

**IN THE SUPREME COURT  
OF NEW SOUTH WALES  
BANCO COURT**

**BATHURST CJ  
AND THE JUDGES OF THE  
SUPREME COURT**

**Tuesday 4 December 2018**

**FAREWELL CEREMONY FOR  
THE HONOURABLE JUSTICE RUTH McCOLL AO  
UPON THE OCCASION OF HER RETIRMENT AS A JUDGE OF THE  
SUPREME COURT OF NEW SOUTH WALES**

- 1 **BATHURST CJ:** We are here this morning to mark the occasion of the retirement of the Honourable Justice Ruth McColl as a Judge of the Court of Appeal. This ceremony gives us the opportunity to show our gratitude for the 15 years of service you have given to the administration of justice in this State. We are pleased to welcome members of your family and friends, including your sister Christine, to share in this occasion. It is my great privilege to have the opportunity to give this address. I have known your Honour at least since the mid-1980s. We have had a long professional association which I have valued greatly, involving the superfecta of having led your Honour,<sup>1</sup> opposed your Honour,<sup>2</sup> appeared before your Honour,<sup>3</sup> and finally, and most enjoyably, sat with your Honour in Court over the last 7 years.
  
- 2 You came to the Court on Tuesday, 29 April 2003, following a 23-year career at the bar, which was in turn preceded by four years at the Crown Solicitor's Office. As others will no doubt make remarks about your early

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<sup>1</sup> *Re Hunter Resources Ltd* (1992) FCR 418.

<sup>2</sup> *Davies v Australian Securities Commission* (1995) 59 FCR 221.

<sup>3</sup> *Dairy Farmers Milk Co-operative Ltd v Australian Co-operative Foods Ltd* [2008] NSWCA 126; *Clark v Inglis* [2010] NSWCA 144.

life, the focus of my remarks will pay tribute to your contribution as a judge. However, it would be remiss not to note two features of your pre-judicial career, because they have continued to be reflected in your judicial life.

- 3 The first is the simple fact that you were and continue to be a trailblazer for women in the profession and a role model for the many talented young women joining the ranks. You were called to the bar at a time when fewer than 20 of the approximately 750 barristers in practice were women. You did not just survive in what was, in some quarters, a hostile environment for women, you thrived. At the time of your appointment you were the second woman to ever be appointed to the Court of Appeal, the first is sitting on my left.
  
- 4 The second was your commitment to service whilst a practitioner. You were on the Bar Council every year from 1981 to 2001, and it should be noted you first stood for election at just one year of call. You were the first woman President of the NSW Bar Association, second of the Australian Bar Association. You were also President of the NSW Women Lawyers' Association, one of the founders of the Australian Women Lawyers' Association, on the board of the Public Interest Law Clearing House and the NSW Cancer Council, a part time Commissioner of the NSW Law Reform Commission – and I could go on, but what I have already listed suffices to make the point, which is this. You have always exhibited a strong commitment to public service and used your energy and intellect to the benefit of others.
  
- 5 This culminated in your acceptance of judicial office, which in your own words, was because you decided that after 23 years, “the time had come to give something back” and the appropriate way to do that was “to move to the engine room of the administration of justice”.<sup>4</sup> It is your fulfilment of this objective to which I will now turn.

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<sup>4</sup> Ruth McColl, 'Address' (Speech delivered at the Swearing-in Ceremony of the Hon Ruth Stephanie McColl SC as a Judge of the Supreme Court of NSW and a Judge of Appeal' (29 April 2003, Banco Court, Supreme Court of NSW, Sydney)

- 6 The first thing that can be said is that you are nothing if not independent of mind and judgment. I need only refer to one example. On 10 July 2003, a mere two months after your appointment, you sat on the matter of *Rich & Silbermann v ASIC*<sup>5</sup> with two very senior and experienced judges. You dissented from their decision in what was described later by the High Court as a view supported by “a long stream of authority”,<sup>6</sup> in the result, vindicating your dissent. Of course, your colleague on the bench, then RBS Macfarlan QC was none too pleased, having successfully convinced a majority of the Court of Appeal, only to lose in the High Court.
- 7 The quality of your judgments is second to none. They are thoroughly researched and invariably well expressed. There is not one superfluous word nor is there one word lacking. A search of Caselaw turned up over 1,200 results, a substantial contribution to the common law of this State. Of particular note is your expertise in defamation,<sup>7</sup> with cases such as *Besser v Kermode*<sup>8</sup> cited widely both in this jurisdiction and around the country.<sup>9</sup>
- 8 Such is the nature of defamation law, that your name is frequently associated with glamour and celebrity far removed from the humdrum of ordinary Court life. For example, your judgment in the matter of *McCrohon v Harith*<sup>10</sup> as to uncertainty in the calculation of damages was recently relied upon in the Rebel Wilson matter in the Victorian Supreme Court.<sup>11</sup>

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<[http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/Pre-2015%20Speeches/McColl/mccoll\\_2003.04.29.pdf](http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/Pre-2015%20Speeches/McColl/mccoll_2003.04.29.pdf)>.

<sup>5</sup> (2004) 48 ACSR 6.

<sup>6</sup> *Rich v ASIC* (2004) 220 CLR 129.

<sup>7</sup> See, eg, *Besser v Kermode* [2011] NSWCA 174; *Habib v Radio 2UE Sydney Pty Ltd* [2009] NSWCA 231; *Corby v Allen & Unwin Pty Ltd* [2014] NSWCA 227; *Ali v Nationwide News Ptd Ltd* [2008] NSWCA 183; *Channel Seven Sydney Pty Ltd v Mahommed* [2010] NSWCA 335.

<sup>8</sup> (2011) 81 NSWLR 157.

<sup>9</sup> See, eg, *Fairfax Digital Australia and New Zealand Pty Ltd v Kazal* [2018] NSWCA 77; *Wilson v Bauer Media Pty Ltd* [2017] VSC 356; *Fleming v Advertiser-News Weekend Publishing Company Pty Ltd (No 2)* [2016] SASC 26.

<sup>10</sup> [2010] NSWCA 67.

<sup>11</sup> *Wilson v Bauer Media Pty Ltd* [2017] VSC 521, [123].

- 9 I do not think anyone would cavil with the proposition that we are losing the leading defamation lawyer on the Court of Appeal. The increasing calls for legislative reform in this area means your retirement comes at a particularly inopportune time for the rest of us, who will be left to muddle through without you.
- 10 Your expertise also extends to commercial law and equity, but the nature of judicial life is such that you have become an expert in matters far afield. One example is your decision in *Director of Public Prosecutions v El Mawas*<sup>12</sup> which considered the statutory mechanism for magistrates to deal with persons with mental health disorders “otherwise than in accordance with law”.<sup>13</sup> Your reasons continue to be cited with regularity as a lucid guide to the discretionary decision required under that Act,<sup>14</sup> and such decisions more generally.<sup>15</sup>
- 11 Third is your prodigious work ethic, one former colleague commented that you were always here before him, always stayed after him, and on the occasion he was in chambers on the weekend, so were you. Now, many judges on the Court work long and hard hours. However, I think you are probably the only judge who does so after having woken up in the dark to ride laps around Sydney on a bicycle. If there is one small gain from your retirement, amidst the melancholy that invariably attends such occasions, it might be a slight subsiding of collective guilt about our sedentary ways as compared to your immense stores of energy.
- 12 In addition to the demands of judging, you have continued to give back to the community in a variety of ways. First, was your service as President of the Judicial Conference of Australia from 2008 to 2010, an organisation which plays a vital role in maintaining a strong and independent judiciary. The second was your willingness to deliver speeches at a variety of

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<sup>12</sup> (2006) 66 NSWLR 93.

<sup>13</sup> *Mental Health (Criminal Procedure) Act 1990* (NSW) s 32.

<sup>14</sup> See, eg, *Robertson v DPP (NSW) & District Court NSW* [2017] NSWCA 180, [14] (Bathurst CJ).

<sup>15</sup> See, eg, *Murakami v Wiryadi* [2010] NSWCA 7, [34] (Spigelman CJ).

events. I am informed that your practice was never to decline unless unavailable. Not only did your words enrich those who attended in person, but they remain available as a substantial body of written work on the Court's website. They will remain a valuable resource into the future, particularly on the issues facing women in the legal profession.

- 13 In a similar vein, you have donated your time to judge many student moots over the years, including, on a number of occasions, the Intervarsity Womens' Moot. In 2015 you were made a life member of the Women Lawyers' Association of NSW and received a Life Achievement Award from that organisation. This was no doubt in recognition of your many achievements and "firsts" in the profession. However, mention must be made of the quiet but consistent effort you have put in to mentoring young women, particularly university students or those at a very early stage of their careers. You provided those individuals with support and guidance and in doing so combatted the pernicious issue that "you can't be, what you can't see". Your efforts will no doubt improve gender and cultural diversity in the profession for many years to come.
- 14 Finally, something must be said as to your manner in Court, and this is because it is a model of judicial behaviour. You are firm but polite, penetrating but courteous, and unfailingly respectful of counsel and the parties before you. These attributes are also reflected in the out-of-court descriptions given by your associates, Wendy Morrow, who was with you for the better part of a decade before retiring, and her successor, Dorothy Yon. They were corroborated by your band of tipstaves who I should add, were fiercely interrogated, but such is their loyalty that no anecdotes as to peculiar habits or idiosyncrasies were unearthed for my purposes today.
- 15 What they revealed was the extremely high regard in which you are universally held amongst your current and former staff, the extent to which you are involved in a meaningful and ongoing way in their career development and the effort you make, despite the demands on your time, to keep in touch with their lives on a personal level. As an employer, you

always had a very clear idea of what you wanted from them, which invariably made their work easier, and you were direct but kind in your feedback, taking the time to explain why you made changes to their work for the selfless purpose of their own development. This extended to the more mundane tasks of a tipstaves' life: one on occasion, being asked to dispose of a particular variety of flowers in chambers, and not knowing which was which, the tipstaff threw away the wrong ones. For Christmas, many months later, he received a reference book on flowers.

16 I have mentioned two of your extra-judicial pursuits, fitness, and cycling, but there is another which combines the two, and that is your love of travel. Your holidays are by no means relaxed affairs, involving cycling, hiking, skiing or a combination of them all. Just in the last three years you have ventured to places as alternative as the Galapagos Islands, to New Zealand where despite an earthquake, you kept calm and carried on cycling, and hiking expeditions through Japan and Asia more broadly. Your cycling at home is also far from uneventful, one anonymous source said, and I quote: "only Ruth would battle a garbage truck on a bike before 6am in the morning".

17 When you finished up your term as President of the ABA, you were interviewed for a feature in *Bar News*. The last question put to you asked what organisation you would be chairing after February 2002, to which you replied, "I think at the end of February I will truly be a feather duster".<sup>16</sup> We now know this to be false, as the rate and intensity of your legal and personal pursuits has only intensified. There is no reason to think the same will not be true on your retirement from this place. On behalf of all the judges of the Court, and of course the public of New South Wales, I thank you for your service to the court. We hope retirement gives you more time to enjoy your diverse range of interests.

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<sup>16</sup> 'Ruth McColl SC: Reflecting on her term in office' (2001) 94 *Bar News* 30  
<[https://www.nswbar.asn.au/docs/webdocs/BAR\\_NEWS\\_2001-02\\_-\\_SUMMER.pdf](https://www.nswbar.asn.au/docs/webdocs/BAR_NEWS_2001-02_-_SUMMER.pdf)>.

- 18 **MR T GAME SC PRESIDENT THE NEW SOUTH WALES BAR ASSOCIATION:** On behalf of the barristers of New South Wales, your Honour it is my pleasure and honour to speak on behalf of the Bar and to acknowledge your Honour's contribution to the law, not just as a judge, but particularly as a barrister and a leader of the Bar over many years. Your Honour became a member of the Bar Council in 1981, just one year after your Honour had been admitted to the bar which is an extraordinary thing because most of us are too frightened to even telephone the Bar Association let alone apply to be a member.
- 19 I certainly felt like that and I think we feared that it was a place that might take our practising certificates away from us rather than assist us on our way. Your Honour did much to change how the Bar Association relates to the community and I will say something more about that in a moment. You in fact were a solicitor for five or six years but before that you were also prescient in your judgment because you became a clerk and from the beginning you were taking in that which involves learning to be a lawyer. You were a clerk of the Crown Law office three or four years before you became a solicitor where you stayed for five years, then you went to the Bar.
- 20 Your contribution has been quite singular in terms of your commitment to the profession. You were elected to the Bar Council every year until you left as President in 2000-2001, which is also a testament to your Honour's popularity because you were elected every year. But not only that, your Honour held every position in the Bar Association over the years which is testament to the respect that your colleagues had of you.
- 21 Then as the Chief Justice just said a moment ago, you were President of the ABA and so that is almost everything that you can do in the profession. Another thing I should mention is your time at the Bar. By the time the Bar News was established, I think by Chief Justice Gleeson, you became editor of that publication and you were editor of it for 12 years which again is a quite significant contribution to the profession.

- 22 I will just mention a few of the things that your Honour did through your position on the Bar Council. You were very strong in pursuing the advocacy for women in the law. Your Honour, with your colleagues, introduced compulsory continuing legal education at the Bar which is of great significance to us as a meaningful profession for our colleagues and the community. Your Honour was also involved in introducing a pro bono litigation scheme and you were involved in a project called indigenous legal strategies.
- 23 All of those are of great importance. One issue that might not be remembered, and it is quite important when a very unattractive problem arose with some barristers not paying their tax and the like, your Honour was President of the Bar Association and your Honour took control of that situation and dealt with it in the only appropriate way which brought about changes to our rules, particularly with respect to show cause, events and the like. So that could potentially have been a crisis for the Bar and your Honour dealt with it head-on and with singular intelligence and wisdom.
- 24 Your Honour has received many awards. I am only going to mention a couple, the Centenary Medal, your appointment as an Officer of the Order of Australia. When you were appointed to this Court in 2003 you were appointed to the Court of Appeal which is itself testament to your Honour's skill as an advocate and as a lawyer. Your Honour practised principally and with distinction in commercial law, public law and defamation law amongst many other areas of practice. but with particular distinction in those areas.
- 25 Some years ago there was a publication of a series on judges in the press and your Honour featured in that and the editor of Justinian described a photo of you as a terrific photo essay of your Honour and the judges, but particularly you, and it said including a "unique shot of Ruth McColl laughing". Now I have not even seen your Honour smile today but maybe a flicker of a smile. Anyway it is quite clear that your Honour leads a very

full life outside the law not limited to cycling in frozen dark earthquake-like conditions. No doubt your Honour will continue that contribution to the profession. We as barristers are very proud of you as one of our number over many years and you have served the community with distinction both as a barrister and as a judge of appeal. If the Court please.

26 **MS ELIZABETH ESPINOSA PRESIDENT-ELECT LAW SOCIETY OF NEW SOUTH WALES:** May it please the Court. I would like to acknowledge the traditional custodians of the land on which this Court stands, the Gadigal People of the Eora Nation and I pay my respects to their elders both past and present. If it pleases the Court her Honour Justice McColl I wish to continue the tradition of hyperbole for which these occasions are often infamous as your Honour said in her swearing-in.

27 Justice McColl on behalf of the other 33,000 solicitors of this State and as President-elect of the Law Society of New South Wales I am honoured to appear before this Court to celebrate your career as a formidable advocate, a great judge and a trailblazer in the law. Your Honour's career first as a solicitor, then a barrister and finally a judge culminates today as a shining example of dedication, achievement and contribution.

28 Prior to going to the bar in 1980, as this Court has heard, your Honour practised as a solicitor. You undertook articles at the Crown Solicitors Office in 1975 and you practised there until 1980. One colleague remembers meeting your Honour at the Crown Solicitors Office in 1978. He was dispatched to take over some files relating to the breaches of what was then the Companies Act 1961. As he walked out of the door to head down to Phillip Street, someone said to him, "See if you can get the files McColl has been working on, they'll be the best in shape." He did. The statement was correct.

29 When your Honour went to the bar you were one of about 20 female barristers out of 750 counsel who were in practice. From earliest days you were involved in cases of the highest prominence. These appearances

were testament to your obvious early promise. You were counsel assisting the Thredbo Inquiry, appeared in the Ettingshausen defamation case led by Tom Hughes QC, and you worked on the landmark Giant Resources litigation. You did industrial personal injury work as a junior to Bob Stitt Astic QC in Newcastle where the steelworks were located. You also appeared in high profile defamation trials as junior to the likes of Murray Gleeson QC and Ian Callinan QC.

- 30 You appeared twice in the Privy Council in *Lloyd v David Syme & Co*, a case in which Tom Hughes QC appeared for the appellant. Unfortunately your Honour's legal team, the first instance decision was reinstated by the Privy Council. It was not all doom and gloom however because I'm told the Privy Council had conveniently listed the hearing for the day after the Lords Test and the start of the legal year. So it was an interesting time filled with lunches in the House of Lords and meals at wonderful London establishments which your companions at that time remember fondly.
- 31 Your Honour took silk in 1994. Solicitors who worked with your Honour in those days recall feeling strongly that you cared about the team. They say you always had their back, particularly when difficult situations requiring ethical sensitivity arose. Instructing solicitors say that as well as relishing your Honour's expertise, they were impressed by your willingness to give things a go and push out into new areas. They also speak of your generosity to the life of their firms. You would frequently give talks to groups of graduates, teaching them about appearing in front of judges, or the path to becoming a judge themselves. More broadly, your Honour has given generously to the community as we have already heard through your involvement with associations. You held leadership roles with the Women Lawyers Association New South Wales and federally. You spent 20 years on the Council of the Bar Association of New South Wales concluding as its first female President. You also President of the Australian Bar Association.

- 32 In addition, you contributed enormously to the legal profession in New South Wales by your membership of the Legal Profession Advisory Council, as well as serving on the Admissions Committee of the Legal Services Council. You spent years as President of the Public Interest Law Clearing House whose work has continued with Justice Connect.
- 33 In 2004 you were made an officer of the Order of Australia for services to the law, to continuing professional development and education, particularly for women and to the community in matters affecting indigenous groups and youth.
- 34 At the bar you were committed to shepherding, shepherding those coming up through the ranks, whether by speaking at events, senior barristers or solicitors, or in tangible signs of generosity such as gifting a pair of designer leather chairs from your chambers to a female barrister when you came off the bench. At the bar your Honour honed her skills that have benefited this bench and the people of New South Wales throughout your tenure. Those attributes are a commitment to rigorous legal analysis, an ability to synthesise first instance judgments into a compelling overarching principle, a clarity of expression, strong work ethic and unfaltering support for younger members of the profession.
- 35 This ceremony presents itself as an opportunity to reflect on the 15 years your Honour has served on the bench of the Court of Appeal. One counsel who appeared before your Honour has said in praise of your talent for listening in the courtroom, and I quote:
- “I was not always on the winning side in the Court of Appeal, but an abiding memory of appearing before her Honour is of being listened to calmly and patiently, and then having my proposition reformulated altogether more concisely and clearly to which all I had to do was reply, ‘That’s our submission your Honour’.”
- 36 The testimony of my informers is that your judgments were extremely thorough and well written as well as being laced with relevant authorities.

Indeed, there was no authority that was left unturned in your Honour's penning of judgments. You were aided in your task by the strains of classical music that would emanate from your chambers, which fellow judges remember fondly.

- 37 Judges found it hard to recall instances of dissenting from your judgments as you just got it right. You have been one of the leading judges on defamation law in Australia and have written many judgments of clear authority in relation to the Defamation Act, play an important role in shaping the interpretation of the Act's provisions.
- 38 You were famously hard working, but equally you balanced your duties as a judicial officer with down time as we have heard. Down time, if we call down time, running, cycling, although I understand you were often in the wars as a result.
- 39 Your Honour's staff team speak fondly of your boundless amounts of energy, sense of fairness, compassion and generosity. Your Honour keeps in touch with all your former tipstaff as they progress through their careers and you are always available to offer advice and encouragement.
- 40 On a personal note your Honour was close to your parents, John McColl who passed away in 1981, and your beloved mother, Mitzi McColl who died in 2009 at the age of 96, and you remain close to your sister, Christine.
- 41 Your mother led a most interesting life, an artist who overcame adversity and came to Australia from her native Austria in 1939, just prior to the outbreak of the Second World War. She was described by my predecessor, President Benjamin, at your swearing-in as a fiercely independent person who has been a role model for her fiercely independent daughter.

- 42 I would like to affirm this morning the extent to which your Honour has been a pioneer in the law. Indeed, the strides you have taken in the law have allowed the women behind you, next to you, around you to forge their own individual paths.
- 43 Much was made of the first all-female bench in 1999 when Justices Beazley, Simpson and Bell sat at the Court of Criminal Appeal. This was indeed an historic milestone, but with your Honour's appointment to the Court of Appeal, all-women benches of three and majority-female benches of three women out of five judges sitting in the Court of Appeal were made possible.
- 44 Substantial change takes place when female visibility and equality of representation is commonplace. The normality and regularity with which women judges have sat together was enabled by your appointment.
- 45 This recent reality has rendered the experience of junior women in the law profoundly changed. Because of this, you were the third recipient of the Lawyers Weekly Lasting Legacy Award in 2014. In accepting that award your Honour invokes the examples of Dame Roma Mitchell, Mary Gaudron, Elizabeth Evatt and Ada Evans as "great women in whose paths we walk".
- 46 Your Honour, today at your farewell in your judicial career, in this 100th anniversary year of women in the law in New South Wales, we hail you, too, as a great woman in the mould of Mitchell, Gaudron, Evatt and Evans. Looking around me this morning it is heartening to see so many senior women lawyers sitting around me in this Honourable Court. Your Honour, I submit that the presence of so many women lawyers are sitting in this Court in such a respected position this morning, is a testament to you, and the perceived boundaries you help to break with your own successful career. You can't be what you can't see.

47 We pay tribute to you today and thank you for a mammoth contribution to the administration of justice in New South Wales.

48 As the Court pleases.

49 **McCOLL JA:** Chief Justice, Mr Game, Ms Espinosa, my judicial colleagues.

50 I acknowledge the traditional owners of the land within our boundaries. I pay my respects to the elders both past and present, and all Aboriginal and Torres Strait Islander people, from whatever nation they may come. In particular, I acknowledge the Gadigal people of the Eora nation as the traditional owners of the lands and waters where the Supreme Court is located for they hold the memories, the traditions, the culture and hopes of Indigenous Australia.

51 I should like to thank Murray Gleeson AC QC, the former Chief Justice of the High Court of Australia; Michael McHugh AC QC, former Justice of the High Court of Australia; Keith Mason AC QC, former President of the Court of Appeal; Chief Justice Allsop AO of the Federal Court of Australia, also a former President of the Court of Appeal; and other present and former members of the judiciary for doing me the honour of attending today.

52 I extend, too, my thanks to my family, friends, all members of the legal profession and members of the broader community who have paid me the compliment of attending. I am very grateful to you all.

53 Thank you, Chief Justice, Mr Game and Ms Espinosa, for your extremely kind and gracious remarks, and your expressions of goodwill. On a mental fact check I ran as you spoke, at least some of what has been said is benevolent hyperbole, for which I am nevertheless grateful as only I, and those close to me, may appreciate to what extent that is the case.

- 54 I have been privileged in the last more than fifteen years to sit in the Court of Appeal and attempt, to the best of my ability, to discharge the affirmation I made on 29 April 2003 do right to all manner of people after the laws and usages of the State of New South Wales without fear or favour, affection or ill-will. I am fully cognisant that this is a privilege accorded to the rather small number of judges necessary to constitute the Court of Appeal from time to time.
- 55 During my time as a judge of appeal I have had to determine in hundreds of cases whether a judge of another court, or a member of a tribunal, has erred in a manner warranting appellate intervention. Fortunately, that decision has not fallen entirely on my shoulders, but has been a burden shared with the other judges who have heard the case. I am extremely fortunate to have undertaken that task in the strongly collegiate Court of Appeal in which robust differences of views as to the outcome of cases remain on the pages of the judgment, and do not otherwise affect our interaction. I thank my colleagues past and present (both permanent and acting judges) for their support over the years.
- 56 In almost every case my colleagues and I have determined, we have pored over a decision whose author has also demonstrably striven to discharge the judicial oath: to determine the facts, to identify and apply the relevant principles of law and to write a judgment demonstrating clearly to all parties, but particularly to the losing party, why, on the singular facts of that case, that has been the outcome. Each case is different. Determining the rights of litigants is not about producing widgets. Sometimes, depending on the level of the judicial hierarchy in which the decision-maker presides, those judgments must be written in circumstances where none of the litigants has any legal advice, can offer no assistance to the Bench and the decision is but one of a multitude which has to be delivered that day. This is a difficult task but one which most discharge in an appropriately judicial manner.

- 57 In the Court of Appeal, we can take the exigencies of the pressure of work in another court into account to some extent. But only relatively speaking. At the end of the day, we, too, must apply the law in the sense in which I have earlier described. We must inure ourselves to the reality if an appeal is allowed, that not only the losing party, but also the decision-maker whose orders we overturn may feel aggrieved. That is part and parcel of our system of justice. During the time I have toiled at the judicial coal-face, my respect for those who also toil there, albeit in different courts, has continued to be repaid. This State, in my view, is fortunate to have such a strong and dedicated judiciary.
- 58 In what seems to me to be a remarkable coincidence in terms of chronology, today is the 46th anniversary of the day I walked through the doors of the Crown Solicitor's Office on 4 December 1972 to join the service of that office, as has been mentioned, as a clerk. With me on that day was the only other of the successful applicants for a position in the office, Justice Peter Johnson, who joins me on the Bench today. It was an excellent place to learn the rudiments of the profession.
- 59 I was admitted as a barrister in this Court on 8 February 1980. The Chief Justice, Sir Laurence Street, presided over the ceremony. Peter Young of Queens Counsel moved my admission. Sir Laurence was the Chief Justice for the first 8 years of my career at the Bar. He was a remarkable Chief Justice, but he retired in 1988 when aged only 62, a decade before the statutory retirement age of 72.
- 60 I should say the old statutory retirement age, as six days ago the *Justice Legislation Amendment Act (No 3) 2018* (NSW), raising the statutory retirement age to 75, received royal assent.
- 61 Sir Laurence was succeeded as Chief Justice of New South Wales by Murray Gleeson. Murray Gleeson was the second president of the Bar Association on whose Council I served. It was Murray Gleeson who in 1984 called for "volunteers" to edit a new magazine, to be called *Bar*

*News*, which was to be the journal of the New South Wales Bar Association. It was an “invitation” I found difficult to resist and a task I undertook, not without some hiccups in the production schedule, for some 12 years.

62 The concept of *Bar News*, as Murray Gleeson wrote in the first issue published in Winter 1985, was to revive the Bar’s corporate spirit, by an appeal directed to the mind, through the publication of “scandalous information; an occasion of privilege for defamation; and a forum for ideas about the Bar”. I’m not sure *Bar News* ever qualified for any of defence of privilege known to the law of defamation, but so far as I am aware, and certainly under my editorship, that issue never had to be tested. The truth of the proposition that *Bar News* could serve the corporate life of the Bar is manifest in the fact that it continues to thrive, with a strong editorial team, contributions from across the Bar and, from what I can gauge, reliable production schedules.

63 It was in the Summer 1988 issue of *Bar News* that I reported an interview I conducted with Murray Gleeson immediately prior to him assuming his position as Chief Justice of this Court. It is an interview which I say with appropriate modesty repays rereading for its demonstration of his typical clarity of thought, pithiness of expression and wit. When I asked him what sort of a Court we could expect to see him run, his response was, “Relaxed. Friendly. A cosy place in which a just solution to people’s problems can be sorted out as a result of a quiet chat between Bench and Bar.”

64 Much is in the eye of the beholder and all, too, is relative. The words “relaxed”, “friendly” and “cosy”, even “quiet chat” I am sure do not spring readily to mind to litigants and the legal profession when thinking of court. Nevertheless, conceptually they envisage a courtroom removed from what historically had been a somewhat pugilistic arena! On the other hand, litigants of course expect nothing less than a “just solution” and that is

what, as I have sought to explain, I believe all members of the judiciary strive to deliver.

- 65 Michael McHugh was the first President of the Bar Association on whose Council I served for two years from November 1981 when I was first elected.
- 66 Both Michael McHugh and Murray Gleeson demonstrated from my first meeting them their recognition, and acceptance, of the changing face of the Bar in terms of the increasing number of women barristers.
- 67 Michael McHugh had what some may have seen as the courage to ask me to be the junior speaker at the Bench and Bar dinner in 1983 at which Sir William Deane was the guest of honour on his appointment to the High Court of Australia. It was only the second time, I believe, a female barrister had been asked to fulfil that role.
- 68 When he was president of the Bar Council in 1984, Murray gave permission to the *Sydney Morning Herald* to run an article in the *Good Weekend Magazine* about half a dozen or so female barristers. I do not know how they were selected. Suffice it to say that whoever did undertake that selection process had a shrewd eye as I believe that all but one of the women interviewed in due course was appointed to the judiciary. I have no doubt that Murray gave permission for that article to increase the profile of female barristers, for the community generally, and also the legal profession. To the best of my recollection only one member of the Bar protested to the Bar Council about what was seen by him to be inappropriate publicity for members of the Bar. As far as I am aware, the protest received short shrift.
- 69 It is trite now to speak of “change agents”. Perhaps neither Michael McHugh nor Murray Gleeson applied that expression to themselves. There is no doubt, in my mind, however, that from when Michael became President of the Bar, it became more socially aware and responsive to the

contemporary world. Murray Gleeson continued that process. I also cannot leave this historical account without mentioning Michael Kirby AC CMG who became President of the Court of Appeal in 1984. The Court of Appeal over which Michael Kirby presided accorded with the model Murray devised – indeed, to some extent, may have been its prototype. Michael Kirby was, and is, a strong supporter of women barristers.

70 It should not be forgotten that, although when I went to the Bar there were only about 20 other female barristers, that group, and those who had preceded them, had already played a significant role as change agents. In many ways, they were a critical mass. I am sure it was their success which demonstrated to progressive members of the male-dominated Bar that female barristers had “arrived”. I cannot mention them all, though I acknowledge each of their individual contributions. I should, however, mention a few.

71 The first, of course, is Mary Gaudron QC. She was admitted to the New South Wales Bar in 1968. She had difficulty buying a room. Michael McHugh tried to sell her his room, but the other members of his chambers would not let her buy it, although there were no other buyers. Within two years of admission to the Bar, Mary Gaudron appeared alone, and successfully, in the High Court in *O’Shaughnessy v Mirror Newspapers Ltd* (1970) 125 CLR 166; [1970] HCA 52 against the doyen of the defamation bar, David Hunt. In 1974 she was appointed to the Conciliation and Arbitration Commission as Deputy President, making her the youngest ever Federal judge in Australia. In February 1981 she was appointed Solicitor-General of New South Wales, and in 1987 she became the first female High Court judge. There are now three female High Court judges, including, of course, the Chief Justice of Australia, the Honourable Susan Kiefel AC.

72 The second is Jane Matthews AO. Jane became a judge of the District Court in 1980 but, of course, as we know, did not stop there, becoming the first female Supreme Court judge in 1987, then being appointed to the

Federal Court of Australia in 1994. Thirdly, Justice Beazley AO who went to the Bar in 1975 and became the first female President of the Court of Appeal in this State in 2013. Fourthly, my recently retired colleague, Justice Simpson, who was admitted to the Bar in 1976, was the second woman appointed to the Supreme Court, and who, when she retired in March this year after 24 years on the court, was its longest-serving female judge.

- 73 These matters of history do have a wider framework and contemporary relevance. The wider framework is that 2018 is the 100<sup>th</sup> anniversary of the passing of the *Women's Legal Status Act 1918* (NSW) which had to be passed to enable women to be admitted to the legal profession! That anniversary should be a reminder to all of the struggle women had to be accepted in the legal profession. I use the word "struggle" advisedly. While it may not resonate with all today, the fact is that there is work still to be done, and which is being done by strong women and men in both ranks of the profession to move towards the goal of professional equality, particularly so far as the Bar is concerned, in equality of briefing practices.
- 74 There is much work still to be done, too, in increasing the number of First Nations barristers. The lack of representation of such barristers proportionate to the First Nations population was recognised in an article in the Autumn 2018 *Bar News* which discussed at some length the Indigenous Barristers' Trust, the Mum Shirl Fund, founded to provide financial support to Indigenous barristers in their first years at the Bar. I am proud to have been involved while President of the Bar in the establishment of the Trust. It would not have happened without the hard work of Justice Michael Slattery, when he was a member of the Bar Council, Chris Ronalds SC and Tony McAvoy SC. The Trust receives strong financial support from the bar and wider legal community. Still, as at 2018, there are only five First Nations barristers in New South Wales. This, too, must change.

- 75 Both Chief Justices under whom I have served, the Honourable James Spigelman AC QC and, of course, Chief Justice Bathurst AC, have been important change agents supporting both female lawyers and a more diverse legal profession. During Chief Justice Spigelman's term of office from 1998 – 2011, the number of female judges increased from two to ten, although he "lost" one who, as he said on his retirement, "we allowed ... to go to the High Court." I speak of course of Justice Bell AC
- 76 There are now 11 female judges on the court. Significantly, this year although we have lost two female judges to retirement, Justice Latham and Justice Simpson, each has been "replaced by a woman". Justice Simpson, of course, has not really left the building, having returned almost the day after her retirement ceremony as an acting judge.
- 77 In addition to fostering the number of female judges, Chief Justice Spigelman and Chief Justice Bathurst have made a point of acknowledging the increasing diversity of the legal profession, both by gender and ethnicity, in the speeches each has given at the literally hundreds of admissions ceremonies over which they have presided.
- 78 Such an acknowledgment plays an important function, as did the *Good Weekend* article too, in confirming in the minds of the public and the profession, the normality of female barristers in particular and a culturally diverse profession. I also welcome that diversity, and hope, too, that the Australian legal profession and of course, the judiciary will increasingly reflect the multicultural society of which Australia should be proud. I fully endorse Justice Simpson's remarks at her retirement ceremony in March this year to the effect that no matter what obstacles aspiring lawyers may perceive to success in the law, they can be overcome. History has demonstrated that each generation stands on the shoulders of the previous one, creating a diagram rather like an inverted iceberg in which the apex is at the bottom and the shape widens above.

- 79 The President of the Court of Appeal when I was appointed was Keith Mason. The Court of Appeal over which he presided also to a large extent followed the model Murray Gleeson proposed in 1988. Keith Mason led the Court of Appeal in a firm and measured manner. It was a style which encouraged the collegiality to which I have already referred. Justice Mason's leadership style was continued by his two successors, Justice Allsop and now Justice Beazley.
- 80 A judge cannot function without a support team. In this Court we are fortunate to have a support team consisting not only of an Associate, but also a legal researcher. I have had two exemplary Associates: Wendy Morrow, who retired in 2015 and was succeeded by my present associate, Dorothy Yon. Each has been the height of efficiency, an invaluable support and a joy to work with. They have kept the wheels of chambers turning smoothly. Dorothy is of course in court today sitting immediately below the Bench. I am pleased too that Wendy has done me the honour today of attending.
- 81 Both Wendy and Dorothy created the pleasant atmosphere in my chambers into which, annually, I welcomed a new legal researcher. I would have to say that one of the joys of being a judge is to encounter each year a freshly graduated lawyer whose enthusiasm to embed themselves in the Court experience is always manifest. By the time I retire I will have had 16 legal researchers. Each in their own way has been a delight to work with and has opened my eyes to a different perspective of the law. They have all been a marvellous support. Their diligent research has enhanced the quality of my judgments. All but those who are overseas, or in geographically impossible areas, are here today and I am honoured by their presence.
- 82 I should also mention the Registry staff who keep the wheels of the Court of Appeal turning over, the administrative staff and the court officers generally. They are the cogs of the machine whose paths regrettably almost never cross with the judges', but who are, of course, indispensable.

- 83 The Supreme Court library and its librarians should also be acknowledged. They are able to produce whatever book you want, no matter how obscure, in the shortest possible time. The Court could not function without them.
- 84 I also thank my close circle of friends who have supported me in the last 16 or so years. Not all are in the legal profession; though, as you could imagine, many are. It is good to get a perspective on life from others who are not at the heart of the workplace.
- 85 Although it is not customary on a retirement ceremony to correct errata from the Bar table, I think I should at least correct one. In the *Ettingshausen* case, I was not led by Tom Hughes QC. Tom Hughes appeared for the plaintiff. I was led by Ian Callinan, of course in due course to become a Justice of the High Court of Australia. We did lose. We also lost *Lloyd v David Syme*, not with Ian Callinan, on that occasion, but nevertheless the decision of the jury in that case was restored.
- 86 The other short matter I should mention is not a matter of errata, but a matter of gratitude. As Mr Game has mentioned, the challenge of dealing with bankrupt barristers in my presidency at the bar was indeed a great one. I could not have got through that crisis without the assistance both of a strong Bar Council but, in particular, my Senior Vice President, Brett Walker SC.
- 87 Finally, I should acknowledge, of course, my sister, Christine, the only surviving member of my immediate family. She has played a most significant role in keeping me grounded throughout my judicial career. There are insufficient words to thank her for all that support.
- 88 Can I return briefly to Sir Laurence and the small example he has provided for my retirement some years short of the statutory retirement age. As I said, Sir Laurence retired when aged only 62. As we all know, he

reinvented himself as a mediator at a time when alternative dispute resolution was in its infancy in this country. I do not pretend that I can assume such a significant role as Sir Laurence did in his retirement. Nevertheless, I wish to make it clear that I do not really regard what I am doing today as retiring. Rather, I have reframed what I am doing as “moving forward”.

89 When I informed the Chief Justice in July of my intention to retire, I was leaving only about 4 years before the statutory retirement age. Now it's been raised to 75, I'm leaving 7 years early! The increase in the retirement age on any textual analysis demonstrates legislative confidence that judicial power can be competently exercised for an extended period. In the almost parallel universe which is now judicial retirement, the legislature's faith gives me confidence about my durability in the next chapter of my life.

90 I do not intend to walk away from the law. It has played too large a part in my life for me to be able to do that. I merely hope to be able to continue to contribute to the law and the greater good of the community in a manner which will enhance the social fabric.

91 Once again, I thank you all for the honour you have done in attending today.

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