court is reported to have been exasperated by the constant chatter of a talkative judge and to have said:
>
> > 'Your Honour, you are paid to listen, I am paid to talk, let us perform our respective duties.'
>
> I doubt, however, if the effect of the rebuke lasted long. A garrulous judge, I have found, is incurable."

21 I think it should go without saying that your Honour Justice Young fits neither into the first nor the second category, but sits comfortably in the third. You are the wise judge, who:

> "allows counsel to proceed, but when he does not understand or accept the proposition that is put, indicates this and asks for further clarification, or, alternatively, tells counsel that he is unlikely

> to succeed on that proposition unless it is put in a more convincing way, or with more convincing authority."

22 If I can say anything on your specific method in this regard, I might quote again from a speech made to you on your swearing-in. It was said that your approach was "particularly forthright and no-nonsense". I dare not disagree.

23 It is regrettable that court rules prohibit your son Marcus, a silk at University Chambers, from appearing in front of you, as you would have the uncanny experience of witnessing yourself in action. Marcus also happens to mark the sixth generation of law men in your family. Your other children are no less accomplished. Your youngest son James, a PhD in Russian History, teaches at the Universities of Sydney and New South Wales, and your daughter, Melinda, is currently in Juba in South Sudan, working with Save the Children.

24 Service to others is clearly a core value in the Young family. Your Honour expresses this clearly in your dedication to learning and teaching and to the wellbeing and development of the legal profession, not only in this country, but in our Pacific Island neighbours. It is also most clearly displayed in the active role you have played in your own Church and in the wider ecumenical community in this State, all your life. Like so many of your other career achievements, these contributions are far too numerous to list individually, so I will mention only that you are currently the Chancellor of Newcastle and occupy multiple leadership roles in the Anglican Church, including as President of the Appellate Tribunal and member of the Church Law Commission. The Great Synod of the Church recognised and thanked you for this service in 2010, describing the "painstaking, thoughtful, good-humoured and wise service" you have performed since 1979. The sentiment of thanks we express here today, could not be better put.

25 Having set out all the things I resolved not to talk about today, it remains only for me to mention by name a few of your notable judgments. I will restrict myself to the recent Court of Appeal judgments, as doubtless others will issue your leading judgment from your time in Equity.

26 Although you were a Judge of the Court of Appeal for only three years, which pales in comparison to your eight years as Chief Judge in Equity and your 16 years as a puisne judge, nevertheless, you have made a distinctive impact.

27 In your first year in the Court of Appeal you wrote the lead judgment in *Sheahan v Londish*, reaffirming the importance of certain formalities in the exercise of corporate governance. You drew a distinction between a purported but defective appointment of a director, and circumstances in which there was an absence of any appointment. The case was widely reported, and your judgment widely cited. In your second year, you wrote the lead judgment in *Crawley v Short*, also widely cited and reported, which established the circumstances in which fiduciary duties can be owed between shareholders. Last year, you wrote the lead judgment in *Buzzle Operations v Apple Computers Australia*. Not only was it widely reported, it was the subject of no fewer than five journal articles. *Buzzle* was an insolvent trading case, in which your Honour set out the key principles that determine whether a person is a shadow director of a company.

28 These three leading cases of the past few years cause me to wonder if the next publication we can expect from your Honour will not be an equity or a mortgage tome, but a new text on corporations law.

29 Justice Young, I hope you will enjoy today's celebrations, which you rightly deserve. You have made a wonderful contribution to the Court and the community and we are secure in the knowledge that that will continue. It only remains for me to say thank you on behalf of us all.

30 **THE HONOURABLE GREG SMITH SC MP ATTORNEY GENERAL OF NEW SOUTH WALES:** If the Court pleases. Your Honours, it is my privilege to speak today not only as Attorney General of New South Wales but also on behalf of the New South Wales Bar Association. We gather today to farewell Justice Peter Wolstenholme Young, a man who has dedicated over 50 years of his life to the service of the law and to the State of New South Wales. Born in Sydney on 24 April 1940, you were educated at Sydney Church of England Grammar, more affectionately known as Shore, before attending Sydney University. I suspect that your decision to study law did not come as a great surprise to your family. Your great-grandfather Richard was admitted in 1873, followed by your grandfather James in 1903, your father also James, in 1933 and yourself in 1963.

31 The statistician in me was very pleased to find that your eldest son, Marcus, who was appointed senior counsel in the last batch of senior counsel appointed, was admitted in, you guessed it, 1993. There is a great tradition of trifectas. By all account, your practice at the bar should have kept you busy, but somehow you found the time to serve on the New South Wales Bar Council, the Barristers Admission Board, the Law Faculties of the Universities of Sydney and New South Wales and to write several books – numerous books and other things. Your published texts on wide ranging subjects including civil litigation, the law of consent, contracts for the sale of land and declaratory orders. You were controlling editor of the New South Wales Supreme Court and District Court practices and an editor of Butterworths Conveyancing Practice.

32 You were admitted to the bar in Victoria, the ACT, the Northern Territory and Papua New Guinea and even practised as a Queens Counsel under Fiji's ad hoc admission system. You also married your wife of almost 48 years Pamela, and raised three highly successful children. I understand that your wife and son Marcus are here today and though your other children Belinda and James could not attend, I am sure they are all extremely proud of you, just as you are of them. And they have much to

be proud of. Appointed as Chief Judge in Equity in 2001 and a Judge of Appeal in 2009, your career at the Supreme Court has now spanned an impressive 27 years. You were appointed to the bench at the tender age of 44. At your swearing-in ceremony in 1985 you remarked with some trepidation: "Having to make a decision which could make or break the lives of litigants will not be easy".

33 If your Honour did not find it easy, I am not sure that anyone noticed. You were already known as a walking legal encyclopaedia, well before you arrived at the bench. Legal practitioners appearing before you quickly came to appreciate the high standards you would demand of them and by 2007 your reputation in legal circles has been described as terrifying but to the people who have the honour and privilege of working with you, terrifying is not the first word that springs to mind. Your peers describe you as unfailingly polite, self-assured man with a razor sharp mind. Razor sharp may surprise your long suffering associate, Rennie, who after 40 years of service is still amazed by your Honour's uncanny ability to lose documents as the Chief Justice has mentioned, sometimes while she is still talking to you about them.

34 Your Honour has made a remarkable contribution to the Supreme Court, which will not be easily forgotten. You have won the admiration and respect of the legal community with your dedication, boundless energy and consideration for others. You have been described as a traditionalist in some matters but you have never been one to shy away from controversy. Some here may recall a stir you caused when your tongue in cheek criticism of a practitioner who dared to place a bottle of water on the bar table was published in a main stream newspaper. One anonymous reader was so incensed that he added you to his list of deficient judges whose behaviour needed careful monitoring. I can safely say that I have detected no deficiencies in your Honour's behaviour, not that you have done a lot of criminal work but you would have in recent times.

35 I recall being a witness in a case heard by your Honour in about 1986 and cross-examined by David Bennett QC with Alex Shand QC appearing for the National Crime Authority for whom I worked at the time. The case concerned a challenge to the seizure of a diary from a boat by police without a search warrant and your Honour's judgment was impeccable with great reasoning and showed that you had a natural propensity to understand criminal principles. We won the case. Thank you. You are renowned for your efficiency and your success in improving timeliness, has influenced many other judges to follow your lead.

36 You are one of the first judges to institute a pre-trial system to ensure that last minute changes to pleadings or witnesses will not cause delays. You also introduced a practice whereby lengthy cross-examination of non-principal witnesses was discouraged. Thank you very much for that. As Chief Judge in Equity, you consulted with registrars and associate judges every week without fail to ensure that everyone was on the same page and as many practitioners who have appeared before you can attest, you demonstrated little sympathy to anyone who wished to spend the first day of proceedings trying to settle the case. But your contribution to the law does not end at the Court room door.

37 You have been a general editor of the Australian Law Journal since 1992, you also published two editions of Fisher and Lightwood on mortgages as well as the more recent *On Equity*, a text that has been described as both accessible and eminently useful. Your Honour's dedication and service to the law cannot be praised highly enough, however, as many here will already know, the law is not your only passion in life and we have heard from the Chief Justice about your fascination with transport history and model buses and timetables. The Honourable Michael Kirby noticed some years ago that this devotion was showing alarming signs of becoming ingrained.

38 I must say and it does not look like things have improved I have it from a reliable source that your Honour was in York Street not long ago

complaining that the 292 Marsfield service was late and you don't live in Marsfield. You were there to check whether the bus was on time. That would be a very frustrating experience I am sure. And despite the demanding work load placed on you by the Supreme Court, your Honour spends a great deal of time on voluntary work including with the Shore School, the ALS Motor Neurone Disease Association and of course, the Sydney Bus and Truck Museum. You have maintained a longstanding association with the Anglican Church and are a member of the Canon Law Commission and the Church Constitution Commission. You served as Chancellor of the Bathurst Diocese from 1978 until 2003 and currently serve as Acting Chancellor of the Newcastle Diocese.

39 While your Honour may be retiring from the Supreme Court, it is clear that you have no plans to slow down. I understand that the Sydney Bus and Truck Museum hopes to reopen to the public in the near future and your work with the Anglican Church is likely to occupy a great deal of your time. You are also committed to producing a third Australian edition of *Fisher & Lightwood on Mortgages*. In addition, as the Chief Justice has said, you will continue as the editor of the *Australian Law Journal* for the foreseeable future. News that has been received, with some delight in my department, where it seems many staff members look forward to your editorials immensely. But I am relieved to hear that it won't be all work.

40 You and your wife will be leaving to take a well deserved break indulging your passion for travel with a two month cruise visiting exotic destinations including Vladavostock, Alaska and Hawaii. Your Honour has been a fine judge and a credit to the Supreme Court. It goes without saying that you will be sorely missed by your colleagues and by the wider legal community but I am confident that you will cope with this transition exceedingly well, after all as you said before one of the problems about being on the bench for over 20 years is that one sense of rationality breaks in at moments of emotional upset.

41 Your Honour, I wish you, your wife, Pamela and your family all the best for the future. Thank you again for your hard work and dedication. The people of New South Wales, the bar of New South Wales and this Court will be forever in your debt. Thank you. If the Court pleases.

42 **MR JUSTIN DOWD PRESIDENT LAW SOCIETY OF NEW SOUTH WALES:** May it please the Court. On Wednesday of last week, legal practitioners attended an advanced CLE seminar organised by the Law Society's elder law and succession committee. Your Honour was the guest speaker and your topic, "The Pitfalls of Growing Old". Retirement, your Honour stated, is one of the pitfalls of growing old. As members of the legal profession well know, the transition from growing old to senility occurs overnight, on the eve of ones 72nd birthday to be precise. This chronological decrepitude apparently renders them instantly incapable of continuing in a judicial role.

43 Fortunately for our justice system, some do return to serve in an acting capacity. On the eve of your Honour's birthday it is a privilege and a pleasure to add my valedictory remarks on the occasion of your retirement from the bench. In addressing the Court, I am mindful of the need to aim for brevity on two counts. Firstly, in light of your Honour's predilection for the wisdom of Greek philosopher, Pythagoras, to 'not say a little in many words but a great deal in a few'. And secondly, the fact that previous speakers and I was only aware that I would have one to deal with have succeeded in poaching many of the salient details and highlights of both your Honour's public and private life.

44 However, as your Honour has noted during your career, not all members of the legal profession find that Pythagoras Maxim easy to apply in the Court room. Your response to their failure has been to uphold their view that your Honour can indeed be a terrifying judge to appear before. It was a concern that your Honour expressed on the occasion of your swearing-in to the bench in 1985 being that while you thought the legal profession was

friendly and helpful, your colleagues may become scared of you once you assumed your judicial role.

45 For some of them that has proved to be the case. Those who appeared before you were expected to meet the same high standards of professionalism, competency and command of legal principle that you demanded from yourself. As one colleague remarked, “Appearing before Justice Young is like driving through a forest blindfolded. Everything seems to be going fine at first and then you hit a tree”. Tales of your Honour’s efforts to stymie under performers abound from running onto the bench to maintain a sense of urgency for the proceedings, imposing the ten minute rule on cross-examination, displaying an impish sense of humour by way of throwing in seemingly related but unconnected cases into the mix and recommending both counsels consult an unavailable textbook during the break.

46 As has already been noted, your Honour comes from a legal family with five successive generations in the law, perhaps your father, James, wetted your Honour’s appetite for the law, regaling you and your mother, Ola, about his latest victory over death duty assessors but equally he could have encouraged your Honour into amateur radio, another of his personal interests. Nonetheless, it seems your Honour had a natural inclination to the law. With your son, Marcus, your Honour had to work a bit harder as his first career move was to study psychology. When his enthusiasm waned, the offer of a stint as your Honour’s tipstaff soon sealed his fate as well. Perhaps it was your Honour’s discourse on medieval law explaining aspects of English feudalism such as grand and petty sergeantry or the differences between ‘fee tail’ male and ‘fee tail’ female that really clinched the deal.

47 Renowned for your encyclopaedic knowledge, impeccable preparation and punctuality, someone who bounds onto the bench having read all the papers and usually with a very well formed view of the facts of the case, these admirable traits do not appear to extend to the state of your

Honour's desk, which has been described with greatest respect as extremely messy. However, I imagine staff would be thankful that your Honour's earliest attempts to categorise files, which involved into a complicated filing system of 20 in trays and 20 out trays, necessitating a diagram as to how documents should be circulated have given way to a simplified system: two trays. One for things that are lost, the other for things that are to be lost.

48 Your Honour, it is many years since your Honour as an article clerk at Norton Smith & Co in the 60s perfected your role as an opening batsman for the office corridor club wielding a 12 inch wooden ruler and much has changed since those days. For the solicitors of this State, your Honour has been a guiding light and incredible role model in every aspect of Court procedures, courtesy and conduct, instruction and practice, taking us to task when necessary and encouraging us to be the best that we can as individuals, legal practitioners and members of society. We are forever in your debt for your work on property law, declarations, equity law, elder law and civil litigation, also otherwise known as the adventures of Brian Butterworth. The latter portrayed a healthy mix of 'sin, sex and sadism', which your Honour is quoted as saying, "You found a particularly effective method of imparting your message to young impressionable minds, enrolled in the study of law".

49 Throughout your career, your secretary and then associate, Reny, has been at your side. It has been a very successful partnership. In preparing for this speech, I was told it was best to get on the good side of your Honour because you carried some sway at least with your associate. However, it seems I was pipped at the post by earlier speakers in that regard. I think I may be close to exceeding your Honour's ten minute rule, so in wishing your Honour and wife, Pamela, a joyous and fulfilling future, I close with a quote from Shakespeare's "As You Like It":

> "And this our life, exempt from public haunt, finds tongues in trees, books in the running brooks, sermons in stones and good in everything."

May it please the Court.

50 **YOUNG JA:** Well thank you, Mr Attorney and Mr Dowd. Sitting here makes me conscious that I am privileged to hear what normally is said at a person's funeral, however, I am glad to make it quite clear, I do not consider that this is in any way the death of my legal career even though I now leave what has been the longest period of it. Furthermore, unlike a funeral, the focus of the event is giving the last word.

51 I commenced my career in the law in early 1958 as an articled law clerk and spent almost five years in that job. Fortunately I had good articles and was exposed to many complicated commercial and company matters as well as being asked to instruct some of the best counsel at the time. I then came to the bar, aged 23. The advice I got from senior barristers was to get through my poor earning period whilst still unmarried; this was, in fact, good advice but for the wrong reasons. There was a lot of work for the bar in 1963, had I waited until 1965, as some solicitors suggested I should, I would have arrived at a time when there was much less work.

52 I have been fortunate in many other parts of my legal life. The work that I started doing was mainly in Magistrates' Courts; minor traffic prosecutions, landlord and tenancy cases and what was called a backyarder. I am not sure where the bar still gets involved in backyarders, but this is the typical situation where Mrs A and Mrs B live next door to each other, Mrs A has always had her fire, burning off rubbish on Monday, Mrs B has always put her washing out on Monday and, before too long, they cross-summons each other for assault. You then go along, you spend half an hour telling them to be polite to each other, they kiss or shake hands, you pocket your fee and go home. I also did some equity and District Court motions and, as I got more senior, more and more equity motions, but my early years at the bar gave me two good insights.

53 I was a bit over owed by authority as a young man and appearing in what was an arena I thought would be quite combative; it was just the reverse. I noticed even that the police prosecutors and the court constables would go out of their way to help a good citizen who just happened to get into strife. I even coached a court constable for his Roman law exam. I frequently went home on the bus to Avalon with a police prosecutor and we chatted and I was quite surprised to find out that he and I had the same lists of who were good magistrates and who were bad, and this is the foundation of my belief that if one tries to do a good job as a judge, without fear or failure, one will gain respect.

54 I learned basic advocacy in those days. Advocacy is convincing the person you are addressing as to the need for him or her to agree with you; that involves attractively presenting the material you have to your hearer. However, for court work, it also means marshalling your material so you can prove every element of your case and involves being so familiar with the case that you can effectively cross-examine opposing witnesses.

55 Advocacy is knowing who you have to convince and using all legitimate cards in your pack to make your case convincing, but I often wonder, when I am sitting on the bench and barristers are addressing me on the basis that if I cannot really accept what they say, I must be a fool. They do not actually say that, but the way in which the case is presented shows that is what they are thinking. Of course, I may be misinterpreting it, if so, it was very bad luck for those barristers whom I suspected, but it is very difficult to convince a person of the validity of your argument by making it appear that the person hearing the argument must be a fool if he does not accept it.

56 When I became a senior junior at the equity bar, there were about a dozen of us and there were about half a dozen judges sitting in equity; we knew each other's capabilities and we also knew the proclivities of the judge and so, although there was always the gamble that the client would not live up

to his statement in cross-examination, we could predict – or at least, we thought we could – the result and so we settled about 85 per cent of the cases. I can remember one case, a mining case, my opponent was the late Bryan Beaumont, we tried to settle the case and got to the stage where we were $2,000 apart. My client said, "You know, in the old days I would have tossed him for it", now, always the opportunist, I said "Why don't you?" After some discussion, he said "Yes", I went over to Bryan Beaumont and he said "You're joking", I said "I'm not", he went to his client, I saw his client laugh and I knew I had got him. So we tossed, I lost but my client was quite happy and shook his former partner by the hand and we went into Michael Helsham, who was the judge, told him the case had been settled. His Honour said "I congratulate counsel for the way in which they've settled this case", I don't think he really knew, but every now and again judges just happen to hit on the truth.

57 I was at the bar for 22 years, the last seven as silk. My practice changed quite a lot when I became silk from being an equity junior to an appellant lawyer, especially in Commonwealth administrative law matters and I ended up my career being senior vice president of the Bar Association. I came to the court, following the good offices of Sir Laurence Street and the attorney general, Terry Sheahan, now a judge of the Land Environment Court and I am glad to see Justice Sheahan in court today.

58 I was 24 years in the equity division, being chief judge for the last eight years and the court changed a lot during that time. When I first came, there were many, many applications for last minute adjournments because of change of counsel and change of pleadings and what have you; so much so, I was able to write a book in my first three months on the bench and I thought that, really something had to be done about it. At this time, in the Commercial list, Ian Shepherd and Andrew Rogers were becoming more interventionist, I did the same. As a result, when I left as chief judge, you got on within three or four months and that is still the case today because of the way in which the judges have had to intervene in getting cases moving. In a Sunday newspaper recently, Charles Waterstreet said

that this puts great stress on the bar; it also puts great stress on judges, but it does mean that we are moving litigation along far more efficiently than we were 27 years ago.

59 I learned quite a bit about judging in my first few years; at that time there was no course on how to be a judge, one just picked it up. One of the first things one learns about being a judge is never to make a decision unless one has to. Parties who have solved their own dispute are more likely to live in harmony together after the case is over than if some order is forced upon one of them, and so you use your skills to try and bring that about.

60 I can remember one case where, a the time when judges of the equity division had to deal with ex-nuptial children and their custody, it was quite clear after day one that both mother and father would go to jail rather than give up the kids. I was a little perplexed what to do, because both seemed decent people, so I asked Michael Helsham, who was then my chief judge, what to do, he said "You ring this lady" and gave me the name of a lady who worked for the then Department of Community Services. I rang the lady, she called in my Chambers the next day, at 10 o'clock I went into the court with her and sat her on my left hand side and said to counsel, "Meet Mrs X, my expert". Counsel, obviously enough, were nonplussed as I would have been in their situation, not happy because of the presence of Mrs X that introduced a factor into the case they had not been anticipating. So I said "Perhaps you gentlemen would like to confer with the court's expert before we continue". Both grabbed at this idea, 20 minutes later Mrs X had settled the whole case. The message is think outside the box, for there are many ways of killing a cat than finding a verdict for the dog.

61 Now, the court has changed over the last 27 years in other ways. Computerisation has speeded up some processes but slowed down others. In 1985, one could prepare a judgment, sometimes with the court reporter in one's Chambers and an original and three carbons would be produced and that was that, but now it takes three or four days to check every word, every authority, put the document on the internet where it can

be read and misunderstood by every vexatious litigant in Australia. In 1985, one picked up the day's transcript from the box in Macquarie Street at 6.00pm on the day of hearing; today, one receives an electronic copy three days later. In 1985, I could hand a note to my associate in 30 seconds; today my e-mail to her in the next room could take up to 16 minutes to appear on her machine. As the Chief Justice has noted, I am not, perhaps, keen on computerisation of the courts. Fortunately, perhaps today I am coming to the end of my full-time judicial career.

62 I came to the bench at 44, probably missed the best earning years of my professional life but I have never regretted it. I have had enough resources to live quite comfortably and have had a very rewarding career on the bench. There has been an Enid Blyton story for the worker who has gone to the station each morning for many, many years and caught the train to town, knowing that on the opposite side of the platform there is a train going to the beach; he has often longed to catch it. I have always come to court by public transport unless I have happened to have a late night meeting. For over 27 years I have alighted from my bus and walked across Wynyard Park; the Palm Beach bus leaves from the other side of the park. For 27 years, I have resisted the temptation to get on that bus, instead walking up Martin Place for the court. However, perhaps on Friday of this week, if I get up early enough and go into Wynyard, I might actually yield to that temptation.

63 When asked about retirement, I have told people, truthfully, that I neither look forward to it nor dread it; it is just another milestone in one's life. I do not intend to give away the law completely, I will be preparing the next Australian edition of Fisher & Lightwood on Mortgages with Justice Croft in Melbourne and Professor Tyler and I have other projects in mind too. Judging is a special career in many ways. I regret to say that two people committed suicide after decisions of mine, though one was a man who actually won his case. This, of course, affected me, but I learned very early in my career that one must just, to use the expression generated by Wartime propagandists in England, "Keep calm and carry on". On the

other hand, being a judge does open up avenues for discussion with other judges in one's own court, or the other superior courts in Australia and overseas as colleagues; it is not open to other professions. Now, I have been privileged to visit the Supreme Court of Canada, Supreme Court of the USA, to have had tea with a Law Lord in the House of Lords overlooking the Thames. I have also been fortunate always to be involved with a happy court; equity has always been a happy court when I was involved with it. It has been a division where the judges are ready to help each other whenever a judge is overloaded and, again, my experience of the Court of Appeal has been a happy court.

64 Although I have only been a permanent judge for three years, I have sat off and on in the Court of Appeal for about 12 years, because the Chief Judge in equity is an additional judge of appeal.

65 I have also been very fortunate to have had a very stable home life. Pam and I were married in 1965 and we had three children and many happy years together. Marcus is here today, with his wife Gabriella and you have heard about my family history and my other children. Melinda is currently working for Save the Children in Juma, South Sudan; she has previously worked there for Oxfam and James is giving three tutorials in Sydney University; he tells me he cannot get a substitute but he has, I think, got the family trait of actually doing his duty rather than being where he would want to be. He and his wife, Effa, who is currently in Jakarta, also a PhD, are a great young couple and I am proud of them all.

66 My associate, Reny Bergen was my secretary at the bar from about 1971 so she has been with me for 42 years. In an age where people serving in one job for five years is considered a long period, 42 years is phenomenal. I will content myself as saying, as many of you know, Reny is a unique person. I thank Reny for her assistance over that long period. I have also been very fortunate with my tipstaves; tipstaves were originally a sort of batman for the judge, but over the years judges become more self sufficient and the current tipstaff is usually a very bright, recent graduate

from one of the law schools. Two of my tipstaves have become senior counsel, a number have become successful solicitors or on their way to becoming successful solicitors; I have enjoyed working with all of them. I will not name names but I am glad to see some of the more prominent ones are in the audience today.

67 Despite being much involved with long hours as a judge, I have also been fortunate enough to be able to devote some time to other activities. The one closest to my court work has been my editorship of the Australian Law Journal, which I have done now for 20 years. I was also deeply involved, during the 12 years it took my co-authors and myself to write "On Equity" and I am honoured that the publishers of the Law Book Company are represented here this morning. I have and am continuing to be a prominent member of the supposed controlling committees of the Anglican Church of Australia, both locally and nationally. For 25 years, I was chancellor of the Diocese of Bathurst, the last two years I have been chancellor of Newcastle, from time to time, I acted as chancellor of the Metropolitan Diocese. I am honoured that the Lord Bishop and Archdeacon, Copeman of Newcastle are here, Bishop Forsyth, the senior Bishop of Sydney is here and Bishop Watson, formally Archbishop of Melbourne is also here today.

68 I have always had an interest in buses and transport generally. I am not a mechanically minded person, but I have always had great interest in timetabling. I am currently chairman of directors of the Sydney Bus and Truck Museum which has just relocated to Leichhardt; hopefully we will get our development application through shortly and be able to reopen to the public. It is the most significant selection of public transport vehicles and trucks in the Southern Hemisphere. I enjoy working with bus enthusiasts, they are a delightful bunch, however I have found an inaccuracy in an article about buses, particularly getting fleet numbers wrong, is considered to be far more heinous than getting a reference wrong in a law report.

69 I now retire from full time work. I am going to do some much needed work on cataloguing my model bus collection; however do not be surprised if you see me here as an acting judge from time to time. I have had an interesting career and now I bid you adieu.

****

LB CO WILLS AND ESTATES SEMINAR

Thursday 18 November 2010

Keynote Address by Hon Mr Justice Peter W Young AO

Judge of Appeal Supreme Court of NSW

(Formerly Chief Judge in Equity and Probate List Judge)

It is a privilege to have been asked to give the keynote address this morning.

I come from a legal family with five successive generations in the law. My father was for many years the probate and estate planning partner at then one of Sydney's bigger law firms. Dinner time conversations were often around my father's latest victory over the death duty assessors in the Stamp Duties Office. He was proud that no will drawn by him was ever the subject of court proceedings to construe it, except for one where his intentions were upheld.

The solicitors and indeed barristers have different problems today. Death duty as such with all its complications for drafters of wills has largely gone. Ever since 1952 when cesser duty bit on estates, wills as such became simpler. This meant fewer will construction suits in the equity Court. However, the complications for estate planners merely shifted into companies and trusts and off shore manoeuvres.

It is 47 years since I last worked in a solicitors' office. Although at the bar and in the court, I was heavily involved in matters concerning wills and estates, it is obvious that in those 47 years there has been considerable change. Let me outline some of them to you and then spend a little time reviewing cases which illustrate the modern position.

I have already mentioned the formal abolition of death and estate duties. Even though Capital Gains tax has entered the field, this abolition has altered the way in which estate planners and probate lawyers prepare wills.

Philosophically, the major changes have been first the shift from the validity of wills depending solely on matters of strict compliance with formal requirements to a system that, within limits, will focus on fulfilling the testator's intention and secondly, the inroads into freedom of testation by expanded rights under the Family Provision legislation.

I will give examples shortly. However, let me first finish the list

Thirdly, the fact that medical science has kept people living longer and healthier has meant that we have needed to review our approach to wills made by the elderly. This is also affected by the fact heat nowadays people often have many diverse shareholdings and may not remember everything they own.

Fourthly, we now allow people under disability to have wills made for them in certain situations.

Fifthly, social attitudes to couples living together outside matrimony and begetting children who once would be classed as illegitimate has meant that we have had to adjust our procedures.

Sixthly, as the world has gotten smaller, but the British Empire has shrunk, we have had to change our attitude to recognition of foreign wills and probates and the law as to reseals of probate.

Seventhly, the regrettable fact that law schools have ceased to focus on the thorough teaching of the saw of succession, private international law and family law and even the technical rules affecting interests in land, has meant that some testator's intentions are being defeated by the ignorance of the will drafter.

Lastly, the law of negligence has moved so that, in some case, disappointed beneficiaries can sue the solicitor whose negligent preparation of the will has meant they did not receive what the testator intended.

There may be other changes, but the eight I have listed are the principal ones. I will now give examples of each, usually from recent cases. There will probably not be time after that to remind drafters of wills of what usually has to be repeated at seminars like this such as when drafting a will, don't forget the residue clause, don't use the word "survive" without specifying who it is that must be survived and remember the difference between saying "To Amanda when she attains 25" and "To Amanda provided she attains 25"

The first of my propositions is that we have moved from strict formalism to a greater focus on fulfilling the intention of the testator. As really had to be the case, most of this change has come about by statutory amendment. When I refer to sections of an Act without naming the legislation, you can assume that I am referring to the Succession Act 2006 with amendments as it is currently in force.

Section 8 (replacing the former s 18A) allows that court to admit to probate informal documents provided the court is satisfied that the deceased intended that the document was to operate as his or her will.

All sorts of scraps of papers have, on occasions, been admitted to probate under this section or its predecessor. Time does not permit a thorough exposition of the ambit of the section. The section can be used to have a copy of a lost will admitted to probate in certain cases if the presumption of revocation because the original will cannot be found.

However, memos of instructions for a solicitor to prepare a will are usually not within the section as the deceased did not intent that document to have testamentary effect. However suicide notes which include a phrase such as, "I want my mother to have all my property" may well qualify even though one might query the sanity of the deceased when he or she wrote the note. My decision in *Ryan v Kazakos (2001) 159 FLR 452* is an interesting discussion of this type of case.

Apart from informal wills, the court may rectify a will. The provisions of s 27 empower t court to rectify a will if the will does not carry out the testator's instruction

s or tit contain a clerical error. It should be noted that this is narrower than s 29A of the previous legislation, but that matter does not concern me this morning.

The most common case is where a “not’ has slipped in unnoticed into a will, such as “ I give a million dollars to my wife Penelope provided she does not survive me by more than one month.”

Before the Act contained provision for rectification, the only methods of curing a mistake was, if the problem was with a gift to a spouse or child, to make a Family Provision Act application. Outside that area, apart from a voluntary rearrangement by the legal beneficiaries, or a suit against the drafter of the will for negligence, tere was no way of adjusting matters.

Passing to the second matter on the list the increased inroad of Family Provision legislation on freedom of testation.

When this legislation was introduced in NSW in 1916 as the Testator’s Maintenance and Guardianship of infants Act the legislation was designed to protect widows and minor children who had been cut off with a shilling. (See Professor Rosalind Croucher’s note on this is (2009) 83 ALJ 617 that one cut off one’s dependants with a shilling to make it plain that the testator had considered the dependant =and then rejected her rather than being thought to be a senile person who had forgotten who his dependants were).

However, as time has gone by, more and more people have become eligible to claim on a testator or even a person who dies intestate. We are even now getting cases brought by homosexual lovers or adult children who themselves are relatively wealthy, in the later case, merely because their father has not distributed his estate equally between the children. Some of these cases even succeed or are settled. This fact has eroded freedom of testation and has meant that some wealthy people seek advice from estate planners to put their assets out of reach of claimants. This is difficult, especially as the legislation allows the court to make awards out of notional property, that is certain property which the testator has parted with by gift or transfer to a trust or holds as joint tenant, see ss 75-77..

The third matter I listed was the fact that people are living longer and healthier lives with a greater range of property interests.

The leading case of *Banks v Goodfellow (1870) LR 5 QB*.549 has guided courts for over a century as to whether a testator had sufficient capacity to make a valid will. The classic passage is at p 565 that

> "It is essential to the exercise of such a power [ie of testation] that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect"

However, these days, it is not necessarily so that a person who cannot remember exactly what property he has is too infirm to make a will: he or she may just be one of the wealthy whose holdings are so wide that it is impossible to remember every investment.

Another problem in this area was highlighted by the resent decision of Briggs J in the English Chancery Division in *Re Key [2010] 1 WLR 2020.* In that case, he testator and his wife had been married for 65 years. The wife died suddenly in November 2006. The testator was then 89 and infirm and had been dependant on his wife for domestic care.

A week after the wife's dearth, at the request of one of his daughters, a solicitor called at the testator's home and took instructions for a will. The testator had two sons and two daughters. His previous will, made in 2001, had left a life estate to his wife and the bulk of the remainder to his two sons who had run the family farm with him. The 2006 will gave the whole estate to the two daughters in equal shares.

The sons challenged the 2006 will on the grounds of lack of testamentary capacity.

Briggs J pronounced against the 2006 will and granted probate of the 2001 will. His Lordship held that, in modern days, bereavement was a matter which could give rise to a mental disorder to deprive a person of rational decision making. On the whole

of the evidence in the present case, the testator was devastated by the death of his wife and was unable during the week following to exercise the decision making powers required of a capable testator.

The judge added for advice to the profession that when a solicitor is instructed to prepare a will for an aged person or one who has been seriously ill, he or she should arrange for a medical practitioner first to satisfy himself or herself as to the testator's capacity and understanding and to make a note of the examination and findings.

My fourth point was that we now allow wills to be made for people who have no testamentary capacity. This occurs in two main areas, minors and mentally incapable people. Minors' wills are dealt with in s 16, under which the court may authorise a minor to make a will. Under ss 18 and following the court may authorise a will for an incapable person.

Recently a 16 year old received a large verdict. He had been living with foster parents for many years and was attached to them. He told the court that, he wanted to make a will so that if anything happened to him, the funds would go to his foster mother and father rather than his biological parents. The boy appeared to the court to be a mature person and the court considered that what he intended to do was fair and reasonable and granted him authority.

As to incapable persons, there was a recent case where a woman was badly injured by her spouse and she received criminal compensation from the government scheme as a result. She was in a perpetual coma and did not have capacity to make a will. If she died intestate, the spouse would receive the proceeds of the criminal compensation paid in respect of his own criminal conduct. Evidence was given by her solicitor that she had only one close friend, a woman in China and she was grateful for the women's refuge in which she had been living. The Court ordered that a will be made for her leaving half of the estate to the friend and the other half to the women's refuge. The case is *Re Kelso* [2010] NSWSC 357: noted 84 ALJ 678 (Kelso was the woman's solicitor who was the applicant for the order).

Fifthly, changes in social attitudes have meant that de facto spouses and ex nuptial children must be borne in mind when making a will and, indeed, on intestacy will take a share of the estate. Indeed, the Succession Act seems to acknowledge that a person may have a number of spouses, de jure and de facto. An odd consequence is that when the Public Trustee is asked to administer the intestate estate of a male person, he cannot ever be sure that there are no children who would be entitled to a share of the intestate's estate.

Recently, another problem emerged. The testator had been living with a person of the same sex. He made his will leaving her property to that person. They then went through a civil partnership ceremony which, apparently, in English law has the same effect as a marriage. The testator then died. The will was revoked because of the entering into the civil partnership under the English equivalent to our section 12. The court held that the will was not shown to have been made 'in contemplation of marriage'.[*Court v Despallieres [2010] 2 All ER 451.* This particular case has, at least for the present no relevance to NSW, but I gave it as a further illustration as to how probate law is affected by changing social attitudes.

Sixthly, when I was an articled clerk, if a testator died domiciled in Queensland with assets in NSW, probate would be obtained in Queensland and then the grant would have to be resealed in NSW as the law would not recognise the Queensland grant. Nowadays s 107 of the 1898 Act authorising reseals is still in place and theoretically the former law still applies. However, with the abolition of State death duties and a more Australia wide commercial approach by share registries, my perception is that, in practice, there are not as many reseals as formerly.

Again, in former times, one had to be very careful when making a will for people who were domiciled outside NSW. The will had to be made in accordance with te law of the domicile. So that, if the testator was domiciled in Arizona, there had to be three witnesses to the will.

This problem has now been solved by ss 47 & 48 which usually mean that the will will be valid here if executed here in our form. What happens in Arizona, however, needs to be borne in mind.

Seventhly, the fact that the full law as to property and succession is no longer taught by the majority of law schools has the effect that solicitors drawing wills and a fortiori their so called paralegals are completely unaware of rules such as those from Locke King's Act now s 145 of the Conveyancing Act, 1919 which makes a general rule as to how charges existing on the testator's property are to be borne by the beneficiaries unless the will otherwise provides.

Finally, there have been cases where the drafter of a will has been successfully sued by a disappointed beneficiary where the loss was caused by the negligence of the drafter in carrying out the testator's instructions. There have also been cases where the will was prepared in such a way that the estate paid the maximum in inheritance taxes which could have been avoided had the drafter taken care. This circumstance gives a further impetus to drafters to take care in everyone's interest to do a professional job.

The greatest risk is where a client is attached to a partner of the firm who has won all her business litigation for her. She has confidence in that solicitor and asks that solicitor to draft her will. The solicitor over confident in his or her ability will do it using text books much to the delight of the probate bar. The wise solicitor will either refer the matter to a partner skilled in that area or have such a person be the backroom boy or girl who does the real work.

However, even experienced solicitors can get caught. The most stark case is that of a solicitor who could see tat his client was too burnt to be able to hold a pen and thus to sign the will, but forgot that s 6 permits another person to sign for the testator in the testator's presence. The intended beneficiary obtained damages against the solicitor, *Summerville v Walsh BC 9800342 CA.*

Finally, how much do you charge for drawing a will? I think most modern firms charge their ordinary hourly rate. However, some entrepreneurial firms do standard wills free or for a nominal fee on the basis that every will in their strongroom means a healthy fee in due course.

So now I wish you to have a good day, though there is time for a few questions.

&&&&&&&&&&&&&&&&&&&&&&&&&&&&&&&&&&&&

CHARITABLE TRUSTS

Speech by Hon Justice Peter W Young to Church Law Forum

Wesley Mission, Sydney 6 May, 2010

Although I suspect the audience tonight consists as to at least 80% of experienced lawyers, I do not intend to spend over much time on the legal nature of a constructive trust, but to concentrate on the history of these trusts and particularly on the basic social and political issues lying behind charitable trusts. Indeed, if there is any cohesive thought in my presentation tonight, it is that society progresses and, unless one progresses with it, one is left stranded. I have arranged for copies of what I am saying tonight to be available at the end of my presentation and the last page of that document will contain a brief bibliography for those who are interested to consult.

I will commence my consideration of charitable trusts in the Middle Ages in England. This was a time when the Church, nominally controlled from Rome, was in a powerful and respected position in society. Life was so brutish and short that no-one was prepared to risk his or her immortal soul by opposing it.

Pope Gregory IX in a decree which was endorsed by the 4th Lateran Council of 1215 urged the faithful to seek their salvation by bequeathing part of their wealth to the support of pious causes including gifts to the church and the foundations for the poor. A person who failed to do so might be denied the Eucharist and burial in consecrated ground.

As a result, the Church amassed considerable property. Included amongst the property were the monasteries which were usually situated on vast acres of land with very large buildings. However, apart from serving as a home and workplace for the monks and a space for religious activities, the monasteries catered for the poor and needy.

Under Henry VIII, the monasteries were dissolved. Their property was redistributed to the king to pay for his wars and royal expenses and otherwise sold to his favourites. The idea that salvation might depend on works of charity dissolved into justification by faith alone, and incentives for being charitable disappeared. But what happened to provision for the poor and needy?

The bureaucratic answer was simple. Set up civil local government units called civil parishes, have each civil parish establish a poorhouse and a workhouse and charge rates to the local property owners to pay for them. However, whenever such a system is set up, the cost cutters get to work to ensure that the rates are as low as possible and thus the facilities in the workhouses get worse and worse.

Again, communities found, like what happened in the 1980s when New York offered superior benefits to the down and out than were available elsewhere, that the poor and needy will flock to the place where the benefits are best. The solution found by the authorities in the time of the Tudor monarchs was only to provide benefits to the poor of the civil parish who were bona fide residents. Others were classed as rogues and vagabonds and the penalty for being so classed was to be whipped through the streets to the parish boundary and, unless the vagabond moved smartly through the neighbouring parishes to reach his or her own parish, to suffer the same fate in each of the neighbouring parishes. Sometimes the letter V for vagabond was branded on their breast as well. Men, women and children would thus be stripped to the waist and publicly whipped through the streets, just for being poor and leaving their usual residential district.

Before we are too dismissive of the solution, we must remember that in the early 16th century in England there were troops of disorderly persons infesting the streets of the principal cities causing trouble. It was thought that harsh penalties would deter them. They didn't. It was only when a scheme was found for putting them to work that the problem was solved.

I should note here that the main problem was in the cities. Conditions were often not as bad for the poor in the rural areas, as local gentry would provide some relief for the deserving poor out of their surplus.

In the time of Elizabeth I the law was ameliorated and the able bodied poor were set to work, often on public projects. However, part of the system was the requirement for each civil parish to set up a house of correction (sometimes referred to as a Bridewell as one of the first, in London, was associated with St Bride's church) where those who would not work would be sent to be punished and to be led to change their attitude. Originally, these houses of correction were not prisons in the then sense of the term. However, later the houses of correction were also used for the punishment of minor nuisance crime such as prostitution. It was thought that a six month term in a house of correction with frequent Bible reading, oakum picking for the men (that is unpicking and reassembling ropes) and spinning for the women with frequent subjection to corporal punishment would turn rogues into useful citizens. The spirit of the idea was a little perverted when the governors sold tickets to witness the weekly flogging sessions of the men and women judged not to have worked hard enough. I suppose one has always to look for ways of funding a charity!

However, surprisingly, the poor law scheme worked quite well until the industrial revolution.

The stripping of funds from the Church also meant that there was less capital available for founding schools and universities. This problem was exacerbated by the Mortmain Acts. (Mortmain derives from the Latin via Law French and translates as 'dead hand') which prohibited the conveyance of land to corporations. The reason for this was that, in Tudor times as well as in the Middle Ages, most taxes were extracted on the death of a landholder. And corporations never die. Various Acts of Parliament had to be passed to allow land to be set aside for schools etc. Indeed there were also Acts passed to allow community projects such as a new bridge over a creek, a new hospital a clock tower or the like. Mostly these enterprises were set up as charitable trusts supervised by the court of chancery.

From 1594-1597 there were a series of bad harvests. England was already finding difficulty in feeding its population and the failure of the harvests put added strain on

the system. The parliament passed 13 pieces of legislation to consolidate the Poor Laws and to deal with abuses in charitable trusts.

Strangely, up to about 1597, there is hardly any litigation over charitable trusts. However, there are thousands of cases in the 17th Century according to Jones' History of the Law of Charity. Even at the end of the 16th Century there was growing public disquiet about the administration of charitable trusts. There were numerous suits alleging for instance that the vicar was supposed to be distributing the income of trust property to the poor etc but was keeping it for himself.

In 1601, the statute 43 Eliz 1 ch 4 (the Statute of Charitable Uses Act, 1601) was passed to control these charitable trusts more effectively. However, the importance of that statute for us is that the courts have used the preamble of that statute as a definition of what sort of purposes can constitute a charitable trust.

Without boring you by the details, the Statute was the origin of the courts in the last 200 years holding that to be a valid charitable trust, the trust had to be for the relief of poverty, the advancement of education, the advancement of religion or such other public purposes as were designated in or are analogous to the purposes mentioned in the preamble of the statute. That preamble covered matters such as building bridges and giving relief to injured soldiers.

Up until the early 19th Century charitable trusts were quite well controlled by the courts under this statute.

However, this does not mean that the definitions in the statute are the best that can be devised. At various interfaces there can be seemingly illogical results. Thus sporting organisations are usually not charitable, but gifts to schools to establish sporting facilities are charitable as being for the advancement of education. At common law (now remedied by statute) a gift to a church for parish purposes was not charitable as it could be used for non-charitable purposes (such as providing a creche), but a gift to a church to repaint the minister's house was charitable.

No gift to an organisation which was political in its objects or aimed to change the law could be classed as charitable. So, one could make a charitable gift to a mosque to support a preacher who spoke on the need for Muslim women to cover their faces (a religious purpose), but one could not give as a charitable gift to a fund to change the law to prevent woman from wearing face obscuring material.

Again, a charitable purpose had to be for the public. Thus a gift to build a bridge in the small town of Dalgety would be charitable as it could be used by any member of the public even though only a few hundred would in fact use it. However a gift to build a bridge so that all the workers at a factory could get ready access to a train station would not be charitable even though the factory employed 10,000 persons. A bridge built in a town whose principal population were Muslims marked “For use by Muslims only” would not be charitable because it could not be said to be for the public.

To confuse matters of principle further, there was an exception that a gift to benefit the donor’s poor relations was considered to be for the public good.

Another problem was that, up until recently, only the Attorney-General as the protector of charities, could commence proceedings to enforce a charitable trust. Thus, if an archbishop saw that a local church was breaching the trust on which it held its building by holding illegal church services under the rules of the denomination, he was powerless to get an injunction. He would have to ask the Attorney-General to institute proceedings, he guaranteeing the costs as what was called a relator. This restriction was awkward, though it did have the advantage of protecting charities from litigation from every Tom, Dick, Harry or Mary.

However, generally speaking, the law as to what are charitable trusts has worked tolerably well

Just as the Reformation and the stripping of the Church of its assets made an impact on the poor, so did the industrial revolution which began to manifest itself in the last third of the 18th Century.

Here we have a massive change in society where the established system of villages and an economy based on agriculture passes away and people need to flock to the cities and the factories.

A consequence is that the Tudor system of local poor relief and the Tudor system of the State fixing wages etc, failed. Many are employed in factories at subsistence wages. Many are jobless as they do not have the necessary skills for the new age. Children work in factories from age 6, the homeless walk the streets. Hangings for pickpockets stealing more than one shilling show a sharp increase.

For a while, the Napoleonic Wars absorbed most of the out of work. With English victory, the unemployed flocked back to London and the Luddites caused problems as did incidents like the battle of Peterloo.

Australia benefits from this rearrangement of the British economy as many of the able bodied nuisance criminals, who did not fit into the "new Britain" are transported to Australia where most seem to flourish.

Another change since Tudor times is that the England of the 19th Century had a strong and numerous Middle Class. This will be increased by the number of wealthy industrialists and railway barons that the industrial revolution will be producing.

The previous system of maintaining the poor and weak has virtually collapsed. Dickens and others expose the abuses of the remaining workhouses. A new system must be invented for the new conditions.

It is with this background that we note that reformers like William Wilberforce set about their reforms. Apart from abolishing slavery, they move to set up a new social structure. We see the emergence of societies not only religious societies like the Church Missionary Society, but also practical help groups like the benevolent Society. By the middle of the 19th Century even in far flung NSW, we see each diocese of the Anglican church with its "Church Society' a group that later evolves into Anglicare. Other churches follow a similar pattern.

Thus the movement is that ordinary folk, some of the rich upper class, but mostly the middle class have grouped together to provide relief for the poor and needy or those suffering from disease. These societies are member governed. Each person who subscribes is a member and is entitled to a vote including a vote for the committee membership and is entitled to see the accounts. These might be described as bottom up organisations. The members make the ultimate decisions, though, in practice, so long as the committee is perceived as working well, it might strongly suggest matters including who might be a suitable member of the committee. The number of these societies grows and grows.

By the end of the 20th Century, these societies continue to be an important part of social life. However, two changes have come about. The first is that the State and the Commonwealth have assumed the basic burden of caring for the poor and diseased. However, their provision does not properly cover the whole field. The second is that the societies have often ceased to be member driven and are now top down organisations. That is, often the subscribers are no longer considered members, but mere donors and the accounts are not widely distributed though a person who really wants a copy can probably obtain one. The society is now incorporated and the committee have become directors usually elected by a church hierarchy or a small group of founders.

Apart from these changes, a most significant factor is the rate and land tax exemptions given to charitable bodies and the allowable deductions for income tax payers making charitable donations. In each case, the financial benefit comes about not because a donee falls within the Statute of Elizabeth but because of specific words in the taxing or rating statute.

We have noticed that at the time of the Reformation and at the time of the Industrial Revolution there were considerable changes in society and that those changes seriously impacted on the poor and the need for charities. The last couple of decades have also thrown up considerable changes. The use of computers and so called IT have operated so that people who once employed secretaries now type their own correspondence. People who used to post letters, now use email. Women now constitute a considerable proportion of the workforce. An effect of all this is that

the unskilled male finds himself without the ability of finding secure employment even if he wanted it. Once again, we are seeing gangs of the aimless thronging the streets at night making themselves a nuisance.

The community attitude to the churches and to charities has also changed. Many younger people can see no value in church attendance. Partly this is a result of a steadily growing secular view in society, partly to the fact that God does not appear to be so much needed today where, in contrast with a century or so ago, women do not see six of their ten children die in infancy, most diseases are curable or controlled, wars and invasions are made to happen elsewhere, education can be free and there are social services. Furthermore, there are so many ways of having fun on Sunday that there is no time for worship of God.

Likewise for good works. It is much harder these days, to find people who are willing to give up their time for voluntary work for charity or to serve on the administrative councils of churches or charities. Some churches have met this by employing more staff, which has the weakness of making the members mere observers rather than participants in the ministry.

Likewise with charities. I became patron of a charity to help relatives of people who were dying or had died of a particularly unpleasant disease. The main function of the charity was that those who had experienced the pain ministered to those currently undergoing the stresses. However, shortly after my appointment, the focus changed, the volunteers thinned out, the professional administrators came in, professional fund raisers were hired and the function of the charity changed from mutual help to funding research into the causes of the disease.

That sort of change turns the charity from a group that almost automatically garners goodwill from the community, where the community sees people of goodwill giving up their time free of charge to help the less fortunate, to seeing an impersonal structure seeking money. This is not universally the case. For instance, the Salvation Army has retained the public goodwill by being seen in the streets and hotels as caring people: the Wesley Mission is probably in the same category.

Those who organise charities seem to be aware of this changed community attitude. They thus put out advertising about, “Help little Sophie cure her blindness” or “Let the poor people of Ruritania have fresh water”. This is supposed to direct the potential donors once more to think of the charity as a “help the little” people group rather than a multi national institution. I don’t know how effective this advertising is in achieving this aim. However, as the community strongly suspects that as there is no guarantee given that any particular donation will in fact be used for little Sophie (if, indeed she exists) or to provide clean water in Ruritania, but will in fact be used as part of the funds needed to run the charity’s office including paying its officials and commission to fund raisers, sooner or later the ACCC will clamp down on this sort of advertising.

Whilst on this subject, another form of advertising used by charities which I hope they will abandon is for a letter to be sent to past donors and others saying, “Thank you for your past donation. However, our funds are low, we urgently need more money to fulfil our vital aims, **Mr Young you must send us $400 by the end of the week.** Yours sincerely, Mary Doe OAM, General Manager.” Whilst I personally am unaffected by that sort of appeal, I have elderly friends who, when they receive that sort of letter, feel that it is written by a person in authority (see the OAM, or OBE or even JP at the end) and that they are virtually compelled to send $400 even though they cannot afford it.

Another thing that concerns me is how some charities are extending their aims and so take in what is already well done by other charities. This would merely seem to split the donations for that overlapping work were it not for the fact that a high percentage of donations is used up in operating expenses. I believe that if a cheap simple cure is found for cancer tomorrow, then the cancer charities should close, and not turn themselves into charities to combat blindness or heart disease which are already covered by other charities. In my last tax return I gave small donations to 40 charities. I sometimes wonder if that was the right thing to do or whether I would have served the community better by giving a larger amount to ten or twelve.

I am asked from time to time why is it that in cases involving contested wills by family members making application under the Family Provision legislation the courts so

often make awards for family members at the expense of the charity to whom the testator gave the donation by his or her will.

The first answer is that the law provides that a person must be just before they are generous and recognise those dependants who have moral claims on the deceased for which he or she ought to have provided. It is surprising that so many people have a blind eye to the need of family, yet are willing to leave considerable funds to charity.

Secondly, when the claimants and the executors of the will are negotiating settlement of the proceedings, it is often the case that the charity to which the testator left his or her money is seen, not as a caring group of people, but rather as a wealthy corporation involved in commercial activities. This view is not assisted by the common perception that most charities have large reserves and some have lost heavily in gambling in the investment market. It does not matter whether that perception is true or not. People will always think of an excuse why not to give or why to freeze out the charity from the will. The fact that charity accounts are no longer widely circulated, of course, does not help.

At this point it is useful to give an illustration of the difficulties that charities may find themselves in with lawsuits where a relative challenges a will giving money to charity.

In *Gill v Woodall* an unreported decision of the English Chancery Division in 2009 which I understand is on appeal, the facts were that Mr & Mrs Gill made mutual wills after an agreement that the first to die would leave his or her entire estate to the other and that the second to die would leave the combined property to the RSPCA. There was one child of the marriage Dr Christine Gill. The husband, who did not get on with his daughter died first.

The estate was over £2,000,000. Dr Gill brought Family Provision Act proceedings and then amended these to claim that her mother's will was invalid because her mother's intentions had been overborne by her husband.

The RSPCA took the view that it had a duty to uphold the will. It fully contested the hearing, but lost. The will was declared invalid, Dr Gill took the whole estate on intestacy and the RSPCA got nothing. Not only that, but the judge said that as the RSPCA had declined to participate in mediation and rejected offers of settlement it must pay the whole of the costs of the action estimated at about £1,300,000.

STEP (Society of Estate and Trust Practitioners) in its Trust Quarterly Review (2010) Vol 8 issue 1 p 16 concludes comment on the case by saying, that the Gill case serves to bring into focus the sorts of issues and difficulties often faced by charities in a probate dispute. The charity usually does not have access to all the background facts about the testator need to defend the will. At issue is not only the amount of the bequest, but also the risk of having to pay costs and the PR damage that such litigation can cause it.

The advice given is that the charity is not prevented from settling this sort of litigation by some principle that they have to respect the testator's intention. They should heed lawyers' advice as to settlement on appropriate and commercial terms.

As I said earlier, at the time of the Reformation and at the time of the Industrial Revolution there were considerable changes in society and that those changes seriously impacted on the poor and the need for charities. The present change in society has likewise caused a rethink in the community about charities.

Probably the rethinking in England has progressed further than it has in Australia. In England the authorities have made it clear that it is not obvious to them why donations to rich private schools should be considered as charitable gifts for the advancement of education. Questions are being asked as to whether, in a secular society, donations to religious bodies should be held to be charitable. Even in Australia, some are saying that donations to private schools should not be tax deductible, nor should churches and private schools have rate and land tax exemptions. The message is clear that charities cannot rely on the existing tax incentives to continue as at present indefinitely.

For some years now, governments have been concerned with eliminating pseudo charities. An example is the person who has a collection of old cars and forms himself into the Killara motor museum for the purpose of getting a tax deduction for spending on his hobby. Nowadays, the tax authorities require such bodies to be governed by independent persons of proved integrity. However, the pseudo charities still exist. I was accosted near Wynyard station a few weeks ago by a woman urging me to donate to a charity. She had a glossy brochure. I read it, it contained the usual pictures of suffering children and executives talking on the telephone, but nothing on who ran the charity. I asked the woman who relied, “A company”. I said, “Who controls the company?” She said, “I don’t know”. I said, “I don’t give if I don’t know” and passed on.

If charities are to expect the community to continue to support them, it seems to me that they need to realise that the community’s attitude has changed and to adjust their approach. How this might be done, is a good question. All I can say is that it is beyond my expertise.

As we have seen, social circumstances often change quickly and it is necessary to adjust or fall by the wayside.

****

BIBLIOGRAPHY

The leading text books on the Law of Charities are the English books, Tudor on Charities and Picarda on Charities, though Keeton on Charities is also useful. In Australia, the treatment in the key books on trusts, Jacobs and Ford & Lee give a good coverage. For history, see Gareth Jones, History of the Law of Charity, Cambridge University Press, 1969.

****

SPEECH TO THE AUSTRALIAN LAWYERS PHIL-HELLENIC ASSOCIATION

HON JUSTICE PW YOUNG AO

26 FEBRUARY 2009

Introduction

My topic tonight comes from a quotation by the Greek philosopher Pythagoras, "Do not say a little in many words, but a great deal in few". When given such a topic, one cannot help but think that people may desire his speech to be brief.

I am reminded of the story of the newly admitted Trappist monk. As you may know, the Trappists are supposed to maintain silence. After the first year of silence, the new monk was allowed to speak and he requested an extra blanket. At the end of his second year of silence he asked for an-extra candle. At the end of his third year, he asked to leave the order. The Prior said he was not surprised, "You've just made constant demands ever since you came here", he said. Obviously in the Prior's eyes, the monk spoke too much.

Although I was a professional advocate and public speaker, in private, I am a retiring person. I find that one learns a whole lot more by letting other people do the talking. It may be that this was what Pythagoras had in mind, though we shall see, shortly, that there are three possible interpretations of his saying.

I will endeavour tonight to cover four matters, (1) a little bit about Pythagoras, (2) what did Pythagoras mean by the saying quoted, (3) a discussion of the possible interpretations and (4) an examination of the relevance of his words to the modem lawyer?

(1) Pythagoras

We best know Pythagoras for the theorem in geometry that bears his name. Shortly stated, the square on the hypotenuse of a right angled triangle is equal to the squares on the other two sides. There is another version of the theorem. An Indian Chief had

three squaws whom he placed in three tepees, one with an hippopotamus hide carpet, one with a bear hide and one with a buffalo hide. The squaw in the first tepee had twins, the others one child each. So as far as children were concerned, the squaw on the hippopotamus was equal to the squaws on the other two hides.

However, in addition to being a mathematician, he was the founder of a religious movement called Pythagoreanism. This secret religious society was similar to the earlier Orphic cult. The Pythagorean order was governed by strict rules of conduct, for example they were cautioned:

- .To abstain from beans;
- .Not to pick up what has fallen; .
- Not to eat from a whole loaf;
- And not to walk on highways.[1]

Not much else is known about Pythagoras, and the little we do know is derivative, for none of his writings survived. Most of what we have comes from Joannes Stobaeus who lived in the 5th Century AD and who recorded some of Pythagoras' sayings in writing primarily for the benefit of his son, Septimus.

Despite the paucity of surviving material, the twentieth century philosopher and mathematician (Lord) Bertrand Russell proposed in his *History of Western Philosophy* that Pythagoras's influence on Plato and others was so great that he ought. to be considered the most influential of all western philosophers. The works of other philosophers and poets demonstrate that his injunction against the eating of beans was certainly influential: the poet Callimachus wrote "Keep your hands from beans, a painful food;/ As Pythagoras enjoined, I too urge"[2] and Empodocles concurred: "Wretches, utter wretches, keep your hands from beans".[3]

(2) What does the quote mean?

As none of Pythagoras's writings survived, we do not know where the present quotation comes from, and it is impossible to give it much context. The quote in full

reads: "It is better wither to be silent, or to say things of more value than silence. Sooner throw a pearl at hazard then an idle or useless word; and do not say a little in many words, but a great deal in a few".

The quote is commonly interpreted in three ways, and all interpretations find support in Pythagoras's life and teachings.

The first and most obvious interpretation is that it is best to be brief, concise and precise. Pythagoras's followers, the Pythagoreans, observed a rule of silence called *echemythia,* which, if broken was

[1] Bertrand Russell, *A History of Western Philosophy,* Chapter 3.
[2] Callimachus Fragment 553, quoted in Jonathan Barnes, *Early Greek Philiosophy.* Second edition, London: Oxford, 2001, p. 165.
[3] Quoted in Barnes, p. 166.

punishable by death. The rationale for the rule lay in the Pythagoreans' belief that man's words were usually careless and misrepresented him, so that when someone was in doubt as to what he should say, the best policy was to remain silent.

The second common interpretation of the quote is unrelated to notions of brevity, and is also more obscure. The Pythagoreans believed that it was better to learn none of the truth about mathematics, God and the universe at all than to learn a little without learning all.[4] This may have been what Pythagoras was talking about.

The third common interpretation of Pythagoras's quote is that it is better to know a lot about one thing than a little about many things.

One final point should be made about Pythagoras's philosophy on teaching which may provide us with some insight into why the quote carries multiple possible meanings. The Pythagoreans were divided into an inner circle of 'mathematicians', and an outer circle of 'listeners'. The inner circle learned the more detailed version of the knowledge Pythagoras was teaching, while the outer circle only heard the summary headings of Pythagoras's writings, without an exact exposition. Those in the outer circle were not taught the inner secrets, but were instead taught laws of behaviour and morality in the form of brief, cryptic sayings with" hidden meanings. It is possible that this quote is one such saying.

(3) Discussion

There is a lot of wisdom in the first interpretation that it is best to be brief, concise and precise. How often do we hear a speech and at the end of it realize that the speaker's message could be summarized in two sentences.

However, it must be realised that the saying is not universally true. Take Abraham Lincoln's Gettysburg Address, the one which famously commences, "Four score and seven years ago, our fathers brought forth on this continent. A new nation etc.…". It is well remembered for its poetical style. Had it just commenced, "This country has now been in existence for 87 years", it would long ago have been forgotten.

There are a number of situations too where it is necessary that a person be allowed to tell his or her own story at length, complete with repetitions and irrelevancies.

The second interpretation is that it is better to know nothing about a subject than just a little. At first sight this sounds nonsense. However, there is a corresponding English proverb that "A little knowledge is a dangerous thing." There are many examples in life where people have suffered because a person thinks they know how to do something, but their knowledge is so limited that they fail to effect it.

[4] Manly Hall, *The Secret Teachings of All Ages.*

The third interpretation that it is better to know a lot about some discrete matter than a little about a lot of matters is problematical. My experience is that there is a need for both specialists and generalists in all fields. If one has an unexplained pain it is sensible to consult a General Practitioner. If he or she diagnoses a possible heart problem, then it is sensible to consult a specialist cardiologist.

(4) The relevance of each interpretation to the modern legal practitioner

I am now going briefly to examine the relevance of each of the three interpretations of the quotation to the modem legal practitioner. One might be forgiven for saying it is easy to see the relevance that a warning to avoid unnecessary verbiage has to a lawyer.

(i) Interpretation One: Brevity and Clarity

Justice Heydon of the High Court has recently published on "Aspects of Rhetoric in Forensic Advocacy Over the Past 50 Years"[5]. His Honour dedicates a section of this work to an examination of rhetorical techniques which are not useful. The first unhelpful technique he identifies is "artificial, ostentatious, over-elaborate speech"- "the opposite of speaking to the point".[6] While he acknowledges that sometimes this may "work", "its effectiveness is rare":

"It conveys the impression that the advocate who employs it is a mountebank. Its windiness and glibness -its failure to mesh precisely with the issues -cause it to bear on its face a badge of irrationality. To employ it is to confess that it is only employed because the legal and factual circumstances are such as to make it impossible to achieve the desired result by rational advocacy."[7]7

This certainly gives voice to the view that it is better to say a great deal in a few words than a little in many words.

Justice Heydon's point causes one to think of another point in favour of brevity and simplicity in court room advocacy: efficiency. Efficiency is seen as a cornerstone of justice: it is the key rationale for modem case management systems. (So long as it does not come at the cost of quality of justice).

The appreciation of brevity in law is not limited to the art of the legal practitioner: it is also desired of the judge. The 17th Chief Judge in Equity, Hon Malcolm McLelland more than any other judge in the history of the NSW Supreme Court produced judgments which were brief, concise and to the point. However, if you were to ask him, he would tell you that this was only achieved after a good deal of time and effort. It is usually far more time consuming to produce a concise statement than a verbose one.

[5] In Justin Gleeson and Ruth Higgins's *Rediscovering Rhetoric: Law, Language, and the Practice of Persuasion* (2008).
[6] P. 222.
[7] PP. 222-223.

Again there are exceptions. Sometimes a proposition that an advocate has to put is, at first blush, likely to arouse hostile feelings. Thus suppose that one needed to support

the proposition that the expulsion of kanaka labourers from Queensland at the turn of the 20th Century was appropriate. You may find that some portion of the audience would feel that you were racist. However, you would be less likely to get this reaction if you led up to it by focusing on the conditions in Australia after the 1890 depression, the plight of poor Australian workers in Queensland, and the exploitation of the kanakas by capitalists (I am not necessarily saying that any of those statements are historically true).

It is difficult to relate the second interpretation, that it is better to know nothing about a subject than a little, to the law, except when considering unrepresented litigants. Many of these people have found some proposition on the internet which seems to support their case and use it without any understanding of the overall picture. It would be better if such people had never investigated the law at all.

The third interpretation is that it is better to know a lot about one thing than a little about many things. It is easy to see the relevance of this to the modem practitioner: in the age of the big law firm, specialisation is rife. Having completed their initial rotations, some lawyers practice in the one area their entire lives.

There are obvious advantages to specialisation such as this. First, it means that practitioners can develop advanced technical knowledge and a high level of competence in a particular area of law. Indeed, the increasingly technical and complex nature of many areas of law can mandate that those who practice in them limit themselves to the one area. Further, extensive hard practice in the one area means a practitioner is likely to be familiar with, or have a feel for, which arguments are likely to succeed.

However, even in specialised areas of law, knowing only your field may not be sufficient, as areas of law often overlap. For example, knowing routine family law may not be enough because often the problems will interface with property law and constitutional law. Unless one has a good overview, problems will occur. It would seem then that the Pythagoreans' belief that it is better to know everything about one thing than a little about many things may not hold true for lawyers -at least, not

absolutely. Modem legal practitioners need core skills and a base general knowledge, as well as any specialised knowledge which may be required by their particular job.

This third interpretation can be applied particularly to the Bar. Barristers in the course of their practices learn a lot about many fields of endeavour. To illustrate, when briefed in an enquiry about new FM broadcast licences, I learnt how the professionals construct a program of rock music for radio broadcast. Apart from entertaining others at social functions, this is useless knowledge except, of course, for radio broadcasters.

When farewelling Justice James Wood, Ian Harrison, then President of the Bar quoted these words of Wood J uttered extra judicially,

> "Experts are people who know much about a little and continue to learn more about less until they know everything about nothing. Barristers know a little about a lot, learning less about more until they know nothing about almost everything. Judges begin knowing everything, but end up knowing nothing. This is caused by barristers and experts."

I will leave that thought with you.

Conclusion

Do not say little in many words, but a great deal in few.

I wonder whether I have fulfilled the prophecy of saying little in many words. I will leave that to you to judge.

****

HUMAN RIGHTS

[The following is a speech made by Hon Justice Peter Young AO to the Synod of the Anglican Diocese of Sydney on Tuesday 21 October, 2008. The Report of the Standing Committee of the Diocese referred to in the first paragraph, if not on the Sydney Diocese web page, may be obtained from the diocesan office].

You will find the Report on which this motion is focussed on pp 34 and following of the supplemental papers you received in the mailout made in late September.

The subject of whether human rights should be entrenched in special legislation, sometimes referred to as a Bill of Rights or a Human Rights Charter crops up periodically. "Entrench" is a word which denotes a law which cannot just be changed by parliament whenever it feels like it. Ordinarily, parliament can make or unmake laws whenever it considers it appropriate. However, if a law is entrenched, it may only be altered by a special procedure such as a referendum or by an increased majority in the parliament.

Recently, senior ministers in the Federal government have made it clear that they intend to reactivate the matter of a possible Charter of Rights at least by holding public consultations about it. Further, our traditional opponents, have again been stirred into making another attempt to remove the protection from the operation of so called 'anti discrimination' laws from religious bodies. Their aim is to force churches to hire persons whose life style or lack of faith would make them in our eyes unsuitable as role models for the pupils in our schools or as representatives of our church members.

The Standing Committee considered that these circumstances meant that a sub-committee of clergy, social issues people and lawyers should compile a report to be presented to the synod. This has been done and the report is in your hands.

The purpose of compiling this report was not to convince members of the synod that they should favour proposals to entrench human rights or that they should oppose that course. Rather the aim was, first to provide material providing background material to enable a proper debate to be held and to focus on the issues that arise. Some of these issues are obvious: some, less so.

The motion standing in the names of myself and Mr Tong is a fairly mild one. It does not set out any definitive direction in which we should be moving: it merely asks various organs of the church to keep working on the matter. The importance of the debate on this motion will be to give members of synod information which they can use to inform others, both in their parishes and in the wider community and for the Standing Committee to listen to the opinions and points of view on the issues which synod members will raise during the debate.

Thus, although this speech will probably carry overtones of my personal feelings on the issue, its prime purpose is to treat the synod as a sort of jury and put up the factors for and against an entrenched Charter of Rights.

First of all can I say that we all fell pangs of sympathy for minority groups, particularly in Africa who are oppressed by their majority rule government. However, the irony is that many of these places in fact have entrenched human rights clauses in their constitution. Point 1 in the debate is that what appears in a country's constitution is not necessarily going to mean anything unless there is a legal system and proper access to that legal system to ensure that the constitutional rules are actually observed.

Secondly, we must realise that our conception of human rights is of comparatively recent origin. I think it was Albert Schweitzer, the German theologian and missionary who, in the 1930s coined the phrase 'reverence for life' as a basic human right. Apart from the position in the USA, which I will come to in due course, it would seem that human rights clauses were written into the constitutions of newly independent former colonies of Britain by the British government as a cheap way of endeavouring to ensure that there would be less friction in the new self governing

nations. It was political expediency, rather than any care for the people that sparked off this attitude.

However, it is true that just after the American revolution, the US government adopted a Bill of Rights, principally drafted by Thomas Jefferson and this was entrenched in the US Constitution known as Amendments 1 to 10. This seemed to ensure that there should be freedom of speech, freedom of the right to exercise religious beliefs. Much of this was sparked because of the severe limitations that had been placed on both dissenting Protestants and Catholics by the English government. It was also inspired by the spirit of the French revolution, the Americans siding with the French against their then enemy the British.

The Bill of Rights makes heartwarming reading. However, two things must be said about it. First, despite the wide wording, the rights were only in practice given to the ruling classes. Slavery and exploitation of the poor continued unabated. Secondly, the rights were illusory.

To illustrate this latter point. Suppose the Charter entrenches the right to freedom of speech. If every citizen has that right, what happens when John Smith and Mary Jones both want to exercise their right at the same time and same place? Who wins? Whose freedom is downgraded? Does the freedom mean that the government (ie the rest of the community) have to provide John and Mary with microphones or access to the print media? If John and Mary have a right to freedom of speech, have other people got an obligation to listen to what they want to say?

What if John wants to say that all religion is bunk with a loudspeaker outside a church and Mary wants to worship reverently inside the church. John has freedom of speech, Mary has the right of freedom of religion. How can they both exercise their rights? One way of doing that is to ban John from speaking within 500 metres of a place of religion. Another is to close all the churches. Thus, one at least occasionally gets the irony of rights and freedoms actually limiting freedom.

This is not just an academic point. The USA gives freedom of religious beliefs. However, saying prayers in schools is illegal because it infringes on the religious

beliefs of people who are not Christians. So we have the paradox of a guarantee of religious freedom in the constitution which works to deny expression of religion.

Again, in America, I have the right to life. However, the odd bod next door has the freedom to have a gun and may well shoot me. My constitutional guarantee is not worth much.

We see this problem in Victoria right now. The majority of the civil rights groups appear to be backing the proposed legislation to allow abortion on demand. A Catholic doctor or nurse may have religious and conscientious objections against abortion. However, the alleged right of a woman to have control over her body appears to be prevailing backed by the very people who are thereby affecting freedom of religion.

As we know anti discrimination laws also affect freedom of religion. If I truly believe that Christ is the only way of salvation and so say that religion X is evil, in Victoria the practitioners of religion X or perhaps some busy body so called civil libertarian will prosecute me for discrimination. Again my church may be forced to employ a teacher who goes out of her way to tell students of her personal view that the Bible is bunk.

The second point to be made about a Bill of Rights is that the academics who have studied the legal nature of rights say that it is nonsensical to speak of rights without realising that if A has a right which involves B, B has a correlative obligation to allow A to exercise that right. One cannot have rights just hanging in the air. Lawyers will remember from law school days the work of the distinguished jurist Wesley Hohfeld who wrote extensively on this subject. You will be pleased to know that I have not the time to expound his theories here.

Thus every time A has a right in respect of B's property, B's rights are curtailed. Thus if A has a right to walk across B's land, B's rights to develop his land are limited because of A's rights.

Until he retired in 2004, Frank Iacobucci was a judge of the Supreme Court of Canada, the Canadian equivalent of our High Court. He wrote an article in the British Columbia Law Review on why it is not meaningful to have a system of entrenched civil rights unless one has a community which has mutual respect for each other's rights. There must be a society in which each member respects each other's rights. Thus it is idle to pass a law which says that police cannot invade a thief's privacy by bugging his phone unless the thief himself is prepared to acknowledge the rights of property of others.

However, that would mean a perfect society. Indeed, if everyone accepted Christ, if everyone loved their neighbour, indeed, if every non-Christian had respect for each other person's feelings, we would not need any Bill of Rights. If we don't have that society, at least, in theory a Bill of Rights cannot work.

So far I have probably been heard to be a bit negative about civil rights. There is a positive side. First, experience shows that, unless properly restrained, people in authority will gradually encroach more and more on ordinary people's ability to live the life that they choose to live. Now, to some extent this is inevitable. Before the last War, people could use their land as they liked. The effect of this was to cause vast erosion and groundwater problems and unsightly structures being erected in inappropriate places. The answer was to pass environmental laws and to empower local councils and others to issue consents to development and building. This effected a loss of freedom, but was necessary when the population increased and resources were limited.

However, we can see activities which the authorities think are necessary to assist them governing and controlling lawbreakers, but which impinge on freedom. Some, everyone would think are reasonable such as some screening for weapons at airports and public buildings, but some are not obvious such as police bugging telephones.

Again, the point must be made that Charters of Rights tend to protect people by mandating procedural protections rather than by looking objectively at the end result. Thus a person who has bashed his wife half to death may escape punishment

because the police, when arresting him, forgot to caution him. The procedural right of the accused is protected. The substantive right of the wife to live her life without being bashed will carry no consequences except those that currently exist.

It is interesting to note that the proponents for a Charter of Rights contain a fair proportion of those people who have lived under totalitarian regimes for part of their lives. Some of these regimes have in fact Charters of Rights which they do not enforce. However, these folk see that, where there is a proper legal system as in Australia, the abuses they suffered or saw other suffering overseas, would be prevented if there was a Charter of Rights.

The main philosophical argument for a Charter of Rights is that the social make up of most countries, including Australia over the past few decades has led to communities being made up of a significant number of minority groups. The political process usually only favours the majority. Appeals to the voters at election time are usually (though not always) directed to the majority. Unless there is something in place with which the majority for the time being cannot interfere, the only assurance that minority can have is that the court system will protect their entrenched rights.

Another argument that is often put is that entrenched Charter of Rights have now been adopted in most Western democratic nations and, although there have been some problems at the interface as happens with most new laws, the fact that the legislation is working overseas shows that the fears of those who oppose are misplaced. This is of some validity. However, the real message is that it is not so much the provision of entrenched laws that gives protection, but rather the availability to minority groups of efficient remedies to protect them from the caprice of the majority and an independent reliable court system ti enforce those rights.

That is the philosophical side of the debate. There is a more practical side, as to what rights should be protected. The American list in essence is to say that that constitution protects, free exercise of religion, freedom of speech, freedom of the press, right of assembly, right to petition the government, right to bear arms, right to refuse to have soldiers billeted on a citizen in times of peace, rights against search warrants, right to refuse self incrimination, right to trial by jury, protection against

excessive bail or fines or cruel and unusual punishment. There were later added protection against slavery, the right to due process and the right to vote.

A more recent list by a government committee listed, the right to a jury trial in serious cases, the presumption of innocence, the right not to incriminate oneself, protection against cruel and inhuman punishment, the right to a speedy trial, freedom of assembly, freedom of religion, the right to liberty, the right to citizenship, freedom of information and the right to property. This list is obviously too focussed on right sin criminal law. However the example is given to show that not everybody thinks of basic human rights in the same way.

On page 38 of the report you will see in footnote 3, the list of rights protected in Victoria.

The report notes in paragraph 18 on page 36 that God is a God of mercy and justice, when He sees human rights are overridden, when someone is cheated of justice, God notices. As people of God, we too must always be mindful of society's and our obligations to the poor, the weak, the fatherless. However, the question is whether these cares should be entrenched in specific constitution type law.

A summary of the arguments appears on page 39 of the report. Paragraphs 47-49. Please read those. Also read paragraph 50 carefully which is the way in which the enactment of a Charter of Rights may affect us individually as Christians or corporately as a church.

On thing is sure. If a Charter of Rights is enacted, there will be a great increase in litigation. This will be so even in matters concerning the church. In Canada, virtually every diocese has had to employ a Deputy Chancellor—Industrial matters, as rectors are regularly sued by organists, Sunday school teachers and the like for alleged failure to accord them their due rights. As a lawyer I would have liked the extra income. As a judge, I have a different view. Some opponents of Charters of Rights say that it gives unelected judges too much power to make rules for the community. There is that possibility, but, as a judge, I much prefer to have the law in such a state as I can apply it without fear or favour affection or ill will, rather than have to judge a

case on ephemeral rules such as whether the defendant's constitutional right to privacy has been violated because some newspaper photographed her wearing old clothes.

I look forward to listening to the debate.

****

Print Page Close Window

A Judge looks at the evidence for the Resurrection

St Barnabas Church (Broadway) at the NSW Leagues Club
Tuesday 11 April, 2006

A Judge looks at the evidence for the Resurrection

Hon Mr Justice Peter W Young AO

There are different ways of looking at a fact situation. Judges and lawyers who are trying to convince judges are experienced in finding facts. That is, even where the judge suspects that all the witnesses are lying about at least one aspect of the case and some of the documents are forgeries, he or she is still required to decide what is more likely to be the truth.

To do this, we use various techniques. I will share some of them with you tonight. It is not necessary to delve into all of them. That would deflect us from our real purpose and also it would be an hour's talk in itself.

Judges are limited by the rules of evidence. These rules were devised in a time when juries found facts rather than judges, but they were moulded by those with experience as to what types of material was likely to be more likely to prejudice the mind of the jury rather than help them get at the truth.

Let us see how a lawyer and his wife, a non-lawyer, approach a topic. The wife asks her lawyer husband whom she knew had called at Fred Johnson's house, whether he'd seen Fred's new baby. The lawyer replied, quite accurately, "I called at Johnson's house, and saw a woman who may or may not have been Mrs Johnson and she was holding a baby who may or may not have been Fred Johnson's."

All this is perfectly and technically correct. One would need DNA tests on the baby and Fred Johnson to get even 95% certainty as to the baby's parents. However, if there was no more material that (a) Fred told me he had a new baby (note whilst the truth of what Fred said would not be admissible as hearsay, the fact that he said is admissible), (b) Fred occupied 21 Lilac St Bronte, (c) a woman with a wedding ring was living at 21 Lilac St, (d) the woman was holding a baby, it would be sufficient for most courts to hold that on the balance of probabilities, the baby was Fred's baby.

We will approach the resurrection of Jesus in the same way. Just as we cannot be absolutely certain of anything, or at least, almost anything, so we would not normally let little doubts or remote possibilities cloud our view of what probably happened, so we must assess the evidence for the resurrection in the same way.

When judging one must put aside pre conceived ideas. One must also realize that, every so often, what appears incredible actually occurred. Of course, the fact that something is at first blush incredible means that it starts behind scratch, but one must not exclude it as a possibility.

The most notorious example of this is given in Eggleston's Book on Probability and the Law. A person looked out his window on a dark night in Boston and saw a tall Afro American walking down the hill past his front fence. The man's head fell off and tumbled over the fence. The man went inside the gate, picked up his head, put it back on his shoulders and resumed his journey.

The police investigated and found the story quite true. An Afro-American medical student had taken a head home for the night to study. He had it on his shoulder with his coat buttoned up to the neck. The head slipped off his shoulder, he picked it up and went on his way.

Now, our life experience says that a person does not rise from the dead. Our life experience says that we do not see God in flesh. However, when we think about it, our life experience is flavoured by the opinions of others and by what we experience in our culture in our age. When we come to the question of the resurrection of Jesus Christ we must not dismiss the possibility of a man, who claimed to be God, rising from the dead, without giving proper weight to the available evidence.

A judge when assessing evidence looks at a number of things. First what appears to be irrefutable factual evidence, ie the sun rose at 6:12am this morning. Then the judge looks to the eye witnesses, he or she assesses their credibility, then relevant documents are considered, then the background material is assessed.

To show what I mean by this last, suppose, a woman is claiming on her husband's life assurance. The insurance company says that the husband isn't dead, but is hiding somewhere. The fact that the widow never wore black, has been seen carousing in hotels and has recently bought airline tickets to London for herself and the couple's son, would lead a judge to say to himself or herself, "Is that the behaviour of a widow who appears to have had a happy marriage?

Is it not more like the conduct of a woman who knows that her husband is alive and well?

So when we are examining the evidence for the resurrection, we need to look to the behaviour of the apostles as well as what they said in the gospels.

What is the evidence for the resurrection?

I always start with St Paul's letter to the Corinthians.

You may remember that St Paul was first a fervent anti Christian who obtained special permission from the Jewish authorities to stamp out Christianity in Damascus. He says "Christ died for our sins according to the scriptures, he was buried and he was raised on the third day and appeared to Cephas and then to the twelve, then he appeared to more than five hundred brothers and sisters at one time, most of whom are still alive, though some have died. Then he appeared to James and then to all the apostles. Last of all, he appeared to me."

Now this was a stupid thing to write if people could just go out and ask for verification and not get it. Even though the letter was written to people in the Greek city of Corinth, there was sufficient chance of people checking up on this statement to make it stupid to say it if it were not true.

Now let us turn to the Gospels themselves.

In the New Testament we find two detailed testimonies describing the death and resurrection of Jesus written by eyewitnesses – Matthew and John (both disciples of Jesus and intimately acquainted with the events in question). A third account of the event is made by Mark, who worked alongside Peter and records Peter's eyewitness version. Luke, a Greek doctor, opens his letter by stating that since he has carefully investigated everything from the beginning, he has chosen to write an orderly account of all that has been fulfilled. Further eyewitnesses confirm Paul's claim that Jesus died and rose, in the letters in the latter part of the New Testament.

Each of these four witnesses agrees in substance concerning the death and resurrection of Jesus, but, like you would expect with genuine witnesses, differ to a small degree in detail. This adds credibility to their story. Witnesses who testify with identical details will raise suspicions as to collusion.

Because of time constraints, I will assume everybody has at least a rough idea of the story of the crucifixion in the Bible. If you don't, even if you are not yet a Christian, read it when you get home. I think we have some gospel portions for you if you prefer not to have to get out the Bible wherever it now is.

I should interpolate here that for the purposes of tonight, it does not matter whether or not you accept the Bible as the Word of God. Assuming you do not do so, you cannot really challenge the evidence that not only do we have extant manuscripts from the third century, but also we have records of statements of bishops in the second century, such as Papias and Iranaeus, who affirmed the existence of the Gospels and their writers.

The four accounts of Jesus by Matthew, Mark, Luke and John are consistent with the general events of the resurrection and can be tested against independent sources. Luke's account enables historians to conclude that Jesus died under the jurisdiction of Pontius Pilate, Procurator of Judea from 26 to 36 AD or during the last ten years of the reign of the Emperor Tiberius.

The evidence is increased in value by the inclusion of bits and pieces which do not portray the writers of the gospels and their friends in a favourable light.

So let us take up Mark's Gospel at ch 14:26, "When they had sung the hymn, they went out to the Mount of Olives. And Jesus said to them, "You will all become deserters: for it is written, "I will strike the shepherd and the sheep shall be scattered" But after I am raised up, I will go before you to Galilee. Peter said to him (and remember it was Peter who gave Mark the information to write the gospel) "Even though all become deserters. I will not." Jesus said to him, "Truly I tell you, this day, this very day, you will deny me three times."

The passage proceeds to show how the disciples just fell asleep at the climax of the first Holy Thursday, that when Jesus was arrested they fled, though Peter and John crept back. John, who had the right connections got inside, Peter stayed outside, and was challenged by various people as being one of Jesus' followers, denied it three times and then the cock crowed.

This contrast with other tales of the founding committee of an organisation where the founding fathers are portrayed as people of impeccable nerve and verve. The gospels present the apostles before the crucifixion as a scared bunch who were not able to stand up to the stress of the arrest of Jesus.

We must contrast this with the behaviour of the same people after the resurrection.

Peter takes the lead. The first cricketing joke comes from his summary of what had happened to the other apostles, "Peter stood before the eleven and was bold!". Peter was not only bold before the other apostles, he was bold before

the community which was quite opposed to the Christian sect.

Acts chapter 3 tells us of the story of Peter and John going up to pray at the Temple and Peter cured a man who could not walk and that in full public view. When challenged he said publicly, “You Israelites, why do you wonder at this, or why do you stare at us, the God of Abraham has glorified his servant Jesus. You killed the author of life whom God raised from the dead.”

The consequence was, of course, that Peter & John were arrested. When they appeared in court, they told the same story.

These people who had only recently been fearful of the authorities are now bold. The difference was the resurrection. If they had not seen the evidence, they would not have been able to speak like this. Only the most clever conman can risk his life for a lie. And the apostles were not in this league.

On the same line, if you read the Easter stories in the Gospels critically and carefully, you will clearly see that on that first Easter Day, the disciples had no real expectation that there would be a resurrection. The women were the first to see evidence of the resurrection because they found no body, but the stone rolled away and an angel or two in the tomb. They told some of the disciples, but, in those days, no one accepted a woman as a credible witness.

Indeed, the Anglican Priest and leading Religious Book Writer, John Dickson, points out that it would be an odd thing that a person making up a story would involve women as witnesses. This is again a small pointer to the veracity of the story.

Peter and John looked in the tomb for themselves, and John believed. However, it took at least a week for all the remaining apostles to accept that Christ had risen. We thus do not have a scenario of people believing what they want to believe.

It must also be recognized that the story of the resurrection belonged to the very earliest stage of Christianity. It was a bedrock of the first thrust of the Jesus movement, not just something added later.

Many lawyers have spoken on occasions like this in an endeavour to convince people that it is quite reasonable to believe in the resurrection because the fact of the resurrection can be established to the satisfaction of our standard of legal proof. Other scholars have done the same. I will mention some, which you might like to read over the Easter season.

There is Frank Morrison’s “Who moved the Stone:” first published in 1930 and I think still in print. Morrison started to write a book sceptical about miracles, but ended up supporting the fact of the resurrection.

Josh McDowell.s “Evidence that demands a Verdict” ,first published in 1972, devotes two chapters to the resurrection. In the first of these, the author says that there is no other option but to accept the resurrection as fact or that the myth of its propagation was one of the most vicious, heartless hoaxes ever foisted upon the minds of men.

McDowell gives extracts from the scriptures, the early Christ Apologists, the philosophers, leading lawyers and others to show a strong case for the resurrection as fact.

Ross Clifford, a Sydney Lawyer now head of the Baptist Theological College produced a book Leading Lawyers Look at the Resurrection” in1991. it’s now out of print, but there is a copy in the Law Court’s Library and many other libraries.

The book contains essays by leading lawyers supporting the evidence for the resurrection including in Appendix 2, an extract from the tract authored by Mr Clarrie Briese, the former Chief Stipendiary Magistrate affirming the fact of the resurrection.

Let us now look briefly at the eye witness evidence of the resurrection and the circumstantial evidence.

Each of the four accounts of Jesus’ resurrection would hold up under skilful cross-examination because they are detailed, coherent and consistent with the resurrection. They provide a solid body of circumstantial evidence - that is a combination of circumstances, that when taken together points to a strong conclusion.

1. Jesus was dead – Roman method (crucifixion and spear producing water and blood separated)
2. The tomb - rich man’s tomb
3. The burial -
4. The stone
5. The seal (hard to break, death to anyone who dared)
6. The guard
7. The disciples (transformation – Pentecost)
8. The Post-resurrection appearances (many – claimed at Pentecost in the city where death occurred)

Now there would be many who might have been able to contradict some of those public events. But no-one ever came

forward to do so despite the fact that the Temple authorities must have been trying to find such people.

Likewise, centuries have now passed and some of the best minds have applied themselves to disputing the fact of the resurrection, knowing, as St Paul admits, that if there was no resurrection, the Christian faith is a fiction.

What happens when we look at the opposing side's witnesses? We do not find any accounts of Jesus' death and burial. The only claim we hear that was circulated at that time is recorded in Matthew. Matthew tells us that the Chief Priest and Jewish elders bribed the soldiers who had guarded the tomb to spread the word that the disciples had stolen the body while the guards slept. This is the first claim, that the disciples stole the body.

The second is that the disciples made it all up in order to get power and influence for themselves.

The third is that Jesus was not really dead, he was only stunned and later revived.

The fourth is that an imposter posed as the risen Jesus.

I have not heard any other objections seriously put, if there are any more, we will deal with them in question time..

Let us consider these objections one by one.

1st claim: that the disciples stole the body

Matthew provides the first reference to the claim – This claim must have been circulating, otherwise the gospel writer would not invent a counter-claim, which sow seeds of doubt, and put it into his work. He wants to refute a widely circulating slander against Christians.

The theory is principally countered by the post resurrection behaviour of the disciples which I have already examined. The disciples, deserted Jesus and did little to prevent the capture of Jesus in the Garden of Gethsemene, There was no expectation that a Jewish martyr would rise from the dead. Traditional Jewish teaching, both before and after Jesus, stated that at the end of history the faithful dead would rise to eternal life in a divinely restored creation.

Furthermore, it would have been a very difficult job to steal the body. The disciples would have had to bribe the guards, difficult as often a guard who failed in his duty was executed, and then would have had to roll away a very heavy stone sealing the opening. They then would have had to dispose of the body without anyone seeing them.

John Dickson, points out that it is odd that it is Matthew's gospel that actually voices this objection. He notes, however, that it has now been abandoned by virtually everybody scholarly, save a few modern sensationalist writers.

2nd claim: the disciples made it up

There is no suggestion in the gospel record of any failure of the disciples to tell the truth and the whole truth. Their credibility was never attacked even by their enemies.

The life they led after the resurrection, ending in martyrdom for the majority tells against any such fraud.

3rd claim: that Jesus only collapsed

Method of Roman execution was cruel and effective. There were professional executioners there who ensured that Jesus was dead. Again, how did he escape from the sealed tomb past the guards, especially in a very weakened state?

4th claim: that an imposter posed as the risen Jesus.

This is again countered by the fact that the disciples lives were changed.

Further, Jesus had had a very public ministry. He had been seen by hundreds. His appearances after the resurrection again were sometimes public events. It is quite implausible that an imposter could have carried out an impersonation.

Recent claims: it is all in the mind

More recently, some Christian scholars have argued that the resurrection was a mere vision. Peter Carnley in his "Reflections in Glass' says that just as in the passage from 1 Corinthians I quoted earlier, Paul's experience of the resurrection must have been a vision, so were all the others to which he referred to in that chapter.

However, just because I have a dream about a car accident, does not mean that those who thought they actually saw the accident were also dreaming. Furthermore, if the 500 did not really see Christ, but had some sort of simultaneous

vision, one would have thought that some would have acknowledged this, but no-one did.

There has not been the time tonight to go deeply into the texts describing Holy Week, the Crucifixion and the resurrection. I understand that a gospel portion containing an eye witness account is available for you to read and take home tonight. It was written by John, a disciple of Jesus. The most relevant chapter for tonight's topic is John 20.

So, the exercise tonight has been to determine a question of fact whether the fact of the resurrection was proved on the balance of probabilities.

When determining a question of fact – that is, whether something happened at a particular time and place –a judge must bring to the hearing an impartial and unprejudiced mind. That is, a mind that bears no preconceived ideas about what probably happened, a mind that bears no prejudices toward the witnesses who will be testifying or other characters involved in the case. A judge must confine his or her thoughts to the event in question.

My analysis is that the resurrection passes the test.

It is important that this be said and accepted.

However, establishing the fact of the resurrection is not the last step in the process. Christ's resurrection ensures our regeneration, it insures our justification before God and it ensures that we also will receive perfect resurrection bodies. Death will be for those who follow Christ merely the doorway from one aspect of life to the next.

This acceptance of Christ is not just a process of examining the evidence and accepting something as a fact of history, but in committing one's whole being to Christ.

Now that is the most important statement I've made all night, but my time is up.

****

Sermon at the Opening of the Law Term Service

Sermon at the Opening of the Law Term Service

St Johns Anglican Cathedral, Parramatta

30th January 2006

Hon. Justice Peter Young

When I was in Year 4 at school, one of the things I dreaded was having to write an essay on a subject of my own choice. I could, and still can, write something on most subjects without difficulty. However choosing what to write about would cost me hours of preparation time.

Bishop Ivan, when inviting me to speak this morning, told me that I could choose the subject. The old dread returned.

Today is January 30. In the 1662 Anglican Prayer Book today is the feast day of the Blessed St Charles, who died to preserve the Anglican Church. Some of you might know him best as King Charles I who was beheaded on this day in 1649. (The 1662 Prayer Book was, of course, issued by the authority of Charles' son, Charles II.) However, this is an ecumenical service and not even most Anglican's today could honestly say that Charles I died for his belief in the Anglican Church let alone the Catholics and Protestants present.

Then I could give a few time-honoured clichés about what wonderful people lawyers are. This would go over well, but would be of little value.

Then I thought that Bishop Ivan would expect me to say something about the gospel.

Then I realised that, without fudging, I could give a gospel message, speak about wonderful lawyers and, perhaps, throw in a little bit about King Charles as well.

To start off, a bit of Caroline trivia. Did you know that the Bradshaw who wrote the book you all have in your libraries and read daily, *Bradshaw on Charitable Trusts*, was written by a direct descendant of the presiding judge at Charles 1st's trial?

I take as my text for part of our second lesson this morning, the letter to Titus, chapter three, verse 13, which, so far as is material for this morning, reads, "Do everything you can to help Zenas the lawyer". (It is one of my favourite verses of scripture, though one seldom preached on by the professional clergy.)

We know virtually nothing about Zenas. However, he is the only lawyer commended in Scripture. It is probably correct to say that he is the only lawyer mentioned in Scripture. There are references to bad lawyers and scribes, but, if one looks closely, these people were actually clergy!

We can glean from the verse that Zenas must have been well known to the leaders of the church and was about to go on a mission with Apollos. However, that's about as far as we can go. The commentators reckon he was a Greek convert (Zenas is short for Zenodoras (gift of Zeus) and he and Apollos were about to pass through Crete where Titus was stationed to some missionary destination.

It is comforting that right from the beginning of the church, lawyers are there in leadership roles, being involved in the church's mission not just in administration. This is a role that lawyers have adopted throughout the ages and still is the case today. Lawyers should be, and I'm pleased to say, often are, the mainstay of churches of almost all descriptions.

I look at the lawyers of my generation. People like the chap who is now a Federal Court Judge, who was a church warden at Manly and in addition to his normal church activities spent many a Sunday night rounding up errant kids from the east and West of Sydney and seeing they got home. I am sure that many lawyers of Generation X or Y or what have you are doing similar things today.

Lawyers have the skills to play a vital part in the life of any congregation. They have people skills, verbal skills and knowledge of the world, and can put those skills to the Lord's service.

Now I realise that I am speaking to a group of people who would fall into one of three basis categories. I would term theses categories, Potential Christians, Plateaued Christians and Active Christians.

First, there are the Potential Christians. I don't like the terms 'pagan' or heathens' or even 'unbelievers' used by some

clergy for this group. The Lord in his mercy will call into His kingdom many who today actively reject the gospel. David McCall, the Anglican Bishop of Bunbury, told me that when he was a young clergyman and visited a particular hospital ward, a man in bed would yell at him,
"Keep away from me, Holy Man, I want none of your nonsense". Within a month, David had led him to Christ. Message to those in this category – if the Lord wants you, He'll get you.

The Plateaued Christian is the person who has found Christ as their Lord and Saviour and may even attend church regularly. They feel that with their own salvation secured and attending a church service in which the leaders do the work and leave the congregation with a happy and righteous feeling, they are living the Christian life to the full. That's where they stop.

The great missionary, CT Studd, parodied this group in a bit of doggerel
"Some want to live within the sound
Of church and chapel bell:
I want to run a rescue shop
Within a yard of hell."

The third group, the Active Christian, realises that, although he or she has been saved from eternal death by the once and for all sacrifice of Jesus Christ upon the Cross, God wants His people to fulfil the petitions of the Lord's prayer.

We prayed it this morning, "Your Kingdom come, Your will be done on Earth as it is in Heaven". Don't think of the Kingdom as a place, but rather as a state of affairs in which God rules. In the Lord's Prayer we are asking for God's will to be done so that it would be seen that God rules on Earth.

Thus, we who are Christians should ask ourselves before we do anything, "Is this what God wants me to do?" However, this is too negative. The proper question should be 'what would God's preferred world be like?'

Most answer this question, 'the world would be a place where there was justice for all, no distinction between rich and poor, there would be peace throughout the world.'

So the Active Christian holds the worldview that achieving justice and peace is a priority.

Thus, in verse 8, the writer of the letter says, "those who have believed in God should be careful to maintain good works."

However, verse 9 says, "avoid disputes, genealogies, contentions and strivings about the law, for they are unprofitable and useless."

The reason why lawyers are often so unpopular in the church is that the thinking lawyer's worldview does not necessarily coincide with those of the majority of the congregation. The majority of our congregations unfortunately prefer to leave things the way they are. This often leads to a discussion in which the lawyer who disputes the view that the church should just continue to do what it has always done is put on the outer.

The accusation often made is that the lawyer is stirring up dissention, and is undermining the peace of the congregation or the pastor's ministry.

Of course, verse 9 has nothing to say about discussions in the church of this nature. It addresses the old problem in the early church as to how freedom in Christ is compatible with the law of Moses or with the then popular Gnostic views.

However, sometimes it is used against the minority view. Sometimes it gets worse. I have been told that my views have been inspired by the devil and this is in a debate as to whether the church next door should take our church over and close it down!

However, whilst there are occasions when discretion is the better part of valour, there are also occasions when it is a Christian's duty to put forward strongly unpopular views.

Again this depends on the type of church one is in. In some Catholic Churches and in some independent evangelical churches, the view of the priest or senior pastor is going to prevail, so that indirect action rather than direct action may be required to produce justice and truth.

I have been working backwards through the passage that we had as our second reading. The most important part is actually at the beginning.

The writer of the letter puts the essential gospel as well as it is put anywhere else. We can see that in verses 4-6. It was not by works of righteousness that we are saved but by the mercy of God through Jesus Christ.

Now having got to the beginning, let's briefly go back to verse 13 via verse 8. Why? To use Charles I's last word so that you might "Remember".

The early verses assure us that our salvation is the gift of God and does not depend on good works. However verse 8 reminds us of what God expects of people who have the skills to bring about God's rule, and that is what God would have done.

"Give Zenas everything he needs." Why? We don't know what mission Zenas and Apollos were undertaking. We should, however, realise our own mission.

We lawyers are in a good position to do good. Of course, we all have our duty to the court and to clients. However, within that we can as lawyers bring about God's rule by the way we tackle each opportunity to help that comes across our paths.

There is a trap here which lawyers need to watch and that is that it is very easy to feel so sympathetic to those we are helping that, instead of assisting the criminal to lead a better life and the adulterer to reform, the lawyer's own standards fall. "Well," they think, "Most of all my family law clients are constantly committing adultery. In this 21st century, they set the standard." Similar thoughts arise with minor crime. This is a trap for lawyers and must be resisted by continuing to associate with committed Christians who maintain the high standards set out in the Bible.

The church was told to give all assistance to Zenas the lawyer. We are members of a society where many lawyers have been endowed with ample funds. We must use what God has given to us both of skills and funds to bring about the coming of the kingdom. May the Lord give us the strength to do so.