

THE JURISPRUDENCE OF THE COURT OF APPEAL: COLOUR AND MOVEMENT

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- 1 In his 1953 novel *The Go-Between*, LP Hartley coined the oft-repeated phrase: “*The past is a foreign country: they do things differently there*”.¹ If that is the case, why do we – or should we – take an interest in the history of the law and what can a study of legal history offer contemporary practitioners? The answer that immediately jumps to mind is a simple one. In a common law system based on precedent, previous decisions are of critical importance. But what of the broader history that surrounds those decisions?
- 2 Legal history matters for the same reason that the history of anything matters. It is always better to understand not only how things are, but how they got to be that way.² There are, however, more specific reasons that legal history is significant. First, legal history can teach us about the historical contingency of law, that is, the extent to which law is shaped by its historical context. Law is “*formed by, and exists within, human societies, and its forms and principles, and changes to them, are rationally connected to those particular societies*”.³
- 3 While the fact that law does not exist in a vacuum may seem self-evident, until the 1970s legal history largely excluded contextual analysis in favour of a

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¹ L P Hartley, *The Go-Between* (Hamish Hamilton, 1953).

² Jim Phillips, ‘Why Legal History Matters’ (2010) 41 *Victoria University of Wellington Law Review* 293, 294.

³ *Ibid* 295.

focus on “*courts, judges and legal doctrine*”.⁴ An understanding that the law is closely tied to the values, beliefs and circumstances of its social and political context gives insight into, not only legal principle, but also the types of cases that arise and the reasons why they arise.

- 4 Related to this is the idea that when we read decisions with an understanding of their context, we gain a much deeper and more comprehensive understanding of the decisions themselves and legal precedent. This, in turn, should serve to make us better lawyers. We can avoid anachronistic interpretations and arguments which divorce a decision from its historical setting in a manner that misapprehends or misconstrues its reasoning.
- 5 Another reason why it is important to have a knowledge and understanding of earlier case law is that, in an era of increasing specialisation, it is sometimes too easy to focus on one’s speciality without understanding the extent to other areas of law may interact with it. As I will explain in the discussion that follows, delving into the decisions of the Court of Appeal provides a rich source of the breadth and extent of the law, an appreciation of which is essential to good lawyering.
- 6 Whilst the areas of tort, contract and equity, as well as cases of judicial review, have been and remain a constant feature of the Court’s jurisprudence over its 50 year history, the jurisprudence of the Court is both reactive, and often integral to, not only to the social and political issues of the day, but also medical, technological, industrial and indeed international legal trends. Likewise, the Court’s jurisprudence is impacted by innovative and remedial legislative regimes.
- 7 Contract law cases involving ships and sailors⁵ have given way to cases involving the carriage of livestock by air and the application of international

⁴ Ibid 296.

⁵ See, eg, *J Gasden Pty Ltd v Australian Coastal Shipping Commission* [1977] 1 NSWLR 575.

conventions.⁶ The Court now deals with cases involving data integration software,⁷ defamation over the internet,⁸ and the leasing of electricity poles.⁹ In the years to come, the legal issues before the Court will continue to evolve, requiring consideration of the complex range of legal questions surrounding drones and driverless motor vehicles and the legal implications arising from the use of blockchain and bitcoin technology.

- 8 Against that background, let me begin with a brief overview of the Court's origins. I then propose to dwell on a limited number of cases that are of political or social interest or which have had a significant impact on the development of the law.

The history of the Court of Appeal

- 9 The earliest colonial judicial system in New South Wales was established by Letters Patent dated 2 April 1787,¹⁰ shortly prior to the departure of the First Fleet from England. The Letters Patent, known as the First Charter of Justice, established a Court of Civil Jurisdiction, to be constituted by the Deputy Judge-Advocate and two "*fit and proper persons*", and a Court of Criminal Jurisdiction, to be constituted by the Deputy Judge-Advocate and six military personnel.¹¹
- 10 The Letters Patent made provision for an appeal to the Governor, with a further right of appeal to the King in Council if more than 300 pounds was involved.¹² It was nearly 40 years later, in 1823, when the Charter of Justice established the Supreme Court of New South Wales and made it a court of

⁶ *Singapore Airlines Cargo Pte Limited v Principle International Pty Ltd* [2017] NSWCA 216.

⁷ *Semantic Software Asia Pty Ltd v Ebbsfleet Pty Ltd* [2018] NSWCA 12.

⁸ See, eg, *State of New South Wales v Frawley* [2006] NSWCA 317.

⁹ *Streetscape Projects (Australia) Pty Ltd v City of Sydney (No 2)* [2013] NSWCA 240.

¹⁰ Made under the *New South Wales Act 1797*, 27 Geo. IV, c. 2 B and C 18.

¹¹ This is not a lecture about New South Wales' legal dynasties, but a paper such as this would not be complete without reference to the Garling or Street families. The position of Deputy Judge-Advocate was later held by Frederick Garling, who assumed the role in an acting capacity in 1815 following the death of Ellis Bent.

¹² New South Wales, *Parliamentary Debates*, Legislative Council, 14 October 1965, 1342 (A.D. Bridges).

record.¹³ The Charter named the first Chief Justice to be Sir Francis Forbes. On 17 May 1724, the first Supreme Court building was opened on what is now the site of the David Jones women's store.

- 11 The Charter provided a limited right of appeal to the Privy Council from decisions of the New South Wales Court of Appeals – a body which Meagher, Gummow and Lehane point out was “*a judicial body whose existence was assumed by the Charter but not defined therein*”.¹⁴ The authors refer to the 1823 Act, which provided that the Governor of New South Wales would act as a Court of Appeals from the Supreme Court of New South Wales. The Court of Appeals was abolished in 1828. An alternative provision for appeals to the Privy Council was not then made until 1850, when an Order-in-Council granted an appeal as of right from the Supreme Court to the Privy Council for matters involving more than 500 pounds.¹⁵
- 12 By the mid-19th century, courts across Australia were gaining recognition as appellate bodies in their own right.¹⁶ Legislatures bestowed a variety of appellate style functions on Supreme Courts. In the meantime, the *Administration of Justice Act 1841* (NSW) recognised a full court of the Supreme Court as an appellate body.¹⁷ The *Supreme Court Appellate Jurisdiction Act 1884* (NSW) was later passed to regulate the constitution of the Supreme Court sitting in Banco, with s 2 providing that “*the Court on the hearing of any such appeal or motion shall consist of three judges*”.
- 13 In the criminal context, there was no provision for appeals in the first days of the colony. This accorded with the English legal practice of the time.¹⁸ However, relief against guilty verdicts was available in the form of an

¹³ JD Heydon, MJ Leeming and PG Turner, *Equity: Doctrines and Remedies* (Butterworths, 5th Ed, 2015) 13.

¹⁴ *Ibid.*

¹⁵ Order-in-Council of 13 November 1850, cited in *ibid.*

¹⁶ Alex C Castles, *An Australian Legal History* (The Book Company Limited, 1982) 334-5.

¹⁷ *Ibid.*

¹⁸ Criminal appeals were not introduced in England to a substantial extent until the passing of the *Criminal Appeal Act 1907*: Lester B. Orfield, ‘History of Criminal Appeal in England’ (1936) 4(1) *Missouri Law Review* 326, 326.

executive pardon, granted by the Governor. It would appear that the pardon was used with some liberality. The first pardon was granted on 11 February 1788, less than three weeks after the First Fleet's arrival at Botany Bay – the first day of operation of the Court of Criminal Jurisdiction, in the case of *The King v Cole*.¹⁹

- 14 William Cole, a convict, was discovered to have taken two wooden planks, each seven feet in length, from the room of the garrison guard. Upon being asked what he was doing with them, he replied that he planned to wash the bugs off and take them to his tent, apparently to keep the rain out. It was apparent that he considered himself to be within his rights to do so. The authorities considered otherwise, and tied him to a tree for several days awaiting trial.
- 15 The Court, consisting of the Judge Advocate and six military personnel, found Cole guilty, and sentenced him to 50 lashes. However, on the basis of his ignorance of committing a crime, the Court recommended his case to the Governor, who pardoned him. It seems clear from the case report that the *mens rea* element of the offence with which Cole was charged was not satisfied – Cole's nonchalance in taking the boards, and his belief that he was not committing a crime, indicated that he did not know that he was taking property owned by another.
- 16 Whilst the purpose of the Governor's pardon was not the correction of error, it operated to ameliorate a harsh outcome resulting from the apparent misapplication of legal principle.
- 17 In *The King v Sherman and Freeman*,²⁰ the two accused were found guilty of taking 15 half pounds of flour. Sherman was sentenced to 300 lashes but was pardoned. Freeman, the ringleader, was sentenced to death. He was also

¹⁹ [1788] NSWKR 3.
²⁰ [1788] NSWKR 4.

pardoned – on the foot of the gallows – but only on the condition that he assist the Governor by becoming the colony’s first public executioner.

- 18 The Court of Appeal was established in its current, permanent form in 1965 by the *Supreme Court and Circuit Courts (Amendment) Bill*,²¹ becoming the first separate intermediate appellate court in Australia. Prior to the creation of the Court, the Chief Justice selected a Full Court at the beginning of each term to hear appeals.
- 19 Much has been written about the events of 1965, and the so-called “*storm in a teacup*” that ensued when the permanent court was created. It was considered particularly controversial that the new court disturbed the established seniority, rank and precedence of the Supreme Court justices.²² Lawyers are notorious gossips, and the professional gossip of the time was that the Liberal Party established the Court of Appeal to reconfigure the bench after two decades of Labor government.²³
- 20 However, gossip is also notoriously unreliable. Recourse to historical archives reveals that the legislators were pursuing three major goals by the establishment of a permanent court: efficiency, collegiality and expertise. That remains the essential ethos of the Court of Appeal and is worthy of a paper in itself. However, in this paper I will explore, necessarily briefly, the jurisprudence of the Court in the context of the political and societal issues of the last 50 years by focussing on several streams within the Court’s caseload.

²¹ In 1965, the Court of Appeal comprised the President Sir Gordon Wallace and six judges of appeal: Sir Bernard Sugerman, The Hon Charles McLelland, Sir Cyril Walsh, Sir Kenneth Jacobs, The Hon Kenneth Asprey and The Hon John Holmes Dashwood. Sir Bernard Sugerman and Sir Kenneth Jacobs later served as President of the Court from 1970-1972 and 1972-1974 respectively. Their Honours were followed as President by The Hon Athol Moffitt (1974-1984), The Hon Michael Kirby (1984-1996), The Hon Dennis Mahoney (1996-1997), The Hon Keith Mason (1997-2008), The Hon James Allsop (2008-2013) and The Hon Margaret Beazley (2013-present).

²² See, eg, Michael Kirby, ‘Judicial Supersession: The Controversial Establishment of the New South Wales Court of Appeal’ (2008) 30 *Sydney Law Review* 177, 181.

²³ *Ibid* 180.

Political cases

- 21 Let me start with the political. The jurisprudence of the Court of Appeal has intersected with the life and times of some major political players in this State across a wide range of legal issues. Indeed, the Court's decisions might be seen as having destroyed the political careers of more than one member of Parliament. Some of the political players will be known to you. Some of you will be too young to even recognise others. In some of the cases, the jurisdiction of the courts in determining issues arising out of parliamentary matters was itself in issue. In others, important principles of general application were established. *Barton v Armstrong* is the obvious choice for the latter.
- 22 Barton and Armstrong were business partners. One of their business ventures involved the development of Paradise Waters on the Gold Coast. Their relationship deteriorated due to what Barton perceived to be undue interference by Armstrong in the day to day operations of their company. Barton asked Armstrong to resign from the company and Armstrong refused. A series of resolutions were passed at directors' meetings, essentially in an effort to reduce Armstrong's power in the company. The situation escalated until Armstrong and Barton entered into a deed, setting out the terms on which Barton would buy out Armstrong's interest in the company.
- 23 Barton then commenced proceedings alleging that Armstrong had coerced him into signing the deed by threatening to have him murdered. In particular, he alleged that over a period of several months he received telephone calls in the middle of the night. Generally, no one spoke and he only heard heavy breathing, but on some occasions, a voice would say "*You will be killed*". He also claimed that someone was watching his house and that on several occasions, Armstrong threatened to "*fix*" him or told him that he was not safe.
- 24 The case established a number of significant principles with respect to common law duress. At first instance, the primary judge found that Armstrong

had, in fact, threatened Barton with death, but that Barton had entered the deed, not due to this coercion, but for commercial reasons. The Court of Appeal held that Barton could not succeed unless he established that, but for the threats, he would not have signed the agreement and that he had failed to establish this.²⁴ The Privy Council, to which appeals could still be made, held that if the threats were a reason for Barton's entry into the deed, he was entitled to relief, despite the fact that he may well have otherwise entered the deed.²⁵ The onus lay on Armstrong to prove that the threats he made contributed nothing to Barton's decision to sign the deed. Accordingly, the Privy Council advised that the deeds in question were void.

- 25 For the purposes of the point I seek to make this morning, namely the need to have a broader understanding of the law beyond one's speciality, it is useful to quote from the judgment of Lords Wilberforce and Simon, who dissented in the result but not in the statement of the law. Their Lordships stated:

“[the case] involves consideration of what the law regards as voluntary or its opposite ... Absence of choice ... does not negate consent in law; for this the pressure must be one of a kind which the law does not regard as legitimate. Thus, out of the various means by which consent may be obtained – advice, persuasion, influence, inducement, representation, commercial pressure – the law had come to select some which it will not accept as a reason for voluntary action: fraud, abuse of relation of confidence, undue influence, duress or coercion. **In this the law, under the influence of equity, has developed from the old common law conception of duress – threat to life and limb – and it has arrived at the modern generalisation expressed by Holmes J – 'subjected to an improper motive for action'.**”²⁶ (citations added)(emphasis added)

- 26 Armstrong was a member of the New South Wales Parliament at the time of the dispute and was expelled following the findings made by the primary judge.

- 27 The Independent Commission Against Corruption (ICAC) has been at the centre of a number of important political and legal stoushes in the State. One

²⁴ *Barton v Armstrong* [2973] 2 NSWLR 598.

²⁵ *Ibid.*

²⁶ *Ibid* 634.

of the early decisions involved Nicholas (Nick) Greiner, then Premier of New South Wales and the political architect of ICAC.

- 28 Allegations were made that Greiner and another Minister, Moore, had bribed a Member of Parliament to resign from office and take up a position in the public service. It was alleged that Greiner and Moore had strong political motives for wanting the Member to resign and that they had arranged the public service position as a means of achieving this outcome. The allegations were referred to ICAC which issued a report determining that both Greiner and Moore had engaged in corrupt conduct. The report was made public and both men resigned from Parliament. They then commenced proceedings, seeking declaratory relief.
- 29 The case required the Court of Appeal to consider the meaning of “*corrupt conduct*” under the *Independent Commission Against Corruption Act 1988* (Cth) and the scope of ICAC’s jurisdiction.²⁷ Gleeson CJ, with whom Priestly JA agreed, determined that the report was made without, or in excess of, jurisdiction and the determination it made was wrong in law. These conclusions were based on the fact that the Commissioner did not apply an objective standard to the facts of the case and that the Commissioner incorrectly stated the issue that arose for consideration.²⁸ Most importantly, Gleeson CJ found that as a Premier or Minister could not be dismissed for such conduct, there could be no finding that it was corrupt under the Act.²⁹
- 30 Another case which established principles of significance is *Egan v Willis*.³⁰ In 1996, Michael Egan was the leader of the government in the New South Wales Legislative Council. The government lacked a majority of seats in the upper House. The Legislative Council passed a resolution calling on Egan to table certain papers which related to the Sydney water supply. Egan refused, on the basis that Cabinet had agreed that Ministers should decline to comply

²⁷ *Greiner v Independent Commission Against Corruption* (1992) 28 NSWLR 125.

²⁸ *Ibid* 147.

²⁹ *Ibid* 147.

³⁰ *Egan v Willis* (1996) 40 NSWLR 650; *Egan v Willis* (1998) 195 CLR 424.

with such orders. The Legislative Council passed a resolution finding Egan guilty of contempt and suspending him from the House for the remainder of the day. When he refused to leave, the Usher of the Black Rod forcibly conducted him to the footpath outside.

- 31 Egan brought an action seeking a declaration that this resolution was invalid. The Court of Appeal dismissed the claim that the resolution was invalid, but found that a trespass had been committed, as the rules of Parliament did not permit Egan to be removed to the footpath, only from the Chamber of the Legislative Council.
- 32 Egan appealed to the High Court, where a key issue was whether the matter was justiciable. While matters relating to the internal affairs of Parliament have traditionally been regarded as non-justiciable, in this instance, a majority of the High Court was prepared to examine whether the powers of the Legislative Council extended to such a resolution on the basis that it was relevant to the justiciable claim that a trespass had been committed.
- 33 The Court dismissed Egan's appeal. It held that the Legislative Council has such powers as are reasonably necessary for the proper exercise of its functions.³¹ Accordingly, in a case where the documents in question were not subject to privilege, the Legislative Council had the power to deal with his refusal to produce them by ordering his suspension for a limited period of time.
- 34 After the High Court delivered judgment, the Legislative Council again required that Egan table certain documents relating to the Sydney water supply. These documents were itemised in great detail. Egan produced many of the documents, but declined to produce Cabinet documents on the basis of public interest immunity or, alternatively, legal professional privilege. The Legislative Council again determined him to be guilty of contempt and suspended him. He was again removed by force from the House.

³¹ Ibid 477-8, 453-4, 495-6, 513.

- 35 The Court of Appeal applied the test propounded by the High Court and determined that, in performing the Legislative Council's accountability function, there are many situations in which access to legal advice will be reasonably necessary.³² Accordingly, it determined that legal professional privilege does not apply in New South Wales when a House of Parliament seeks production of Executive documents.³³ Their Honours took a similar view with respect to the claimed public interest immunity, although Spigelman CJ, with whom Meagher JA agreed, recognised an exception with respect to Cabinet documents which reveal "*the internal deliberations of the Cabinet*".³⁴
- 36 In *Obeid v R*,³⁵ there was again a challenge to the Court's jurisdiction. The question was whether the relevant House of Parliament was the only entity which had jurisdiction with respect to contraventions of the Members' Code of Conduct. The Court answered this question in the negative.
- 37 Issues of contempt have also arisen from the intersection between court proceedings and the political sphere. The case of *Director of Public Prosecutions v Wran*³⁶ concerned circumstances in which the Director of Public Prosecutions charged the Premier of New South Wales, Neville Wran, and Nationwide News Pty Ltd with contempt of court. Wran was interviewed by a journalist and asked about his views with respect to a court order granting a fresh trial to High Court judge, Justice Lionel Murphy, on charges of attempting to pervert the course of justice. Wran expressed his "*very deep conviction*" that Justice Murphy was innocent and his expectation that Justice Murphy would be found not guilty at the new trial. This interview was published by Nationwide News.
- 38 A five judge bench of the Court of Appeal stated the test for contempt in terms of whether the publication had a tendency as a matter of practical reality to

³² *Egan v Chadwick* [1999] NSWCA 176.

³³ *Ibid* [86], [139], [152].

³⁴ *Ibid* [69], [152].

³⁵ *Obeid v R* [2017] NSWCCA 221.

³⁶ (1987) 7 NSWLR 616.

interfere with the proposed new trial.³⁷ This tendency had to be judged objectively by reference to the nature and circumstances of the offence.³⁸ In undertaking this assessment, extrinsic factors such as delay between the making of the statement and the new trial, the existence of preceding and subsequent discussion of a non-contumelious nature and regard to the public interest in the ventilation of questions of public concern were relevant considerations.³⁹

39 The Court considered that the words spoken and the circumstances in which they were spoken clearly fell within the terms of the test. The Court took the view that the circumstances in which the statement was made “*strongly support a conclusion that Mr Wran intended that his statement should influence the views on Mr Justice Murphy’s innocence of any members of the public who might hear it broadcast.*”⁴⁰ Accordingly, the Court found both Wran and Nationwide News guilty of contempt.

40 Administrative law oversight of government functions is not limited to issues such as contempt or corrupt conduct, as found in the ICAC cases. It also lies at the heart of a series of cases the Court has recently considered, regarding the legality of the procedure by which proposed local council amalgamations were being conducted.⁴¹

41 A key issue in those cases was the role of external expertise in government decision-making and the extent to which, as a matter of legal principle, any such advice or material should be made available to the public. In both *Ku-ring-gai Council v Garry West as delegate of the Acting Director-General*,

³⁷ Ibid 626.

³⁸ Ibid 626.

³⁹ Ibid 628.

⁴⁰ Ibid 630.

⁴¹ *Hunter’s Hill Council v Minister for Local Government*; *Lane Cove Council v Minister for Local Government*; *Mosman Municipal Council v Minister for Local Government*; *North Sydney Council v Minister for Local Government*; *Strathfield Municipal Council v Minister for Local Government* [2017] NSWCA 188; *Ku-ring-gai Council v Garry West as delegate of the Acting Director-General, Office of Local Government* [2017] NSWCA 54; *Woollahra Municipal Council v Minister for Local Government* [2016] NSWCA 380.

*Office of Local Government*⁴² and *Hunter's Hill Council v Minister for Local Government*,⁴³ the Court split on this issue, demonstrating the complexity of modern political and societal issues and their legal implications.

42 In a similar vein, and in response to growing environmental concerns, the Court has increasingly been asked to consider cases concerning the approval of mines⁴⁴ or, more recently, coal seam gas exploration.⁴⁵ The most recent of these cases was *4nature Incorporated v Centennial Springvale Pty Ltd*,⁴⁶ which was delivered in August last year. In that case, the Court held that a development consent granted to extend the Springvale coal mine was invalid. It should be noted that, once again, in these cases the Court was engaged in an administrative law assessment of the decision-making process and was not directing its attention to the merits of the actual decision.

43 Thus, while the Court of Appeal is often called to consider questions of political import, the distinction between the legislature and judiciary remains an essential one. This much was emphasised in the '*BLF* case', in which Kirby P rejected the notion that the right to have an appeal determined by this Court ran "so deep" that the legislature cannot disturb it. His Honour:

"[did] so in recognition of years of unbroken constitutional law and tradition in Australia and, beforehand, in the United Kingdom. That unbroken law and tradition has repeatedly reinforced and ultimately respected the democratic will of the people as expressed in Parliament... I also do so in recognition of the dangers which may attend the development by judges (as distinct from the development by the people's representatives) of a doctrine of fundamental rights more potent than Parliamentary legislation. Such extra-constitutional notions must be viewed with reservation not only because they lack the legitimacy that attaches to the enactments ultimately sanctioned by the people. But also because, once allowed, there is no logical limit to their ambit."⁴⁷

⁴² [2017] NSWCA 54.

⁴³ [2017] NSWCA 188.

⁴⁴ See, eg, *Ashton Coal Operations Pty Ltd v Hunter Environment Lobby Inc* [2015] NSWCA 358; *Warkworth Mining Limited v Bulga Milbrodale Progress Association Inc* [2014] NSWCA 105.

⁴⁵ *People for the Plains Incorporated v Santos NSW (Eastern) Pty Ltd* [2017] NSWCA 46.

⁴⁶ [2017] NSWCA 191.

⁴⁷ *Building Construction Employees and Builder's Labourers Federation v Minister for Industrial Relations* (1986) 7 NSWLR 372, 405 (Kirby P).

44 The Court of Appeal is also not immune from considering key political issues affecting other countries. A quintessential example is the *Spycatcher Case*,⁴⁸ in which the United Kingdom Government sought an injunction against Heinemann Publishers to restrain the publication of Mr Wright's memoirs, *Spycatcher*. The claim was made on the basis that Mr Wright drew substantially upon confidential knowledge and information acquired during his employment at the British Security Service (MI5). A majority of the Court of Appeal (Chief Justice Street dissenting) dismissed the appeal, although the judges differed on the proper basis for rewarding relief.

45 Justice McHugh held that, in the absence of a contract between the parties, the appellant could only succeed by establishing that the disclosure of the information would be detrimental to the public interest of the United Kingdom, and that Australian courts would not hear an action requiring them to make such a judgment. In contrast, Kirby P relied on principles of private international law – a view ultimately endorsed by the High Court, which found:

“...the action is neither fully nor accurately described as an action to enforce private rights or private interests of a foreign State. It is in truth an action in which the United Kingdom Government seeks to protect the efficiency of its Security Service as “part of the Defence Forces of the country”. The claim for relief made by the appellant in the present proceedings arises out of, and is secured by, an exercise of a prerogative of the Crown, that exercise being the maintenance of the national security.”⁴⁹

46 The Hon Justice Kirby has reflected upon the wider significance of this decision, citing it as evidence of the evolution of legal independence in Australia from the United Kingdom. This found expression in his Honour's judgment, where he indicated that the United Kingdom should be classified as a “*foreign state*”.⁵⁰ His Honour rejected the argument that special significance should be attached to comity between countries of the Commonwealth, as “*to say otherwise is to deny the self-respect and independence of the members*”

⁴⁸ *AG (UK) v Heinemann Publishers Australia Pty Ltd (1987) 10 NSWLR 86.*

⁴⁹ *AG (UK) v Heinemann Publishers Australia Pty Ltd (1988) 165 CLR 30, 46.*

⁵⁰ *AG (UK) v Heinemann Publishers Australia Pty Ltd (1987) 10 NSWLR 86, 138.*

*of the Commonwealth of Nations*⁵¹ (although it is nevertheless interesting to note that his Honour is a committed monarchist).

Faith-based cases

47 In a political system which recognises the separation of Church and State, the frequency with which the Courts are asked to deal with matters which have their genesis in church or faith-based matters might be thought to be surprising or even intriguing. These cases sometimes raise questions regarding the intersection between the legal rules which govern all Australians and the faith-based rules that govern those who ascribe to a particular religious code. Sometimes the issue is more prosaic, involving questions, for example, of taxation or planning law.

48 In the Court's foundational year, the Court considered whether the Theosophical Foundation Pty Ltd was a "*religious society*", with the result that certain land was wholly exempt from land tax by virtue of the fact it was "*land owned by, or in trust for a religious society*".⁵² The Theosophical Foundation was an unincorporated association with the purpose of "*the pursuit and dissemination of the Divine or Spiritual Wisdom known as Theosophy and synonymously called by some the Wisdom-Religion*".⁵³ Sugerman JA, with whom McClelland JA agreed, took the view that the Foundation could not properly be characterised as a religious society, but was rather a group of affiliated bodies.⁵⁴ Accordingly, the Foundation's central claim failed. However, Sugerman JA found that it was nevertheless entitled to some deduction in land tax.

49 The ability of the law to accommodate the way in which society develops – or one might say, to accommodate a 'broader church' – was evident in *House of Peace Pty Ltd v Bankstown City Council*,⁵⁵ where the Court was asked to

⁵¹ *Ibid.*

⁵² (1966) 70 SR (NSW) 67.

⁵³ *Ibid* 79.

⁵⁴ *Ibid* 84.

⁵⁵ (2000) 48 NSWLR 498.

construe the meaning of the word “*church*” in the context of a 1954 development consent. President Mason, with whom Stein and Giles JJA agreed, held that:

“The 1954 consent was not concerned to ensure that liturgy remained orthodox according to Christian standards. It was concerned to authorise the use of a building inter alia as a ‘church’, the word being apt to the proposed building but illustrative of the genus of a place of public worship being the relevant purpose in the County of Cumberland Planning Scheme.”⁵⁶

50 Accordingly, the word “*church*” in the development consent was deemed sufficiently wide to encompass a proposed use of a building in 1995 as a mosque. Strictly, the case was one involving the construction of an ‘instrument’, but it aptly demonstrates that the legal mind is not a closed mind and must appropriately accommodate societal developments as they arise from time to time.

51 In 2006, in *Azriel v New South Wales Land & Housing Corporation*,⁵⁷ the Court was asked to consider a decision of the Department of Housing to remove the Mr Azriel’s name from its housing register after he refused “*two reasonable offers*” of housing. This move was taken in accordance with the Department’s transfer policy. Mr Azriel practised as an orthodox Jew and stated that he required housing within walking distance of the Synagogue he attended in Bondi and preferably within the Eruv area, within which he was allowed to carry certain items on the Sabbath. Mr Azriel also stated that he required an outdoor area to allow him to build a hut within which to consume food during the Festival of the Tabernacles. Mr Azriel claimed that the Department’s decision to remove his name from the register was in breach of the *Anti-Discrimination Act 1977* (NSW).

52 The Department had treated Mr Azriel’s refusal of the offers of housing as being one based on “*personal preferences*”. The Court held that this was not correct and explained that:

⁵⁶ *Ibid* 511.

⁵⁷ [2006] NSWCA 372.

“the ADA does not impose on the Respondent an obligation to provide public rental housing within an area and of a kind which would satisfy an applicant’s ethno-religious requirements. Rather, the Respondent must take such steps as it reasonably can to provide such accommodation and, in determining whether an offer (or its rejection) is reasonable, must give genuine and proper consideration to an applicant’s religious requirements.”⁵⁸

- 53 This again was a case that involved a question of statutory construction, and again reiterated the fact that the proper construction and application of an Act is not frozen in time. Nor is an Act to be interpreted within a particular societal capsule.
- 54 The Court is also frequently asked to consider the structure and operation of religious associations. In *Macedonian Orthodox Community Church St Petka Incorporated v Metropolitan Petar*,⁵⁹ there was a dispute between the congregation and the Bishop over the appointment of the priest to the particular parish community. The dispute involved 11 separate decisions of the New South Wales Court of Appeal and one decision of the High Court,⁶⁰ with another application for special leave being rejected.⁶¹ One aspect of the dispute involved an application for judicial advice under s 63 of the *Trustee Act 1925* (NSW). The cost of the litigation was causing Church assets, which included trust and non-trust assets, to be depleted at a considerable rate.
- 55 On appeal from a judgment in which judicial advice was given in the Supreme Court, the Court of Appeal held that the primary judge had erred in the exercise of his discretion to give judicial advice, because he had failed to take into account the fact that if the claimants were successful in establishing a breach of trust, they would seek to recover their costs from the trustee who had recourse to the trust property, resulting in a reduction of about one third of the trust property. This was in circumstances where nearly all of the non-trust assets had already been used up in the litigation.

⁵⁸ *Ibid* [55].

⁵⁹ [2013] NSWCA 223.

⁶⁰ *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar The Diocesan Bishop of The Macedonian Orthodox Diocese of Australia and New Zealand* (2008) 237 CLR 66; [2008] HCA 42.

⁶¹ *Macedonian Orthodox Community Church St Petka Incorporated v Petar the Diocesan Bishop of the Macedonian Orthodox Church of Australia and New Zealand* [2014] HCATrans 28.

56 The High Court was unimpressed with this reasoning!

57 The Court is presently reserved on a case which centred on the issue of whether a contract incorporated provisions of *Halakha* (Jewish Law) and, in particular, *Hazakah* (which relates to possession of property). The Court was also asked to consider whether *Hazakah* was capable of being applied by a New South Wales court and whether, as a choice of law question, it was invalid, void or could not be given effect as a matter of Australian law.

58 One of the upcoming cases for appeal concerns a threat to impose religious sanctions on a party to a commercial dispute who refused to attend the Sydney *Beth Din* (rabbinic court) for arbitration and the related question of whether the Sydney *Beth Din* had jurisdiction to conduct arbitration proceedings under either the *Commercial Arbitration Act 2010* (NSW) or the *International Arbitration Act 1974* (Cth).⁶² One of the questions before the primary judge was whether the dispute was justiciable. His Honour held:

“202 With any religious organisation, which, in most instances can be aptly described as a voluntary association, questions always arise about the extent to which a court’s jurisdiction can be invoked so as to review or intervene in the affairs of that association.

203 As stated above, I am satisfied the Courts have taken the view they will, and can, only interfere in a private dispute, including a religious dispute, where there is a contractual, legal or equitable proprietary right that can be properly enforced or protected by a private law remedy. As the law stands, adverse reputation or financial consequences which may arise from the dispute are insufficient grounds to invoke the Court’s jurisdiction.

204 On this basis, I accept the Defendants’ submissions the Plaintiffs’ claim regarding apprehension of bias in the Beth Din is not justiciable. While Mr Barukh may well suffer harm going beyond religious matters to reputation and financial, the Beth Din is a purely religious body which lacks any statutory or contractual element.

205 However, merely because a body acting in the name of religion may be impervious to a legal challenge, in the exceptional circumstances of this case I believe I am compelled to make the following observations. This is an organisation that wishes, indeed demands, the respect and reverence from its parishioners and adherents, and yet appears to be a law unto itself.”

⁶² See the decision below: *Live Group Pty Ltd v Rabbi Ulman* [2017] NSWSC 1759.

- 59 His Honour then examined in detail the conduct which he considered demonstrated that the Sydney *Beth Din* was in “*flagrant breach*” of the principles of natural justice. However, having regard to his finding that the Court did not have jurisdiction to grant relief, his Honour observed that his “*findings were purely academic*”. No doubt, however, those findings will add to the rich history the Jewish community and will be of interest for that reason alone.
- 60 Let me move to another, and arguably one of the most important and perhaps controversial, decisions of the Court in the personal injuries field. It is controversial not because of the Court’s decision but because of the stance taken by the defendants in the proceedings. I refer to the decision of *Trustees of The Roman Catholic Church v Ellis*⁶³ with which you will be familiar. The point I wish to make about this case is the one that I made earlier. There are occasions when a matter arises within the context of a particular specialty, but where other areas of law are essential to its determination.
- 61 The plaintiff commenced proceedings in the Supreme Court for damages, alleging that he was repeatedly sexually assaulted by an assistant priest of the Roman Catholic Church in the Archdiocese of Sydney between 1974 and 1979. The plaintiff sued the Archbishop of the Archdiocese of Sydney, who was appointed in 2001. The plaintiff also sued the Trustees of the Roman Catholic Church for the Archdiocese of Sydney. He needed an extension of time in respect of the claims against each defendant: see ss 58 and 60G of the *Limitation Act 1969* (NSW).
- 62 The Supreme Court dismissed proceedings against the Archbishop, but extended the limitation period against the Trustees. The Trustees appealed, by leave, against the decision to extend time, and the plaintiff cross-appealed, by leave, against the dismissal decision. The plaintiff was unsuccessful on all

⁶³ (2007) 70 NSWLR 565.

counts in the Court of Appeal.⁶⁴ That is, the Trustee's appeal was upheld and the plaintiff's cross-appeal was dismissed.

63 I have relied upon the headnote to the judgment as it aptly demonstrates the point about the cross-fertilisation of legal principles.

- (1) An unincorporated association, such as the Catholic Archdiocese of Sydney, cannot be sued in its own name at common law as it does not exist as a juridical entity.⁶⁵
- (2) Persons or groups within an unincorporated association can be held liable in tort or contract as principals provided they assumed an active or managerial role in which they exercised palpable control over an activity at the relevant time. However, the liability of such persons or groups within the unincorporated association is personal, not representative in nature: *Smith v Yarnold* [1969] 2 NSW 410; *Banfield v Wells-Eicke* [1970] VR 481; *Peckham v Moore* [1975] 1 NSWLR 353, considered.⁶⁶
- (3) The relationship between an assistant priest of the Roman Catholic Church, and all members of such Church, is too slender and diffuse to establish agency in contract, or vicarious liability in tort: *Sweeney v Boylan Nominees Pty Ltd* (2006) 226 CLR 161; *Wilkins v Jennings* (1985) Aust Torts Reports ¶180–754 (69,516), considered.⁶⁷
- (4) A representative order under r 7.4 of the Uniform Civil Procedure Rules 2005 cannot be made unless a class of numerous persons have the same liability or interest in the proceedings. Neither the current Archbishop, nor all the members of the Church, had a sufficiently common interest to satisfy the making of a representative order:

⁶⁴ *Ibid.*

⁶⁵ *Ibid* at 576 [47]; 604 [200]; 604 [201].

⁶⁶ *Ibid* at 577 [49], 577 [51]; 604 [200]; 604 [201].

⁶⁷ *Ibid* at 578 [54], 579 [61]; 604 [200]; 604 [201].

Shepherd v Australia and New Zealand Banking Group Ltd (1996) 20 ACSR 81 at 96; *Roche v Sherrington* [1982] 1 WLR 599; [1982] 2 All ER 426, applied.⁶⁸

- (5) A judgment under r 7.5 of the Uniform Civil Procedure Rules 2005 in a representative action is a judgment against each individual member of the class, and is not a means of access to the funds of an unincorporated association with an ever-changing membership: *Attorney-General (Vic) v City of Brighton* [1964] VR 59; *Campbell v Thompson* [1953] 1 QB 445, considered.⁶⁹
- (6) The Roman Catholic Church Trust Property Act 1936 did not confer on the Trustees any power to appoint, manage, discipline or remove priests: *Archbishop of Perth v AA* (1995) 18 ACSR 333, applied.⁷⁰
- (7) The power conferred by s 9 of the Roman Catholic Church Trust Property Act 1936 on the Trustees to acquire, hold and to engage in property transactions does not extend to the Trustees being rendered subject to all legal claims associated with Church activities: *John Doe v Bennett* (2004) 236 DLR (4th) 577, distinguished.⁷¹
- (8) The Archbishop of the Archdiocese of Sydney is not a corporation sole, and cannot be liable for alleged obligations of a predecessor in that office: *Hubbard Association of Scientologists International v Attorney-General (Vic)* [1976] VR 119; *Wylde v Attorney-General (NSW) (ex rel Ashelford)* (1948) 78 CLR 224; *Wright v Morgan* 191 US 55 (1903), considered.⁷²
- (9) No estoppel arises in respect of a draft deed unless there is an unequivocal representation and detrimental reliance on the

⁶⁸ Ibid 579 [63], 580 [67], 582 [74]–[75], 584 [83]; 604 [200]; 604 [201].

⁶⁹ Ibid 586 [91]–[92]; 604 [200]; 604 [201].

⁷⁰ Ibid 589 [111], 589 [112], 590 [117], 594 [140]–[141]; 604 [200]; 604 [201].

⁷¹ Ibid 596 [149]; 604 [200]; 604 [201].

⁷² Ibid 597 [153]–[154], 598 [162], 604 [200]; 604 [201].

representation: *Commonwealth v Verwayen* (1990) 170 CLR 394, distinguished.⁷³

(10) Consideration of whether each member of a class must have an identical defence to satisfy the requirement of having the same liability or interest in the proceedings to warrant the making of a representative order.

64 Although the legal basis of this decision may well be overtaken by statutory or internal Church reform, it does emphasise the need to have a ‘broad church’ of legal knowledge to be an effective practitioner even within a specialty.

65 In May of this year, the Court delivered its decision in *Elzahed*. In that case, the primary judge had declined the application of a woman to give evidence wearing a niqab.⁷⁴ The woman was a plaintiff in proceedings against the State, and alleged that she had been assaulted by police in a dawn raid on her home, which she shared with her husband and two sons, who had also brought proceedings for assault.

66 Contrary to media publicity about the matter, the case was not about the right of a person to choose how to dress when giving evidence, or the right of a person to have the Court act upon that person’s religious or other beliefs – in that case the woman would not reveal her face to men outside her family. More particularly, as was said in the judgment, this was not a case “*about the permissible courtroom attire of women of Islamic faith, or women of other faiths more generally*”.⁷⁵ The sole issue in the case was whether the primary judge’s discretionary decision to reject her application was affected by error of the kind described in *House v The King*.⁷⁶ The court held that no *House v The King* error had been demonstrated.

⁷³ (603 [191], 603 [192], 604 [197]; 604 [200]; 604 [201]).

⁷⁴ *Elzahed v State of New South Wales* [2018] NSWCA 103.

⁷⁵ *Ibid* [6].

⁷⁶ (1936) 55 CLR 499; [1936] HCA 40.

67 The case is of interest, not only because of its currency, but because it is another example of the importance of being able to correctly identify the issue – and that often means knowing an area of law outside one’s particular specialist domain. Although every personal injuries’ lawyer knows the principles in *House v The King*, this case emphasises the need to identify the real issue. The primary judge had made a ruling in the course of regulating the procedures of that case and the question in issue was whether her Honour had erred in the exercise of her discretion – no more and no less.

Medical influences: asbestos cases

68 The Court’s jurisprudence has also been shaped by medical trends in the community, as evidenced by a substantial volume of asbestos litigation. At one point these cases primarily centred on questions of foreseeability. Once that was settled, the focus turned to complex questions of causation.

69 The long latency period of asbestos diseases makes reconstructing the facts of exposure extremely challenging.⁷⁷ Workers may have been exposed to asbestos when working for multiple employers, or in non-work related contexts. If a plaintiff has a history of smoking, this can also “*muddy the diagnosis*”.⁷⁸

70 Once the courts began to accept the medical evidence being advanced by plaintiffs in support of their case, employers responded by relying upon epidemiological evidence. Epidemiologists study the distribution and determinants of disease in human populations, making judgments about whether a statistical pattern proves a “*cause and effect*” relationship. In *Seltsam v McGuinness*,⁷⁹ the Court of Appeal considered the admissibility of this type of evidence (adduced to demonstrate an association between asbestos exposure and renal cell carcinoma). Chief Justice Spigelman noted

⁷⁷ Neil Gunningham, ‘Asbestos-Related Diseases and Workers’ Compensation’ (2012) 34 *Sydney Law Review* 269, 270.

⁷⁸ *Ibid.*

⁷⁹ (2000) 49 NSWLR 262.

that “*this was a case of significance for the appellants beyond the individual case. It was fought below and in this Court as if it were a test case*”.⁸⁰

71 Chief Justice Spigelman outlined the application of this type of evidence:

“With respect to many diseases, medical science is able to give clear and direct evidence of a causal relationship between a particular act or omission and a specific injury or disease. There are, however, fields of inquiry where medical science is not able to give evidence of that character...

Epidemiological evidence may be able to fill the gap. It is of particular potential utility in the field of what is often referred to as toxic torts, especially in case of diseases with long latency periods.”⁸¹

72 However, his Honour went on to caution that:

“The courts must determine the existence of a causal relationship on the balance of probabilities. However, as is the case with all circumstantial evidence, an inference as to the probabilities may be drawn from a number of pieces of particular evidence, each piece of which does not itself rise above the level of possibility. Epidemiological studies and expert opinions based on such studies are able to form strands in a cable of a circumstantial case.”⁸²

73 A related question of causation came before this Court in *Bendix Mintex v Barnes*.⁸³ In that case, the plaintiff was exposed to asbestos on two occasions: during his employment by Bendix Mintex, and at an earlier stage during his service with the United Kingdom Royal Navy. Allowing Mintex’s appeal, Mason P found that “*the highest that [Barnes’] case can be put is that [Mintex’s] involvement increased the statistical contingency that their acts or omissions may have caused or materially contributed to the mesothelioma*”.⁸⁴ His Honour supported a statement by the Full Court of the Supreme Court of South Australia that “*the law does not equate the situation where the*

⁸⁰ *Ibid* [185].

⁸¹ *Ibid* [93].

⁸² *Ibid* [98].

⁸³ (1997) 42 NSWLR 307.

⁸⁴ (1997) 42 NSWLR 307, 316-7.

defendant materially increased the risk of injury with one where the defendant materially contributed to the injury".⁸⁵

- 74 The impact of asbestos litigation also extended to corporations law. In *CSR v Wren*,⁸⁶ the plaintiff's legal representatives correctly understood the intersection of the principles of negligence and corporations law in bringing a claim, not against an employer – Asbestos Products Pty Ltd – which had long since gone into liquidation and been deregistered, but against the holding company – CSR. The Court of Appeal held that CSR's direction, control and involvement in the operation of its subsidiary company, Asbestos Products, was sufficient to establish a relationship between CSR and an employee of Asbestos Products. This relationship gave rise to a duty of care, which was co-extensive with that owed by the employer to an employee. Justice Stein, who was a member of the bench, later reflected that the case was a "*real eye-opener to corporate manoeuvrers denying damages to workers suffering from mesothelioma*".
- 75 Asbestos litigation is likely to continue to impact the jurisprudence of this Court in the near future. Medical experts advise that asbestos disease cases will peak in 2020, generating a significant caseload for the Dust Disease Tribunal⁸⁷ – and perhaps also this Court.
- 76 In 2006, the Court of Appeal was asked in *Seltsam v McNeill*⁸⁸ to consider whether the asbestos manufacturer Seltsam owed a duty of care to "*home handymen and other low-intensity casual end users*". This Court answered in the negative. This case was a significant contribution to the existing body of asbestos case law, not least because it was the first in a "third wave" of asbestos cases which concern persons who have contracted malignant asbestos disease as a result of "*short-term and/or low level exposure*" in the

⁸⁵ *Ibid*, citing *Pibworth v Bevan M Roberts Pty Ltd* (1994) 176 LSJS 39.

⁸⁶ (1997) 44 NSWLR 463.

⁸⁷ Jane Southward, 'Joanne Wade: Asbestos Lawyer' (April 2017) *Law Society Journal* 50, 51.

⁸⁸ [2006] NSWCA 158.

home or workplace.⁸⁹ In contrast, the “first wave” involved miners and millers of raw asbestos, and the “second wave” involved workers producing or using asbestos products in industry. While ultimately turning on this particular defendant’s state of knowledge in the 1960s, the judgment’s delineation of industrial and home users was a clear warning to this class of prospective plaintiffs.

77 Another case involving the same manufacturer, *Seltsam Pty Ltd v Ghaleb*, raised interesting issues regarding the apportionment of liability as between defendants to a claim.⁹⁰ Seltsam Pty Ltd employed the respondent between 1971 and 1977 in its factory. Amaca Pty Ltd bought Seltsam’s business in 1977 and employed the respondent until 1986. The respondent brought proceedings against both Seltsam and Amaca, claiming that the companies had negligently exposed him to asbestos. After the trial had commenced, the proceedings between the respondent and Amaca settled. This raised questions as to the relative liability of Seltsam.

78 The nature of the disease suffered by the appellant in this case is of particular relevance. The appellant suffered from asbestos related pleural disease (ARPD), a disease which increases in severity through successive events that harm the victim. Each infliction of harm is separate and independent of the harm that went before, meaning that where there are different tortfeasors over different periods, each is separately liable for the damage it caused. The trial judge concluded that the ARPD from which the respondent suffered had, in its entirety, been caused by Seltsam.

79 The Court of Appeal held that the trial judge had failed to afford procedural fairness in reaching this decision. In dealing with the apportionment of liability, the Court considered the cases of *Watts v Rake*⁹¹ and *Purkess v*

⁸⁹ See discussion in Tanya Segelov, ‘Third Wave Asbestos Cases’ (2012) 109 *Precedent* 40, 41. See also Finity Consulting, ‘The Third Wave: Australian Mesothelioma Analysis & Projection’ (Report, Asbestos Safety and Eradication Agency, March 2016).

⁹⁰ [2005] NSWCA 208.

⁹¹ (1960) 108 CLR 158.

Crittenden.⁹² The effect of these cases, and the conclusion reached by the Court of Appeal, was explained by Macfarlan JA in *Pel-Air Aviation Pty Ltd v Casey*.⁹³ His Honour considered them as authority for the proposition that:

“if a defendant wishes to contend that a plaintiff’s condition has been caused by, or is in the future likely to be affected by, a matter for which the defendant is not responsible, the defendant bears an evidentiary onus to raise that issue. If that is done, it remains for the plaintiff to establish on the whole of the evidence that his or her condition is or will be attributable, in whole or in part, to the defendant’s conduct.”⁹⁴

Other common law cases

- 80 Looking more broadly in the field of medical law, societal changes and developments are evident in the increasing body of jurisprudence concerning complex questions relating to modern reproductive technology, including surrogacy and IVF treatment. Like the asbestos cases, these often raise difficult questions of causation, and require the Court of Appeal to navigate both legal and ethical quandaries.
- 81 In *Waller v James*,⁹⁵ which involved an IVF pregnancy, the couple seeking to become parents raised concerns with their IVF specialist that the child may inherit his father’s genetic condition. The specialist provided the couple with a post-it note containing the details of a genetic counsellor, but did not fully explain why he was referring the couple to the counsellor. The couple did not consult the counsellor, and the child was born with the genetic condition. At four days old, the child suffered a stroke and was left profoundly disabled.
- 82 Before the Supreme Court, the couple argued that the child’s stroke was caused, or materially contributed to, by the genetic condition. In the alternative, it was argued that, had the specialist warned them, they would not have undergone IVF treatment. The primary judge found that the specialist did owe the couple a duty of care to provide information relating to the importance

⁹² (1965) 114 CLR 164.

⁹³ [2017] NSWCA 32.

⁹⁴ *Ibid* [90].

⁹⁵ [2015] NSWCA 232.

of seeking genetic counselling, and breached that duty by failing to explain to the couple the reasons for referring them to a genetic counsellor. However, the claim failed on causation – the hereditary condition did not cause, or materially contribute to, the stroke.⁹⁶

83 This Court dismissed the couple’s appeal. In holding that the right to plan a family is an interest capable of being protected by law, I noted in my judgment that the nature of IVF technology had influenced the outcome of the proceedings:

“The appellants ... were vulnerable in the sense that they were under the professional care of an IVF specialist and were dependent upon him for all aspects of treatment, including providing them with relevant information. This included information as to the importance of understanding genetic factors before undertaking IVF treatment.”⁹⁷

84 The Court’s jurisdiction in this area will potentially be enlarged by s 48 of the *Surrogacy Act 2010* (NSW), which grants the right for birth parents or intended parents to appeal to the Court of Appeal against a decision of the Supreme Court to refuse a parentage order.⁹⁸

85 The Court’s jurisprudence over the last 50 years has also been shaped by legislative developments, particularly where Parliament has intervened with innovative or remedial legislation. This is perhaps most evident in the introduction of the *Civil Liability Act 2002* (NSW) (CLA) in 2002, and similar enactments across the country.

86 The narrative surrounding the introduction of the CLA was that of an increasingly litigious culture, courts recognising a duty of care in an ever expanding range of circumstances, and an insurance industry in a state of crisis.⁹⁹ The CLA was introduced with the aim of encouraging greater

⁹⁶ *Waller v James* [2013] NSWSC 497.

⁹⁷ *Waller v James* (2015) 90 NSWLR 634, 660.

⁹⁸ Although, note that no appeal has yet been brought under this section.

⁹⁹ See, eg, Michael Pelly, *The Smiler: Murray Gleeson* (Federation Press, 2014) 238-239.

“*personal responsibility*” and sending “*a clear message to the courts that ... liability for insignificant risk is too easily imposed*”.¹⁰⁰ Demonstrating the role played by external expertise in government decision-making, particular emphasis was placed on a PricewaterhouseCoopers report which calculated that the reforms would bring about a 17.5 per cent reduction in the cost of personal injury claims, a 14 per cent reduction in the cost of public liability claims as a whole and a 12 per cent reduction in public liability premiums.¹⁰¹

87 Today, torts cases still make up a significant portion of the Court’s caseload – in 2016, they were the second largest substantive topic area considered by the Court, comprising approximately 15% of proceedings (closely followed by administrative law and contract cases, which each comprised 12%). A not insignificant portion of these cases continue to be typical “*slip and fall*” scenarios.¹⁰² However, the days of week-long listings for damages cases are long gone.

88 Other significant pieces of legislation that have shaped the jurisprudence of the Court include the *Australian Consumer Law*,¹⁰³ the *Personal Properties and Securities Act 2009* (Cth) (particularly in respect of fixed and floating charges), the *National Credit Code*¹⁰⁴ and the *Contracts Review Act 1980* (NSW) all of which feature in modern jurisprudence.

89 The relationship between the Court’s jurisprudence and legislative change goes both ways, as the jurisprudence of appellate courts can directly result in Parliament acting to amend or introduce legislation. An example of this is the case of *R v Young*,¹⁰⁵ in which a five-judge bench considered whether a defendant charged with sexual assault should be granted access to the patient’s notes and records of the complainant’s psychologist. The Court held

¹⁰⁰ New South Wales, *Parliamentary Debates*, Legislative Assembly, 23 October 2002, 5764 (Bob Carr).

¹⁰¹ *Ibid.*

¹⁰² See, eg, *Sutherland Shire Council v Henshaw* [2004] NSWCA 386; *Woolworths Ltd v McQuillan* 2016/302301.

¹⁰³ As set out in sch 2 of the *Competition and Consumer Act 2010* (Cth).

¹⁰⁴ As set out in sch 1 of the *National Consumer Credit Protection Act 2009* (Cth).

¹⁰⁵ (1999) 46 NSWLR 681; [1999] NSWCCA 166.

that provisions of the *Evidence Act 1995* (NSW) which provided that evidence of “*protected sexual assault communications*” was not to be adduced if it would disclose a “*protected confidence*” or “*the contents of a document recording a protected confidence*”¹⁰⁶ did not apply in this case and that there was no other legal principle preventing the defendant from accessing the patient’s notes.

90 In dissent, I held that the situation attracted a public interest immunity against disclosure on the basis that non-disclosure served the public interest by “*protecting victims and promoting victims’ recovery from sexual assault; facilitating the effective operation of sexual assault services; and encouraging complainants to report the crime of sexual assault to police*”.¹⁰⁷ Later that year, and explicitly in response to the decision in *Young*, Parliament expanded the scope of the relevant provisions of the *Evidence Act 1995* (NSW) to protect such evidence from disclosure.¹⁰⁸

91 Returning to the impact of legislative intervention on the Court’s jurisprudence, there are two points to which I wish to draw attention. The first is the significant effect of the introduction of uniform legislation across the country. The trend toward uniform legislation is seen, for example, in the *Corporations Act*, the *Defamation Act* and the *Legal Profession Act*. In *Australian Securities Commission v Marlborough Gold Mines Ltd*, the High Court laid down the principle that:

“uniformity of decision in the interpretation of uniform national legislation ... is a sufficiently important consideration to require that an intermediate appellate court ... should not depart from an interpretation placed on such legislation by another Australian intermediate appellate court unless convinced that that interpretation is plainly wrong”.¹⁰⁹

¹⁰⁶ See *Evidence Act 1995* (NSW) Div 1B, Pt 3.10 (as it then was).

¹⁰⁷ (1999) 46 NSWLR 681; [1999] NSWCCA 166 [214].

¹⁰⁸ See Criminal Procedure Amendment (Sexual Assault Communications Privilege) Bill 1999 (NSW); Explanatory Memorandum, Criminal Procedure Amendment (Sexual Assault Communications Privilege) Bill 1999 (NSW) 1.

¹⁰⁹ (1993) 177 CLR 485, 492.

- 92 As a result, the New South Wales Court of Appeal finds itself in a position where it must consider a broader range of authorities than it once would have. This has the positive effect of increasing dialogue between judges who sit on intermediate appellate courts, bringing about an increased degree of interconnectedness across Australia. (At the least, it has given rise to some lively interstate jurisprudential debate.)¹¹⁰
- 93 A further impact of increased legislative intervention is a widening of the Court of Appeal's jurisdiction, through both expanded supervision over a greater number of statutory tribunals, and new avenues of appeal.
- 94 The Court reviews an increasing number of applications for judicial review of tribunal decisions. In the two years between January 2014 and March 2016, parties challenging proceedings in the New South Wales Civil and Administrative Appeals Tribunal went "*directly to the Supreme Court (single judge and Court of Appeal)*" in 21 cases.¹¹¹ The Tribunal's decision was set aside in 9 of these 21. In contrast, 986 parties chose to appeal using the Tribunal's internal appeals mechanism. From these 986 decisions, 14 then appealed or commenced judicial review applications in the Supreme Court, with 11 of these proceedings dismissed.¹¹²
- 95 We have also witnessed an increase in the number of applications for judicial review generally. Proceedings that invoke the Court's supervisory jurisdiction have long been a central aspect of the Court's work.¹¹³ However, over the past six years, these proceedings have increased from seven to twelve per cent of the Court's new cases.

¹¹⁰ See, eg, the debate between the New South Wales and Victorian Courts of Appeal regarding tendency evidence prior to the High Court's decision in *Hughes v The Queen* [2017] HCA 20; *Hughes v R* [2015] NSWCCA 330; *Velkoski v The Queen* (2014) 45 VR 680.

¹¹¹ Robertson Wright, 'The New South Wales Civil and Administrative Tribunal: Where did it come from? How does it work? How does the Supreme Court related to NCAT?' (Speech delivered at the Supreme Court of New South Wales Seminar, Sydney, 16 March 2016).

¹¹² *Ibid.*

¹¹³ See, for example, *Herron v McGregor* (1986) 6 NSWLR 246, where the Court of Appeal held that the Supreme Court has power to stay proceedings in disciplinary proceedings, on the ground that their continuation is harsh and oppressive, and an abuse of process.

Arbitration

- 96 Over the last few years, the Court of Appeal has increasingly been asked to consider questions arising from, and relating to, arbitration. Amongst others, these included questions regarding the construction of an arbitration clause,¹¹⁴ whether interlocutory relief should be ordered in circumstances where the underlying dispute was to be determined by an arbitral tribunal,¹¹⁵ and the enforceability of foreign arbitral determinations.¹¹⁶
- 97 This development can be understood as the result of several converging factors. In particular, the rise of alternative dispute resolution mechanisms since the 1970s has seen, among other things, the growth of parties choosing to resolve their disputes by arbitration.
- 98 Arbitration carries the advantages of procedural flexibility, privacy and confidentiality, the ability to choose the decision-maker, and the certainty and confidence that comes with the recognition and enforcement of any award.¹¹⁷ For these reasons, arbitration is frequently the dispute resolution method of choice for commercial parties, and particularly those operating across jurisdictions. By virtue of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, known as the ‘New York Convention’, foreign arbitral awards may be enforced domestically in a number of jurisdictions. This Convention requires contracting states to undertake to recognise as binding and to enforce arbitral awards made within the territory of another contracting state. At present, 159 states are parties to the Convention, including Australia.
- 99 The first recorded instance of the Court of Appeal considering a case involving arbitration arose in 1966, again in the Court’s first sitting year. *Ex*

¹¹⁴ *Warner Bros Feature Productions Pty Ltd v Kennedy Miller Mitchell Films Pty Ltd* [2018] NSWCA 81.

¹¹⁵ *Kawasaki Heavy Industries, Ltd v Laing O’Rourke Australia Construction Pty Ltd* [2017] NSWCA 291.

¹¹⁶ *Aircraft Support Industries Pty Ltd v William Hare UAE LLC* [2015] NSWCA 229.

¹¹⁷ See Kevin Lindgren, “The Choice between Litigation and Arbitration” in Michael Legg (ed), *Resolving Civil Disputes* (LexisNexis, 2016) 209, 211-218.

*parte Farley & Lewers Ltd; Re Transport Workers' Union of Australia (New South Wales Branch)*¹¹⁸ concerned the system of industrial arbitration established in New South Wales and, in particular, a dispute which arose when an industrial union submitted certain intended alterations to its rules concerning membership for the approval of the industrial registrar pursuant to reg 16 of the *Industrial Arbitration Act 1940* (NSW).

- 100 One of the more recent cases the Court considered involving arbitration, *Warner Bros Feature Productions Pty Ltd v Kennedy Miller Mitchell Films Pty Ltd*,¹¹⁹ concerned a dispute arising out of an agreement relating to the supply of services for the production and direction of the film entitled *Mad Max: Fury Road*. The dispute involved Warner Brothers Feature Productions Pty Ltd and Warner Brothers Entertainment, names with which I am sure you are all familiar.
- 101 Warner Brother Productions sought a stay of the proceedings on the basis that the agreement between the parties included a term requiring the dispute to be submitted to arbitration in California. This term was said to be incorporated by virtue of clause 21 which provided that the “*balance of terms*” would be “*W[arner] B[rothers] standard for ‘A’ list directors and producers*”, subject to “*good faith negotiations*”. Bathurst CJ (Beazley P and Emmett AJA agreeing) found that a clause requiring the arbitration of all disputes was “*W[arner] B[rothers] standard for ‘A’ list directors and producers*” and was therefore incorporated by clause 21.¹²⁰
- 102 In another significant decision involving arbitration, *Rinehart v Welker*,¹²¹ the Court was asked to consider whether, when construing arbitration clauses, the presumptive approach in favour of arbitration taken by the United Kingdom House of Lords in *Fiona Trust & Holding Corporation v Privalov*¹²²

¹¹⁸ (1966) 67 SR (NSW) 171.

¹¹⁹ [2018] NSWCA 81.

¹²⁰ *Ibid* [83].

¹²¹ [2012] NSWCA 95.

¹²² [2007] 4 All ER 951.

should be adopted. In that case, the House of Lords adopted what was described as a “*fresh start*” and determined that arbitration clauses should be construed in accordance with the presumption that the parties are likely to have intended that any dispute arising out of the relationship into which they have entered should be decided by the same tribunal, unless the language makes it clear that certain questions were intended to be excluded.¹²³

103 Bathurst CJ, with whom McColl JA and Young JA agreed, considered that it was not appropriate for the Court of Appeal to adopt this approach on the basis that:

“Whilst the presumption that parties intended the same tribunal to resolve all their disputes may justify a liberal approach consistent with the plain meaning of the words in question, the approach suggested by [the House of Lords] is contrary, in my opinion, to the approach laid down by the High Court as to the construction of commercial contracts.”¹²⁴

Decisions of significant social impact

104 Judges are not politicians. Our task is not to take pre-determined stances, but to decide cases upon the facts established by the evidence and having regard to the submissions of the parties made in open court.¹²⁵ Equally, notwithstanding the fact finding function of judges, especially at first instance, judges are not juries, which exist to “*personify the people*”.¹²⁶

105 However, the Court is not divorced from social standards and the societal and political issues of the day. Rather, the Court’s jurisprudence is significantly shaped by these matters, encompassed as they become in the litigation before the Courts. This is particularly evident in in what I have described as the faith-based cases. However, there are many other examples of cases where the Court has been asked to consider prevailing or emerging community values, itself raising the question of what “*community values*” are.

¹²³ Ibid [13].

¹²⁴ Ibid [121].

¹²⁵ Anthony Mason, ‘The Courts and Public Opinion’ (Speech delivered at the National Institute of Government and Law Public Lecture, Parliament House, Canberra, 20 March 2002).

¹²⁶ Ibid.

106 Although the essential question in *Norrie v NSW Register of Births, Deaths and Marriages*,¹²⁷ was one of statutory construction, in which the Court of Appeal held that as a matter of construction, the word “sex” does not bear a binary of “*male*” or “*female*”, the case was brought in the context of increased understanding about transsexuality and intersexuality. I acknowledged that:

“Matters such as gender identity and sexual preferences are often overlain with social, moral and religious considerations that may vary widely in different segments of the community. The law’s role in the regulation of such matters may itself be controversial or, at the least, influenced by the different views within the community on such matters.”¹²⁸

107 Nevertheless, I concluded that:

“...the fact that particular language may be in a state of evolution and that a changed or extended meaning may not have universal acceptance, does not mean that the traditional meaning of the word must be taken as the meaning of the word as a matter of common usage.”¹²⁹

It is not correct to say therefore that the law always follows, dealing only with past events.

108 *Gradidge v Grace Brothers*¹³⁰ is another illustration of this point. Because Ms Gradidge was deaf, an interpreter was provided to translate the hearing into sign language. While Ms Gradidge was being examined as a witness, counsel for Grace Brothers objected to the interpreter translating an argument concerning the admissibility of certain evidence. It argued that there was no means of checking what was being said, and that it gave the impression of a private conversation between the witness and interpreter. The trial judge directed that the interpreter should desist. The interpreter refused, advising that she saw it as her function to interpret everything which took place in a court. His Honour was not prepared for the matter to continue on that basis and it was adjourned.

¹²⁷ (2013) 84 NSWLR 697.

¹²⁸ Ibid 733 (Beazley ACJ).

¹²⁹ Ibid.

¹³⁰ (1988) 93 FLR 414.

109 The Court of Appeal unanimously held that the trial judge erred in law by directing the interpreter to desist. An earlier High Court decision¹³¹ held that witnesses are not entitled, as of right, to give evidence in their “*native tongue*” through an interpreter.¹³² However, Kirby P distinguished this authority:

“...here the interpretation was necessary not to translate the language of the witness in the witness-box. It was necessary in order to ensure basic communication with the party so that she would understand what was happening in a public courtroom.”¹³³

110 Since *Gradidge*, significant strides have been made in providing deaf litigants, defendants and witnesses with access to interpreters. The Supreme Court does not charge a fee to defendants using an interpreter in criminal matters. Professional interpreters are provided by the Language Services division of Multicultural NSW, which provides interpreting and translation of 100 dialects and languages, including Auslan.¹³⁴

111 Interestingly, in 2016 the High Court held in *Lyons v Queensland*¹³⁵ that the Queensland Court of Appeal did not err in holding that Ms Lyons – who is deaf – was not discriminated against when she was excluded from jury service. This is not necessarily inconsistent with *Gradidge* because the Court’s reasoning turned substantially upon the mechanics of the *Jury Act 1995* (Qld) and the common law surrounding jury secrecy. In particular:

- (1) the common law requires that juries be kept separate and restricts communication between jurors and the outside world;
- (2) s 54(1) of the *Jury Act*, which prohibits any person besides a juror from communicating with any of the jurors without the judge’s leave, does not extend a grant of leave to an Auslan interpreter; and

¹³¹ *Dairy Farmers Co-operative Milk Co Ltd v Acquilina* (1963) 109 CLR 458, 464.

¹³² *Ibid.*

¹³³ *Gradidge v Grace Brothers Ltd* (1988) 93 FLR 414, 424.

¹³⁴ Supreme Court of New South Wales, *Interpreters and Translators* (10 February 2017) <http://www.supremecourt.justice.nsw.gov.au/Pages/sco2_facilitiessupport/sco2_interpretersandtranslators.aspx>.

¹³⁵ [2016] HCA 38.

- (3) no provision exists allowing an oath to be administered to an interpreter.

Conclusion

112 The cases I have mentioned provide a snapshot into the jurisprudence of the Court. I can only conclude by urging you to read for interest, read for context and read to enhance your legal expertise within your area of speciality.
