tied behind you . . .'. The judicial handicap is increased by the ease with which court decisions can be distorted and sensationalised in an emotional context. The Chief Justice sees the solution as being the need to communicate what the role of the court is so as to avoid the politicisation of the judiciary and the phenomenon of 'politicians in black robes' beholden to special interests and powerful groups.

to handle power with grace. Her approach to the goal of publicising the ideal of the rule of law has been to open up the courts by publishing all court rules and to attempt to allow the judiciary to see itself as an organic whole. The diffusion of the natural tension between trial and appellate court judges has, she believes, been achieved by bringing up judges from the system below to sit on the Supreme Court, so that each level of the judiciary appreciates the problems of the other levels. Although this was regarded as abhorrent at first, the Californian judiciary now accept the practice. She is firmly committed to the notion that, in a diverse and pluralistic society, the judiciary should reflect that diversity so as to break down the belief that there is only one crucial viewpoint which must be adhered to by everyone appointed to the judiciary. She stated, 'it's very important to handle power with grace and the way in which to do that is to fundamentally understand that your view is a perception rather than the truth.' In her view, this is particularly difficult in an uncertain age when people seek certainty from somewhere and often look to the criminal law to provide it. The situation is worsened, she believes, when politicians exploit that need by using emotional rhetoric which makes it difficult to reach rational solutions, particularly in the context of the cult of personality in American political dialogue.

an independent judiciary. Nonetheless, Chief Justice Bird takes the view that there is a role for democracy in the appointment of the system of judges since the system of confirmation elections allows popular debate and genuine dialogue concerning the role of the court. However this creates a tension between the ideal of judicial independence and the notion of judicial accountability. In her view, at least, the message can be put across that a democracy needs an independent judiciary which will make unpopular decisions in a diverse culture so as to protect the rights of everyone, even the unpopular.

an ordinary citizen. Chief Justice Bird resists attempts to invade her personal life. However she believes that it is important for a public official to be 'as close to an ordinary citizen as possible', to use her words. She does most of her own typing and drives her own car, rather than using a chauffeur-driven limousine. She has written a number of articles on cancer, having herself undergone a modified radical mastectomy in 1976 and two subsequent operations for cancer. She described the experience as 'a kind of liberation' even though she said in 1979 'under the statistics, I will be lucky if I am alive in five years'.

what winning is about. In a recent address to the New South Wales Women Lawyer's Association (April 30, 1986), Chief Justice Bird discussed the risk that professional pressures and stresses may distort one's development as a human being. She spoke of restructuring the concept of what success and winning are about in order to achieve wisdom and live ethically. She described life as a learning and risk-taking process, but, in her view, if one learns something in the process of risk-taking then one can

> re-structure the concept of what winning is about . . . [and] risks are just a natural part of life . . . [F]ailure is an inability to come to terms with who you are and what life is about.

criminal law developments

Yet malice never was his aim;
He lashed the vice, but spared the name;
No individual could resent
Where thousands equally were meant.
Jonathan Swift, *On the Death of Dr Swift* C. 1700

increase in criminal appeals. In his address to the Commonwealth Magistrates' Associa-

tion at Nicosia, Cyprus in September 1985, Sir Harry Gibbs, the Chief Justice of the High Court of Australia, drew attention to the fact that the time of judges of the appellate courts in Australia has been occupied more and more by criminal appeals. For this he cited two reasons:

- a significant increase in the rate of serious crimes, except for homicide; and
- the availability of legal aid in criminal cases.

He noted that the latter meant that counsel had come to feel free, or even bound, not only to become more meticulous, so that they explore every possible avenue of defence, but also to become more imaginative and to raise points formerly not thought of and to test decisions formerly regarded as establishing the law.

murder. His Honour discussed a number of recent cases in both England and Australia. In particular, he drew attention to the case of *R v Crabbe* ((1985) 59 ALJR 417) where the accused had been physically ejected from the bar of a motel at Ayres Rock where he had created a disturbance and the following morning returned to the motel at the controls of a prime mover which he drove through a wall into the bar killing five persons. On appeal, it was held by the High Court that the mental state necessary to constitute murder in such a case was knowledge by the accused that his or her acts would probably cause death or grevious bodily harm, and that it was wrong to tell the jury that it would be enough if the accused knew that death or grievous bodily harm was a possibility. The court held that reckless indifference was not an element of the mental state necessary to constitute the crime of murder.

intention in murder. A few days before this decision the House of Lords had determined that foresight of consequences as an element bearing on the issue of intention in murder belongs not to the substantive law but to the law of evidence. (*R v Maloney* [1985] 2 WLR 648). It was held that in the rare cases in which it was necessary for the judge to direct a jury by reference to foresight of consequences, he or she need do no more than invite them to consider two questions: first, was death or really serious injury in a murder case a natural consequence of the defendant's voluntary act? Secondly, did the defendant foresee that consequence as being a natural consequence of his or her act? It was held that the jury should then be told that if they answered yes to both questions, it was a proper inference to draw that the accused intended that consequence. This decision had not been available to the Australian High Court which expressed the law in the way in which it was earlier understood in England and held that the state of mind of a person doing an act knowing death or grievous bodily injury is a probable consequence is comparable with an intention to kill or do grevious bodily harm.

mens rea. Finally, the Chief Justice drew attention to the important recent decision of the High Court in *He Kaw Teh v R* (1985) 60 ALR 449 in relation to illegal importation of drugs. His Honour admitted that:

> There had been a tendency in Australia to regard the presumption that *mens rea* is an essential element of the offence as a weak one and to hold that in the case of many statutory offences it is unnecessary to prove guilty knowledge or intention although the accused will nevertheless not be guilty if he acted under an honest and reasonable mistake as to the existence of facts which, if true, would have made his act innocent.

His Honour noted that the High Court had held in *He Kaw Teh v R* that this defence of honest and reasonable mistake now has a part to play only in statutory offences where the legislature has excluded guilty intent as an ingredient of an offence to be proved by the prosecution. In relation to that same case, his Honour said that the answer to the question of whether the Crown was bound to prove knowledge on the charge of possession of prohibited substances was reached by a

'rather different route'. It was held that it was unnecessary to rely on the common law presumption that *mens rea* is required because the statutory words 'in his possession' necessarily import a mental element and that on a prosecution for that offence the Crown bore the onus of proving that the accused knew of the existence of the goods which he or she had brought into Australia. It was not enough for the person to know that he or she had the bag; it was necessary to show knowledge of the existence that heroin was in it.

His Honour closed his paper saying that:

> the continuing increase in crime makes it of great importance that all those concerned with the administration of criminal justice should operate with the greatest possible efficiency, but it does not make it necessary that the criminal law should be other than humane and rational.

professional negligence

> All professions are conspiracies against the laity.
> George Bernard Shaw, *The Doctor's Dilemma*, I

Two recent cases, one involving barristers and solicitors in Victoria and the other a psychiatrist in Western Australia, have produced new insights into the law relating to professional negligence.

psychiatrists. In 1982 Mrs Christine Holt, now aged 36 was prescribed a common tranquiliser Lexotan, by her psychiatrist for symptoms of stress. She became addicted to the drug which was discovered when she went to hospital for an operation and ceased taking the tranquiliser. She suffered acute withdrawal symptoms including hallucinations and convulsions. Mrs Holt claimed that she had been told that the drug was harmless and had been advised to take a tablet whenever she felt stressed. The doctor claimed that, if she had been taking the quantity of the drug that she claimed, it was against his express advice as she had been told to take it only at times of extreme anxiety or stress.

Mrs Holt received $19786 in damages. It is believed to be one of the first successful actions by a person claiming damages for drug dependence in Australia.

A number of Sydney doctors commenting on the case suggested that it was likely to lead to a significant drop in the prescription of certain drugs. Dr Jean Lennane, a Sydney psychiatrist specialising in drug and alcohol addiction, noted that many doctors were unaware that benzodiazepines (minor tranquilisers) were addictive drugs and that addiction could occur at normal dosage levels. Furthermore, drug companies failed to mention the addiction dangers. Dr Lennane who has campaigned against overprescription of such drugs added 'it will do more in one day than I have done in 5 years' (*Sydney Morning Herald*, 14 May 1986, page 3).

barristers and solicitors. A second case involved an action brought in the Supreme Court of Victoria alleging professional negligence by certain solicitors and barristers. Mr Justice Marks was required to determine as a preliminary matter of law the scope of the immunity from suit for professional negligence of barristers and solicitors in Victoria.

The origins of this particular case may be found in the Royal Commission into the Federated Ship Painters and Dockers Union conducted by Mr FX Costigan QC. Emilio, Mario and Giovanni Giannarelli were each convicted of perjury contrary to s314 of the Crimes Act 1958 arising out of evidence each of them gave to the Costigan Commission on 20 October 1981. The first plaintiff received a 5 year good behaviour bond and the second and third, terms of imprisonment. The latter two plaintiffs served almost 8 months in prison before the High Court upheld their appeal and quashed their convictions and sentences. The High Court upheld a submission that by virtue of s6DD of the Royal Commissions Act 1902 (Cth) evidence given before the Costigan Commission was inadmissible